APPENDIX

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APPENDIX A

Supreme Court of North Carolina
In the MATTER OF J.R.
No. 313A21
Filed December 16, 2022

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 278 N.C. App. 604, 2021-NCCOA-366, 859 S.E.2d 650, affirming an involuntary commitment order entered on 3 January 2020 by Judge Pat Evans in District Court, Durham County. Heard in the Supreme Court on 20 September 2022.

Joshua H. Stein, Attorney General, by James W. Doggett, Deputy Solicitor General, and South A. Moore, General Counsel Fellow, for the State.

Glenn Gerding, Appellate Defender, by Wyatt Orsbon, Assistant Appellate Defender, for respondent-appellant.

Disability Rights North Carolina, by Lisa Grafstein, Raleigh, Holly Stiles, and Elizabeth Myerholtz, for Disability Rights North Carolina, National Association of Social Workers, Promise Resource Network, and Peer Voice North Carolina, amicus curiae.

BERGER, Justice.

¶ 1 Respondent was involuntarily committed after the trial court concluded that respondent had a mental illness and was dangerous to himself. Based upon a dissent at the Court of Appeals, the issue before this Court is whether respondent's due process rights were violated when the trial court, in the ab-

sence of counsel for the petitioner, called witnesses and elicited testimony during the hearing. For the reasons stated below, we affirm the decision of the Court of Appeals that respondent's due process rights were not violated.

I. Factual Background

¶ 2 In late fall 2019, respondent was found unconscious on a Durham street after he suffered an alcohol-induced seizure. On December 9, 2019, a Duke University Medical Center (DUMC) physician, Dr. Ayumi Nakamura, petitioned for the involuntary commitment of respondent. That same day, a magistrate entered an order for respondent to be taken into custody and held at DUMC while respondent awaited judicial review.

¶ 3 On January 3, 2020, respondent came before the trial court for an involuntary commitment hearing pursuant to N.C.G.S. § 122C-267. N.C.G.S. § 122C-267 (2021). Upon calling of the case for hearing, respondent's counsel immediately objected to the proceeding because the State did not have a representative present. The trial court did not explicitly overrule counsel's objection but instead stated the following:

> [L]et the record reflect, that the Public Defend[er's] Office objects to this court proceeding in this hearing without the District Attorney's Office participating. The District Attorney's Office of Durham County has notified this [c]ourt that they will not be participating in these hearings as in prior years, and this [c]ourt intends to go forward with this hearing, and the

> Respondent is more than welcome to appeal this [c]ourt's decision.[1]

¶ 4 The trial court then called Dr. Sandra Brown, a physician and psychiatrist from DUMC who had been subpoenaed to testify. The court began direct examination of Dr. Brown by asking her the following: "state your name and occupation for this [c]ourt, and tell me what it is you want me to know about this matter."

¶ 5 Dr. Brown testified that respondent had a history of chronic obstructive pulmonary disease (COPD) and alcohol use disorder, and he had been hospitalized approximately eight times in the prior year for alcohol withdrawal or for hyponatremia, related to the disorder. Respondent also suffered from deficits in executive functioning and bipolar disorder which caused manic episodes. Respondent had not received full treatment for his conditions because he left against medical advice on each admission. Additionally, respondent had been squandering his retirement money, had been homeless, was drinking regularly, and had been charged frequently with being intoxicated in public.

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[1] The trial court noted that the Durham County District Attorney's Office had notified the trial court that it would not be participating, but it is unclear why the district attorney's office would have been expected to participate in this hearing at all when a doctor from DUMC was the petitioner in the case. The record does not contain any reference to pending criminal charges, respondent's capacity to proceed in a criminal case, or a determination that respondent had been found not guilty of a criminal charge by reason of insanity. *See* N.C. Const. art. IV, § 18; N.C.G.S. §§ 7A-61; 122C-264(d)–(d1), 122C-268(c), 122C-268.1, 122C-276 (2021).

¶ 6 The trial court then asked Dr. Brown, "Anything else?" Dr. Brown responded by explaining that respondent's behavior of spending money was likely due to his alcohol use disorder and the bipolar manic episodes that he was experiencing as a result of his bipolar disorder, and she opined that these behaviors were "likely to cause harm to self." Dr. Brown expressed concern that respondent would not get necessary medications and that he would not be properly tapered off a potentially dangerous and addictive medication if he were not involuntarily committed.

¶ 7 Again, the trial court asked, "Anything else?" Dr. Brown responded that she had nothing more to share with the court. Respondent's counsel then cross-examined Dr. Brown. After cross examination concluded, the following exchange occurred:

> [Trial Court]: Dr. Brown, is it your testimony that the Respondent is a danger to himself?
>
> [Dr. Brown]: Yes.
>
> [Trial Court]: All right. And what about whether or not he's a danger to others?
>
> [Dr. Brown]: I believe, at this time, he is not a direct danger to others, but in the past he has been intoxicated in public, and it's hard to predict what someone like that might do.
>
> [Trial Court]: All right. And how long are you asking that he be committed for?
>
> [Dr. Brown]: We're asking for 30 days, given that we're not sure exactly what will happen with the guardianship proceedings, and we feel that it's important for that to be settled, as far as creating a safe plan for aftercare.

> [Trial Court]: All right. Based on my questions, does the Respondent have anything else they wish to ask this witness?
>
> [Respondent's counsel]: No, Your Honor.
>
> [Trial Court]: All right.... Any other evidence on behalf of the Petitioner?
>
> [No audible response.]
>
> [Trial Court]: Will there be any other evidence on behalf of the Respondent?

¶ 8 Counsel for respondent then called respondent to the witness stand. Respondent testified on his own behalf. He expressed that he did not feel that he has ever posed a threat to himself or others. He answered affirmatively when asked by his counsel whether he was aware that he had a mental health diagnosis and that he needed medication to treat his mental health issues. He also expressed a desire to "be responsible for [him]self" but would be willing to work with a guardian. Once respondent's counsel concluded questioning respondent, the trial court asked respondent, "Anything else you want me to know ...?" Respondent replied in the negative.

¶ 9 The trial court then asked respondent's counsel, "Do you wish to be heard further, counsel? Any other evidence? Any argument?" Respondent's counsel responded that she had no further evidence to present on respondent's behalf and the trial court allowed respondent's counsel to proceed to closing argument.

¶ 10 At the end of the hearing, the trial court stated that it found that respondent had a mental illness and was a danger to himself, and the trial court entered a thirty-day commitment order. Fur-

ther, the trial court made written findings that there was clear, cogent, and convincing evidence to support involuntary commitment; that respondent was suffering from bipolar disorder, COPD, and alcohol abuse; and that respondent was a danger to himself.

¶ 11 Respondent gave notice of appeal in open court and subsequently filed a written notice of appeal.[2] On July 20, 2021, a divided panel of the Court of Appeals affirmed the trial court's order of commitment "for the reasons stated in the majority opinion and concurring opinion addressing the 'Due Process Concerns' issue in *In re C.G.*, [278] N.C. App. [416], 2021-NCCOA-344, 863 S.E.2d 237." *In re J.R.*, 278 N.C. App. 604, 2021-NCCOA-366, ¶ 7, 859 S.E.2d 650; *see In re C.G.*, 278 N.C. App. 416, 2021-NCCOA-344, ¶ 25, 863 S.E.2d 237 (finding that "the trial court did not violate Respondent's right to an impartial tribunal"). The dissenting judge in *In re C.G.* stated that he could not "conclude that Respondent received a full and fair hearing before a neutral officer of the court." *Id.* ¶ 46 (Griffin, J., dissenting).

¶ 12 Respondent appeals to this Court based upon the dissent at the Court of Appeals. On November 15, 2021, this Court allowed respondent's motion to designate respondent's case as the lead case on ap-

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[2] Five other respondents appealed from involuntary commitments orders on similar grounds. *See In re C.G.*, 278 N.C.App. 416, 2021 -NCCOA- 344, 863 S.E.2d 237; *In re Q.J.*, 278 N.C.App. 452, 2021 -NCCOA- 346, 863 S.E.2d 424; *In re C.G.F.*, 278 N.C.App. 604, 2021 -NCCOA- 364, 859 S.E.2d 650; *In re E.M.D.Y.*, 278 N.C.App. 604, 2021 -NCCOA- 365, 860 S.E.2d 49; *In re R.S.H.,* No. COA20-777 278 N.C.App. 605, 2021 -NCCOA- 369, 860 S.E.2d 50, 2021 WL 3043473.

peal. In his appeal, respondent contends that the Court of Appeals erred in determining that his due process rights were not violated. Specifically, respondent argues that the trial court failed to remain independent and impartial when it "elicited the evidence supporting [respondent]'s involuntary commitment and then, based on the evidence the judge introduced, decided to involuntarily commit [respondent]." Respondent implicitly requests a blanket rule that would prohibit the trial court from asking questions which elicit evidence and satisfy the burden of proof because, in so doing, the trial court ceases to be impartial. We decline to adopt such a rule.

II. Analysis

¶ 13 Both our federal and state constitutions require due process. The Constitution of the United States declares that "[n]o state shall ... deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend XIV, § 1, and our State Constitution states that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land," N.C. Const. art. I, § 19.

¶ 14 Under our law, "anyone who has knowledge of an individual who has a mental illness and is either (i) dangerous to self ... or dangerous to others ... or (ii) in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness," may file an affidavit and petition the court to have the individual involuntarily committed. N.C.G.S. § 122C-261(a) (2021).

After the initial affidavit is filed, the clerk or magistrate must determine whether "reasonable grounds" exist to believe that the facts in the affidavit are true, respondent has a mental illness, and one of the aforementioned criteria are met, before taking the individual into custody. N.C.G.S. § 122C-261(b).

¶ 15 Once an individual is taken into custody, the individual must go before a commitment examiner for further determinations of whether the requirements for involuntary commitment are met. N.C.G.S. §§ 122C-263(c), 122C-263(d)(2). If the examiner recommends involuntary commitment, the individual must be admitted to a 24-hour facility where the individual must be examined by a physician to determine once again if the criteria for involuntary commitment are met. N.C.G.S. §§ 122C-263(d)(2), 122C-266.

¶ 16 From that point, if the physician recommends involuntary commitment, within ten days a hearing must take place before the trial court. N.C.G.S. § 122C-268(a). An individual may be involuntarily committed if the trial court finds "by clear, cogent, and convincing evidence" that the respondent is mentally ill and is a danger to himself or others. N.C.G.S. § 122C-268(j).

¶ 17 An individual facing involuntary commitment has numerous procedural protections, including the right to counsel, N.C.G.S. § 122C-268(d); the right to have the commitment reports and other relevant documents shared with the trial court, N.C.G.S. § 122C-266(c); and the right to confront and cross examine witnesses. N.C.G.S. § 122C-268(f).

¶ 18 It is uncontroverted that an involuntary commitment proceeding implicates the deprivation

of a liberty interest, triggering due process concerns. The Supreme Court of the United States has "repeatedly ... recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 1809, 60 L. Ed. 2d 323 (1979) (citing *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972)); *Humphrey v. Cady*, 405 U.S. 504, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972); *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967). One such element of due process protection is the presence of an independent decisionmaker. *See Vitek v. Jones*, 445 U.S. 480, 495–96, 100 S. Ct. 1254, 1264–65, 63 L. Ed. 2d 552 (1980) (holding that the district court properly determined the procedures necessary, including that an independent decisionmaker is a requirement of due process, in the involuntary commitment context). "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S. Ct. 1610, 1613, 64 L. Ed. 2d 182 (1980). Accordingly, "a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955).

¶ 19 However, this Court has recognized that "[j]udges do not preside over the courts as moderators, but as essential and active factors or agencies in the due and orderly administration of justice. It is entirely proper, and sometimes necessary, that they ask questions of a witness...." *State v. Hunt*, 297 N.C. 258, 263, 254 S.E.2d 591, 596 (1979) (quoting *Eek-*

hout v. Cole, 135 N.C. 583, 583, 47 S.E. 655, 657 (1904)). Further, instances arise that *require* the trial court to ask questions to fulfill its role in the judicial process. In *State v. Perry*, this Court declared that "there are times in the course of a trial, when it becomes *the duty* of the judge to propound competent questions in order to obtain a proper understanding and clarification of the testimony of the witness or to bring out some fact that has been overlooked." 231 N.C. 467, 470, 57 S.E.2d 774, 776 (1950).

¶ 20 Notably, the rules of evidence contemplate that the court will actively participate in proceedings. Rule 614 of the North Carolina Rules of Evidence expressly allows judges to participate by calling witnesses and questioning them. The rule states that "[t]he court may, on its own motion ... call witnesses, and all parties are entitled to cross-examine witnesses thus called." N.C.G.S. § 8C-1, Rule 614(a) (2021). Additionally, "[t]he court may interrogate witnesses, whether called by itself or by a party." N.C.G.S. § 8C-1, Rule 614(b) (2021). In neither case does a trial court shed its impartiality or abandon its role as an independent decisionmaker.

¶ 21 Respondent contends, however, that when counsel for a petitioner does not appear, the trial court acts as prosecutor for the State when it asks questions and elicits testimony which tends to support the commitment of respondent. It is true, as respondent argues, that in *Vitek*, the U.S. Supreme Court concluded that involuntary commitment proceedings are adversarial in nature. 445 U.S. at 495, 100 S. Ct. at 1265. However, "[w]hat makes a system adversarial rather than inquisitorial is not the presence of counsel ... but rather, the presence of a judge

who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties." *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2, 111 S. Ct. 2204, 2210, 115 L. Ed. 2d 158 (1991). In this case, the judge properly decided on the basis of facts presented at the hearing and arguments of the parties—respondent, respondent's counsel, and a doctor at DUMC who sought to have respondent committed for his health. As such, the judge did not take on the role of a prosecutor merely because counsel was not present.

¶ 22 Under our law, a trial court does not, and cannot as a matter of practicality, automatically cease to be impartial when it merely calls witnesses and asks questions of witnesses which elicit testimony. Such an argument elevates form over substance and would have potentially far-reaching, negative consequences for various types of pro se cases, contempt proceedings, domestic violence actions and sensitive juvenile hearings, let alone commitment proceedings. As the Supreme Court has stated, an argument such as respondent's "assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Richardson v. Perales*, 402 U.S. 389, 410, 91 S. Ct. 1420, 1432, 28 L. Ed. 2d 842 (1971).

¶ 23 Here, a bench trial occurred based upon a petition filed by DUMC. No jury was present, and there was no risk of any improper influence by the trial court's actions. *See State v. Smith*, 240 N.C. 99, 102, 81 S.E.2d 263, 265 (1954) (announcing that "the probable effect or influence upon the jury" prevents a

judge from casting doubt on the credibility of a witness or impeaching a witness such that it would prejudice either party). The trial court did not ask questions designed or calculated to impeach any witnesses, the judge merely asked questions based upon the contents of the petition, such as asking whether there was "anything else" that the witness would like to say and asking the witness to "tell [the court] what it is you want [the court] to know about this matter." The most specific questions asked by the trial court were clarifying questions to fulfill the trial court's *duty* to "obtain a proper understanding and clarification of the testimony of the witness" to confirm whether the requirements for involuntary commitment had been met. *Perry*, 231 N.C. at 470, 57 S.E.2d at 776.

¶ 24 In *State v. Stanfield*, the Court of Appeals found that when "the judge asked a neutral question which, depending upon the answer would benefit either the State or the defendant," no violation of due process occurred. 19 N.C. App. 622, 626, 199 S.E.2d 741, 744 (1973). In short, even though the "testimony tended to prove an element" of the offense with which the defendant was charged, it was not sufficient to be improper questioning by the judge. *Id.* at 626, 199 S.E.2d at 744.

¶ 25 Here, the trial court remained an independent decisionmaker, and the answers to the trial court's questions weighed toward commitment of respondent. The testimony given in response to the court's questions established the required elements to have respondent committed, but like *Stanfield*, that alone is not sufficient to find a violation of due process. The trial court did not advocate for any par-

ticular resolution and did not exceed constitutional bounds with its questions even though the responses supported involuntary commitment.

¶ 26 Respondent argues that the trial court attempted to fulfil two roles of both adjudicator and prosecutor. While we disagree that the trial court stepped into any role other than its proper role as an independent decisionmaker, we recognize that the United States Supreme Court has addressed the ability of an adjudicator to perform dual roles. In doing so, the Court has found that due process is not violated when the same individual both investigates and adjudicates, while making it clear that when the accuser doubles as the adjudicator, due process is violated. *Withrow v. Larkin*, 421 U.S. 35, 52, 95 S. Ct. 1456, 1467, 43 L. Ed. 2d 712 (1975); *Williams v. Pennsylvania*, 579 U.S. 1, 8, 136 S. Ct. 1899, 1905, 195 L. Ed. 2d 132 (2016); *In re Murchison*, 349 U.S. at 139, 75 S. Ct. at 627.

¶ 27 In the context of administrative agencies, the Supreme Court of the United States has rejected "the bald proposition ... that agency members who participate in an investigation are disqualified from adjudicating." *Withrow*, 421 U.S. at 52, 95 S. Ct. at 1467. Put another way, both investigating and adjudicating a matter is not sufficient, standing alone, to disqualify a judge for lacking impartiality.

¶ 28 Yet, the Supreme Court has also concluded that the same person acting as accuser and adjudicator offends due process. *Williams*, 579 U.S. at 8, 136 S. Ct. at 1905 (citing *In re Murchison*, 349 U.S. at 136, 75 S.Ct. 623). In *Murchison*, the judge acted as a grand jury and then tried cases as the judge. 349 U.S. at 137, 75 S. Ct. at 625. The Court held that

due process was violated when a judge acted as both a grand jury, the accuser, and the adjudicator of the case. *Id.* at 139, 75 S. Ct. at 627.

¶ 29 Here, however, the trial court did not function as an investigator or an accuser. The trial court did not investigate the underlying facts or initiate the filing of the petition to have respondent committed; those functions, i.e., being the investigator and the accuser, were performed by individuals with DUMC. The trial court simply presided over the hearing and asked questions to increase understanding and illuminate relevant facts to determine whether respondent met the necessary conditions for commitment.

¶ 30 By calling the witness from DUMC to testify and asking even-handed questions, the trial court did not advocate for or against the involuntary commitment of respondent; it merely heard evidence in conjunction with contents of the petition and applied the law to the facts as presented. These neutral and clarifying questions do not call into question the trial court's impartiality and do not offend due process.

III. Conclusion

¶ 31 For the reasons stated herein, the trial court did not violate respondent's due process right to an impartial tribunal, and we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

¶ 32 *In re J.R.* and its companion cases[1] arose when Duke Hospital, a private entity, filed a petition for the involuntary commitment of each of the six respondents in these cases. Under North Carolina law, counsel for the State must appear at any hearing concerning an involuntary commitment at a state facility, such as those at one of the State's three regional psychiatric hospitals or at UNC Hospitals in Chapel Hill. N.C.G.S. §§ 122C-268(b), 122C-270(f) (2021). But when a person is held in custody for treatment at private facilities, counsel for the State is under no statutory obligation to appear. § 122C-268(b). For commitments related to private facilities, like those at Duke Hospital, "the Attorney General *may*, in his discretion, designate an attorney who is a member of his staff to represent the State's interest." *Id.* (emphasis added). This statute differs substantially from that of other states which explicitly contemplate the issue before this Court and provide that counsel for the State or petitioning party must appear and present the case to the trial court.[2]

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[1] *See In re C.G.*, No. 308A21, 2022 WL 17726445; *In re R.S.H.*, No. 317A21, 2022 WL 17725827; *In re E.M.D.Y.*, No. 279A21; *In re Q.J.*, No. 309A21, 2022 WL 17726225; *In re C.G.F.*, No. 312A21, 2022 WL 17726217. These cases were consolidated for oral argument on this due process issue.

[2] *See, e.g.,* N.D. Cent. Code § 25-03.1-19(2) (Lexis, effective Aug. 1, 2021) ("At the hearing, evidence in support of the petition must be presented by the state's attorney, private counsel, or counsel designated by the court."); Kan. Stat. Ann. § 59-2959(e) (Lexis, effective July 1, 2022) ("If the petitioner is not represented by counsel, the county or district attorney shall represent the petitioner, prepare all necessary papers, appear at the hearing and present such evidence as the county or district at-

torney determines to be of aid to the court in determining whether or not there is probable cause to believe that the person with respect to whom the request has been filed is a mentally ill person subject to involuntary commitment for care and treatment under this act, and that it would be in the best interests of the person to be detained until the trial upon the petition."); Iowa Code § 229.12(1) (West, effective July 1, 2018) ("At the hospitalization hearing, evidence in support of the contentions made in the application shall be presented by the county attorney."); N.J. Stat. Ann. § 30:4-27.12(b) (West, effective Aug. 11, 2010) ("[T]he assigned county counsel is responsible for presenting the case for the patient's involuntary commitment to the court, unless the county adjuster is licensed to practice law in this State, in which case the county adjuster shall present the case for the patient's involuntary commitment to the court."); Minn. Stat. § 253B.08(5a) (West, effective Aug. 1, 2020) ("The proposed patient or the patient's counsel and the county attorney may present and cross-examine witnesses, including court examiners, at the hearing."); Haw. Rev. Stat. § 334-60.5(e) (West, effective July 1, 2018) ("The attorney general, the attorney general's deputy, special deputy, or appointee shall present the case for hearings convened under this chapter, except that the attorney general, the attorney general's deputy, special deputy, or appointee need not participate in or be present at a hearing whenever a petitioner or some other appropriate person has retained private counsel who will be present in court and will present to the court the case for involuntary hospitalization."); Or. Rev. Stat. § 426.095(3) (West, effective June 16, 2015) ("The person alleged to have a mental illness and the individual representing the state's interest shall have the right to cross-examine all the following: (a) Witnesses. (b) The individual conducting the investigation. (c) The examining physicians or other licensed independent practitioners who have examined the person."); Fla. Stat. § 394.467(6)(a)(2) (West, effective July 1, 2016) ("The state attorney for the circuit in which the patient is located shall represent the state, rather than the petitioning facility administrator, as the real party in interest in the proceeding."); Ariz. Rev. Stat. Ann. § 36-503.01 (West, effective July 1, 2016) ("Whenever a physician or other person files a petition for court-ordered evaluation or court-

¶ 33 The majority holds that there is no due process violation when a person is involuntarily committed after a trial judge comingles adjudicatory and prosecutorial functions by eliciting the testimony of witnesses and building the record that then is the basis to support the individual's involuntary commitment so long as the judge merely asks "even-handed questions" that are "neutral and clarifying. However, when a party does not appear, the judge necessarily must comingle these functions, thereby abandoning their role as an impartial decisionmaker and violating the respondent's right to due process. *See Sung v. McGrath*, 339 U.S. 33, 46, 70 S.Ct. 445, 94 L.Ed. 616 (1950), *superseded by statute as recognized in Marcello v. Bonds*, 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1955). To be sure, a trial judge is placed in a difficult position when deciding whether to proceed after hearing from the State that it would "not be participating in these hearings" even though it had elected to do so "in prior years." This is the functional equivalent of a party failing to appear at all. It is one thing for a trial court to proceed when a party appears but is unrepresented by counsel, it is quite another thing for a trial court to proceed when a party with the burden of proof fails to appear.

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ordered treatment on behalf of a state or county screening, evaluation or mental health treatment agency, the attorney general or the county attorney for the county in which the proceeding is initiated, as the case may be, shall represent the individual or agency in any judicial proceeding for involuntary detention or commitment and shall defend all challenges to such detention or commitment."); 18 Vt. Stat. Ann. § 7615(d) (Lexis, effective July 1, 2014) ("The attorney for the State and the proposed patient shall have the right to subpoena, present, and cross-examine witnesses, and present oral arguments.").

¶ 34 Setting up a straw man by taking respondent's argument to illogical extremes, the majority mischaracterizes respondent's position as "implicitly request[ing] a blanket rule that would prohibit the trial court from asking questions which elicit evidence and satisfy the burden of proof because, in so doing, the trial court ceases to be impartial." Respondent and the amicus party in these cases are seeking the fundamental due process guarantees of a neutral factfinder and a truly adversarial process when an individual's personal liberty is at stake. They are not arguing that a trial court can never ask a witness a question. The problem in these cases is that the trial court elected to proceed to hear a case when one party failed to appear. The fact that, as the majority points out, the respondent has a right to counsel does not satisfy their right to a neutral decisionmaker.

¶ 35 When a person is involuntarily committed to a psychiatric hospital, they experience a "massive curtailment of liberty." *Vitek v. Jones*, 445 U.S. 480, 491, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)). Accordingly, the person has a "powerful" "interest ... in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment." *Id.* at 495, 100 S. Ct. 1254, 1264–65. In the case of involuntary commitment, the deprivation of liberty does not stop with the person's "loss of freedom from confinement" and involuntary commitment — as the name implies — also involves "[c]ompelled treatment." *Id.* at 492, 100 S. Ct. 1254, 1264–65 (citing *Addington v. Texas*, 441 U.S. 418, 427, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)). Involun-

tary commitment also comes with serious collateral consequences such as restrictions on a parent's fundamental right to custody and control of their children, being forbidden from owning a firearm, and being prohibited from obtaining several types of professional licenses, including a license to practice law. *See In re Carter*, 25 N.C. App. 442, 443–44, 213 S.E.2d 409 (1975) (wife's involuntary commitment "may well affect the determination" of her child custody dispute with her husband); *District of Columbia v. Heller*, 554 U.S. 570, 626, 627 n.26, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) ("longstanding prohibitions" on the possession of firearms by people suffering from mental illness are "presumptively lawful"); N.C.G.S. § 83A-15(a) (2021) (architectural license may be denied, suspended, or revoked due to mental disability); N.C.G.S. § 84-28(g) (2021) (law license may be inactivated because of mental incompetence); N.C.G.S. § 90-14(a) (2021) (medical license may be revoked due to mental illness); N.C.G.S. § 90-171.37(a) (2021) (nursing license may be denied, suspended, or revoked because of mental illness). Indeed, a person's involuntary commitment is "always an ominous presence" that may be used to attack their competence, credibility, and character whenever there is "any interaction between the individual and the legal system." *In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633 (1977) (quoting *In re Ballay*, 482 F.2d 648, 652 (D.C. Cir. 1973)). Our society can also be unkind to people with mental illness, and "[w]hether we label this phenomena 'stigma' or choose to call it something else ... we [must] recognize that [involuntary commitment] ... can have a very significant impact on the individual." *Vitek*, 445 U.S. at 492, 100 S.Ct. 1254 (first and second altera-

tions in original) (quoting *Addington*, 441 U.S. at 425–26, 99 S.Ct. 1804). Accordingly, the United States Supreme Court has acknowledged that "an erroneous commitment is sometimes as undesirable as an erroneous conviction." *Addington*, 441 U.S. at 428, 99 S.Ct. 1804 (citing J. Wigmore, Evidence § 1400 (Chadbourn rev. 1974)).

¶ 36 A person cannot be committed against their will without due process of law. *Addington*, 441 U.S. at 425, 99 S.Ct. 1804. This concept is expressly stated in *Addington*, which noted that the United States Supreme Court "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Id.*; *see, e.g., Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); *Humphrey*, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394; *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). The hallmark of due process is "fundamental fairness" *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), and in the context of judicial proceedings, this equates to the right to a "full and fair hearing," *Miller v. French*, 530 U.S. 327, 350, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000). This right is essential in guarding against erroneous involuntary commitment and is designed to give the person to be committed the ability to "understand the nature of what is happening to him" and to "challenge the contemplated action." *Vitek*, 445 U.S. at 496, 100 S.Ct. 1254.

¶ 37 J.R. argues that in these circumstances, the trial court acts as a prosecutor for the State when it

elicits testimony that supports commitment of the respondent. In response, the majority acknowledges that the United States Supreme Court held in *Vitek*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552, that involuntary commitment proceedings are adversarial proceedings but then illogically maintains that because a medical doctor testified as a witness in this case, the trial judge did not actually take on the role of a prosecutor.

¶ 38 The adversarial nature of involuntary commitment hearings was indeed acknowledged by the United States Supreme Court in *Vitek*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552, and *Addington*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323. The Court observed that these proceedings are based on an "essentially medical" question, *Vitek*, 445 U.S. at 495, 100 S.Ct. 1254, and the determination "turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists." *Addington*, 441 U.S. at 429, 99 S.Ct. 1804. It is precisely because of this, and "'[t]he subtleties and nuances of psychiatric diagnoses' that ... the requirement of adversary hearings [is justified]." *Vitek*, 445 U.S. at 495, 100 S.Ct. 1254 (first alteration in original) (quoting *Addington*, 441 U.S. at 429, 99 S.Ct. 1804); *see also Foucha v. Louisiana*, 504 U.S. 71, 81, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (Louisiana's statutory commitment procedure for insanity acquittee violated due process because, among other things, it failed to provide the acquittee with an "adversary hearing"); *French v. Blackburn*, 428 F. Supp. 1351, 1356 (M.D.N.C. 1977) (involuntary commitment procedure under repealed Chapter 122 of the General Statutes afforded due process because, among other things, it

provided "a full adversary hearing"), *aff'd*, 443 U.S. 901, 99 S.Ct. 3091, 61 L.Ed.2d 869 (1979); *Logan v. Arafeh*, 346 F. Supp. 1265, 1270 (D. Conn. 1972) (because Connecticut's involuntary commitment statute required "an adversary hearing," among other things, it complied with due process), *aff'd sub nom., Briggs v. Arafeh*, 411 U.S. 911, 93 S.Ct. 1556, 36 L.Ed.2d 304 (1973). Further, over thirty years ago our own Court of Appeals held that one of the safeguards in commitment cases guaranteed by due process is "a full adversary hearing." *In re Hernandez*, 46 N.C. App. 265, 269, 264 S.E.2d 780 (1980) (citing *French*, 428 F. Supp. 1351).

¶ 39 The adversarial model is distinct from "the inquisitorial model in which the judge — a neutral decisionmaker — conducts an independent investigation" and instead "our adversarial system requires the parties to present their own arguments and evidence at trial." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326 (2012). It follows that under this model, the judge must decide whether a person is to be involuntarily committed based on the "facts and arguments pro and con adduced by the parties" and not based on the judge's own "factual and legal investigation." *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991).

¶ 40 Although the majority acknowledges that involuntary commitment hearings are subject to due process protections, they hold that "[i]t is entirely proper, and sometimes necessary, that [a judge] ask questions of a witness," citing *State v. Hunt*, 297 N.C. 258, 263, 254 S.E.2d 591 (1979). In doing so, they cite two of this Court's decisions in criminal cases, *Hunt*, 297 N.C. 258, 254 S.E.2d 591, and *State*

v. Perry, 231 N.C. 467, 57 S.E.2d 774 (1950). However, these cases are not analogous to J.R.'s case because they contemplate an entirely different scenario and thus answer a separate question, namely if a judge may ask questions of a witness in criminal cases where both parties are represented by counsel. Because of the nature of criminal cases, the State was required to appear and put on its case by calling witnesses, introducing evidence, and eliciting testimony. Thus, in those cases it may become "the duty of the judge to propound competent questions in order to obtain a proper understanding and clarification of the testimony of the witness or to bring out some fact that has been overlooked" without violating the defendant's due process rights. *Perry*, 231 N.C. at 470, 57 S.E.2d 774. Importantly, J.R. does not argue that there is a due process violation any time a judge asks a question. Rather, he argues that in this case the judge did not simply ask the doctor a question or two to clarify her testimony or develop some overlooked fact, as this Court contemplated in *Perry*. *See Perry*, 231 N.C. at 470, 57 S.E.2d 774. Instead, the trial court called the only witness, asked all the questions, and elicited all the evidence used to support J.R.'s commitment.

¶ 41 The majority also notes that under *State v. Stanfield*, 19 N.C. App 622, 626, 199 S.E.2d 741 (1973), there is no due process violation even when a trial court elicits the testimony used to prove an element of the crime in a criminal case. However, as noted above, criminal cases are not analogous because both parties are represented by counsel. In the involuntary commitment context where an attorney for the State or petitioner is not present, the situa-

tion discussed in *Stanfield* does not exist and the judge will be forced, perhaps unwillingly, to act as the prosecuting party by calling all the witnesses and eliciting the testimony and other evidence necessary to commit the respondent.

¶ 42 The majority also states that because this was a bench trial, and there was no jury present, "there was no risk of any improper influence by the trial court's actions," citing *State v. Smith*, 240 N.C. 99, 102, 81 S.E.2d 263 (1954). But this conclusion does not address J.R.'s argument. J.R. does not contend that the trial court's questions improperly influenced a jury, instead his argument is that when a trial judge elicits testimony and weighs the evidence, there is a risk that the judge's impartiality is compromised. This principle was recognized nearly one hundred years ago by the United States Supreme Court in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), where the Court explained that the test for impartiality is not whether judges "of the highest honor and the greatest self-sacrifice could carry ... on [the proceeding] without danger of injustice," *id.* at 532, 47 S.Ct. 437. Instead, the test for impartiality is whether the judicial procedures "offer a possible temptation to the average [person] as a judge to forget the burden of proof required ... or which might lead [them] not to hold the balance nice, clear, and true between the [S]tate and the accused." *Id.* The Supreme Court later affirmed this principle in *Sung*, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616, where the Court noted that when the trial court has "at once" the responsibility of "presenting" the case and "appraising [its] strength," a "genuinely impartial hearing conducted with critical detachment, is

psychologically improbable if not impossible," *id.* at 44, 70 S.Ct. 445. Accordingly, the Court concluded that "commingling" the functions of "investigation or advocacy" and "deciding" are "plainly undesirable." *Id.*

¶ 43 Additionally, in *In re Spivey* this Court has recognized that due process requires a neutral decisionmaker. 345 N.C. 404, 417, 480 S.E.2d 693 (1997). There, a local district attorney was judicially removed from office after repeatedly calling an African American man a racial slur in public to provoke a fight. *Id.*, 345 N.C. 404, 417, 480 S.E.2d at 408, 416. On appeal, the former district attorney argued the trial court had violated his due process rights by appointing independent counsel to present the evidence concerning his conduct because the appointment had "resulted in his being removed by a court which had directed and controlled the discovery and presentation of evidence against him." *Id.*, 345 N.C. 404, 417, 480 S.E.2d at 417. But this Court rejected that argument reasoning that because the trial judge "should not both present the case against a district attorney and pass judgment on the case" the judge had the power to appoint independent counsel. *Id.* Thus, there was no due process violation.

¶ 44 Furthermore, the majority states that in the administrative agency context, the United States Supreme Court has rejected "the bald proposition ... that agency members who participate in an investigation are disqualified from adjudicating," quoting *Withrow v. Larkin*, 421 U.S. 35, 52, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). However, administrative agencies are subject to Section 554 of the Administrative Procedure Act which states that "[a]n employee or

agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision." 5 U.S.C. § 554(d). Thus, many areas of federal agency law are subject to greater due process protections than the involuntary commitment proceedings contemplated in J.R.'s case.

¶ 45 At least two other states have held that in the context of involuntary commitment proceedings, a due process violation exists when the judge takes on the role of the prosecutor and questions the witness in support of commitment. In *In re Commitment of Raymond* S., 263 N.J. Super. 428, 432, 623 A.2d 249 (Super. Ct. App. Div. 1993), New Jersey's intermediate appellate court explained:

> Although we were advised at oral argument that county counsel was present at the hearing, it is not reflected in the transcript. The case for commitment was advanced by the judge rather than by county counsel. Such procedure is inappropriate because of the statutory requirement that county counsel present the case for commitment, and also because it places the judge in the role of an adversary rather than that of a neutral decision maker.

Id. at 432. The Iowa Supreme Court has also found a due process violation when the judge "elicit[ed] testimony that ... support[ed] the applicants' burden of proof." *In re S.P.*, 719 N.W.2d 535, 539 (Iowa 2006). In *In re S.P.*, the court held

> that an analysis based solely upon the nature of the questions asked by the referee or district court judge is not wholly determinative of the issue of advocacy. We cannot provide the trial

> court a cookbook of right or wrong questions, but merely observe that any effective questioning will inevitably lead to the heart of the case. When the court itself directs the case in this way it is marshaling or assembling the evidence. Artfully crafted questions will not hide the court's role in the proceedings at that point—the role of deciding what evidence is needed to prove the case and steering the case down that road.

Id. at 539–40. There, the court cautioned against a case-by-case approach when a due process violation is raised due to the commingling of adjudicatory and prosecutorial functions.

¶ 46 Today, the majority affirms an unfortunate case-by-case legal standard where due process protections depend not on the adherence to well-established procedures of an adversarial process but rather on the particular questions asked by the judge. More fundamentally, this leaves trial judges, when faced with no party appearing as petitioner in a private-facility involuntary commitment proceeding, with the unenviable task of deciding how to present all the evidence necessary to meet the standard for involuntary commitment while also determining whether they have done a good enough job of doing so. The majority's opinion sets out some parameters by identifying the features that made the process in these cases adequate. Additionally, a trial judge cannot use language or conduct themselves in a way "which conceivably could be construed as advocacy in relation to petitioner or as adversative in relation to the respondent." *In re Q.J.*, 278 N.C. App. 452, 2021-NCCOA-346, ¶ 21, 863 S.E.2d 424 (quoting *In re*

Perkins, 60 N.C. App. 592, 594, 299 S.E.2d 675 (1983)). Similarly, trial courts must "be careful to avoid prejudice to the parties." *Id.* ¶ 22 (citing *State v. Howard*, 15 N.C. App. 148, 150–51, 189 S.E.2d 515 (1972)). Finally, trial courts in these circumstances may not impeach a witness's credibility. *Id.* Based on our own caselaw, any of the above instances would violate a respondent's due process right to a neutral decisionmaker.

¶ 47 Finally, it is important to note that due process standards in these proceedings serve not only to protect against erroneous commitments but also ensure that the commitment process is not overused. Under N.C.G.S. § 122C-268(j) (2021), an involuntary commitment order must be supported by findings demonstrating "clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self ... or dangerous to others." Under § 122C-3(11)(a), a person is considered a danger to themselves and can be involuntarily committed if:

> a. Within the relevant past, the individual has done any of the following:
>
> 1. The individual has acted in such a way as to show all of the following:
>
> I. The individual 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 the individual's daily responsibilities and social relations, or to satisfy the individual's need for nourishment, personal or medical care, shelter, or self-protection and safety.

> II. There is a reasonable probability of the individual's 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 or herself.
>
> 2. The individual has attempted suicide or threatened suicide and that there is a reasonable probability of suicide unless adequate treatment is given pursuant to this Chapter.
>
> 3. The individual has mutilated himself or herself or has attempted to mutilate himself or herself and that there is a reasonable probability of serious self-mutilation unless adequate treatment is given pursuant to this Chapter.

§ 122C-3(11)(a)(1), (2), (3). Under this standard, "[p]revious episodes of dangerousness to self, when applicable, may be considered when determining reasonable probability of physical debilitation, suicide, or self-mutilation." *Id.* at § 11(a)(3). Furthermore, under North Carolina law, a person can be involuntarily committed if they are a danger to others. *Id.* at § 11(b). A person is considered a danger to others if:

> Within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has

> engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.

Id. By requiring the above be shown, our law attempts to guard against overuse of and erroneous commitment.[3] However, the law cannot have its intended effect without full due process protections in place. Overuse of involuntary commitment is concerning for both the person being committed unnecessarily against their will and for our state. An overreliance on institutional treatment is generally more expensive and less effective than community-based alternatives. *See* N.C. Dep't of Health & Hum. Servs., *Strategic Plan for Improvement of Behavioral Health Services* 5, 87-88 (Jan. 31, 2018). https://medicaid.ncdhhs.gov/media/3907/download. North Carolina data also shows that certain groups are more likely to be subjected to care in psychiatric hospitals, namely males and African Americans, and this likely correlates to their limited access to com-

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[3] Reports indicate that in the last decade involuntary commitment use has increased by ninety-one percent in North Carolina. Taylor Knopf, *NC didn't track the data on mental health commitments, so some advocates did it instead*, North Carolina Health News (Dec. 21, 2020), https://www.northcarolinahealthnews.org/2020/12/21/nc-didnt-track-the-data-on-mental-health-commitments-so-some-advocates-did-it-instead/.

munity-based services. *See* Tech. Assistance Collaborative, *An Assessment of the North Carolina Department of Health and Human Services' System of Services and Supports for Individuals with Disabilities: Submitted to the North Carolina Department of Health and Human Services* 93 (Apr. 30, 2021), https://www.ncdhhs.gov/media/12607/download? attachment. But a lack of access to community-based services should not render involuntary psychiatric hospitalization the only available form of treatment. Thus, ensuring that appropriate due process protections exist in involuntary commitment proceedings is paramount to guaranteeing that only those who truly require hospitalization are subjected to it against their will.

¶ 48 Therefore, I would hold that in civil involuntary commitment proceedings in which a petitioner fails to appear, a trial judge cannot put on the case for them, eliciting and then evaluating all the evidence. By doing so the trial court inevitably commingles the separate and distinct functions of prosecutor and neutral decisionmaker and denies the respondent in the proceeding important procedural due process guarantees that have long been understood to be a vital element of our adversarial system of justice.

Justices HUDSON and MORGAN join in this dissenting opinion.

APPENDIX B

Unpublished Disposition

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

Court of Appeals of North Carolina

In the MATTER OF: J.R.

No. COA20-457

Filed July 20, 2021

Appeal by Respondent from order entered 3 January 2020 by Judge Patricia Evans in Durham County District Court. Heard in the Court of Appeals 10 March 2021. Durham County, No. 19 SPC 2379

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth Forrest, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for Respondent-Appellant.

DILLON, Judge.

¶ 1 Respondent appeals from an involuntary commitment order committing him to an inpatient facility for a period not to exceed thirty (30) days.

I. Background

¶ 2 On 9 December 2019, Respondent J.R.'s interim guardian filed an affidavit and petition for involuntary commitment alleging that J.R. was mentally ill and dangerous to self or others. He was taken into custody the same day. J.R.'s involuntary commitment hearing was conducted on 3 January 2020 in Durham County by Judge Patricia Evans.

¶ 3 When J.R.'s case was called by the trial judge, no attorney appeared to represent the State's interest in the matter. A doctor who had been subpoenaed by the State was present, along with J.R., his counsel, and the trial judge. J.R.'s counsel objected at the beginning of the hearing, arguing that the hearing could not proceed without a representative from the State. The judge proceeded, implicitly rejecting the objection.

¶ 4 The trial judge called the State's sole witness, a doctor who had not evaluated J.R., and asked open-ended questions. J.R.'s attorney had the opportunity to cross-examine the doctor. J.R. was also called as a witness by his own attorney. At the conclusion of the hearing, the judge concluded that J.R. was mentally ill and dangerous to self, involuntarily committing him to thirty (30) days of inpatient treatment. J.R. appealed from the trial judge's involuntary commitment order.[1]

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[1] J.R.'s appeal is not moot even though his period of involuntary commitment has expired. *See In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 635 (1977) ("The possibility that respondent's commitment in this case might likewise form the basis for a future commitment, along with other obvious collateral consequences, convinces us that this appeal is not moot.").

II. Analysis

¶ 5 J.R. argues that "the trial judge violated his right to an impartial tribunal by assuming the role of prosecutor by presenting the State's case" when the State failed to appear at his involuntary commitment hearing.

¶ 6 This appeal and five others from Durham County involving involuntary commitments were heard by this panel on 10 March 2021. In each case, the State did not send a representative to the hearing, apparently as part of a new policy in Durham County.[2] In each matter, the respondents have raised the issue presented by J.R. in this appeal.

¶ 7 For the reasons stated in the majority opinion and concurring opinion addressing the "Due Process Concerns" issue in *In re C.G.*, —— N.C. App. ——, 2021-NCCOA-344, one of the other involuntary commitment cases heard by this panel on 10 March 2021, we affirm the trial court's order.

AFFIRMED.

Report per Rule 30(e).

Judge HAMPSON concurs.

Judge GRIFFIN dissents.

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[2] The trial judge responded to J.R.'s counsel's objection to proceeding without a State representative by stating: "The District Attorney's Office of Durham County has notified this Court that they will not be participating in these hearings as in prior years, and this Court intends to go forward with this hearing, and the Respondent is more than welcome to appeal this Court's decision."

GRIFFIN, Judge, dissenting.

¶ 8 I dissent from the majority opinion for the reasons stated in my dissenting opinion in *In re C.G.*, —— N.C. App. ——, 2021-NCCOA-344, a companion case heard by this panel on 10 March 2021.

APPENDIX C

Court of Appeals of North Carolina
In the MATTER OF: C.G.
No. COA20-520
Filed July 20, 2021

Appeal by Respondent from an Order entered 7 February 2020 by Judge Doretta Walker in Durham County District Court. Heard in the Court of Appeals 10 March 2021. Durham County, No. 20 SPC 202

Attorney General Joshua H. Stein, by Assistant Attorney General Erin E. McKee, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for respondent-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Respondent-Appellant C.G. (Respondent) appeals from an Involuntary Commitment Order entered in Durham County District Court declaring Respondent mentally ill, a danger to self and others, and ordering Respondent be committed to an inpatient facility for thirty days. The Record reflects the following:

¶ 2 On 30 January 2020, Dr. Phillip Jones, with the Duke University Medical Center (Duke), signed an Affidavit and Petition for Involuntary Commitment stating Respondent: "presents [as] psychotic and disorganized ... [Respondent's] ACTT team being unable to stabilize his psychosis in the outpatient

treatment. He is so psychotic he is unable to effectively communicate his symptoms and appears to have been neglecting his own care." Dr. Jones also stated: "Per [Respondent's] ACTT he threw away his medications and has not been taking them. He needs hospitalization for safety and stabilization." This affidavit was filed on 31 January 2020 in the Durham County District Court and Dr. Jones submitted a First Examination for Involuntary Commitment report with the Affidavit. The report lists the exact same findings supporting commitment as the Affidavit. On 31 January, a Durham County magistrate issued a Findings and Custody Order finding Respondent was mentally ill and a danger to self or others. Respondent was subsequently delivered to Duke's 24-hour facility.

¶ 3 That same day, Dr. Miles Christensen, also with Duke, signed a 24-Hour Facility Exam for Involuntary Commitment report; the report was filed on 3 February 2020. In this report, Dr. Christensen concluded Respondent was mentally ill and a danger to self and others. In the description of findings supporting commitment, Dr. Christensen noted, when asked about his goals for hospitalization, Respondent replied: "I don't know, 30, 40, 50 pounds probably." Dr. Christensen stated Respondent said he would like to gain weight while he was in the hospital. Dr. Christensen further noted: "Patient perseverates on being 'Blessed and highly favored' ... Talks to other people in the room during interview ... States 'gods people putting voices in my head'" and "[s]uddenly begins crying without any precipitant."

¶ 4 On 7 February 2020, the trial court heard Respondent's case pursuant to N.C. Gen. Stat. § 122C-

268. At the outset, Respondent's counsel objected to the proceedings because there was no representative for the State present. Respondent's counsel stated, "the judge, on its own initiate---or volition, cannot conduct the business of the State and these proceedings to move forward." The trial court responded:

> Because it sounds like the DA's office is refusing to do anything, and then it sounds like the Attorney General's office is refusing to do anything, and Duke and the VA are private and/or federal entities; therefore, they can't. So you're suggesting we do nothing and not have these cases at all as a result of people failing to do their duty? ... I'm not gonna do that.

¶ 5 Respondent's counsel continued:

> Additionally, beyond that issue, I would argue that, in this case, the paperwork was also improper ... based on 122C-281 and 285, in that while there is an allegation that [Respondent] is an individual with a mental illness and dangerous to himself, the description of findings in both the first examination and the examination done by the 24-hour facility does not allege facts that would be sufficient pursuant to the statute to--to meet those criteria and what is contained therein is more conclusory, and according to In Re: Reid and In Re: Ingram [phonetic spellings], the Court of Appeals has held that conclusory statements are not sufficient in the description of findings to proceed in that.

The trial court stated: "Okay. That's gonna be denied."

¶ 6 The hearing continued and the trial court asked if any witnesses were present in this case. The trial court called Dr. Max Schiff, also with Duke, to the witness stand. Respondent's counsel objected as Dr. Schiff was not the doctor who completed or signed either of the evaluation or reports in this case. The trial court overruled the objection and noted, "if [Dr. Schiff] doesn't know anything about this case, you can keep making your objection and we will go from there."

¶ 7 The trial court stated to Dr. Schiff: "you or someone in your organization has indicated that [Respondent] has a mental illness and is a danger to himself and others, and I will leave you to tell me whether or not you can give me enough evidence on this to go forward." Dr. Schiff responded: "So, yes. [Respondent] has a long-standing history of mental illness with psychosis. He currently carries a diagnosis of schizoaffective disorder, for which he's been treated since his late teens." Dr. Schiff continued to explain Respondent had been brought to Duke by "his ACT team" because of "an acute change in his mental status with increasing disorganization, hallucinations, delusions, abnormal psychomotor behavior, wandering around the streets" and because "he had not been taking his medications and had thrown them away[.]"

¶ 8 Dr. Schiff also stated: "On my evaluation ... [Respondent] continued to demonstrate very profound disorganization of thought and behavior responding to hallucinations or internal stimuli"; that it was "very difficult to elucidate a narrative from [Respondent]"; and that Respondent was "reporting that thoughts were being inserted into his head and

occasionally controlling him, as well as containing derogatory content that was quite disturbing to him." The trial court interjected: "I'm sorry. Say -- I didn't quite get the last thing you said. You said some kind of behavior and then you said disturbing?" Dr. Schiff clarified that Respondent heard voices in his head and that some of the content was derogatory and disturbing to Respondent. Dr. Schiff testified Respondent was compliant with treatment while at Duke but that "[Respondent] has stated he does not feel that he really needs the medication, nor does he have a long-standing issue." Dr. Schiff continued: "Although he is accepting of help and has improved," Dr. Schiff was "still concerned that, if he were to be discharged, that there would be an immediate decompensation, given his ... hallucinations which are disturbing and to him and, in the past, have led him to have aggressive behaviors in the community."

¶ 9 After questioning by the trial court, Respondent's counsel questioned Dr. Schiff. When Respondent's counsel asserted Dr. Schiff was not the doctor who completed Respondent's first examination, Dr. Schiff responded that he was not but that he was present for the second examination and was Respondent's attending physician since the second examination. Respondent's counsel asked Dr. Schiff if Respondent had an "ACT team" that was able to assist Respondent when he was not in the hospital. Dr. Schiff replied: "That's right ... but they felt that ... they could no longer support him in the community based on his level of disorganization and decompensation[.]" Dr. Schiff testified that he was not aware of any prior suicide attempts by Respondent, but that Respondent had exhibited "aggressive behavior"

and been subject to assaults in the past. Dr. Schiff further testified Respondent had improved and was taking his medication while at Duke, but Dr. Schiff was concerned Respondent would decompensate if discharged especially because Respondent's ACT team—who would normally encourage Respondent to take his medication—felt it could not support Respondent in the community.

¶ 10 After Dr. Schiff testified, Respondent took the stand. Counsel asked Respondent with whom Respondent lived. Respondent replied: "My brother and my friend. My -- he's my brother first, but he's my friend second.... And his best friend, which is my roommate, which is my brother." Respondent also testified that he had previously "gotten into it" with a man named William on the street when William became angry. Respondent stated he thought William had an anger management problem. However, Respondent said he had never thought of harming William. Respondent stated he had been taking his medication and would continue to do so if discharged, but that he could not "tell the difference" when asked if he thought the medication was helping him. Respondent also stated that his ACT team and Easterseals could provide him assistance if discharged, but that his ACT team wanted him to "take care of [his] teeth more," and Respondent "just disregarded it." Respondent also testified he did not eat "three meals a day," but that "they have started to give me at least breakfast" and he was "gonna have to eat more." When counsel asked Respondent if he would like to be released from Duke, he replied: "I see her ankles and Amy -- the Amy at Williams Ward -- Williams Ward remind me of my mom's an-

kles, and she takes her water pills in the morning. I remind her." Counsel then asked if Respondent was okay.

¶ 11 After questioning by Respondent's counsel, the trial court asked Respondent: "Your ACT team, tell me about what they do to help you." Respondent testified he would see his ACT team on Monday, Wednesday, and Thursday and that Fridays were for group substance abuse meetings. Respondent stated he went to group sessions "once in a blue" and that he received a bus ticket every time he went. He also stated Easterseals gave him weekly checks that he used to buy groceries. The trial court asked: "So right before they took you to the hospital, what was going on?" Respondent said, "I don't ... everything was the same, you know?" When the trial court asked "[s]o you don't know why they took you there?" Respondent replied, "No, not really. I'm just there to eat and drink." The trial court asked Respondent about the hallucinations Dr. Schiff said Respondent had experienced; Respondent replied: "I see angels, white dots." The trial court asked: "You see angels?" Respondent explained he saw white dots and black dots floating in the air. The trial court asked how the angels made Respondent feel. Respondent replied he knew the white dots were angels and that the black dots might be hallucinations or "negativity."

¶ 12 The trial court asked Respondent if he felt better when he was in the hospital or when he was not. Respondent replied that he had "bad habits." The trial court asked Respondent to tell the trial court about his bad habits. Respondent stated he smoked cigarettes and marijuana. Respondent continued:

> I pick up Black & Mild filters that's wooden.... I clean up cigarette butts. I have picked up a piece of glass ... in our apartment that was right there in the corner near our trash can, but I didn't vacuum the floor over there in that area. I try.

The trial court asked: "You try?" Respondent replied: "Yes."

¶ 13 After Respondent's counsel gave closing arguments, the trial court found "by clear, cogent, and convincing evidence that the Defendant, in fact, has a mental issue of illness that is schizoaffective disorder and has a long-standing history of mental illness since his late teens." The trial court further found Respondent: suffered from hallucinations and disorganized thoughts; was "noncompliant with his medication when" not in the hospital; and was a danger to himself and others due to his active psychosis. The trial court continued: "[Respondent's] ACT team initially had him committed, as they are unable to see to his needs" and that "[Respondent] was unable to sufficiently care for his needs, that being dental and his nourishment needs." Moreover, the trial court found, "[Respondent] has, in fact become a victim of assaultive behavior and disturbing thoughts, which caused deterioration and leaves him unable to perceive dangers to himself[.]" Accordingly, the trial court ordered Respondent be committed for an additional thirty days. Respondent's counsel gave oral Notice of Appeal in open court.

¶ 14 That same day, the trial court entered its written Order. The trial court checked a box incorporating the examination reports signed by Dr. Jones and Dr. Christensen as Findings of Fact supported

by clear, cogent, and convincing evidence. The trial court found by clear, cogent, and convincing evidence the following additional Findings of Fact: Respondent had long-standing mental illness dating back to his teens; Respondent suffered from hallucinations; Respondent did not take his medication when he was not hospitalized; Respondent's psychosis caused him to be a danger to himself; Respondent's ACT team was "unable to sufficiently take care" of Respondent's dental and nourishment needs; and Respondent had been the victim of assaults and disturbing thoughts "which cause deterioration and leaves [Respondent] unable to perceive dangers to himself[.]" Accordingly, the trial court concluded Respondent was mentally ill and was dangerous to himself and to others. Consequently, the trial court ordered Respondent committed for thirty days.

Issues

¶ 15 The issues on appeal are: (I) whether this Court should exercise its discretion and allow Respondent's appeal when Respondent's counsel did not file a written notice of appeal as required by our Rules of Appellate Procedure; (II) whether the trial court violated Respondent's due process right to an impartial tribunal by calling and examining a witness in order to elicit evidence, in the absence of any representative of the State; and (III) whether the trial court erred in incorporating examination reports as Findings of Fact when the reports were not formally admitted into evidence and trial, and whether, absent those reports, the trial court's underlying Findings of Fact were supported by competent evidence and, in turn, supported its ultimate

Findings Respondent was dangerous to himself and to others.

Analysis

I. Jurisdiction

¶ 16 Recognizing Respondent's trial counsel never filed a written Notice of Appeal, Respondent's appellate counsel has filed, concurrently with Respondent's brief, a Petition for Writ of Certiorari with this Court to allow review of the trial court's Order.

¶ 17 Respondents in involuntary commitment actions have a statutory right to appeal a trial court's order. N.C. Gen. Stat. § 122C-272 (2019) ("Judgment of the district court [in involuntary commitment cases] is final. Appeal may be had to the Court of Appeals by the State or by any party on the record as in civil cases."). Rule 3 of our Rules of Appellate Procedure governs such appeals. N.C.R. App. P. 3(a) (2021) ("Any party entitled to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court[.]"). Rule 3 requires parties to file written notice of appeal thirty days after the entry of such a judgment or order. N.C.R. App. P. 3(a), (c) (2021). "Rule 3 is a jurisdictional rule" and "a party's compliance with Rule 3 is necessary to establish appellate jurisdiction[.]" *Am. Mech., Inc. v. Bostic*, 245 N.C. App. 133, 143, 782 S.E.2d 344, 350 (2016). "[A] jurisdictional rule violation ... precludes the appellate court from acting in any manner other than to dismiss the appeal." *Id.* at 142, 782 S.E.2d at 350 (citation and quotation marks omitted). Thus, in the absence of a properly filed notice of appeal, this

Court has no jurisdiction to consider Respondent's appeal as of right.

¶ 18 However, Rule 21 of our Rules of Appellate Procedure provides: "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C.R. App. P. 21(a)(1) (2021); *see also* N.C. Gen. Stat. § 7A-32(c) (2019). Respondent concedes his counsel did not file written notice of appeal, but, because counsel objected to the proceedings and gave oral Notice of Appeal in open court, asks this Court to exercise its discretion and issue a writ of certiorari to review his case. Because Respondent's counsel objected to the proceedings and demonstrated at least the intent to appeal the trial court's order, and because involuntary commitment is a significant incursion to one's liberty interests, *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L. Ed. 2d 394 (1972), we grant Respondent's Petition and review the trial court's Order.

¶ 19 Additionally, although neither party argues this case is moot because the period of commitment has expired, discharge from involuntary commitment does not render an appeal moot. "The possibility that respondent's commitment in this case might likewise form the basis for a future commitment, along with other obvious collateral legal consequences, convinces us that this appeal is not moot." *In re Moore*, 234 N.C. App. 37, 41, 758 S.E.2d 33, 36 (2014) (citation and quotation marks omitted). Accordingly, Respondent's appeal is properly before this Court.

II. Impartial Tribunal

¶ 20 Respondent argues the trial court violated his due process right to an impartial tribunal because the State was not represented by counsel and the trial court elicited evidence in favor of committing Respondent. The due process right to an impartial tribunal raises questions of constitutional law that we review de novo. *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 66, 468 S.E.2d 557, 562 (1996). "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. Rule 10(a)(1) (2021). Although Respondent's counsel did not expressly state an objection on constitutional grounds, it is apparent from the context Respondent objected on due process grounds as counsel objected to the nature of the proceedings where there was no counsel for the State present and where the trial court was the only entity to elicit evidence on direct examination.

¶ 21 N.C. Gen. Stat. § 122C-268 provides for how both a respondent and the State are to be represented in an involuntary commitment proceeding. N.C. Gen. Stat. § 122C-268(d) mandates a "respondent shall be represented by counsel of his choice; or if he is indigent within the meaning of G.S. 7A-450 or refuses to retain counsel if financially able to do so, he shall be represented by counsel appointed in accordance with rules adopted by the Office of Indigent Defense Services." N.C. Gen. Stat. § 122C-268(d) (2019). As to representation of the State's interests, the statute has separate provisions depending on

whether the proceeding arises out of a state facility or not:

> The attorney, who is a member of the staff of the Attorney General assigned to one of the State's facilities for the mentally ill or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill, shall represent the State's interest at commitment hearings, rehearings, and supplemental hearings held for respondents admitted pursuant to this Part or G.S. 15A-1321 at the facility to which he is assigned.
>
> In addition, the Attorney General may, in his discretion, designate an attorney who is a member of his staff to represent the State's interest at any commitment hearing, rehearing, or supplemental hearing held in a place other than at one of the State's facilities for the mentally ill or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill.

N.C. Gen. Stat. § 122C-268(b) (2019).[1]

¶ 22 The State takes the position that the latter provision means the Attorney General has complete discretion whether or not to appear in involuntary commitment proceedings at non-state-owned facilities and, thus, involuntary commitment proceedings

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[1] In addition: "If the respondent's custody order indicates that he was charged with a violent crime, including a crime involving an assault with a deadly weapon, and that he was found incapable of proceeding, the clerk shall give notice of the time and place of the hearing as provided in G.S. 122C-264(d). The district attorney in the county in which the respondent was found incapable of proceeding may represent the State's interest at the hearing." N.C. Gen. Stat. § 122C-268(c) (2019).

at private hospitals may proceed without the State's interests being represented, as occurred in this case. We express no opinion on the correctness of the State's statutory interpretation or as to the soundness of such practice. However, our Court has previously rejected arguments respondent's due process rights were violated in involuntary commitment proceedings where the State, as petitioner, was not represented by counsel and where:

> [t]he gravamen of [respondent's] contention is (1) that he was denied a fair hearing because, due to absence of counsel for petitioner, the court acted as petitioner's de facto counsel; and (2) that he was denied equal protection of the law because petitioners in hearings at state regional psychiatric facilities are represented by counsel, G.S. 122-58.7(b), -58.24, while petitioners in hearings held elsewhere are not.

In re Perkins, 60 N.C. App. 592, 594, 299 S.E.2d 675, 677 (1983). There, this Court noted: "We are aware of no *per se* constitutional right to opposing counsel. Nothing in the record indicates language or conduct by the court which conceivably could be construed as advocacy in relation to petitioner or as adversative in relation to respondent." *Id.* We reached the same conclusion in a companion case filed the same day as *Perkins*, rejecting the argument "it is unconstitutional to allow the trial judge to preside at an involuntary commitment hearing and also question witnesses at the same proceeding." *In re Jackson*, 60 N.C. App. 581, 584, 299 S.E.2d 677, 679 (1983). Therefore, because our Court has previously upheld involuntary commitments where the State has not appeared and where the trial court has questioned

witnesses and elicited evidence, we are bound by our prior precedent to conclude the same. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

¶ 23 Moreover, "[j]udges do not preside over the courts as moderators, but as essential and active factors or agencies in the due and orderly administration of justice. It is entirely proper, and sometimes necessary, that they ask questions of a witness[.]" *State v. Hunt*, 297 N.C. 258, 263, 254 S.E.2d 591, 596 (1979) (citation and quotation marks omitted). However, trial courts must be careful to avoid prejudice to the parties and may not impeach a witness's credibility. *State v. Howard*, 15 N.C. App. 148, 150-51, 189 S.E.2d 515, 517 (1972) (citation omitted).[2]

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[2] We note that, although involuntary commitment cases involve significant curtailment of individual liberty interests, these proceedings are not adversarial in the respect that the State seeks to convict and incarcerate a respondent for allegedly violating the criminal code. Rather, these proceedings are inquisitorial as to whether a respondent is a danger to self or to others. *Cf. Ramirez-Barker v. Barker*, 107 N.C. App. 71, 78, 418 S.E.2d 675, 679 (1992) ("However, there is no burden of proof on either party on the 'best interest' [of a child in child custody cases] question. Although the parties have an obligation to provide the court with any pertinent evidence relating to the 'best interest' question, the trial court has the ultimate responsibility of requiring production of any evidence that may be competent and relevant on the issue. The 'best interest' question is thus more inquisitorial in nature than adversarial. (citation omitted)). As such, even though the trial court—at least initially—elicits a petitioner's evidence, and, thus, facilitates a peti-

¶ 24 In this case, as in *Perkins*, the Record does not evince language or conduct by the trial court that could be construed as advocacy for or against either petitioner or Respondent. Here, the trial court called Dr. Schiff to testify. The trial court's only questions of Dr. Schiff on direct examination were: "you or someone in your organization has indicated that [Respondent] has a mental illness and is a danger to himself and others, and I will leave you to tell me whether or not you can give me enough evidence on this to go forward[;]" and "I'm sorry. Say -- I didn't quite get the last thing you said. You said some kind of behavior and then you said disturbing?"

¶ 25 The trial court asked Respondent: "Your ACT team, tell me about what they do to help you[;]" "So right before they took you to the hospital, what was going on?"; "[s]o you don't know why they took you there?"; whether Respondent experienced hallucinations and saw angels; whether Respondent felt better when he was in the hospital or in the community; and "tell me about [Respondent's bad habits]." As such, the trial court only elicited evidence that would otherwise be overlooked as no counsel for the State was present. The trial court did not ask questions meant to prejudice either party or impeach any witness. Accordingly, the trial court did not violate Respondent's right to an impartial tribunal.

III. Findings of Fact

¶ 26 Respondent also argues the trial court violated his confrontation rights by incorporating exami-

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tioner's case at the outset, a trial court that maintains objectivity and does not prejudice either party does not advocate for a petitioner in an adversarial manner.

nation reports signed by Dr. Jones and Dr. Christensen in its Findings of Fact when the trial court did not admit the reports into evidence and where Dr. Jones and Dr. Christensen were not present to testify at the hearing. Consequently, according to Respondent, the trial court's underlying Findings were insufficient to support its ultimate Findings Respondent was a danger to himself and to others.

A. Confrontation

¶ 27 "Certified copies of reports and findings of commitment examiners and previous and current medical records are admissible in evidence, but the respondent's right to confront and cross-examine witnesses may not be denied." N.C. Gen. Stat. § 122C-268(f) (2019). The Record does not indicate the reports were ever formally introduced at the hearing. As such, Respondent claims he never had a chance to properly object to their admission or confront the reports or the doctors who signed them, and the State argues Respondent waived his confrontation rights because he failed to object during the hearing.

¶ 28 Although the trial court never formally admitted the reports into evidence and, thus, Respondent did not object to the reports' admission, the Record reflects Respondent's counsel did object to the reports as insufficient bases for Respondent's initial commitment. Moreover, Respondent's counsel objected to Dr. Schiff testifying because he was not the doctor who completed and signed the examination reports. The trial court overruled the objection stating, "if he doesn't know anything about this case, you can keep making your objection and we will go from

there." Because Respondent asserted his right to confront Dr. Jones and Dr. Christensen, as the doctors who completed and signed the examination reports, Respondent did not waive his confrontation rights. *See In re J.C.D.*, 265 N.C. App. 441, 446, 828 S.E.2d 186, 190 (2019) ("Since respondent did not object to admission of the report, and she did not assert her right to have Dr. Ijaz appear to testify, the trial court did not err by admitting and considering the report."). Therefore, the trial court erred by incorporating the reports as Findings of Fact in its Order.

¶ 29 However, even absent the reports, Dr. Schiff's testimony and the trial court's Findings were sufficient to support the trial court's Order. *See In re Benton*, 26 N.C. App. 294, 296, 215 S.E.2d 792, 793 (1975) (reversing the trial court's order where the doctor, who signed an affidavit incorporated by the trial court, was not present to testify because "[n]o evidence, except for the [improperly admitted] affidavit, was adduced to show that the respondent was imminently dangerous to herself or others."). Consequently, here, the trial court's error was harmless. *See State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001) ("Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial.").

B. Sufficiency of the Evidence

¶ 30 "To support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self, ... or dangerous to others ...." N.C.

Gen. Stat. § 122C-268(j) (2019). Our General Statutes define dangerous to self and others as:

> a. Dangerous to self.—Within the relevant past, the individual has done any of the following:
>
> 1. The individual has acted in such a way as to show all of the following:
>
> I. The individual 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 the individual's daily responsibilities and social relations, or to satisfy the individual's need for nourishment, personal or medical care, shelter, or self-protection and safety.
>
> II. There is a reasonable probability of the individual's 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 or herself.
>
> ....
>
> b. Dangerous to others.—Within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a rea-

> sonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.

N.C. Gen. Stat. § 122C-3(11) (2019).

¶ 31 Thus, the trial court must satisfy two prongs when finding a respondent is a danger to self or others on any of the bases above: "A trial court's involuntary commitment of a person cannot be based solely on findings of the individual's 'history of mental illness or ... behavior prior to and leading up to the commitment hearing,' but must [also] include findings of 'a reasonable probability' of some future harm absent treatment[.]"*In re J.P.S.*, 264 N.C. App. 58, 62, 823 S.E.2d 917, 921 (2019) (citing *In re Whatley*, 224 N.C. App. 267, 273, 736 S.E.2d 527, 531 (2012)). "Although the trial court need not say the magic words 'reasonable probability of future harm,' it must draw a nexus between past conduct and future danger." *Id.* at 63, 823 S.E.2d at 921.

¶ 32 It is the role of the trial court to determine whether the evidence of a respondent's mental illness and danger to self or others rises to the level of clear, cogent, and convincing. *In re Whatley*, 224 N.C. App. at 270-71, 736 S.E.2d at 530 (citation omitted). "Findings of mental illness and dangerousness to self are ultimate findings of fact." *In re B.S.*, 270 N.C. App. 414, 417, 840 S.E.2d 308, 310 (2020) (citing *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980)). On appeal, "[t]his Court re-

views an involuntary commitment order to determine whether the ultimate findings of fact are supported by the trial court's underlying findings of fact and whether those underlying findings, in turn, are supported by competent evidence." *B.S.*, 270 N.C. App. at 417, 840 S.E.2d at 310 (citing *In re W.R.D.*, 248 N.C. App. 512, 515, 790 S.E.2d 344, 347 (2016)). As such, the trial court must also record the facts that support its "ultimate findings[.]" *Whatley*, 224 N.C. App. at 271, 736 S.E.2d at 530. "If a respondent does not challenge a finding of fact, however, it is presumed to be supported by competent evidence and [is] binding on appeal." *Moore*, 234 N.C. App. at 43, 758 S.E.2d at 37 (citation and quotation marks omitted).

¶ 33 Here, Respondent does not challenge the trial court's ultimate Finding he was mentally ill. Respondent challenges the trial court's ultimate Findings he was a danger to himself and to others. Because we conclude the trial court properly found Respondent was a danger to himself, we do not reach the issue of whether he was a danger to others.

¶ 34 As to whether Respondent was a danger to himself, Respondent challenges the trial court's underlying Findings Respondent could not "take care of his nourishment and dental needs" because, according to Respondent, these Findings were not supported by the testimony. However, the trial court heard testimony from Respondent that his ACT team wanted him to take better care of his teeth and that Respondent "disregarded" that advice. Respondent also told the trial court he needed to eat more, and that his ACT team was able to provide him "at least one meal" at breakfast. But, Dr. Schiff testified that

Respondent's ACT team brought Respondent to Duke's attention because the team felt like it could no longer care for Respondent in the community. Therefore, there was some competent evidence as to Respondent's inability to care for his own nourishment and dental needs. It is the trial court's role, and not this Court's role, to determine whether this evidence rises to the level of clear, cogent, and convincing. *Whatley*, 224 N.C. App. at 270-71, 736 S.E.2d at 530. Thus, these underlying Findings satisfied the first prong requiring the trial court find Respondent was unable to care for himself.

¶ 35 The trial court's Finding Respondent's ACT team was unable to "sufficiently" care for Respondent's "dental and nourishment" needs also created the nexus between Respondent's mental illness and future harm to himself. Accordingly, the trial court satisfied the requirement it find a reasonable probability of future harm absent treatment.

¶ 36 Moreover, the trial court heard testimony from Dr. Schiff that, while under Dr. Schiff's care, Respondent experienced hallucinations and stated "thoughts were being inserted to his head and occasionally control[ed] him." Dr. Schiff testified these hallucinations and disturbing thoughts had led to Respondent "wandering the streets" and being assaulted in the past and that Respondent would decompensate if discharged. Respondent confirmed he saw "angels" and "black dots" he thought were hallucinations. Dr. Schiff also testified Respondent said he did not need his medication and did not think he had a long-standing issue. "A showing of behavior that is grossly irrational, of actions that the individual is unable to control, ... or of other evidence of se-

verely impaired insight and judgment shall create a *prima facie inference* that the individual is unable to care for himself or herself." N.C. Gen. Stat. § 122C-3(11)(a)(1)(II) (2019) (emphasis added). Here, the trial court heard evidence of actions Respondent was unable to control and of Respondent's severely impaired insight as to his own condition. As such, the evidence supported the *prima facie* inference Respondent could not care for himself. Consequently, the trial court did not err in finding Respondent was a danger to himself.

Conclusion

¶ 37 For the foregoing reasons, we affirm the trial court's Order.

AFFIRMED.

Judge DILLON concurs in a separate opinion.

Judge GRIFFIN dissents in a separate opinion.

DILLON, Judge, concurring.

¶ 38 I fully concur in the majority opinion and its reasoning. I write separately to expound on two issues.

I. Due Process Concerns

¶ 39 First, as noted in the majority opinion, the calling/questioning of Dr. Schiff by the trial court, where the State's interest was not represented at the hearing, was not a *per se* constitutional violation. An involuntary commitment hearing is civil in nature, the purpose of which is to determine whether an individual is a danger to self or others such that (s)he

needs to be further evaluated/treated; the matter is not criminal in nature. The State typically does not instigate the process. Rather, the process is instigated by a concerned private citizen – typically a doctor or a guardian. And while the State has the right to have its interests represented at the hearing, the State is not required to have representation.

¶ 40 The individual respondent, whose liberty interests are at issue, has constitutional rights, such as to counsel, to present evidence, to cross-examine witnesses, and to an impartial judge; however, the individual does not have the constitutional right to have *the State's interests* represented at the hearing. As noted in the majority opinion, our Court has so held in the context of involuntary commitment hearings, and we are so bound to hold. *See, e.g., In re Perkins*, 60 N.C. App. 592, 594, 299 S.E.2d 675, 677 (1983).

¶ 41 It may be that the Attorney General's Office simply did not have the resources or the desire to appear. However, this decision does not divest the trial court from the ability to seek the truth concerning a petition, to determine whether a respondent is a danger to self or others.

¶ 42 Further, the respondent's constitutional rights are not violated simply because the trial court calls the person (typically the petitioner) who has appeared at the hearing and to question that witness, so long as the trial court remains impartial in its search for the truth. Indeed, our Rules of Evidence allow for the trial court to call witnesses and question them. N.C. Gen. Stat. § 8C-1, Rule 614(b) (2020). Our Supreme Court has described this principle, that "the trial judge may interrogate a witness

for the purpose of developing a relevant fact ... in order to ensure justice and aid [the fact-finder] in their search for a verdict that speaks the truth." *State v. Pearce*, 296 N.C. 281, 285, 250 S.E.2d 640, 644 (1979). That Court has further held that it is not a *per se* constitutional violation for the trial court to exercise its right to call or question witnesses. *State v. Quick*, 329 N.C. 1, 21-25, 405 S.E.2d 179, 192-93 (1991). And our Court has held that it is not *per se* prejudicial for a judge to question a witness, even where the answer provides the *sole proof* of an element which needs to be proved. *See State v. Lowe*, 60 N.C. App. 549, 552, 299 S.E.2d 466, 468 (1983); *see also State v. Stanfield*, 19 N.C. App. 622, 626, 199 S.E.2d 741, 744 (1973).

¶ 43 Other state courts held similarly. For instance, the Indiana Court of Appeals held that there was no violation of due process when the presiding judge called and questioned witnesses during an involuntary commitment hearing where the State was unrepresented. *In re Commitment of A.W.D.*, 861 N.E.2d 1260, 1264 (Ind. App. 2007).

¶ 44 A Florida appellate court has held that the calling and questioning of the witness by the judge due to the absence of any attorney representing the State's interest was harmless and that the respondent's constitutional rights were not violated based on the procedure. *Jordan v. State*, 597 So.2d 352, 353 (Fla. App. 1992). However, that same year, that same court – though recognizing *Jordan* as good law – held that the due process rights of another respondent were violated when the trial judge called and questioned the petitioning doctor. *Jones v. State*, 611 So.2d 577, 580-81 (Fla. App. 1992). The *Jones*

court so held, though, *not* because the State was not represented at the hearing. Rather, the court so held because the treating doctor did not provide testimony sufficient to support the trial court's subsequent order for involuntary placement. *Id.* at 580. Perhaps the doctor would have provided sufficient testimony in that case had the State's attorney been present to ask more probing questions. But a trial court is more limited, from a due process perspective, in its questioning, as the judge may not appear to be advocating to reach a particular result.

II. Evidentiary Concerns

¶ 45 Second, I appreciate the dissent's concern regarding the trial court's incorporation of the reports of doctors who had examined Respondent in the past but who did not testify. However, all the evidence which the trial court relied on to make its ultimate findings was supported by the testimony of either Dr. Schiff, whom Respondent's counsel was allowed to cross-examine, or of Respondent himself. And, as noted by the majority, the trial court stated at the outset that it was concerned that any evidence supporting a commitment order needed to come from Dr. Schiff based on what he knew and not from the opinions of doctors who had drafted the reports based on their prior examinations. Dr. Schiff had conducted the most recent evaluation of Respondent and was the current doctor caring for him.

GRIFFIN, Judge, dissenting.

¶ 46 In this case, an individual was deprived of his liberty by an officer of the court who, after expressing some reluctance, offered and admitted evi-

dence against that individual, called an adverse witness to testify on his adversary's behalf, and examined that witness to elicit the State's evidence. I therefore cannot conclude that Respondent received a full and fair hearing before a neutral officer of the court, as is his right under Article I, Section 19, of the North Carolina Constitution and the Fourteenth Amendment of the United States Constitution. Additionally, the majority holds that, although the trial court erred by incorporating into its findings of fact examination reports written by physicians who did not testify at the hearing, the trial court's error was harmless. I would hold that this assignment of error was not preserved for appellate review, as Respondent was deprived of the opportunity to object to the reports' admission, making preservation of this argument for appellate review impossible under N.C. R. App. P. 10(a)(1).

I. Analysis

¶ 47 Respondent argues that he was deprived of his right to an impartial tribunal because, in the absence of representation for the State, the trial judge impermissibly "present[ed] the State's evidence in support of [the State's] claim" and called and questioned the State's witness on its behalf. I agree.

¶ 48 The trial court violated Respondent's right to due process by (1) offering and admitting examination reports into evidence without the knowledge of Respondent or his counsel; (2) depriving Respondent of his opportunity to object to the reports it offered and admitted; and (3) calling and examining the State's witness on the State's behalf. Each of these errors are discussed below in turn.

A. Offering and Admitting the Examination Reports

¶ 49 "A judge's impartiality ... implicates both federal and state constitutional due process principles." *State v. Oakes*, 209 N.C. App. 18, 29, 703 S.E.2d 476, 484 (2011) (citing *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749 (1927)). The Fourteenth Amendment of the United States Constitution provides that no state "shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Law of the Land Clause contained in Article I, Section 19, of the North Carolina Constitution "guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before an impartial tribunal, where he may contest the claim set up against him, and ... meet it on the law and the facts and show if he can that it is unfounded." *In re Edwards' Estate*, 234 N.C. 202, 204, 66 S.E.2d 675, 677 (1951) (citations omitted); *see also Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) ("The term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution." (citation omitted)).

¶ 50 In cases where an individual's "claim or defense turns upon a factual adjudication," as here, "the constitutional right of the litigant to an adequate and fair hearing *requires that he be apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it*." *In re Gupton*, 238 N.C. 303, 304-05, 77 S.E.2d 716, 717-18 (1953) (emphasis added) (citations omitted); *see also State*

v. Gordon, 225 N.C. 241, 246, 34 S.E.2d 414, 416 (1945) (" 'The basic elements' of a fair and full hearing on the facts 'include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence[.]' " (quoting *Carter v. Kubler*, 320 U.S. 243, 247, 64 S.Ct. 1, 88 L.Ed. 26 (1943))); *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 663, 75 S.E.2d 777, 780 (1953) ("In a judicial proceeding the determinative facts upon which the rights of the parties must be made to rest must be found from ... evidence offered in open court .... Recourse may not be had to records, files, or data not thus presented to the court for consideration."). Our Supreme Court has previously held that "manifestly there is no hearing in any real sense when the litigant does not know what evidence is received and considered by the court." *Edwards' Estate*, 234 N.C. at 204, 66 S.E.2d at 677.

¶ 51 In this case, the trial court considered as evidence examination reports written by two physicians who did not testify at the hearing. Critically, the trial court never offered the reports into evidence in open court, nor did it make any ruling on the reports' admissibility as evidence. Respondent was thus not "apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it[,]" in accordance with his constitutional right to a full and fair hearing on the facts. *Gupton*, 238 N.C. at 304-05, 77 S.E.2d at 717-18. Instead, the trial court unilaterally offered the reports as evidence in the State's stead, admitted them as evidence, and proceeded to incorporate the evidence into its findings of fact. All of this occurred without the

knowledge of Respondent or his counsel. Such a practice cannot comport with the bedrock procedural safeguards demanded by our State and federal constitutions. It is a basic guarantee of due process that every litigant be informed of the evidence considered by the court. *In re Gibbons*, 245 N.C. 24, 29, 95 S.E.2d 85, 88 (1956) ("The basic and fundamental law of the land requires that parties litigant be given an opportunity to be present in court when evidence is offered in order that they may know what evidence has been offered[.]").

B. Opportunity to Object

¶ 52 Respondent was also deprived of an opportunity to object to the admission of the reports as required to preserve the issue of their admissibility for appellate review.

¶ 53 N.C. Gen. Stat. § 122C-268(f) provides that "[c]ertified copies of reports and findings of commitment examiners and previous and current medical records are admissible in evidence, but the respondent's right to confront and cross-examine witnesses may not be denied." N.C. Gen. Stat. § 122C-268(f) (2019). It follows that an examination report authored by a physician who does not appear to testify at trial is normally inadmissible as evidence. *In re Hogan*, 32 N.C. App. 429, 432-33, 232 S.E.2d 492, 494 (1977). However, this Court has held that a respondent must "object to admission of the report" or "assert her right to have [the physician who authored the report] appear to testify" at trial in order to preserve the issue of the report's admissibility for appellate review under N.C. R. App. P. 10(a)(1). *In re*

J.C.D., 265 N.C. App. 441, 446, 828 S.E.2d 186, 190 (2019).

¶ 54 As noted by the majority, "the trial court never formally admitted the reports into evidence and, thus, Respondent did not object to the reports' admission." Nonetheless, the majority holds that the issue of the reports' admissibility as evidence was adequately preserved by Respondent, reasoning that Respondent asserted his right to confront the two physicians who authored the reports:

> Respondent's counsel objected to Dr. Schiff testifying because he was not the doctor who completed and signed the examination reports. The trial court overruled the objection stating, "if he doesn't know anything about this case, you can keep making your objection and we will go from there." Because Respondent asserted his right to confront Dr. Jones and Dr. Christensen, as the doctors who completed and signed the examination reports, Respondent did not waive his confrontation rights. *See In re J.C.D.*, 265 N.C. App. 441, 446, 828 S.E.2d 186, 190 (2019) ("Since respondent did not object to admission of the report, and she did not assert her right to have Dr. Ijaz appear to testify, the trial court did not err by admitting and considering the report.").

¶ 55 The majority does not explain how Respondent managed to assert his right to confront Dr. Jones and Dr. Christensen by lodging an objection to the admissibility of Dr. Schiff's testimony. Considering the context in which the objection was made, along with the trial court's ruling in response, Respondent's objection was clearly based on the grounds that

Dr. Schiff lacked the personal knowledge necessary to provide admissible testimony. *See* N.C. Gen. Stat. § 8C-1, Rule 602 (2019) ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself."). The trial court made it clear that it understood this to be the grounds for Respondent's objection when it ruled on the objection, stating "if [Dr. Schiff] doesn't know anything about this case, you can keep making your objection and we will go from there." This ruling can hardly be interpreted as a ruling made in response to a party asserting his right to confront two witnesses who were not present at the hearing.

¶ 56 The majority also notes that "the Record reflects Respondent's counsel did object to the reports as insufficient bases for Respondent's initial commitment." This specific objection was directed at whether the reports were sufficient "to establish reasonable grounds for the issuance of [the original] custody order" by the magistrate. *See In re Reed*, 39 N.C. App. 227, 229, 249 S.E.2d 864, 866 (1978). Given that this objection was made on specific grounds wholly unrelated to the admissibility of the reports as evidence at the district court hearing or Respondent's right to confrontation, it cannot extend to preserve the issue at bar for appellate review. *See, e.g., Powell v. Omli*, 110 N.C. App. 336, 350, 429 S.E.2d 774, 780 (1993) ("A specific objection that is overruled is effective only to the extent of the grounds specified." (citation omitted)).

¶ 57 Respondent was deprived of his opportunity to object to the admissibility of the reports as evidence. I would therefore hold that his argument regarding the reports' admissibility is not preserved for appellate review under N.C. R. App. P. 10(a)(1). As discussed above, however, the trial court deprived Respondent of his constitutional right to an impartial tribunal by offering the reports into evidence, admitting them as evidence, and incorporating them into its findings of fact. The trial court also violated Respondent's right to due process by depriving him of his opportunity to object to the admissibility of the reports, and thus depriving him of the opportunity to have the question of the reports' admissibility reviewed on appeal.

C. Calling and Examining the State's Witness

¶ 58 The trial court impermissibly assumed the role of Respondent's adversary by calling and examining the State's witness on the State's behalf. "A commitment order is essentially a judgment by which a person is deprived of his liberty, and as a result, he is entitled to the safeguard of a determination by a neutral officer of the court ... just as he would be if he were to be deprived of liberty in a criminal context." *Reed*, 39 N.C. App. at 229, 249 S.E.2d at 866 (citation omitted). This Court has previously held that, because a commitment order involves a deprivation of liberty, a trial judge may not "assume[ ] the role of prosecuting attorney [by] examining the State's witnesses" on its behalf during "juvenile proceedings that could lead to detention." *In re Thomas*, 45 N.C. App. 525, 526, 263 S.E.2d 355, 355 (1980).

¶ 59 This Court's decision in *Thomas* involved a juvenile proceeding in which the respondent was represented by counsel but where "[t]he State was not represented by the District Attorney or other counsel." *Id.* at 526, 263 S.E.2d at 355. In the absence of counsel for the State, "the trial judge examined all three witnesses" on the State's behalf. *Id.* Although the record on appeal did "not reveal that [the trial judge] asked leading questions or was otherwise unfair during the course of the hearing[,]" this Court held that the respondent's right to due process was violated because "the judge, at least technically, assumed the role of prosecuting attorney in examining the State's witnesses." *Id.*

¶ 60 Here, the trial judge similarly called and examined the State's witness on the State's behalf. The judge did not ask any "leading questions[,]" nor was she "otherwise unfair during the course of the hearing." *Id.* Nonetheless, as this Court reasoned in *Thomas*, the "dual role of judge and prosecutor" simply cannot "measure up to the essentials of due process and fair treatment" in a proceeding where an individual's physical liberty is at stake. *Id.* at 527, 263 S.E.2d at 356.

¶ 61 Although this Court's opinion in *Thomas* involved a civil commitment order in the context of juvenile proceedings, "as in both proceedings for juveniles and mentally deficient persons [where] the state undertakes to act in *parens patriae*, it has the inescapable duty to vouchsafe due process[.]" *In re Watson*, 209 N.C. App. 507, 516, 706 S.E.2d 296, 302 (2011) (citations omitted). Moreover, "the Due Process Clause *requires the Government in a civil-commitment proceeding to demonstrate by clear and*

convincing evidence that the individual is mentally ill and dangerous." *Jones v. U.S.*, 463 U.S. 354, 362, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983) (emphasis added) (citing *Addington v. Texas*, 441 U.S. 418, 426-27, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)); *Foucha v. Louisiana*, 504 U.S. 71, 76, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) ("[T]he State is required by the Due Process Clause to prove by clear and convincing evidence the ... statutory preconditions to commitment[.]" (citation omitted)). The trial court thus cannot relieve the State of its burden of proof by calling the State's witnesses when the State fails to prosecute its case.[3]

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[3] The majority contends that involuntary commitment proceedings are not "adversarial" but are instead "inquisitorial[,]" citing the "best interest" of a child in custody cases as analogous to the nature of the inquiry in involuntary commitment proceedings. However, caselaw clearly indicates that involuntary commitment proceedings are not only adversarial in nature but are necessarily so as a matter of due process. *See Vitek v. Jones*, 445 U.S. 480, 485, 495-97, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (holding that, because individuals "facing involuntary [commitment] to a mental hospital are threatened with immediate deprivation of liberty ... and because of the inherent risk of a mistaken [commitment], the District Court properly determined that" involuntary commitment "must be accompanied by adequate notice, *an adversary hearing before an independent decisionmaker*, a written statement by the factfinder of the evidence relied on and the reasons for the decision[,]" and independent assistance provided to the respondent by the State (emphasis added)); *Foucha*, 504 U.S. at 81, 112 S.Ct. 1780 (holding that Louisiana's civil commitment statute did not comply with due process because, pursuant to the statute, the respondent was not "entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community"); *Demore v. Kim*, 538 U.S. 510, 550, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003) (Souter, J., concurring in part and dissenting in part) (noting

that the Court in *Foucha* "held that Louisiana's civil commitment statute failed due process because the individual was denied an 'adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community'" (quoting *Foucha*, 504 U.S. at 81, 112 S.Ct. 1780)).

Moreover, unlike in involuntary commitment proceedings where "the State is required by the Due Process Clause to prove by clear and convincing evidence the ... statutory preconditions to commitment[,]" *Foucha*, 504 U.S. at 75, 112 S.Ct. 1780, "there is no burden of proof on either party" when determining the "best interest" of a child in custody cases. *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 78, 418 S.E.2d 675, 679 (1992), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). This distinction is critical; "[i]n cases involving individual rights, whether criminal or civil, the standard of proof at a minimum reflects the value society places on individual liberty." *Addington*, 441 U.S. at 425, 99 S.Ct. 1804 (1979). "The rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests, and therefore it should be guarded carefully and rigidly enforced by the courts." *Skyland Hosiery Co. v. American Ry. Express Co.*, 184 N.C. 478, 480, 114 S.E. 823, 824 (1922).

It is clear that the State may only "confine a mentally ill person if it shows 'by clear and convincing evidence that the individual is mentally ill and dangerous[.]'" *Foucha*, 504 U.S. at 80, 112 S.Ct. 1780. "Here, the State has not carried that burden." *Id.* The State's burden of proof does not suddenly vanish when the State fails to prosecute its case. *Id.* Instead, the burden must be assumed by either the trial court or the respondent, or the case must be dismissed. The trial court cannot simultaneously bear the incompatible burdens of neutrality and proof without depriving litigants of the right to due process. Indeed, the burden of proof is inherently adversarial and unneutral. *See Skyland Hosiery Co.*, 184 N.C. at 480, 114 S.E. 823, 824. The trial court therefore necessarily deprived Respondent of his right to an impartial tribunal by prosecuting the State's case in the State's absence. *See Upchurch v. Hudson*

¶ 62 The majority holds that "because our Court has previously upheld involuntary commitments where the State has not appeared and where the trial court has questioned witnesses and elicited evidence, we are bound by our prior precedent to conclude the same." In so holding, the majority relies exclusively on this Court's decisions in *In re Perkins*, 60 N.C. App. 592, 299 S.E.2d 675 (1983), and *In re Jackson*, 60 N.C. App. 581, 299 S.E.2d 677 (1983). Neither *Perkins* nor *Jackson* passed on the constitutional question we are being asked to decide. Both cases involved constitutional challenges to the involuntary commitment statutes. This Court disposed of both cases on the same grounds, holding that neither respondent could demonstrate standing sufficient to challenge the constitutionality of the statutes. *See Perkins*, 60 N.C. App. at 594, 299 S.E.2d at 677 (holding that the respondent failed "to show that he ha[d] been adversely affected by the involuntary commitment statutes as applied, and he therefore ha[d] no standing to challenge their constitutionality"); *Jackson*, 60 N.C. App. at 584, 299 S.E.2d at 679 ("A litigant who challenges a statute as unconstitutional must have standing. To have standing, he must be adversely affected by the statute. We find no prejudice to the respondent in the challenged portions of the statute. Thus, she has no standing to challenge their constitutionality." (citations omitted)).

Funeral Home, Inc., 263 N.C. 560, 567, 140 S.E.2d 17, 22 (1965) ("Every suitor is entitled by the law to have his cause considered with the cold neutrality of the impartial judge .... This right can neither be denied nor abridged." (citations and internal quotation marks omitted)).

¶ 63 The majority's reliance on *Perkins* and *Jackson* is misplaced for two reasons. First, "standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction[.]" *Willowmere Community Assoc., Inc. v. City of Charlotte*, 370 N.C. 553, 563, 809 S.E.2d 558, 560 (2018) (citations and quotation marks omitted). By holding that the respondents in *Perkins* and *Jackson* lacked standing to challenge the involuntary commitment statutes, this Court declined to decide the underlying constitutional question in both cases. Accordingly, *Perkins* and *Jackson* cannot stand for the proposition that the trial court's conduct in this case complied with due process requirements.

¶ 64 Second, unlike in *Perkins* and *Jackson*, Respondent does not challenge the constitutionality of the involuntary commitment statutes as applied to him. He alleges that *the trial court* deprived him of his right to have his case decided by a neutral officer of the court when it presented the State's case in the State's absence. He does not argue that the involuntary commitment statutes unconstitutionally vest discretion in the State to either send a representative to pursue its interest in court or not. He argues that a trial judge's absolute duty of impartiality cannot be waived without depriving litigants of their right to due process.[4]

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[4] Because Respondent does not raise a constitutional challenge to the involuntary commitment statutes on appeal, neither *Perkins* nor *Jackson* assists us in addressing the constitutional question raised by Respondent. For the same reason, the standing analyses in both cases are inapplicable in this case. Writing for our Supreme Court in *Committee to Elect Dan Forest v. Employees Political Action Committee*, 376 N.C. 558, 2021 -NCSC-

D. Discretion of the Attorney General

¶ 65 The State argues on appeal that N.C. Gen. Stat. § 122C-268(b) "specif[ies] that the Attorney General has discretion on whether to send a member of his staff to a hearing outside a State facility for the mentally ill." Respondent does not challenge the Attorney General's statutory authority to choose not to send a representative to represent the State in in-

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6, 853 S.E.2d 698, Justice Hudson delineated the key distinctions between the standing requirements under our State and federal constitutions. Among those distinctions is that, unlike the federal constitution, "the federal injury-in-fact requirement has no place in the text or history of our [State] Constitution" and is "inconsistent with the caselaw of this Court." *Id.* ¶¶ 73-74. "[A]s a rule of prudential self-restraint," however, our caselaw requires "a plaintiff to allege 'direct injury'" before a court can "invoke the judicial power to pass on the constitutionality of a legislative or executive act." *Id.* ¶ 73.

In cases where an individual is not challenging the constitutionality of a statute, as here, our caselaw only requires that the individual allege a legal injury in order to establish standing: "When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, ... *the legal injury itself gives rise to standing*." *Id.* ¶ 82. (emphasis added). This is because the "remedy clause [of our State Constitution] should be understood as *guaranteeing* standing to sue in our courts where a legal right at common law, by statute, or arising under the North Carolina Constitution has been infringed." *Id.* ¶ 81 (emphasis in original) (citing N.C. Const. Art. I, § 18, cl. 2).

Here, Respondent alleges that he has the right pursuant to our State and federal constitutions to have his case decided by an impartial tribunal and that he was deprived of this right when the trial court prosecuted the State's case in the State's absence. Because Respondent does not challenge the involuntary commitment statutes as unconstitutional, his allegation of a legal injury "itself gives rise to standing." *Id.* ¶ 82. Accordingly, none of this Court's reasoning in *Perkins* or *Jackson* has any application to the constitutional concerns raised in this case.

voluntary commitment proceedings involving non-State facilities. Respondent alleges that the trial court deprived him of his right to an impartial tribunal by presenting the State's case in the State's absence.

¶ 66 Nonetheless, in evaluating the adequacy of procedural protections afforded to an individual in a government proceeding, the due process inquiry under the federal constitution considers "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). While this is not a consideration under our State Constitution, "[a] judge's impartiality ... implicates both federal and state constitutional due process principles." *Oakes*, 209 N.C. App. at 29, 703 S.E.2d at 484 (citing *Tumey*, 273 U.S. at 523, 47 S.Ct. 437). Accordingly, it is helpful to address the State's argument in order to thoroughly examine the due process concerns at issue in this case.

¶ 67 In "striking the appropriate due process balance" under the Fourteenth Amendment, "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed." *Mathews*, 424 U.S. at 347-48, 96 S.Ct. 893. N.C. Gen. Stat. § 122C-268(b) provides that

> [t]he attorney, who is a member of the staff of the Attorney General assigned to one of the State's facilities for the mentally ill or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill, shall represent

> the State's interest at commitment hearings, rehearings, and supplemental hearings held for respondents admitted pursuant to this Part or G.S. 15A-1321 at the facility to which he is assigned.
>
> In addition, the Attorney General may, in his discretion, designate an attorney who is a member of his staff to represent the State's interest at any commitment hearing, rehearing, or supplemental hearing held in a place other than at one of the State's facilities for the mentally ill or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill.

N.C. Gen. Stat. § 122C-268(b) (2019). According to the language of the statute, the Attorney General has the discretion to choose whether to send a representative to pursue the State's interest in cases where, as here, a respondent has been committed to a non-State facility.

¶ 68 It is clear that the statute has given the Attorney General discretion. There is no indication, however, that he is so lacking in administrative and financial resources that he is unable to send a member of his staff to represent the State's interest at involuntary commitment proceedings. In recent years, the Attorney General has devoted immense State resources to national litigation in which North Carolinians have much less at stake than their constitutionally protected liberty interests. *See, e.g.*, Complaint for Declaratory and Injunctive Relief, *California v. Chao*, No. 19-CV-02826 (D.D.C. Sept. 20, 2019) (joining other states' attorneys general in suit seeking injunctive relief to allow California to set independent standards for vehicle emissions); Complaint

for Declaratory and Injunctive Relief, *New York v. Trump*, No. 20-CV-05770, 2020 WL 4253046 (S.D.N.Y. July 24, 2020) (joining other states' attorneys general in suit seeking to enjoin the Trump Administration from adding a citizenship questionnaire to the 2020 U.S. Census).

¶ 69 I do not question the Attorney General's judgment in pursuing such claims. He has been elected by the citizens of North Carolina to make such decisions. Nonetheless, ensuring that North Carolina citizens' due process rights are observed prior to depriving them of their physical liberty is indisputably of paramount, steadfast importance. At a bare minimum, each of our branches of government must observe the constitutional rights guaranteed to the citizens of this State. These rights are not waivable by the Attorney General, the General Assembly, or this Court. The State's interest in declining to have an individual represent its interest in this case must yield to the constitutionally guaranteed right that each individual has in having his cause heard by an impartial tribunal prior to being deprived of his physical liberty.

¶ 70 Finally, the instant case is one of several cases pending before this Court in which the respondents argue that they were deprived of their right to an impartial tribunal. In each proceeding, the Attorney General chose not to send a member of his Office to represent the State's interest. It is apparent from the Record in this case that no one present at the proceeding, including the trial judge, was provided any explanation as to why a representative did not appear for the State. In response to Respondent's ob-

jection for lack of representation for the State, the trial judge stated,

> Because it sounds like the DA's office is refusing to do anything, and then it sounds like the Attorney General's office is refusing to do anything, and Duke and the VA are private and/or federal entities; therefore they can't.
>
> So you're suggesting we do nothing and not have these cases at all as a result of people failing to do their duty?

....

¶ 71 I'm not gonna do that.

¶ 72 The Attorney General places North Carolina trial judges in an impossible situation by choosing to not send a representative to prosecute the State's case at involuntary commitment proceedings. The trial judge can either abandon her constitutional duty to remain impartial by prosecuting the State's case in the State's absence, or she can dismiss the commitment petition for lack of evidence to support commitment. The former has the effect of denying parties their constitutional right to a full and fair hearing before an impartial tribunal. The latter may prevent an individual suffering with mental illness from receiving the medical care he needs. This could be at the expense of his safety, or the safety of others. Regardless of which choice the trial judge makes, the result is a disservice to the respondents in these proceedings and to the citizens of this State.

II. Conclusion

¶ 73 The process of involuntary commitment necessarily involves "a massive curtailment of liberty."

Humphrey v. Cady, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972). "Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." *Addington v. Texas*, 441 U.S. 418, 429, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). "The medical nature of the inquiry, however, does not justify dispensing with due process requirements[,]" as "[i]t is precisely the subtleties and nuances of psychiatric diagnoses that justify the requirement of adversary hearings." *Vitek v. Jones*, 445 U.S. 480, 495, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (citation, internal quotation marks, and alteration in original omitted).

¶ 74 Each of the errors discussed above would not have occurred were Respondent afforded the transparent structure of an adversarial proceeding held in open court with all parties present. Each of the foregoing errors, standing alone, were enough to deprive Respondent of his constitutional right to an impartial tribunal.