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Brian T. Lawler

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Out of Sight, Out of Mind: Indefinite Confinement and the Unconstitutional Treatment of North Carolinians with Mental Retardation

INTRODUCTION*

In 2008, Floyd Brown was released from Dorothea Dix Hospital in Raleigh, North Carolina, following a fourteen-year, involuntary psychiatric commitment.[1] Brown's commitment to Dorothea Dix followed a criminal accusation and determination that, because of his mental retardation,[2] he was incapable of proceeding to trial.[3] He remained in a secure environment for well over a decade without a trial or the opportunity to confront his accuser—effectively denying him his constitutional protections as a United States citizen.[4]

In 1993, following a tip to local law enforcement, Brown became a suspect in the homicide of a woman in Anson County, North Carolina.[5] A fellow resident reported that he heard from an unidentified man claiming to have witnessed the crime that Brown was the perpetrator.[6] The

* This article is dedicated to the thousands of North Carolinians who are so often overlooked by the protective eyes of the law and who are in need of advocates zealously fighting for their equal treatment. I would like to thank my wife Jean for her unwavering love and support. I owe all of my success, including the completion of this project, to her encouragement and patience, and I will forever be indebted to her.

1. *See* Scott Michels, *Man Held Without Trial for 14 Years*, ABC NEWS.COM (Oct. 2, 2007), http://abcnews.go.com/TheLaw/story?id=3673696&page=1#.TwYTAZggvgo.

2. The term "mental retardation" is the medically appropriate term associated with people who have "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior." N.C. GEN. STAT. § 122C-3(22) (2011). *See also* AM. PSYCHIATRIC ASS'N, *infra* note 77.

3. *See* Mandy Locke & Joseph Neff, *SBI Ignores Years of Warnings on Confession Called 'Fiction'*, NEWSOBSERVER.COM (Aug. 8, 2010), http://www.newsobserver.com/2010/08/08/619461/sbi-ignores-years-of-warnings.html.

4. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . [and] to be confronted with the witnesses against him . . . .").

5. *See* Susan Greene & Miles Moffeit, *14 Years Later: Tell My Story*, DENVERPOST.COM (July 26, 2007), http://www.denverpost.com/evidence/ci_6455487.

6. *Id.*

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unidentified man was never discovered or questioned, and Brown was not placed at or near the scene, but he was arrested, questioned, and held on the accusation.[7] In addition, Brown is alleged to have waived his *Miranda* rights and to have offered a detailed, signed confession of the crime—a task that would have been beyond Brown's intellectual capability.[8]

Chapter 122C of the North Carolina General Statutes provides the guidelines under which a person, following an incident, may be involuntarily committed to a mental health institution if questions are raised regarding his or her stability or general welfare.[9] Section 15A-1001 of the North Carolina General Statutes prohibits prosecution of a person who is incapable of comprehending the charges against him.[10] Together, these two statutory schemes give courts wide latitude to commit individuals with mental retardation to psychiatric institutions[11] for extended periods of time on the sole basis of their "incapacity to proceed."[12] This was the fate of Floyd Brown who found himself indefinitely restrained "for treatment [of his mental retardation][,] . . . a condition from which he cannot recover"[13]—the victim of an unintended cycle created by North Carolina's civil commitment and criminal procedure statutes.

The primary purpose of this Comment is to analyze North Carolina's civil commitment and criminal procedure statutes. Specifically, focus will be given to criminal defendants with mental retardation, who, when accused of a crime and found incapable of proceeding to trial, are involuntarily confined without the due process protections afforded non-disabled persons. This Comment argues that North Carolina's statutory scheme for the involuntary civil commitment of mentally disabled, criminal defendants[14] fails to distinguish between the "mentally ill" and the

7. *Id.*

8. *Id.*

9. *See generally* N.C. GEN. STAT. § 122C (2011).

10. *See id.* § 15A-1001.

11. Bruce A. Arrigo & Christopher R. Williams, *Chaos Theory and the Social Control Thesis: A Post-Foucauldian Analysis of Mental Illness and Involuntary Civil Confinement*, 26 SOC. JUSTICE 177, 186–87 (1999).

12. N.C. GEN. STAT. § 15A-1001.

13. The Arc of North Carolina & Carolina Legal Assistance, *Brief of Amici Curiae in Support of Floyd Lee Brown Application of Writ of Habeas Corpus*, THE ARC OF NORTH CAROLINA POLICY (Oct. 8, 2007) http://thearcnc.blogspot.com/2007/10/amicus-brief-in-support-of-floyd-brown.html (arguing on behalf of Floyd Brown for his release on the grounds that his confinement violates principles of basic fairness and due process) (on file with the author).

14. *See generally* N.C. GEN. STAT. § 122C.

"mentally retarded,"[15] a critical difference that creates the circumstances under which a person with mental retardation can be indefinitely and unconstitutionally confined.

A secondary purpose of this Comment is to propose several legislative and procedural solutions that would afford equal protection for persons with mental retardation who are incapable of proceeding to trial. Such solutions would prevent long-term hospitalizations like the fourteen-year confinement sustained by Floyd Brown.

Part I of this Comment will identify the fundamental public policy in North Carolina that aims to provide fair and equal protection for all citizens facing criminal charges. The term "incapacity to proceed" will be defined, and its determinative test examined. In addition, Part I will analyze the statutory scheme of civil commitment in North Carolina. Part II will briefly identify United States Supreme Court jurisprudence on involuntary commitment to identify its lack of protection for persons with mental retardation. Part III will explore several basic constitutional protections, particularly those found in article I, sections 19 and 21 of the Constitution of the State of North Carolina, intended to protect criminal defendants' basic liberty interests. Part IV will identify a statutory gap involving the determination of "dangerousness" in defendants and identify how this gap permits the indefinite confinement of a person with mental retardation. Finally, Part V will draw several conclusions about the current statutory scheme and identify possible solutions that could afford criminal defendants with mental retardation specific protections aimed at preventing unreasonably long involuntary commitments in secure psychiatric facilities.

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15. The term "mentally ill" indicates a medical condition with treatable, possibly curable, symptoms. For example, depression and bi-polar disorder can be effectively treated with targeted medication. ValueOptions, *Differentiating Between Mental Retardation/Developmental Disability and Mental Illness*, ARKANSAS.VALUEOPTIONS.COM 9 (last visited April 5, 2013), http://arkansas.valueoptions.com/provider/training/Differentiating_Mental_Retardation-Developmental_Disability_Mental_Illness_Webinar.pdf. In such cases, people who were at one time incapable of proceeding to trial may be rendered competent. "Mentally retarded" is a term that refers to an intellectual and developmental disability that will never be cured or treated in such a manner that could counter its effects. *See* N.C. GEN. STAT. § 122C-3(12a) (defining "developmental disability," in part, as a mental impairment manifesting prior to age twenty-two that is "likely to continue indefinitely"). In other words, a person with an IQ of fifty (i.e., Moderate Mental Retardation), *see infra* note 77, cannot take medication to increase his IQ by twenty points, rendering him competent for trial. *See* ValueOptions, *Differentiating Between Mental Retardation/Developmental Disability and Mental Illness*, ARKANSAS.VALUEOPTIONS.COM 9 (last visited April 5, 2013), http://arkansas.valueoptions.com/provider/training/Differentiating_Mental_Retardation-Developmental_Disability_Mental_Illness_Webinar.pdf.

I. NORTH CAROLINA PUBLIC POLICY

It is the fundamental public policy of North Carolina that all citizens, regardless of race, gender, or mental ability, are treated fairly and equally.[16] The North Carolina constitution requires that all persons "restrained of . . . liberty" be permitted to "inquire into the lawfulness [of such restraint]," thereby protecting the writ of habeas corpus.[17] In order to ensure such a level of fairness, equality, and reasonable inquiry, North Carolina courts have carved out a special protection for those individuals whose mental competence during criminal proceedings is in question.[18] This protection, codified by the North Carolina General Assembly, exists to ensure a fair trial for all individuals by expressly prohibiting the "trying, convicting, sentencing, or punishing [of] a criminal defendant . . . '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 . . . or to assist in his defense . . . .'"[19] In creating this prosecutorial restriction, the legislature established a policy that protects individuals accused of criminal acts from prosecution during a time of mental incapacity—ensuring a fair trial and preserving the individual's right to due process.[20]

Involuntary commitment to a secure psychiatric institution is a restriction on an individual's fundamental right to liberty as provided in the North Carolina constitution.[21] As such, in order to restrict one's

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16. N.C. CONST. art. I, § 1 ("We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."); *see also* State v. Ballance, 51 S.E.2d 731, 734 (N.C. 1949). The North Carolina Supreme Court held:

> The term "liberty" . . . does not consist simply of the right to be free from arbitrary physical restraint or servitude, but is "deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator . . . . It includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out these purposes to a successful conclusion."

Id. (citations omitted).

17. *See* N.C. CONST. art. I, § 21.

18. *See* State v. Aychte, 391 S.E.2d 43, 45 (N.C. Ct. App. 1990); *see also* N.C. GEN. STAT. § 15A-1001.

19. Jennifer L. Morris, Comment, *Criminal Defendants Deemed Incapable to Proceed to Trial: An Evaluation of North Carolina's Statutory Scheme*, 26 CAMPBELL L. REV. 41, 43 (2004) (quoting N.C. GEN. STAT. § 15A-1001(a)).

20. *See Aychte*, 391 S.E.2d at 45; *see also* Morris, *supra* note 19, at 43.

21. *See supra* note 16 and accompanying text.

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fundamental right to remain free with involuntary commitment, the state must demonstrate a compelling relationship between maintaining the safety of all its citizens, and infringing on personal liberty for the sake of community protection.[22] Applied to the involuntary commitment of a criminal defendant to a mental institution absent a criminal trial or conviction, due process requires that the state's interest in community protection outweigh the individual's liberty interest.[23] Narrowing this balancing test in favor of the defendant at risk of confinement, the United States Supreme Court held that a mentally ill person cannot be involuntarily committed without an additional showing of "dangerousness,"[24] and commitment without a showing of dangerousness is a violation of an individual's due process rights.[25] North Carolina adopted this public policy in regards to mentally ill patients, requiring something more than mere mental illness—i.e., a showing of dangerousness, albeit loosely defined[26]—in order to involuntarily commit a person who is facing criminal charges and is determined to be incapable of proceeding.[27]

A. *"Incapacity" Defined*

North Carolina criminal procedure explicitly forbids the prosecution of an individual who, "by reason of mental illness or defect, . . . is unable to understand the nature and object of the proceedings against him . . . ."[28] "Incapacity to proceed" is defined as a defendant's inability to comprehend

22. Morris, *supra* note 19, at 46–47 ("Substantive due process requires that before a person may be involuntarily committed, the state's interests both in protecting society and the mentally ill individual must be shown to outweigh the individual's interest in personal liberty.").

23. *Id.*; *see also* Jackson v. Indiana, 406 U.S. 715, 738 (1972).

24. *See* O'Connor v. Donaldson, 422 U.S. 563, 576 (1975).

25. *Id.*

26. *See* N.C. GEN. STAT. § 122C-3(11) (2011).

27. *See In re* Rogers, 306 S.E.2d 510, 512–13 (N.C. Ct. App. 1983) (upholding the constitutionality of involuntary commitment proceedings, as found generally in chapters 15A and 122C of the North Carolina General Statutes, on grounds that patient was not held indefinitely and that he was subject to release pending a determination of dangerousness to others); *see also In re* Collins, 271 S.E.2d 72, 76–77 (N.C. Ct. App. 1980). *Collins* is distinguishable on the grounds that the patient was not a criminal defendant. *Id.* at 73. However, the holding remains applicable since, upon a finding of incapacity by a trial court, a criminal defendant's involuntary commitment is governed under the same civil commitment statute—N.C. GEN. STAT. § 122C—governing commitment of non-criminal defendants. *See id.* at 76–77; *see also* N.C. GEN. STAT. § 15A-1003.

28. N.C. GEN. STAT. § 15A-1001.

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proceedings and participate in his own defense.[29] The statutes subsequently provide additional clarity by defining "mental illness" as "an illness which so lessens the capacity of the individual to use self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary . . . for him to be under treatment, care, supervision, guidance, or control."[30] The North Carolina Supreme Court's interpretation of this definitional standard has resulted in the creation of a test of mental capacity that is carried out by the trial court, often without the aid of a jury.[31] As a result, when a trial judge makes a determination that an individual is incapable of proceeding to trial based on competent evidence, the determination is deemed conclusive for the purpose of appeal.[32]

The test of mental capacity has been further refined to require a "clear, cogent, and convincing" showing of competent evidence that the individual charged is "mentally ill . . . and dangerous to himself or others, or is mentally retarded."[33] This determination of the competency of evidence is for the trial judge and, like the determination of mental capacity generally, is conclusive for the purposes of appeal.[34] The appellate court's function is merely to determine whether the judge erred in his discernment of evidentiary competence.[35] Interestingly, and of particular concern, is that since the evidence is most often presented to the court[36] prior to the commencement of proceedings, as a preliminary question of fact, it is not

29. *Id.*; *see* State v. Bowman, 666 S.E.2d 831, 836 (N.C. Ct. App. 2008) (defining a person as "mentally incompetent" if he lacks the ability to properly consult with his attorney or if he lacks a "factual understanding of the proceedings against him").

30. N.C. GEN. STAT. § 122C-3(21)(i).

31. *See* State v. Clark, 265 S.E.2d 204, 208 (N.C. 1980) (holding the test of mental capacity to be whether the defendant has, "at the time of trial, the mental capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed").

32. *See In re* Monroe, 270 S.E.2d 537, 539 (N.C. Ct. App. 1980).

33. *In re* Jackson, 299 S.E.2d 677, 679 (N.C. Ct. App. 1983) (citation omitted).

34. *See Monroe*, 270 S.E.2d at 539.

35. *Id.*

36. In some instances, the evidence is offered to a magistrate judge who makes a determination of mental illness and issues a secure custody order for involuntary commitment based entirely on witness testimony and certification. *See, e.g., In re* Zollicoffer, 598 S.E.2d 696, 700 (N.C. Ct. App. 2004) (holding that a hearing before a magistrate to decide a petition for an involuntary commitment order is a "miscellaneous proceeding" under Rule 1101 of the North Carolina Rules of Evidence where the restrictions of the rules do not apply).

subject to the more stringent rules of evidence, such as the hearsay rule.[37] In fact, an individual may be deemed incapable to proceed and subject to a secure custody order for involuntary commitment under section 122C-261 of the North Carolina General Statutes so long as the trial judge or magistrate "finds *reasonable grounds* to believe that the facts alleged . . . are true and that the [defendant] is *probably* mentally ill and either (i) dangerous to self . . . or dangerous to others . . . ."[38] This standard of permissible evidence "does not expressly state whether the [witness's] knowledge must be based on personal knowledge or whether it can be in whole or in part based upon hearsay."[39]

The North Carolina Supreme Court confirmed this use of hearsay evidence when it held that "the existence of [reasonable grounds for commitment] is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent, but only with whether the [witness] has reasonable grounds for his belief."[40] As applied—at least initially—an individual who is mentally retarded and presumed incapable of proceeding to trial can be subject to the court ordering involuntary commitment on the grounds that another person has presented reasonable evidence, albeit hearsay, that the accused committed the crime and is a danger to himself.[41]

B. *Statutory Scheme—Involuntary Commitment and Disposition*

Chapters 15A and 122C of the North Carolina General Statutes provide the procedural foundation on which a person may be involuntarily

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37. *See* N.C. R. EVID. 104(a) (2011).

38. *Zollicoffer*, 598 S.E.2d at 698 (citation omitted) (second emphasis added). Following the issuance of a secured custody order pursuant to section 122C-261, a hearing is required to determine the need for involuntary commitment. *See* N.C. GEN. STAT. § 122C-268 (2011). Upon such a determination based in part on the defendant's incapacity to proceed to trial, the statute requires that the defendant's commitment be governed under chapter 122C of the North Carolina General Statutes. *See infra* Section I.B.

39. *Id.* Under circumstances where an individual may be temporarily incapacitated by his mental illness or inebriation, it is plausible to see why this low threshold might be permissible. Once a party regains competency, he is able to participate in his own defense and challenge the evidence against him. In the case of a person with mental retardation, however, the low threshold creates a standard whereby an individual may be confined based on the hearsay testimony of a non-confronted witness, despite the fact that such a person will never regain the competency necessary to participate in his own defense.

40. *Id.* at 699 (quoting State v. Campbell, 191 S.E.2d 752, 756 (N.C. 1972)). The bracketed portion of the quotation originally used the term "probable cause," which the North Carolina Supreme Court established as synonymous with the term "reasonable grounds" earlier in the opinion. *Id.* This author exchanged the language for clarity.

41. *See id.*

committed for an indefinite period of time following the accusation of a crime and determination of their incapacity to proceed.[42] Following the accusation and arrest of a mentally retarded person, a judge may determine that he is incapable of proceeding to trial or of understanding the charges against him.[43] If the defendant is deemed incapable, the judge must make a determination of whether there are "reasonable grounds to believe that the defendant meets the criteria" for involuntary commitment under chapter 122C.[44] This decision by the judge will be chiefly determined by a psychiatric professional's determination as to whether the individual is considered to be at risk of being dangerous, either to himself or toward others.[45] If the presiding judge finds "reasonable grounds" for the commitment, he will issue a secured custody order, and the defendant will be transported to a hospital or other designated facility.[46] The statute does indicate an exception for those individuals determined to be mentally retarded but only insofar as they are not considered dangerous.[47] Even then, the exception merely provides for treatment in a facility that is not designated specifically for the mentally ill.[48]

While the statute generally permits only a temporary detention of the defendant,[49] sections 15A-1004 and 122C-268.1 provide the basis for a longer commitment.[50] Section 15A-1004 provides that if a defendant is determined to be safe for release from the hospital or other institution where he has been committed, he is to be released back into the custody of law enforcement for prosecution.[51] Further, following an initial

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42. *See generally* N.C. GEN. STAT. ch. 122C, art. 5, pt. 7 ("Involuntary Commitment of the Mentally Ill; Facilities for the Mentally Ill"); N.C. GEN. STAT. ch. 15A, subch. X, art. 56 ("Incapacity to Proceed").

43. N.C. GEN. STAT. § 15A-1001.

44. *Id.* § 15A-1003.

45. *See id.* § 122C-263(d)(2) ("If the physician or eligible psychologist finds that the respondent is mentally ill and is dangerous to self . . . the physician or eligible psychologist shall recommend inpatient commitment . . . .").

46. *See id.* § 15A-1003 (indicating that upon the court's issuance of a secure commitment order, the defendant is governed under the civil commitment statute found in chapter 122C of the North Carolina General Statutes).

47. *See id.* § 122C-263(d)(2).

48. *See id.*

49. *See id.* § 15A-1003.

50. *See id.* § 15A-1004; *see also id.* § 122C-268.1 (providing for the ongoing commitment of a patient who is classified under section 122C-3 as "Dangerous to Himself" or "Dangerous to Others," and placing the burden of contrary proof on the patient).

51. *See id.* § 15A-1004(c). While this procedure is logical for a person with a treatable mental illness, it creates a cycle for the mentally retarded defendant who, upon release into

involuntary commitment period, a defendant bears the burden of proof that he is either no longer mentally ill or a danger to himself or others.[52] If such a showing is made, then the court "shall order the [defendant] discharged and released."[53] If no such showing is made, then the court "shall order that inpatient commitment continue . . . ."[54] The clerk of court is required to maintain a docket of defendants who are involuntarily committed and incapable of proceeding.[55] This docket is reviewed at least semiannually,[56] and so long as the prosecuting authority does not dismiss the charges against the defendant, he may remain committed indefinitely. While the North Carolina General Assembly recognized and codified the requirements for dismissing charges against individuals lacking the capacity to proceed,[57] the requirements hardly protect against the loss of liberty that the statutory proceedings permit.[58]

C. Dangerousness Standard

It is a fundamentally held principle that a person cannot be involuntarily confined based on their mental illness alone.[59] Rather, a showing of "dangerousness," either to oneself or towards another, is

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the custody of law enforcement, will be returned to the hospital upon further determination of his continued incapacity to proceed.

52. *Id.* § 122C-268.1(i).

53. *Id.*

54. *Id.*; *see also infra* note 80 (comparing definitions of "mentally retarded" and "danger to self"). It is reasonable to suggest that a person with mental retardation will never be capable of making such a showing before a trial court since, by the nature of his disability, he will always be deemed incapable. Since the diagnostic criteria of "mentally retarded" and "danger to self" are so similar, it would be difficult to negate one without the other.

55. N.C. GEN. STAT. § 15A-1005.

56. *Id.*

57. *See id.* § 15A-1008.

58. *Id.* (providing the court three circumstances under which charges against a defendant lacking the capacity to proceed *may* be dismissed: (1) when "it appears . . . the defendant will not gain capacity to proceed"; (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) following a five- or ten-year period (for misdemeanor or felony charges, respectively) from the date that the defendant was deemed incapable to proceed). The statute does not provide a requirement under which the prosecuting authority *must* dismiss charges. *See id.*

59. *See* O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) ("A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement."); *see also* Jackson v. Indiana, 406 U.S. 715, 720 (1972) (holding that a state cannot constitutionally commit a person for an indefinite period simply on the basis of his incompetency to stand trial).

required to justify a commitment.[60] In North Carolina, the term "danger" is divided into two categories by statute: "Dangerous to himself" and "Dangerous to others."[61] It is the definition of "Dangerous to himself" that is most critical to an understanding of how, and why, an individual with mental retardation might be confined, without formal conviction, following an accusation of criminal activity. The statute provides in part:

> a. "Dangerous to himself" means that within the relevant past:
>
> 1. The individual has acted in such a way as to show:
>
> I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and
>
> II. That there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself. . . .[62]

A showing of dangerousness to self is, in part, a two-pronged test that addresses both one's inability to care for oneself and the risk of debilitation that is likely to result from such inability.[63] Interestingly, there is no requirement that this danger exist imminently,[64] or that the person have made any overt acts implicating the existence of either prong.[65] Instead,

60. *See Jackson*, 406 U.S. at 728.

61. N.C. GEN. STAT. § 122C-3(11).

62. *Id.* §§ 122C-3(11)(a)(1)(I), (II).

63. *In re* Monroe, 270 S.E.2d 537, 540 (N.C. Ct. App. 1980).

64. *See* N.C. GEN. STAT. § 122C-3(11)(a)(1)(II) (requiring only a risk of debilitation in the near future).

65. *See Monroe*, 270 S.E.2d at 541 (indicating that "dangerousness" does not require any overt actions, merely threats of harm within the relevant past or the reasonable probability that such harmful behavior will be repeated); *see also In re* Collins, 271 S.E.2d 72, 76 (N.C. Ct. App. 1980) (indicating that although "dangerousness" remains a required element of involuntary commitment, the danger is no longer required to be "imminent"). Largely ignoring the second prong of the "Dangerous to himself" standard, the court has failed to provide a clear distinction between the "imminent" requirement from the pre-1979 statute and the current, amended statutory requirement of "near future" debilitation. *See, e.g., id.* This lack of distinction has resulted in judicial deference to physician testimony as

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the person need only be at risk, through a showing of previous acts,[66] of danger to himself to qualify under this definitional requirement for involuntary commitment.[67] The threshold of "dangerous" behavior is low, especially when viewed in conjunction with the medical diagnostic criteria of "mental retardation."[68] It is so low, in fact, and so similar to the diagnostic standard of mental retardation, that it becomes apparent how a person with mental retardation, accused of a violent crime, could be considered dangerous and indefinitely confined.

D. *Mental Retardation Is Not a Mental Illness*

Section 122C-3 of the North Carolina General Statutes provides distinct definitions for the terms "mentally ill" and "mentally retarded,"[69] but the distinction is lost when the statute incorporates application of the dangerousness standard for the purpose of executing an involuntary commitment order.[70] This is problematic primarily because the term "mentally ill" presumes an ability to recover, or at least regain competency to a level acceptable to proceed to trial.[71] Conversely, the term "mentally retarded" is defined as "[of] significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior" and does not include any of the presumptive "treatment" language included in the "mentally ill" definition.[72] This absence of presumptive language

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to a defendant's propensity or likelihood of future debilitation to satisfy the second prong. *See id.* at 247.

66. The statute does not expressly require a showing of past acts in order to justify a finding of danger to self. However, such a showing is implied by the statute in that it requires a physician's finding of risk as evidenced by a "showing of . . . actions that the individual is . . . unable to care for himself." N.C. GEN. STAT. § 122C-3(11)(a)(1)(II).

67. *See In re* Lowery, 428 S.E.2d 861, 864 (N.C. Ct. App. 1993) (recognizing the low threshold for a showing of dangerousness). The holding in *Lowery* quotes the current, amended statute. *Id.* The statute was amended to remove the specific, illustrative language in favor of more general, descriptive language. *See* N.C. GEN. STAT. § 122C-3(11). The amended language more closely mirrors the diagnostic criteria for determining the existence of mental retardation. *See* AM. PSYCHIATRIC ASS'N, *infra* note 77.

68. *See infra* note 80 and accompanying text.

69. *See* N.C. GEN. STAT. §§ 122C-3(21), (22).

70. *See, e.g., id.* § 122C-268 (grouping the two categories together by requiring mental illness with dangerousness as the prerequisite for involuntary commitment); *see also id.* § 122C-271 (permitting involuntary commitment upon a "clear, cogent, and convincing" showing of "mental[] ill[ness] [and] . . . dangerousness").

71. *See id.* § 122C-3(21) (applying the term "treatment" to mental illness, indicating the possibility of improvement); *see also id.* § 15A-1004 (requiring a mentally ill defendant who has regained competency to be returned to court in order to proceed to trial).

72. *Id.* § 122C-3(22).

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indicates a lack of legislative understanding about the chronic and untreatable nature of mental retardation, as do the subsequent statutory procedures for involuntary commitment that generally fail to make a distinction between mental illness and mental retardation.[73] The result is legislative deference to the court to draw a distinction when issuing a secured custody order.[74] In doing so, the court will most often look to the testimony of psychiatric experts, who in turn rely on diagnostic criteria and characteristics to identify the likelihood of risks in mentally ill or mentally retarded defendants.[75] The application of diagnostic criteria to the procedural requirements set forth in chapters 15A and 122C of the North Carolina General Statutes may cause the indefinite commitment of mentally retarded criminal defendants.[76]

The American Psychiatric Association's *Diagnostic and Statistics Manual–IV–TR* (hereinafter "DSM-IV") defines "Mental Retardation" as:

> [S]ignificantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B).... Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below.... *Adaptive Functioning* [generally the predominant symptoms] refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.[77]

The United States Supreme Court has acknowledged this definition of mental retardation[78] and added that "mental retardation" means the inability of one to adequately care for one's self "in the everyday world."[79] What is

73. The term "mental retardation" is mentioned only eight times in the entirety of chapter 122C, article 5, part 7 of the North Carolina General Statutes, titled "Involuntary Commitment of the Mentally Ill," of which most mentions do not make a distinction for treatment. *See, e.g.*, *id.* § 122C-271 (limiting the placement options for defendants who are mentally retarded and mentally ill).

74. Arrigo & Williams, *supra* note 11, at 186.

75. *Id.*

76. *See generally* THE ARC OF NORTH CAROLINA POLICY, *supra* note 13 (identifying the nature of the defendant's mental retardation as the chief factor for: (1) why he could not have committed the crime for which he was accused; and (2) why his physicians continued to classify him as "dangerous").

77. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41–42 (4th ed. text rev. 2000).

78. *See* Atkins v. Virginia, 536 U.S. 304, 318 (2002).

79. Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985).

most problematic by the Court's adaptation and acknowledgement of the diagnostic standard for mental retardation is its similarity to the North Carolina statutory definition of "dangerous."[80]

The DSM-IV identifies two necessary criteria for a diagnosis of mental retardation: "subaverage intellectual functioning" and the more readily apparent symptom, "deficits in adaptive functioning."[81] Comparatively, the North Carolina General Statutes define "Dangerous to himself" as: (1) acting in a manner that indicates "[that the defendant] would be unable, without care, . . . to exercise self control . . . in the conduct of his daily responsibilities and social relations"; and (2) that this inability creates a "reasonable probability of . . . suffering serious physical debilitation within the near future . . . ."[82] Following a criminal accusation and determination of a defendant's incapacity to proceed, it is the "dangerousness" component that justifies the on-going commitment of a defendant based, in large part, on the statutory presumption that the illness can be treated and the defendant returned to court.[83] Yet, for the mentally retarded defendant who cannot receive treatment, his permanent disability—being a danger to himself—becomes the medical justification for on-going commitment.[84] The court then, relying on the doctor's finding, may order a confinement based on danger—a quality which, until recently, was never considered offensive or criminal.[85] North Carolina courts have consistently supported the notion that the compelling state interest of protecting the community from people who are either dangerous to themselves or others is served through involuntary commitment of

80. *Compare* AM. PSYCHIATRIC ASS'N, *supra* note 77, *with* N.C. GEN. STAT. § 122C-3(11) (2011). While the two definitions do not mirror one another, in practical application to defendants with mental retardation, they are significantly similar. Mental retardation, in part, requires a significant impairment in daily living skills. AM. PSYCHIATRIC ASS'N, *supra* note 77. Practically, such impairment will lead to a significant debilitation if left unsupervised or unsupported. The two-pronged statutory definition of "Danger to []self" states a significantly similar requirement: impairment with a risk of future debilitation without supervision. N.C. GEN. STAT. § 122C-3(11)(a)(1).

81. *See* AM. PSYCHIATRIC ASS'N, *supra* note 77. Deficits include an inability to properly or adequately care for one's self independently. *See id.*

82. N.C. GEN. STAT. § 122C-3(11)(a)(1).

83. *See id.* § 15A-1004(e).

84. *See* THE ARC OF NORTH CAROLINA POLICY, *supra* note 13, at 10.

85. *See* Arrigo & Williams, *supra* note 11, at 179 (quoting Michael Foucault in stating, "*[D]anger* has never constituted an offense. To be dangerous *is not an offense* . . . . It is not a symptom.").

dangerous criminal defendants, regardless of whether they have committed an offense.[86]

II. UNITED STATES SUPREME COURT JURISPRUDENCE

A. *Jackson v. Indiana*

The United States Supreme Court held that the confinement of a person on the sole basis of being mentally ill was unconstitutional, setting forth a policy protecting the liberty interests of individuals with mental retardation.[87] The Court stated, "We hold . . . that a person charged by a State with a criminal offense who is committed *solely* on account of his incapacity to proceed to trial cannot be held more than [a] reasonable period of time . . . ."[88] The petitioner, "a mentally defective deaf mute with a mental level of a pre-school child," was charged with robbery against two women.[89] The total amount allegedly stolen was nine dollars.[90] Following an initiation of trial proceedings, the trial court determined that the petitioner "lack[ed] comprehension sufficient to make his defense" and committed him to an institution operated by the Indiana Department of Mental Health.[91] Petitioner's attorney argued before the trial court that such a disposition "amounted to a 'life sentence' without his ever having been convicted of a crime," but the trial court rejected that argument, and the Supreme Court of Indiana affirmed the decision.[92]

Petitioner appealed to the United States Supreme Court arguing that his Fourteenth Amendment rights to due process and equal protection were violated by an Indiana statute that permitted confinement with a mere showing of "mental illness."[93] Petitioner reasoned that, but for the criminal accusation, a confinement would have occurred under the more stringent commitment statutes applicable to all other citizens.[94] Under the Indiana statutes, a person's need for civil commitment was based on a higher standard, conditions for release were more lenient, and there was access to

86. *See e.g.*, *In re* Monroe, 270 S.E.2d 537, 539, 541 (N.C. Ct. App. 1980); *In re* Lowery, 428 S.E.2d 861, 864 (N.C. Ct. App. 1993).

87. *See generally* Jackson v. Indiana, 406 U.S. 715 (1972).

88. *Id.* at 738 (emphasis added).

89. *Id.* at 717.

90. *Id.*

91. *Id.* at 719.

92. *Id.*

93. *Id.* at 719–23.

94. *Id.* at 723.

greater privileges.[95] Petitioner argued that if a criminal *conviction* is not a sufficient reason to deprive a person of procedural and substantive due process, then "the mere filing of criminal charges surely cannot suffice."[96] The Court agreed with the petitioner, holding:

> [W]e cannot conclude that pending criminal charges provide a greater justification for different treatment than conviction and sentence. Consequently, we hold that by subjecting [petitioner] to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment . . . Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment.[97]

The holding in *Jackson*, opposing the virtual criminalization of mental illness and requiring an equal standard applicable to all criminal defendants and non-criminal patients,[98] is distinguishable from the problem created by the North Carolina statutes. In fact, the Court recognizes this distinguishing factor in its comparative analysis of the Indiana statute with similar federal regulations on civil commitment.[99] The Court recognizes that in order for a person to be confined involuntarily, a showing of mental illness *and danger* must be made.[100] The Court appears to suggest that a showing of dangerousness is sufficient to implicate a commitment beyond a "reasonable period of time."[101]

Additionally, the Court held that if it could be determined that the defendant would not attain capacity within a reasonable time, then it was for the State to "institute [its] customary civil commitment proceeding[s] that would be required to commit indefinitely any other citizen . . . ."[102] While this holding by the Court ensured that the liberty interests of mentally ill defendants were protected, it failed to recognize the

95. *Id.*

96. *Id.* at 724 (citing Commonwealth v. Druken, 254 N.E.2d 779, 781 (Mass. 1969)).

97. *Id.* at 729–30.

98. Jackson v. Indiana, 406 U.S. 715, 729–30 (1972) (conducting an Equal Protection Clause analysis).

99. *See id.* at 731–32 (recognizing a "dangerousness" requirement as the most significant difference between the two statutory procedures). The federal regulations to which the Court refers can be found at 18 U.S.C. §§ 4244–46 (2012).

100. *Id.*

101. *Id.* at 733 ("*Without* a finding of dangerousness, one committed [under federal law] can be held only for a 'reasonable period of time' necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future." (emphasis added)).

102. *Id.* at 738.

permanency of mental retardation.[103] The *Jackson* Court continued the criminalization of "danger" by acquiescing to the indefinite commitment of potentially dangerous defendants and by failing to create an exception for the mentally retarded, who, in North Carolina, with an additional showing of probable debilitation, could be deemed *per se* dangerous.[104]

B. O'Connor v. Donaldson

In *O'Connor v. Donaldson,* the United States Supreme Court furthered the notion that danger, either to self or others, could stand alone as the determinant factor of indefinite confinement of a mentally retarded person.[105] The respondent was civilly committed following a petition to the court by his father and ultimately held involuntarily for over fifteen years.[106] The hospital's superintendent continued to authorize the respondent's commitment, despite repeated requests by the respondent to be released, asserting that a release to his elderly parents could pose a safety risk to both parties.[107] Respondent brought a civil suit against the superintendent of the state hospital alleging a malicious deprivation of his constitutional liberty,[108] and the trial court held in respondent's favor.[109] The Fifth Circuit affirmed the decision of the trial court, upholding the conclusion that a person involuntarily confined has a right to receive treatment and should not be held beyond a reasonable time.[110]

Petitioner appealed the ruling to the United States Supreme Court where respondent argued that although he may have been initially committed for a justifiable reason, his due process rights were violated when his commitment ceased being for treatment and instead became a mere custodial placement.[111] In its analysis, the Court initially looked to *Jackson* and determined that the duration of the respondent's confinement was constitutionally suspect since it appeared to extend beyond a reasonable measure of time.[112] Confirming the holding in *Jackson*, the Court emphasized that mental illness *alone* "cannot justify a State's locking

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103. *See id.* (permitting the indefinite commitment of individuals who fail to attain capacity).

104. *See supra* note 80 and accompanying text.

105. Morris, *supra* note 19, at 47.

106. O'Connor v. Donaldson, 422 U.S. 563, 564 (1975).

107. *Id.* at 567–70.

108. *Id.* at 563.

109. *Id.* at 572.

110. *Id.* at 572–73.

111. *Id.* at 567–69.

112. *Id.* at 574–75.

a person up against his will and keeping him indefinitely in simple custodial confinement."[113] The Court suggested that there must be something more to the person's condition than the mere possibility of sub-standard living conditions to justify "incarcerating" him for the purpose of providing a higher standard of living.[114] Specifically, "while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising . . . living standards . . . ."[115] The Court continued in stating that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[116]

The holding in *O'Connor* is an affirmation of the *Jackson* decision. It clearly indicates the Court's aversion to the confinement of mentally ill persons without a showing of some level of dangerousness[117] and confirms the notion that the justification for confinement must continually "exist throughout the institutionalization."[118] Like *Jackson*, *O'Connor* carves out a quasi-criminal characteristic for danger, and at least considers the idea that a "State may arguably confine a person to save him from harm."[119] In an attempt to protect the liberty interests of the mentally ill, by requiring states to demonstrate a greater interest in confining mentally ill persons through a showing of dangerousness, the Court has instead provided an exception to the rule against indefinite commitment. While the North Carolina statutes appear to generally conform to the policies set forth in *Jackson*[120] and *O'Connor*,[121] they fail to place any limits on the involuntary commitment of people accused of being dangerous, and they particularly fail to provide an applicable standard for the confinement of those in need of help to live independently.

113. *Id.* at 575.

114. *Id.*

115. *Id.*

116. *Id.* at 576.

117. *Id.*

118. Laura W. Harper, Comment, *Involuntary Commitment of People with Mental Retardation: Ensuring Georgia's Citizens Receive Adequate Procedural Due Process*, 58 MERCER L. REV. 711, 719 (2007).

119. *O'Connor*, 422 U.S. at 575.

120. *See* N.C. GEN. STAT. § 15A-1003 (2011) (limiting commitment to a temporary and reasonable time).

121. *See id.* § 122C-263.

C. French v. Blackburn

Shortly following the decisions in *Jackson* and *O'Connor*, the Court affirmed a North Carolina case upholding the constitutionality of the state's involuntary commitment proceedings found in chapter 122C of the North Carolina General Statutes.[122] The U.S. District Court held:

> The Court is of the general opinion that the North Carolina General Assembly has enacted an excellent legislative scheme which adequately protects the interests of all who may be involved in an involuntary commitment proceeding. We perceive no reason to hold the statutory provisions unconstitutional. There is no doubt that the liberty interest of a person subjected to such proceedings is great and is an interest which has long been protected and to which the state and this Court are obligated to give great deference.[123]

The Court proceeds to identify two "humanitarian purposes of the involuntary commitment proceedings": (1) the temporary withdrawal from society of those who are mentally ill and potentially dangerous; and (2) the provision of treatment for those unable to seek it out for themselves.[124] The Court additionally suggests, "the very purpose of that deprivation [of liberty] is not solely to protect society but also has a purpose [for] the protection, treatment, and aid of an individual who cannot or will not protect himself."[125]

By rendering such a strong affirmation of the statutory requirements of involuntary commitment, and by holding so firmly in favor of chapter 122C, the Court accepts the statutory presumption that persons held under this scheme have the potential for rehabilitation towards competency.[126] Like the cases before it, *French* fails to distinguish between the "mentally ill" and the "mentally retarded" and does not account for the possibility that one may not be able to regain competency. While it can be said that *French* goes a long way to uphold the rights of the mentally ill[127] and even those accused, but not tried, of a crime, it fails to protect those most vulnerable to the effects of the statute.[128]

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122. French v. Blackburn, 428 F. Supp. 1351, 1354 (M.D.N.C. 1977), *aff'd*, 443 U.S. 901 (1979).

123. *Id.* at 1354.

124. *Id.*

125. *Id.*

126. *See* N.C. GEN. STAT. § 15A-1004.

127. For example, the holding ensures that civil commitment will only be for a reasonable time, allows for a step-down to outpatient treatment for non-dangerous behaviors, etc. *See French*, 428 F. Supp. at 1354–55.

128. *See supra* Part I.

III. NORTH CAROLINA CONSTITUTIONAL PROTECTION OF LIBERTY INTEREST

The North Carolina constitution provides for every individual's right "to inquire into the lawfulness" of his or her confinement without undue delay.[129] Commonly referred to as the right to a "speedy trial,"[130] the constitution provides in part that "[e]very person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint if unlawful, and that remedy shall not be denied or delayed."[131] This right is intended to protect defendants from unreasonable pre-trial incarcerations that may accompany criminal accusations.[132] The constitutional right is the foundation for the inherent public policy favoring prompt resolution to criminal charges, and it acts as a reasonable balance between the rights of an accused person and the ability of prosecutorial authorities to seek justice.[133] This balancing is "described as not affording the defendant a 'sword for [his] escape, but rather . . . a shield for his protection.'"[134]

In *State v. Pippin*, the North Carolina Court of Appeals established a reasonableness standard for determining whether a defendant's right to a speedy trial has been abridged and held that a fourteen-month lapse in time between a defendant's initial indictment and the start of trial was *prima facie* evidence of a violation of this right.[135] The court adopted four interrelated factors that the court must balance with the defendant's liberty interest to determine whether the defendant's right to a speedy trial has been abridged: "(1) [the] length of delay; (2) [the] reason for delay; (3) defendant's assertion of the right to a speedy trial; and (4) [the] prejudice to defendant resulting from the delay."[136] These factors are not dispositive, and a court must balance each factor with the specific circumstances of the

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129. N.C. CONST. art. I, § 21.

130. State v. Spivey, 579 S.E.2d 251, 254 (N.C. 2003) (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)).

131. N.C. CONST. art. I, § 21. In addition to the N.C. constitution, the right to a "speedy trial" is protected by the Sixth Amendment to the United States Constitution and is applied to the states through the Fourteenth Amendment. *See* Klopfer v. North Carolina, 386 U.S. 213, 222 (1967).

132. State v. Pippin, 324 S.E.2d 900, 903 (N.C. Ct. App. 1985) (citing United States v. Ewell, 383 U.S. 116, 120 (1966)).

133. *Id.* at 903 (quoting *Barker*, 407 U.S. at 520).

134. *Id.* (citation omitted).

135. *Id.* at 903–04.

136. *Id.* at 903.

crime charged and how the prosecution has developed its case against the accused.[137]

Applying the dispositional requirements listed in section 15A-1008 of the North Carolina General Statutes to the reasonableness standard set forth in the above four-factor test, it is difficult to see how the possible dispositions comport with the constitutional requirements.[138] According to the statute, a person accused of a crime but never tried may not be held for a period of more than the maximum allowable sentence for the crime charged or ten years, whichever is less.[139] On its face, when viewed in light of the *Pippin* factors, being confined for a period of ten years for a crime for which a defendant is never tried or convicted of appears to be an inherent violation of the defendant's right to a speedy trial. The Massachusetts Supreme Court found this to be true when it held in favor of a defendant, deemed incompetent to stand trial, yet involuntarily committed for sixteen years.[140] The court held:

> [Defendant] has effectively served more than the mandatory minimum sentence on a charge for which he has never been convicted .... Under these circumstances, it is unreasonable for the government to continue to imprison [defendant] on the grounds that he might be declared competent to stand trial on some future date.[141]

So how did Floyd Brown, and others like him,[142] remain confined without conviction or trial for over fourteen years? The answer lies more in what is left unaccounted for by the United States Supreme Court jurisprudence as well as what remains permissible by gaps in the North Carolina statutory scheme governing involuntary commitment.

The Supreme Court decisions in *Jackson* and *O'Connor* prohibit the indefinite confinement of mentally ill defendants who are incapable of standing trial, but both decisions also permit the ongoing commitment of defendants who pose a danger to themselves or to others.[143] In the case of defendants deemed "dangerous," the Court defers to the civil commitment proceedings of the state.[144] Likewise, in North Carolina, the Criminal

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137. *Id.*

138. *See* N.C. GEN. STAT. § 15A-1008 (2011); *see also supra* note 58.

139. *See* N.C. GEN. STAT. § 15A-1008.

140. *See* United States v. Ecker, 424 F. Supp. 2d 267, 270 (D. Mass. 2006).

141. *Id.*

142. *See* Crim. Code Comm. Comment., N.C. GEN. STAT. § 15A, subch. X, art. 56 (referring to the Criminal Code Commission's commentary recognizing several instances of defendants committed to state institutions without trial or conviction).

143. *See* Jackson v. Indiana, 406 U.S. 715, 731 (1972); *see also* O'Connor v. Donaldson, 422 U.S. 563, 564 (1975).

144. *See Jackson*, 406 U.S. at 738.

Procedure Act, codified in chapter 15A of the North Carolina General Statutes, requires that defendants found to be incompetent to stand trial only be held temporarily until such time as a judge can determine the need for longer-term commitment under the civil commitment statute, codified in chapter 122C of the North Carolina General Statutes.[145] This need is based entirely on the defendant's likelihood of, or propensity for, being dangerous.[146] What remains is a *civil* commitment statute that permits the involuntary commitment of so-called "dangerous" individuals who—at a trial judge's discretion, with consultation from a physician—may be held indefinitely following a *criminal* accusation and finding of future risk of harm to self,[147] for no other reason than that the person is mentally retarded, i.e. "dangerous" in the eyes of the law.[148] Viewed in light of article I, section 21 of the North Carolina constitution, as well as the *Pippin* factors applying the right to a speedy trial, this indicates a constitutional deprivation of liberty.

IV. THE STATUTORY "DANGER" GAP

Indefinite involuntary commitment without criminal trial or conviction is a consequence of the convergence of four factors: (1) the statutorily low threshold for defining danger to self;[149] (2) the removal of the imminent and overt acts requirement from the meaning of danger;[150] (3) the court's reliance on, and deference to, physician testimony as to the predictability of a defendant's propensity for danger;[151] and (4) the permissible evidentiary minimum of hearsay allegations to begin the entire petitioning process.[152] The DSM-IV diagnostic criteria for "mental retardation" state that in addition to low intellectual functioning, a person must also have an under-developed ability to adapt and function in daily life without some level of assistance.[153] Although the diagnostic criteria do not include a requirement that such a lack of adaptive functioning place the individual in a danger of

145. *See* N.C. GEN. STAT. § 15A-1003(b).

146. *See id.* § 122C-263; *see also id.* § 122C-3(11).

147. *See id.* § 122C-263.

148. *See id.*; *see also supra* note 80 and accompanying text.

149. *See In re* Zollicoffer, 598 S.E.2d 696, 699 (N.C. Ct. App. 2004) (finding non-compliance with medication and treatment team members as placing the patient at "high risk" of both prongs of the statutory definition of danger, justifying involuntary commitment).

150. *See In re* Collins, 271 S.E.2d 72, 76 (N.C. Ct. App. 1980).

151. *Id.* at 75.

152. *Collins*, 271 S.E.2d at 76.

153. *See* AM. PSYCHIATRIC ASS'N, *supra* note 77 and accompanying text.

hurting himself, the implication is clear that without some level of support, the person might be at risk.[154]

The North Carolina General Statutes likewise make this implication clear in the statutory definition of "Danger to himself,"[155] and North Carolina courts have confirmed this connection between danger and lack of adaptive functioning.[156] Specifically, the North Carolina Court of Appeals has—on more than one occasion, and for the purposes of justifying involuntary civil commitment—permitted a low threshold for what may be considered "dangerous to self."[157] The Court stated, "We have held specifically that the failure of a person to properly care for his/her medical needs, diet, grooming and general affairs meets the test of dangerousness to self."[158] When viewed comparatively, it is difficult to see a clear distinction between the medical definition of mental retardation and what the state defines as dangerous behavior worthy of involuntary commitment.

Historically, the statutory definition of "danger" required either some identification of overt acts by the accused or a showing that such acts were imminent.[159] In 1979, the North Carolina General Assembly redefined the term "Danger to himself" and in doing so removed the "imminent" requirement.[160] In light of these showings not being required, the court need only find an individual dangerous to himself based on considerations of past acts, present sense impressions of an examining physician, or expert testimony concerning the individual's propensity and risk for future danger.[161]

The court has upheld a predictability standard of determining dangerousness, despite its recognizable flaws.[162] "Empirical research repeatedly demonstrates that mental health professionals remain unable to predict accurately the dangerousness of any one individual."[163]

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154. *See id.* at 44–45.

155. *See* N.C. GEN. STAT. § 122C-3(11)(a)(1) (2011).

156. *See In re* Lowery, 428 S.E.2d 861, 864 (N.C. Ct. App. 1993).

157. *See id.*

158. *Id.*

159. *See In re* Collins, 271 S.E.2d 72, 76 (N.C. Ct. App. 1980) (referring to changes reflected in N.C. GEN. STAT. §§ 122C-58.1, -58.7 (1979) that delete the word "imminently" in connection with the word "dangerous"); *see also In re* Monroe, 270 S.E.2d 537, 541 (N.C. Ct. App. 1980) (recognizing the removal of "overt acts" from the former standard of "imminent" danger).

160. *See Collins*, 271 S.E.2d at 76.

161. *See id.* at 74.

162. Arrigo & Williams, *supra* note 11, at 189 (identifying commentary on this standard suggesting that it is unreliable and unpredictable).

163. *Id.*

Nevertheless, courts around the country have yet to "implement additional due process safeguards to defend against unwarranted commitments, instead accepting 'remarkably low levels of predictive accuracy' to justify involuntary confinement."[164] What have resulted are courts willing to accept "'mere prediction[s] of future harm, without evidence of an actual fact, attempt, or threat of dangerous behavior'"[165] as justification for indefinite civil commitment.[166]

A person facing involuntary commitment based on the dangerousness standard need only to have been accused of a crime and determined by a magistrate to be "*probably* mentally ill and . . . dangerous to self."[167] In fact, "[the statute] does not expressly state whether the affiant's knowledge must be based on personal knowledge or whether it can be in whole or in part based upon hearsay."[168] The court goes on to explain, "[h]earsay evidence is sufficient to support an affidavit supporting an arrest warrant, even though not admissible to prove guilt at trial."[169] Under traditional circumstances, such an accusation would be resolved at trial with a likely exclusion of any non-excepted hearsay evidence. However, under the circumstances of the mentally retarded defendant, he or she never reaches the trial phase, and the court has upheld court orders for involuntary commitment based entirely on hearsay evidence.[170] Once the commitment has taken place under this convergence of circumstances, chapter 122C of the North Carolina General Statutes governs the continued confinement, which—in the case of men like Floyd Brown—amounts to a virtual life sentence.

V. CONCLUSION

North Carolina's criminal procedure and civil commitment statutes—chapters 15A and 122C of the North Carolina General Statutes—viewed in conjunction with the fundamental rights to liberty and unreasonable restraint guaranteed by article I, sections 19 and 21 of the North Carolina constitution—establish a public policy preventing criminal prosecution of people who are unable to properly comprehend and participate in their own

164. *Id.* (citing R. LEVY & L. RUBENSTEIN, THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES 31 (1996)).

165. *Id.* at 188 (citing LEVY, *supra* note 164).

166. *Collins*, 271 S.E.2d at 74.

167. *In re* Zollicoffer, 598 S.E.2d 696, 698 (N.C. Ct. App. 2004) (quoting N.C. GEN. STAT. § 122C-261(b) (2004) (emphasis added)).

168. *Id.*

169. *Id.* at 699 (citations omitted).

170. *Id.* (citation omitted).

defenses.[171] Chapter 15A prohibits prosecution of criminal defendants who lack the requisite capacity to proceed to trial and provides a means by which defendants can be involuntarily committed in order to receive the treatment necessary to establish capacity.[172] If determined to lack capacity to proceed to trial, chapter 15A permits a judge or magistrate to issue a secure custody order placing defendants in an involuntary commitment setting until such time as they have the capacity to proceed in their own defense.[173] Once ordered and committed, the statutory regulations provided in chapter 122C govern defendants' civil commitments, including the showings required to justify a defendant's length of stay.[174]

There is a significant gap in North Carolina's statutory scheme that fails to clearly distinguish between criminal defendants who *temporarily* lack capacity because of an interfering mental illness and those defendants who *permanently* lack capacity because of an untreatable mental disability. The statute does, however, create a clear distinction between those defendants who present a danger and pose a risk—either to themselves or to others in the community—and those who are merely mentally ill. While this "danger" distinction reflects a compelling state interest in protecting the community from potential harm by permitting a restriction on individual liberty in order to achieve that end,[175] the distinction is overly inclusive.

Mental retardation is defined in the DSM-IV as the combination of subaverage intellectual function and the significant impairment of adaptive functioning in two or more life skills areas.[176] "Danger to []self" is defined in the North Carolina General Statutes as the inability, without supervision, to care for one's self in the conduct of his daily "responsibilities and social relations" combined with a risk of significant debilitation without proper support.[177] While the two definitions do not mirror one another, in a practical application to defendants with mental retardation, they are so significantly similar that it is possible to see their inherent connection. Mental retardation requires a significant impairment in two or more life skill areas, such as self-care, daily living requirements, diet, and

171. *See supra* note 16 and accompanying text; *see also* N.C. GEN. STAT. § 15A-1001 (2011).

172. *See* N.C. GEN. STAT. §§ 15A-1001 to -08.

173. *See id.* § 15A-1003.

174. *See generally id.* §§ 122C-261 to -68.

175. *See supra* notes 34 and 67.

176. AM. PSYCHIATRIC ASS'N , *supra* note 77.

177. *See* N.C. GEN. STAT. § 122C-3(11).

grooming.[178] Applying a reasonable inference, it can be deduced that without support, care, or supervision in those areas, a person with mental retardation could suffer significant debilitation, physical or otherwise. Likewise, a determination of danger to self only requires an identification of impairment in life skill areas and a physician prediction that without the proper care, support, or supervision, the person is at risk of suffering significant physical debilitation.[179] Therein lies the statutory link between mental retardation and a finding of "danger to self" that can lead to the potential indefinite involuntary commitment of criminal defendants with mental retardation.

Our criminal justice system is founded on the premise that defendants are innocent until proven guilty, yet the statutory scheme provided in chapters 15A and 122C of the North Carolina General Statutes, as applied to defendants with mental retardation, has resulted in treatment of presumably innocent defendants that reflects the opposite notion—if you are accused of a crime and deemed a danger to yourself, the state has the right, and perhaps the obligation, to confine you until such time as you can prove your own innocence and safety. This is a notion that is impossible for the mentally retarded defendant to prove.

The most significant solution needed to reverse the disparate treatment of criminal defendants with mental retardation is to amend the current statutory scheme found in chapters 15A and 122C, creating a distinction between the incapacity to proceed caused by mental illness and the incapacity to proceed caused by a permanent mental disability. Additionally, the standards governing the involuntary commitment of criminal defendants deemed incapable to proceed to trial and at risk of being a danger to self should be revised to include a similar distinction.

Although the diagnostic criteria of "mental retardation" is not likely to change, the legal definition of "Danger to himself" could be amended to reflect a greater distinction between it and the criteria for diagnosing mental retardation, closing the gap into which many defendants with mental retardation fall. For example, this distinction could be achieved, in part, by reinstating the requirement of showing a defendant's *imminent* risk of danger to justify continued involuntary commitment. Once the risk has subsided from imminent to merely possible, then the court could consider alternative and less restrictive means of managing the defendant. Regardless of the chosen language, to be most effective, an amended legal definition will also require recognition by the courts and legislature of the significant difference between mental illness and mental retardation. The

178. AM. PSYCHIATRIC ASS'N , *supra* note 77.

179. *See* N.C. GEN. STAT. § 122C-3(11).

legislature will need to reflect the chronic and untreatable nature of mental retardation in an amended statute, while the courts will need to recognize the necessity to change its procedures dealing with, and dispositions relating to, mentally retarded defendants.

Without amending current legislation, there are other procedural changes that could help reduce the lengths of unreasonable involuntary commitments, like the fourteen-year commitment sustained by Floyd Brown. In fact, preceding chapter 15A of the North Carolina General Statutes, in a commentary written by the Criminal Code Commission, the very problem identified in this Comment is recognized, and the Commission proposes a procedural solution—an increase in reporting to the clerk of court in the county where the crime is alleged to have occurred.[180] This measure would presumably increase the court's awareness of the criminal defendant and require the court to render on-going justifications for his continued involuntarily commitment.

Another procedural solution would be to require the appointment of a Guardian ad Litem, or other court-appointed advocate, to every criminal defendant deemed incapable of proceeding to trial based on his or her mental retardation. Although this may not put a complete end to the unreasonable lengths of involuntary commitment, it could be a significant step toward ensuring that all criminal defendants are guaranteed adequate and consistent representation for the duration of their criminal proceedings.

There are certainly criminal defendants with mental retardation who have committed crimes and should be subject to punishment equal to those defendants of average intelligence and capacity. However, there are also criminal defendants like Floyd Brown who are unable to adequately represent themselves in the justice system and who may be innocent of the crimes with which they are charged—criminal defendants who, as a result of a permanent disability, have their fundamental rights to life and liberty restrained for unreasonable, and arguably unconstitutional, lengths of time. While this Comment and its identified solutions are not a call for more lenient treatment of defendants with mental retardation, it is an appeal for a more reasoned, informed, and constitutionally-sound approach to ensuring adequate protections for all defendants regardless of intellectual ability.

Brian T. Lawler

180. *See id.* § 15A, subch. X, art. 56.