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Joseph E. Krakora
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August 12, 2021

Glenn A. Grant, J.A.D
Acting Administrative Director of the Courts
Comments on the Future of Court Operations
Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08625 – 0037

Dear Judge Grant:

Please accept this submission as responsive to the Request for Comments in the July 16, 2021 Notice to the Bar and Public.

SUMMARY

For the reasons contained herein it is the position of the Public Defender through the Division of Mental Health Advocacy that all civil commitment hearings should be conducted in person and should be included in Category 2.a. along with criminal jury trials. Alternatively, it is suggested that these hearings be included in Category 2.b.v. ("…hearings in which constitutional interests are at stake…").

THE DIVISION OF MENTAL HEALTH ADVOCACY

The Division of Mental Health Advocacy is a department within the Office of the Public Defender. The Division employs 29 attorneys and 27 investigators who are employed on a full-time basis representing individuals at 41 hospitals in New Jersey who are subject to civil commitment. The Division also employs nine full-time attorneys who represent individuals subject to civil commitment as sexually violent predators. The Division currently represents all minors subject to civil commitment and individuals from 16 counties. The Division also

represents individuals who have been released into the community under the Involuntary Outpatient Commitment process. In the five counties in which patients are not represented by the Division private counsel is provided at county expense. In recent years, the Division has opened over 30,000 files annually for clients subject to involuntary civil commitment.

PRIOR TO THE COVID-19 PANDEMIC ALL CIVIL COMMITMENT HEARINGS WERE CONDUCTED IN PERSON AT ALL PSYCHIATRIC HOSPITALS

Prior to March 2020 and for at least 45 years before that, judges – Superior Court judges, retired judges and municipal court judges – have been traveling to hospitals throughout the state to conduct hearings in person. Your Honor may recall that in early 2017 there was a proposal by Greystone Park Psychiatric Hospital personnel to convert to a teleconferencing format to replace actual appearances by a judge at civil commitment hearings. I wrote to Your Honor at that time, a meeting was held, and the proposal was tabled. Thereafter, in March 2020, when the Covid-19 pandemic forced all parties to suspend in person court proceedings, civil commitment trials were conducted remotely. The numerous problems associated with this format are detailed below. In any case, I can now report that practically all of the hospitals which house are clients have permitted our investigators and attorneys to return to in-hospital visits. I believe by the beginning of September we will be back in person in all hospitals.

THE LEGAL FRAMEWORK

In our view, allowing a judge to make determinations regarding involuntary commitment – "a profound and dramatic curtailment of a person's liberty" – (from In re Commitment of D.M., 285 N.J. Super. 481, 486 (App. Div. 1995) by way of a remote proceeding completely undermines the dignity of the proceedings and the respect due to the civilly committed patients.

Involuntary civil commitment produces a "massive curtailment of liberty." Humphrey v. Cady, 405 US. 504, 509 (1972). Accord Vitek v. Jones, 445 U.S. 480, 491 (1980) and Parham v. J.R., 442 U.S. 584, 600 (1979). Because of the "extraordinary control it exerts over a citizen's autonomy", the civil commitment process must be "narrowly circumscribed." In re S.L., 94 N.J. 128, 139 (1983). As a result, involuntary commitment requires "meticulous adherence to statutory and constitutional criteria." In re Commitment of M.M., 384 N.J. Super.313, 328 (App. Div. 2006) citing In re Commitment of D.M., 285 N.J. Super. 481, 486 (App. Div. 1995), certify. Denied, 144 N.J. 377 (1996). Indeed, commitment for any purpose "constitutes a significant deprivation of liberty that requires due process protection". Addington v. Texas, 441 U.S. 418, 425 (1979) citing Jackson v. Indiana, 406 U.S. 715 (1972) and Humphrey v. Cady. As noted by New Jersey's Appellate Division:

> [B]edrock liberty interests are threatened whenever the State seeks an involuntary commitment. That threat obligates the State to provide sufficient procedures and limits to prevent liberty restraints disproportionate to the undertaking. [Matter of Commitment of C.M, 485 N.J. Super. 563, 566 (App. Div. 2019), citing In re S.L., 94 N.J. 128, 137 (1983) and N.J.S.A. 30:4-27.1(b).]

Given this constitutional framework, and the fact that liberty interests are at stake at every civil commitment proceeding, the continued use of remote proceedings to conduct civil commitment trials cannot withstand scrutiny. Moreover, it is unclear why civil commitment trials should be singled out for this treatment. Our courts have repeatedly emphasized that because involuntary commitment to a mental hospital deprives the committee of important liberty interests, the procedural and substantive safeguards established by statute and Court Rules "...must be scrupulously followed ...". In the Matter of Commitment of Raymond S., 263 N.J. Super. 428, 432 (App. Div. 1993). Civil commitment "hearings" are trials. All witnesses must be sworn. In the Matter of the Commitment of M.W., 346 N.J. Super. 285 (App. Div. 2002). The patient has a right to counsel, In re. S. L., 94 N.J. 128, 136-137 (1983), who has the right to cross-examine the State's witnesses and to present evidence on behalf of the patient. In the Matter of the Commitment of Raymond S., supra, at 430. The patient has the right to be present at the hearing and may not represent himself. N.J.S.A. 30:4-27.12 (d); R 4:74-7(e). The rules of evidence apply to the hearing. In the Matter of the Commitment of J.B., 295 N.J. Super. 75, 78 - 79 (App. Div. 1996). The court must make finding of fact and conclusions of law to support commitment. Matter of Commitment of D.M., 313 N.J. Super. 449, 454 (App. Div. 1998). In short, civil commitment hearings are in all respects trials, the results of which often result in "a massive curtailment of liberty." In the Matter of the Commitment of B.L., 346 N.J. Super. 285, 303 (App. Div. 2002), citing Vitek v. Jones, 445 U.S 480, 100 S. Ct. 1254, 1263, 63 L. Ed. 2d 552, 564 (1980).

Research has disclosed few cases on the constitutionality of conducting involuntary commitment hearings using videoconferencing. Of note in this regard is Doe v. State, Supreme Court of Florida, No. SC16-1852 (decided May 11, 2017) (attached herein) in which the Florida Supreme Court held that individuals subject to the Baker Act (the Florida equivalent to New Jersey's civil law) had the right to have a judicial officer physically present at their commitment hearing.

However, this submission is not designed to be a legal brief in support of in-person hearings. Indeed, there is little published law on this subject because, prior to the Covid pandemic which foreclosed the continuation of in-person hearings, the practice of having judges conduct civil commitment hearings at hospitals was firmly established. And this practice made sense. Rather than arranging for the transportation of dozens of mentally ill clients (and treating doctors) to county courthouses to conduct the commitment trials, the judge and court personnel held court in designated spaces within the hospital setting. This procedure, while inconvenient for the judiciary, nonetheless insured that an individual facing involuntary commitment at least had the opportunity to be in the same room as the judicial officer making this decision.

OUR EXPERIENCE WITH REMOTE HEARINGS OVER THE PAST 16 MONTHS DEMONSTRATES THE FAILURE OF THESE PROCEEDINGS TO PROTECT THE RIGHTS OF OUR CLIENTS.

Appended to this letter are certifications from Public Defenders who have been participating in remote civil commitment hearings since late March 2020. The sad fact is that even after a year of remote hearings the same technical difficulties occur with numbing frequency: non-functioning camera equipment; unavoidable power outages; slow, unstable internet connections; audio feedback; malfunctioning recording devices; frozen screens; litigants forced to appearing via cell phones; unusable trial transcripts; and difficulty in transmitting or utilizing court documents. These frequent technological problems have prolonged hearing calendars, frustrated participants, and resulted in testimony being lost and hearings being rushed to make up for time lost due to technical failures. Potential witnesses have lost patience with attempting to appear and have failed to testify at hearings. Most tragically, clients who under other circumstances would attend their hearings are confounded by the process and simply choose not to attend.

It is certainly conceivable that, over time, solutions could be found to address the technology problems, although our experience over the past 15 months would suggest that virtual hearings will always be subject to serious recurring technical problems. It is also conceivable that litigants, witnesses and judges could be trained to conduct themselves as they would in an in-person setting. However, even were this to occur it would never ensure that virtual hearings would address several fundamental concerns in civil commitment trials.

First, individuals being considered for civil commitment are, in almost every case, suffering from mental illness. Under New Jersey law mental illness is defined as "A current, substantial disturbance of thought, mood, perception or orientation which significantly impairs judgment, capacity to control behavior or capacity to recognize reality." N.J.S.A. 30:4 – 27.2 (r). Experience has shown, after representing thousands of patients subject to civil commitment, that many such individuals suffer from audio and visual hallucinations (two common symptoms of mental illness) which rob them of the ability to accurate perceive reality. As such, many of our clients are wary of the entire court process and in some cases misperceive the role and authority of the judge in the courtroom. Some clients express the belief that they are being controlled by television, video or radio transmissions, or that they can communicate using these media. Other clients express doubts that the person in the court who is deemed to be the "judge" is actually serving in this capacity. One can only imagine the effect on a person suffering from paranoid delusions who is expected to accept a hearing involving a judge appearing on a video screen. It is entirely predictable that in some instances an individual client's paranoia with regard to television or video technology might not manifest itself until the video conference actually commences.

Second, there are several problems inherent in the virtual hearing process which defy easy solution. One such issue is the challenge of conducting a confidential conversation with a client in a remote setting. Another issue involves the use of spoken language or sign language interpreters, which as reflected in the attached certifications has proven to be an intractable problem. Finally, some of our clients look forward to appearing before a judge in person to participate in a process which might result in their release. In a therapeutic sense, the fact that a judge has taken the time to come to a hospital and listen to them often provides a ray of hope and imparts a measure of self-esteem to a client who feels hopelessly trapped in the system. Virtual hearings can never substitute for this experience.

Third, while we recognize that the proposed procedures mandating remote hearings provide a possible exception triggered by an application for an in-person hearing "based on the individual circumstances of the case" it is difficult to envision how this would take place in practice. In most cases our attorneys receive the expert doctor's report the day prior to the hearing. It is at this point that the attorney is aware of whether or not the hearing would be contested. If the hearing is to be contested, it would then be up to the attorney to determine whether "the individual circumstances of the case" (presumably the inability of the client to comprehend a virtual proceeding) would support an application for an in-person hearing (the doctor's report would not address this issue). Moreover, given the fluctuating and unpredictable nature of mental illness, a patient who appeared amenable to a remote hearing the day before a scheduled hearing might, on the actual hearing date, exhibit delusions which would preclude the viability of a virtual hearing.

Finally, assuming the application is successful (putting aside how it would be heard) the court system would then have to convert to providing an in-person hearing with less than 24 hours' notice, which would be challenging at best. Thus, in all likelihood, a patient who suffers from a particular condition which makes it impossible for them to comprehend a remote hearing will be "punished" by having the hearing postponed for up to 14 days, which in many cases will violate the mandate that an initial involuntary commitment hearing must be held within 20 days from admission, absent "exceptional circumstances and good cause shown on the record." R. 4:74 – 7 (c)(i); In re. Commitment of M.M, 384 N.J. Super. 313 (App. Div. 2006); Matter Commitment of C.M., 458 N.J. Super. 563 (App. Div. 2019). In addition, given the likelihood that out of the 40 or more cases typically scheduled for a court session there will be several patients who are not "suitable" for a remote proceeding a judge will necessarily be required to personally attend hearings for such individuals, thereby negating any possible benefit to the use of the remote system.

As attorneys, we have a duty not to engage in conduct which would serve to undermine the public's confidence in the judicial process. However, the proposed remote hearing protocol does just this by removing one of the main pillars of American jurisprudence: the right of individuals at risk of being deprived of their liberty to personally appear before a judge. The average citizen would not see such a system as either promoting justice or fostering equity. The individuals unfortunate enough to be subject to civil commitment due to an illness which is beyond their control will also know that their trials are not important enough to require a judge to take the time to meet them in person.

Thank you for your consideration of these concerns. I am available to discuss this matter with Your Honor at your convenience.

Respectfully submitted,

Carl J. Herman
Director

Cc: Chief Justice Stuart Rabner

ATTACHMENTS

Attorney Certifications

- Daniel O'Brien
- Karol Ruiz
- Doris Newman
- Michael Mangels
- Michael Soffer
- Kelli-Ann Dreisbach
- Renee Bissonnette
- Shannon Dolan
- Amy DeNero
- Purificacion Flores
- Jeanne Stahl
- Brian Hughes
- Patrick Hurst
- Emily Preziosa

Case

Doe v. State, Supreme Court of Florida, May 11, 2017

No. SC16-1852

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Certification Regarding Short-Comings Of Virtual Civil Commitment Hearings

I, Daniel F. O'Brien, being of full age certified as follows:

1. I am an attorney licensed to practice law in the State of New Jersey.

2. I have been employed by the Office of the Public Defender's Division of Mental Health Advocacy for the past ten years in the Northern Regional Office in Newark, New Jersey which represents clients at 19 hospitals. In my time with the Public Defender, I estimate I have conducted at least 5,000 contested civil commitment trials, at least 70 guardianship bench trials in Chancery Division, and 500 Krol review hearings.

3. I am the primary attorney assigned to represent civilly committed Adults at University Hospital in Newark and Newark Beth Israel Hospital. Until recently I was the primary attorney assigned to represent adults at Clara Maass Medical Center.

4. I am the primary attorney assigned to represent minors at Newark Beth Israel Hospital and St. Clare's Hospital.

5. In anticipation of the lockdown necessitated by the Covid-19 pandemic I worked to set up virtual hearings at my assigned hospitals.

6. I also had to help implement hearings at Clara Maass Medical Center which began having clients from Essex County. Prior to that time, we occasionally represented

clients at the facility, but now we represent a significant number of clients every two weeks.

7. In preparing for virtual hearings, it became apparent hospitals had different technologies and abilities to hold hearings.

8. I had grave reservations about the virtual hearings as client have right to "be present" at their hearings pursuant to N.J.S.A. § 30:4-27.14. I expressed these reservations to my superiors at the time and have continued to do so.

ABILITY TO SEE & HEAR ALL PARTICIPANTS

9. There have been repeated issues with hospitals having proper technology to conduct hearings. In all the hospitals at which I have conducted virtual hearings the doctor, social worker and client must sit very close to the monitor to be properly heard. Particularly at University Hospital and Newark Beth Israel the doctor will have to lean in towards the microphone and the client will have to lean back away from the computer and will be unable to observe the proceedings.

10. At Newark Beth Israel due to technical issues that I raised to hospital management, the doctor on the adult unit had to access Microsoft Teams via his personal cellphone so only the doctor's face was visible. I could not see my client and my client could not see the proceeding. I raised this issue with the Court which acknowledged the problem but took no action to remedy the issue. The problem of being able to view both my client and the doctor at the same time still persists.

11. At St. Clare's Hospital, University Hospital, and Newark Beth Israel, when a new witness must testify all the participants must rearrange in the room, so the witness is closest to the computer.

COMPLAINTS OF CLIENTS

12. Clients frequently complain during the trial they are unable to hear the proceeding adequately. This is more frequent with elderly patients who have hearing impairments.

13. Clients have complained after the hearings they were unable to make out any of the remarks of the judge and were unaware of the final ruling and did not hear the findings of fact.

14. Multiple clients have indicated to me their wish for an in-person hearing noting they have the right to be "present" at their hearing.

15. Numerous clients have refused to participate in virtual hearings because they do not believe it is "real court."

16. Clients have complained to me that virtual hearings are discriminatory, and they feel they are being treated differently than other litigants on account of their mental illness.

17. Clients have indicated to me they lack confidence in the fairness of the virtual hearings, and they believe they cannot obtain a fair hearing using virtual court.

CONFRONTATION & BEST EVIDENCE

18. Civil Commitments are quasi-criminal and nature; therefore, the clients have the right to confront witness.

19. Prior to virtual hearings, family members would frequently appear in-person to testify at hearings. Since that time families have begun to participate virtually.

20. Often family members would join by phone and not participate by video. I objected to this initially on confrontation grounds. These objections were always overruled, and I informed my objections were frivolous.

21. Many times, witnesses have testified from their car, place of work, or other location with excessive background noise, that has made it difficult to hear the witness and to determine their tone and inflection as Is necessary to properly assess their credibility. It is also impossible to ensure that the in camera rights are being upheld.

22. To this date no witness who has called in telephonically has been required by the Court to testify via video thus depriving my clients of their right to confront adverse witnesses.

23. The best evidence rule is frequently invoked in civil commitment hearting regarding documents such as complaints detailing pending charges, restraining orders, and letters of guardianship.

24. When family members in virtual proceedings they are unable to prove they are the guardian of a client as they cannot transmit a letter of guardianship in real time. This is the same with criminal complaints and restraining orders.

25. Most recently in a trial captioned IMO the Commitment of J.R. held on August 4, 2021, at Newark Beth Israel, his mother appeared telephonically and testified J.R.'s girlfriend had a restraining order against him. I objected based on best evidence and hearsay as the mother was not a party to the order. The judge acknowledged the accuracy of my objection but allowed the testimony about the restraining order because the "mother said she was aware of it."

26. I have filed an appeal, currently pending, captioned IMO the Commitment of S.W. which addresses, among other issues, the Court's failure to properly determine if a sister was indeed the guardian of a S.W. by examining a Letter of Guardianship.

COMMUNICATION WITH CLIENTS

27. As of this date there is no effective way to communicate with a client during a virtual civil commitment hearing. A breakout room is of no use as the client is always in the same room as either the doctor or staff, and is frequently using the same computer as the doctor.

28. Frequently, the decision of a client to testify is made during the course of the trial based on the testimony that is present by the County. I must resort to asking my client through Teams if they wish to testify. I have no ability to have a private conversation with the client about the benefits and risks of testifying based on the current record.

29. For many clients, especially minors, civil commitment trials bring up painful memories. There will be testimony about past actions which are embarrassing, as well as sexual and physical abuse suffered by the client as well as other intimate details. Often a client needs a break from the hearing. This was easily dealt with in person when I could observe the client's body language up close and speak to them discreetly. Clients were also able to communicate to me when they wished to leave the hearing which they can no longer do.

30. In protected Krol reviews I am also unable to communicate with the client to determine if they need a short recess.

Clients have complained to me about not being able to communicate this properly to me and being embarrassed to announce to the Court they require a bathroom break.

IOC HEARINGS & COMMUNITY KROL HEARINGS

31. I represented adults on involuntary outpatient commitment (IOC) review hearings from certain counties at both the Morris and Passaic County IOC hearings. I also represent Krol clients who are released into the community

32. Frequently my clients, who often only receive social security benefits, do not have the technology to participate via video as they cannot not afford computer or smart phones. Many are not even able to afford to have internet in their home. Thus, they must call in to their hearings and appear telephonically.

33. To the credit of the Court, in some instances the Judge asks the client if they agree to participate via telephone. However, their consent must be given because there is no alternative means of participating.

34. For clients participating in the Morris IOC review hearings, they do not call into the Teams call. The instead call a phone in the office of their case manager and are placed on speak phone.

35. For these clients I believe they must have in-person hearings as they do not have resources to participate in virtual hearings due to poverty.

POOR TRANSCRIPTS

36. I have had significant difficulty in obtaining accurate transcripts since the move to virtual hearings.

37. In a pending appeal IMO the Commitment of S.W. has a very poor transcript and poor recording which has hindered the appeal.

38. For two matters heard on April 7, 2021, at University hospital, IMO the Commitment of M.W. and IMO the commitment of G.M. the clients requested appeals.

39. I filed a request for the transcripts only to be informed by the Court for the entire calendar at University Hospital there were no recordings.

I certify that the foregoing statements made by me are true. I am aware that if any of my statements are knowingly false, I am subject to punishment.

I certify that confidential personal identifiers have been redacted from the documents now submitted to the Court and will be redacted from all documents in the future, in accordance with R. 1:38-7(b).

August 6, 2021

JOSEPH E. KRAKORA
PUBLIC DEFENDER

By: /s/ Daniel F. O'Brien
Daniel F. O'Brien
Asst. Deputy Public Defender
NJ Attorney ID: 015822011

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Director

NORA R. LOCKE
Managing Attorney

I, Karol Y. Ruiz, being of full age, do hereby certify as follows:

1. I am an Assistant Deputy Public Defender for the New Jersey Office of the Public

2. Defender, Division of Mental Health Advocacy (OPD-DMHA). I am assigned to the Northern Regional Office.

3. Our office represents individuals in their civil commitment matters at 19 hospitals throughout the Northern Region of New Jersey. The OPD-DMHA represents individuals in their involuntary outpatient commitment (IOC) matters in 16 of the 21 counties.

4. Civil commitment hearings were not successfully adapted to remote operation during the extended COVID-19 crisis, despite the number of virtual court proceedings, as many participants were either unavailable, unwilling or unable to participate remotely.

5. Civil commitment hearings were not successfully adapted to remote operation during the extended COVID-19 crisis because audio, visual, logistical, and technological barriers impeded complete and accurate communication throughout the hearing. Technological barriers also impeded the complete and accurate recording of the hearing for transcripts.

6. Civil commitment hearings were not successfully adapted to remote operation during the extended COVID-19 crisis because the lack of in-person proceedings diminished the professional courtroom decorum and interfered with the judge's ability to command the courtroom. Some judges presided over civil commitment hearings without their robes, explaining that they forgot to wear their robes, or that wearing their robes in their home or office made them hot, or simply without explanation. Some county counsel representing all 21 counties and private attorneys representing clients from Middlesex, Passaic, Bergen, Morris, and Warren counties appeared without appropriate courtroom attire. At least one attorney held a dog on their lap while questioning witnesses. Attorneys, witnesses, and even judges multi-tasked during remote hearings, to the detriment of the integrity of the hearing, viewing several screens at once, and some attorneys even appearing on several different remote hearings at once. I witness attorneys interrupting each other, rolling their eyes at one another, and even making *ad hominem* arguments against one another with much more frequency during remote hearings than during in person hearings. During remote hearings, witnesses interrupt each other, the attorneys, and even the judge, more frequently than during in person hearings. On more than one occasion, lay witnesses were heard using foul language during remote hearings, unaware that their device was not muted. Expert witnesses appearing virtually while at the hospital often take command of the courtroom, directing other witnesses, attorneys, and even the judge. During in person hearings, the judge always commands the courtroom. Both expert witnesses and lay witnesses appear in remote hearings from their living rooms, cars, and even from the grocery store, violating my clients' right to an *in camera* proceeding. The diminished decorum in remote hearings impacts the veracity of testimony, as both expert and lay witnesses corrected their testimony, gave false testimony, or gave testimony the judge found not credible more often than during in person hearings.

7. Civil commitment hearings adapted to remote operation during the extended COVID-19 crisis often took more time, not less, than in-person hearings. On several occasions, I participated in remote civil commitment hearings that were scheduled to begin at 9:00 A.M. or 10:00 A.M. that continued well past 5:00 P.M. In person hearings rarely continue past 4:00 P.M.

8. Civil Commitment hearings adapted to remote operation during the extended COVID-19 crisis excluded lay witnesses without access to the necessary technology, knowledge, and skill to participate in remote hearings. Family members and loved ones who would otherwise offer in-person support to my clients throughout the civil commitment hearings were similarly excluded, or their participation was significantly limited, when they lacked access to the necessary technology, knowledge, and skill to participate in remote hearings.

9. Civil commitment hearings were not successfully adapted to remote operation during the extended COVID-19 crisis because civilly committed patients were denied the opportunity to communicate directly and immediately with their attorney during the proceeding, using body language and written notes. During remote hearings, patients are seated next to the psychiatrist, instead of next to their attorney. During remote hearings, the psychiatrist directs the patient, instead of the patient's attorney directing the patient. The power differential between the patient and their treating psychiatrist creates a condition of undue influence from the doctor and impedes direct, immediate communication and intervention from the patient's attorney during the proceedings. In person, a patient and their attorney can whisper to one another, tap one another, or otherwise use body language to communicate or help the client remain quiet and calm during the hearing, or to prevent the patient from speaking out of turn or making statements that may be prejudicial to their case. Discreet communication using body language and touch is impossible during remote hearings.

10. The following examples are just a few of the many instances of remote hearings' failure to guarantee both procedural and substantive due process rights in civil commitment proceedings as compared to in person civil commitment hearings.

11. At an August 7, 2020, remote civil commitment hearing for one of my juvenile clients at St. Clare's Hospital, the sound quality was so poor that the transcript for this hearing lists the testimony, questions, and judge's statements as "indiscernible" at least 17 times. My client's mother, a lay witness whom required a Spanish/English interpreter, had connectivity issues, which led the judge to make negative inferences as to the credibility of her testimony, finding her not credible. My client's mother's connection dropped at the beginning of the hearing and also during cross examination. The interpreter used consecutive interpretation unsuccessfully, as attorneys and witnesses spoke without providing the interpreter the opportunity to interpret the question or the answer, or otherwise spoke over one another. This impeded the ability of my client's mother to fully understand her child's civil commitment proceedings. The judge then dismissed the interpreter when my client's mother's connection was dropped one more time, and once the mother returned to the remote hearing, she was unable to understand the judge's ruling.

12. At a December 20, 2020, remote civil commitment hearing for one of my juvenile clients at Summit Oaks Hospital (SOH), the poor sound quality was reflected in the transcript. On pages 62 through 64 of the transcript for this hearing, the judge says to the witness, "I'm sorry, you are breaking up" and throughout the transcript you can see examples of the attorney, the judge, and the witnesses not being able to accurately hear and understand one another.

13. At the same December 20, 2020 hearing referenced above, the expert witness was waving and pointing on camera seeking to interrupt the testimony, as recorded on pages 68 through 70 of the transcript. Finally, the expert witness does in fact interrupt to inform the Court that

another witness is calling the hospital. In other remote hearings at SOH, this same expert witness interrupts the testimony of other witnesses, including social workers, in an attempt to correct or bolster testimony. Similar interruptions have also occurred during remote hearings at Greystone Park Psychiatric Hospital (GPPH). I have never observed such interruptions during in person hearings. The remote hearings seem to give witnesses the perception that they have the liberty to interrupt and intervene in direct and cross examinations. Such interruptions interfere with the flow and veracity of testimony.

14. At a January 19, 2021, remote civil commitment hearing at SOH, the judge's screen froze during the hearing. Frozen screens are a regular occurrence at remote hearings.

15. During the same January 19, 2021 hearing referenced above, the expert witness was eating, with the camera on, during the hearing. Such behavior was repeated *ad nauseam* at other hearings, and at other hospitals, by other witnesses. Such behavior is a distraction at best, and does not occur during in person hearings.

16. At a March 2, 2021, remote civil commitment hearing at SOH, the audio quality was so poor that the transcript for this hearing includes over 40 uses of the word "indiscernible" to describe testimony, attorneys' questions, or the judge's questions, comments, and rulings. Several times in this hearing, as is common in other virtual hearings, the attorneys, the witnesses, and the judge ask for questions or answers to be repeated as the listener cannot hear.

17. During this same March 2, 2021 remote proceeding, as occurred in other remote civil commitment hearings, the judge lost command of the courtroom. The expert witness offered her own "witness" and even invited this "witness" in the hospital room and into the remote hearing screen, without the consent of my client, without any attorney calling this witness, without the judge instructing the witness to enter, thereby violating my client's *in*

camera proceeding rights. In response, the judge states, "Wait, this is a courtroom guys... let me run my court." I never witnessed such behavior from witnesses nor a loss of the judge's command of the courtroom during in-person hearings, likely because the formality of a court proceeding was palpable in-person and we had closed doors which the judge controlled as she directed witnesses to enter.

18. At a March 9, 2021, civil commitment hearing at GPPH, the sound quality was so poor that the transcript uses the word "indiscernible" over 90 times. Remote hearings not only make it difficult to hear and understand the testimony, but also impede the judge's ability to see the witness completely, as the frame on the screen captures a limited sight of the person and the room in which they are physically present. A witness can easily read from a document, use computers or other sources to read hearsay into the record, especially if their camera is off, but even with the camera on, as the frame does not capture everything. During this hearing, the expert admits that he does not have his camera on and that he is looking at a system on his computer to read into the record. The expert is clearly unprepared, testifying to the wrong medication and diagnosis, admitting he believed he was testifying about a different patient. As this hearing progressed, this expert witness moved from his office to his car, and testified from his car. His testimony was erroneous and incomplete. From his car, the expert witness did not have access to the patient's chart to ensure accurate testimony. During another hearing at this same hospital, this same witnessed called a colleague, while on the remote "stand", to request the answer to a question posed on cross examination. By contrast, in person hearings at GPPH require the witness's physical presence in the court room, often with the patient also present, and with the medical chart in front of them, thereby avoiding the opportunity for confusion as to which patient is the subject

of the hearing, ensuring the patient's *in camera* hearing rights, and facilitating accurate, complete, and truthful expert testimony.

19. At a June 29, 2021, remote civil commitment hearing at GPPH, my client, whom never missed a hearing in the three years that I have been representing him, refused to appear. Both in person and remotely, this client's hearings are facilitated by an American Sign Language (ASL) and Certified Deaf Interpreter (CDI) team, who tap my client's shoulder as necessary to redirect his attention. It is impossible to redirect a deaf person's attention during a remote hearing as neither the interpreters nor the attorney are in the room with the client. Previous remote hearings for this client, as well as other clients requiring an ASL interpreter at GPPH, whether using Zoom or Scopia, were delayed or adjourned due to technical and logistical barriers. Further, ASL is a 3-dimensional language and virtual hearings are 2-dimensional mediums; virtual hearings impede our ability to communicate effectively via ASL. All hearings at GPPH requiring ASL interpretation adapted to remote operation during the extended COVID-19 crisis were a failure.

20. At the July 13, 2021, remote civil commitment hearing at GPPH, my client's *in camera* hearing rights were violated, with no available remedy. My client resides in the GPPH cottages, where there is no Wi-Fi connection for the laptop used during hearings. Instead, GPPH uses a desktop at the cottages for the hearings. The desktop is in a public space without doors or walls to secure my client's right to an *in camera* proceeding. During this hearing, GPPH staff entered the space during the hearing to take files out of cabinets and walked by engaged in conversation so loudly that the witness testimony could not be heard.

21. At a July 15, 2021, remote involuntary outpatient civil commitment hearing, my client was nodding his head and otherwise expressing himself with his body language in ways that

I worried could be prejudicial to his case. Such behavior from my clients occurs regularly during civil commitment hearings. At an in-person hearing, I could tap my client's hand on the counsel table or even whisper to my client, reminding them to maintain proper courtroom composure. The inability to communicate immediately and discreetly with my clients during their hearings could lead to unfair prejudice that might otherwise be prevented with direction from their attorney.

22. The July 20, 2021, remote civil commitment hearings at SOH started approximately an hour later than scheduled, due to connectivity issues. Late starts to hearings have become the norm as many hospitals lack the strong Wi-Fi signals necessary to adequately support remote hearings, as do many courthouses, and many witnesses have trouble logging on to Microsoft Teams. If attorneys or lay witnesses also have connectivity issues, this compounds the problem. Clients that wished to appear at their hearing change their minds after waiting so long, especially as the hearings conflict with the lunch hour. Late starts, connectivity issues, and other logistical barriers compound to make the court day longer, with hearings that used to conclude no later than 3:00 P.M. or 4:00 P.M. now continuing until past 5:00 P.M.

23. The COVID-19 pandemic took the life of some of my clients at GPPH, as well as the lives of some of my former clients at Andover Nursing Home. The COVID-19 pandemic changed my legal practice, and thanks to the commitment and ingenuity of the entire OPD-DMHA, we rose to the challenge of ensuring our clients constitutional rights, even as we struggled with the grief the pandemic has caused. While the failures of remote hearings may have been a necessary sacrifice to protect against the loss of life, we have a duty to successfully and completely protect our clients' constitutional rights once the pandemic is over.

24. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Karol Y. Ruiz, Esq.

Karol Y. Ruiz, Esq.
Assistant Deputy Public Defender
Division of Mental Health Advocacy

Dated: August 6, 2021

Phil Murphy
Governor

Sheila Oliver
Lt. Governor

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Joseph E. Krakora
Public Defender

I, Doris J. Newman, being of full age, do hereby certify as follows:

1. I am an Assistant Deputy Public Defender for the New Jersey Office of the Public Defender. I am assigned to the Northern Regional Office of the Division of Mental Health Advocacy.

2. Our office handles civil commitment matters at numerous hospitals throughout the Northern Region of New Jersey.

3. Since April 2020, I have represented adults and minors in virtual commitment hearings at numerous hospitals including the following: Summit Oaks Hospital; Trinitas Regional Medical Center; Newark Beth Israel; Cornerstone Behavioral Health Hospital; Clara Maass Hospital; University Hospital; St. Michael's Medical Center; St. Clare's Hospital; Jersey City Medical Center; and Greystone Park Psychiatric Hospital.

4. Depending on each hospital, various issues arose with respect to the use of virtual hearings at every single hospital on every occasion. The instances are too numerous to recount specifically as I have averaged two, full, hearing calendars per week representing hundreds of

clients. Therefore, I have limited my examples herein to those issues which are of the biggest concern and which violate the rights of my vulnerable clients.

5. Trinitas Regional Medical Center (hereinafter referred to as "Trinitas") is one of the few, acute facilities in the state to hold patients suffering with a dual diagnosis of mental illness and a developmental disability. The patients are often selectively mute, have limited verbal abilities, and limited intellectual functioning. The virtual hearing process further confuses these patients at time when their mental illness symptoms are acute. Many of these clients are diagnosed with autism spectrum disorder which often includes symptoms of heightened sensitivity to their surroundings. When these individuals can only see the judge and lawyers on a computer screen, they are often disoriented as to the reality of the hearing taking place or fearful to speak out on their own behalf. Many, we are told by staff, decline to appear before the judge at all. This limits the judge's ability to observe their demeanor, mannerisms and interaction with those around them, an essential element toward determining their eligibility for discharge.

6. Trinitas also holds numerous children for acute care and those awaiting placement to out-of-home residential facilities. The physical structure of the building and physical appearance of the children is missed by the judge in virtual hearings. These children are garbed in hospital gowns rather than street clothes for comfort. They don't get more than an hour of outside time a day and sometimes less. When presenting their right to be in a lesser restrictive-setting, it is essential judges have the opportunity to observe the children up close and be able to interact with them in person. The judges are limited to seeing a figure on the screen. The in-person observation time is extended when the hearings are in-person allowing small talk as the patients come into the court room. Without the full feel of the hospital using all senses, the judges are denied the opportunity to take in the sights, smells and sounds of the unit as well as

connect to the patients. This subtle, yet essential interaction can be the difference in the final ruling of a child's liberty.

7. The minor calendar at Trinitas often runs more hours than any adult calendar. The hearings commence every other Thursday at 10 A.M. At every hearing I've had there, including 14 just this year, the computers used by the hospital froze. Several hours into the hearings, the laptops or tablets being used become hot, causing the screens to freeze or the audio to become garbled. This results in the hospital staff signing off and having to sign back on. Often, a minor child is waiting while this takes place. This increased time of being under a microscope is excessively challenging for the children while they are directed to sit quietly waiting. This pressure is too much for some young children who become more agitated than they would for an in-person hearing. I have often excused my clients' appearance before the end of the hearing in fear they will "act out" before the judge while under this pressure. This compromises their right to participate in the hearing process. I am forced to weigh the prejudicial value of their frustrated appearance as it may affect the judge's final ruling.

8. Greystone is another hospital with which I've had regular, virtual appearances during the pandemic. Due to the large size of the facility, the staff must take an exorbitant amount of time going from one unit to the next setting up their computers to have each case heard. Previously with live hearings, I'm told the patients were escorted down to the courtroom with no significant time between matters. The hearings now run many hours over what would have been at an in-person hearing. Although some judges take small breaks, they are usually forced to push through to complete the day's calendar. By the end of the day, all persons involved are struggling to remain at their professional best. More time was spent waiting between cases for the hospital to gather up patients than actual time hearing cases. In additional

to it being taxing on the court personnel, the clients whose cases are heard at the day's end are at a disadvantage.

9. I appeared on behalf of patients at Summit Oaks on July 6, 2021. The technical issues at that hospital seemed to be worse than the others. The court was forced to start very late as the hospital's computers were not working at all. Once hearings did commence, the usual problems of freezing and restarting also occurred.

10. Another significant disadvantage to our clients in virtual court, is the absence of their counsel next to them throughout their hearing. Certain, non-verbal ways of communication, such as a gentle tap on the shoulder or hand to tacitly remind a patient when it is their turn to speak is lost. These non-verbal ways of communicating with mentally ill clients are essential to the outcome of their cases. Even being able to position myself in front of my clients to make sure they see my reassuring smile makes the world of difference in the middle of a commitment hearing. I am convinced that some contested cases were lost when a judge was more inclined to believe a doctor testifying about impulse control when my client interrupted and spoke out of turn because as their counsel, I was not there to give gentle reminders.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Doris J. Newman
Doris J. Newman, Esq.
Assistant Deputy Public Defender
Division of Mental Health Advocacy

Dated: July 31, 2021

PHIL MURPHY
Governor
SHEILA OLIVER
Lt. Governor

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JOSEPH E. KRAKORA
Public Defender
CARL J. HERMAN
Director
MICHAEL MANGELS
Managing Attorney

I, Michael Mangels, being of full age, do hereby certify as follows:

1. I am the Deputy Public Advocate of the Office of the Public Defender. I am assigned to the Division of Mental Health Advocacy – Alternative Commitment Unit (ACU). I took over as the Managing Attorney of the ACU on March 1, 2020.
2. The ACU represents more than 90 percent of people who are civilly committed under the Sexually Violent Predator Act ("SVPA") and those who remain subject to court ordered restrictions under the SVPA through a process known as conditional discharge.
3. As the State was beginning to close things down, my office had a conference with the court and the Attorneys General responsible for the proceedings under the SVPA. At that conference, the parties agreed that temporarily all cases would be handled telephonically, and we would only address consent orders. This was based in part on the Judge's position that he felt uncomfortable making credibility determinations in a video format rather than proceedings in person.
4. This temporary agreement continued through April into May. As it became clear that the restrictions were going to last longer than a few weeks, and that this temporary agreement was not tenable in the long term, the parties began to discuss remote court proceedings. It was decided that the New Jersey Department of Corrections (DOC), as the agency

given custody over individuals committed pursuant to the SVPA, or the New Jersey Department of Human Services, as the agency tasked with providing treatment to individuals committed under the SVPA, would provide equipment that would remain on site in order to conduct hearings.

5. While this agreement was reached in April or May, it was not until June that the equipment was secured and set up.
6. Since the equipment was set up, the technology has created issues that have disrupted the proceedings.
7. I have participated in and observed hearings where we lose the client's feed. At that point, the hearing must stop, we have to wait for the DOC officer to rejoin the meeting, and then the Court has to read back his notes on the testimony to ensure that the client heard the testimony. This sometimes happens more than once in a given hearing, which causes serious delays.
8. Somewhat frequently during proceedings, the judge has mentioned that he is getting feedback due to one of the participants' feeds, which takes some time to figure out the cause and alleviate the situation.
9. This issue has been raised by the court with the agencies that have custodial authority over the residents on more than one occasion within the past few months. Despite that, these issues persist.
10. While technology has been a serious concern during the remote hearings, even if the technology begins to work optimally, there will still be issues that impact the ability of defense counsel to effectively fulfill its responsibility of providing effective assistance of counsel.

11. Prior to the pandemic, we would sit next to our clients during the proceedings. If they needed to communicate with us, they could either whisper or pass a message in writing in confidence. With remote hearings, we are not in the same location as our clients. Thus, if our client wants to communicate with us, they must stop the proceedings and alert us that they would like to speak with us. When our clients alert us, we have to call them on a landline while the proceeding is paused, and then we have to conclude our conversation with the client before the hearing resumes.
12. Many of our clients have been locked up for many years and are not familiar with the video technology in use for court proceedings. Unfortunately, sometimes after the clients communicate that they would like to speak with us, their feed may not be properly "muted" at the beginning of our conversation, which harms the confidential nature of our discussions and undermines the attorney/client relationship.
13. While attorneys from the ACU could address this by sitting in the room with the client, that would create a different set of challenges for client representation in remote hearings.
14. Hearings under the SVPA involve many documents. There are treatment records generated after the prior year's commitment order, records related to the client's prior criminal history, and numerous prior psychiatric evaluations. Sometimes these records can span more than 20 years. In fact, some of our clients have been committed since 1999, the inception of the Statute. Testifying experts will frequently refer to events that took place before the client's last hearing, which means that the underlying records that discuss those events are not present in the records for that proceeding. As such, attorneys need access to those records, and frequently will utilize those records in the context of a given year's hearing.

15. ACU attorneys currently are not permitted to bring electronic devices into the facility. Thus, if defense counsel chooses to utilize a document in the hearing while present with the client, there would be no way to have that document appear on screen such that it was clear that everyone was looking at the same document. In prior years, counsel would approach the witness with documentary evidence, but the fact that the hearing now takes place across multiple locations makes that much more difficult.
16. Moreover, it starts to raise questions of fairness as specifically for impeachment documents, counsel would need to provide pre-marked exhibits to their adversaries as counsel would not be able to provide those documents in real time as they would not have access to them due to the electronic setup and the fact that defense counsel would not be able to use their own electronic devices. During the pandemic, while we are not in the same room as our clients, we have been utilizing our own electronic devices and using the "share screen" function when we are directing a witness's attention to the document for impeachment. Given the rules of the facility, this would not be possible in a world where we are doing a remote hearing in the same room as our clients.
17. The primary concern is related to technology and the delays that has caused in the proceeding. Moreover, even if that issue were fixed, the unique circumstances of proceedings under the SVPA would make it difficult if not impossible to address the simultaneous need of effective client communication as well as effective representation in a contested hearing. When faced with a choice of sub-optimal proceedings or no hearings at all, we were happy to consent to this arrangement to ensure that clients did get hearings. However, continuing these proceedings after the pandemic subsides does not seem to procure any benefits, and raises serious concerns of due process.

18. Some of our clients have chosen to forgo hearings during the pandemic and wait until court returns to in person proceedings because they feel that a remote hearing will not be fair.
19. From my reading of the proposed rule, despite the fact that proceedings under the SVPA implicate clear constitutional interests, they were not placed into the category of hearings that implicate constitutional interests. Instead they were specifically carved out and placed into the section of the proposed rule that states that they will proceed remotely in general.
20. While there are times that my office would consent to remote proceedings, such as for times where a client's status will not be changed, in general, this office takes that position that contested hearings should continue to take place in person.
21. If remote hearings proceed after the pandemic has completed, this office will object and insist on proceedings occurring in person.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ *Michael Mangels*
Michael Mangels
Deputy Public Advocate
Alternate Commitment Unit

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JOSEPH E. KRAKORA
Public Defender
CARL J. HERMAN
Director
MICHAEL MANGELS
Managing Attorney

I, Michael Soffer, being of full age, do hereby certify as follows:

1. I am an Assistant Deputy Public Defender for the New Jersey Office of the Public Defender. I am assigned to the Alternative Commitment Unit in the Newark Office of Mental Health Advocacy.

2. I represent individuals who have been civilly committed to the Special Treatment Unit pursuant to the Sexually Violent Predator Act. I have been in this role since September 2019.

3. We began remote hearings in approximately September 2020, due to the COVID-19 pandemic and the government's stay at home order. Since that time, I have participated in numerous SVPA commitment hearings held remotely via Microsoft Teams.

4. I feel that remote proceedings significantly hamper effective communications between attorney and client during the proceedings. At SVPA commitment hearings, clients are typically placed on mute while witnesses are testifying to reduce background noise. Clients are instructed that if they wish to speak with their attorney, they should waive their hands or give a signal to the judge so that the proceedings can be stopped and the attorney given an opportunity to call the client privately by phone. I feel that this process chills the clients' communications with counsel because clients are often intimidated or hesitant to stop the entire proceeding simply to ask their attorney a question or provide input to the attorney. I typically request to speak with my client privately before I finish questioning each witness to see if my client has any input or concerns. However, the client is not able to whisper something to me in real time or pass me a note, as he would typically be able to do if sitting next to me in the courtroom.

5. When I cross examine expert witnesses remotely, I am not able to see most of their bodies. The camera is usually focused on their face. It is more difficult, if not impossible, to read their body language and facial expressions over a computer screen. This is especially true when the video quality is poor or the lighting conditions are not ideal. Also, I am not able to tell what the witness may be reading on his or her desk or computer screen when they are testifying. There have been times when I suspected that an expert witness was improperly reading from his report during his testimony, but

there was no way for me to know based on my limited view of him over the computer screen. All of these issues hampered my ability to conduct an effective cross examination. Furthermore, if I am encountering these problems, surely the judge's ability to assess a witness's credibility is also impacted.

6. Throughout the last year and a half, all parties have experienced internet troubles, ranging from slow, unstable connections to problems with audio or video feeds, which cause delay and frustration. On one occasion, I encountered computer problems and had to utilize my smartphone to move forward with my client's court proceeding. In that particular proceeding, I did not need to share my computer screen or documents with any witnesses. However, if I had needed to share my screen or a document with a witness or the court, I would have been unable to do so from my smartphone.

8. On countless occasions screens froze, feedback and interference made witness testimony inaudible, testimony was missed, and therefore witnesses had to repeat sections of testimony and attorneys had to repeat arguments. On several occasions, my client was dropped from the Teams meeting in the middle of the proceeding. Once this was realized, the proceeding had to be stopped and the connection reestablished with my client. The judge asked the client to identify the last thing he heard before being dropped. The judge then summarized the testimony that was missed. Obviously, this is not an ideal way to conduct legal proceedings.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/S/ Michael Soffer
Michael Soffer, Esq.
Assistant Deputy Public Defender

Dated: August 4, 2021

Phil Murphy
Governor

Sheila Oliver
Lt. Governor

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Joseph E. Krakora
Public Defender

I, Kelli-Ann Dreisbach, being of full age, do hereby certify as follows:

1. I am an Assistant Deputy Public Defender for the New Jersey Office of the Public Defender. I am assigned to the Central Regional Office of Mental Health Advocacy.

2. Our office handles civil commitment matters at numerous hospitals throughout the Central Region of New Jersey.

3. I am currently assigned to represent clients on a rotating schedule at Hackensack Meridian Health - Carrier Clinic ("Carrier Clinic"). Carrier Clinic holds court proceedings weekly on Tuesdays.

4. I am the primary attorney assigned to represent clients at Rutgers University Behavioral Health ("Rutgers"). Rutgers holds court proceedings bi-weekly on Fridays.

5. Anticipating the unknown, at the onset of the COVID-19, our office worked tirelessly to develop plans so that our clients' hearings could continue to take place, thereby protecting their due process rights.

6. Since remote hearings have begun, there have been widespread technical issues. There is no one individual who solely experiences or is responsible for these problems, rather, every single person involved in the hearings has experienced, and continues to experience, technical difficulties.

7. Courtroom decorum barely exists anymore. County counsel at Rutgers does not wear a suit jacket for hearings. There are times when private defense counsel holds conversation with someone else in the room, sometimes on mute, other times not – breaching our clients' right to in camera hearings.

8. There have been times where the judges cannot see all the witnesses and/or clients that are testifying, or clients are unable to see the judge. There was one particular hearing where a child commented how he could not see the judge; he could only hear his voice, but wished he saw him.

9. Although court hearing start times have been changed to begin earlier, this has very little, to no effect, on the impacts caused by issues with technology, whosever end the issues may be on that day. Our clients' hearings are being truncated, as the time allotted for the hearings is spent attempting to resolve technology issues, and judges are quick to move on to other hearings or calendars so as to complete all assignments.

10. While use of an interpreter can be a challenge in and of itself, using an interpreter virtually is an entirely different experience. Interpreter cases take longer than they ever have before, often because the interpreter may not be able to fully hear the client, requiring repetition of what was originally said, but also because the interpretation cannot be done simultaneously.

11. Because of virtual court, I am unable to be present alongside my clients for their hearings. Thus, I am unable to communicate with them during the hearing. There have been

many times where clients have questions during the hearing that they are unable to ask me, as I am not next to them. Additionally, clients will often speak out of turn because they think they are allowed to speak whenever to whomever, impacting their credibility. If I were next to them, I would be able to instruct them on courtroom decorum, that they may speak when they are called as a witness, quietly answer any questions they have as to not interfere with the hearing, etc. The inability to turn and immediately communicate with counsel raises significant due process concerns.

12. During the Rutgers hearings one day, there was a buzzing sound that would not go away and was interfering with the Court Smart recording. After much time was spent logging off and back on to Microsoft Teams by all parties, we learned that the lights in the room of the hospital where the patients were was causing this interference. We had to proceed with the hearings with the lights off.

13. Many, many times during virtual court participants screens froze, bringing the hearing to a halt as soon as it was realized. Testimony was not captured, so witnesses had to repeat testimony. This also applies to attorneys making arguments. This ever-present issue causes significant delays each time hearings are held.

14. There are a few specific dates that I can identify what problems occurred based on communications exchanged with my office.

15. On June 2, 2020, during the Carrier Clinic hearings, it was brought to my attention that it sounded as though there was a lawnmower in my apartment. No lawn mowers were being utilized that day. There was a delay in the hearings, as I had to make multiple phone calls to get assistance with the audio issue. Ultimately, I had to phone into the hearings.

16. On July 14, 2020, during the Carrier Clinic hearings, there were multiple issues with sound and feedback. No one could resolve the issues, but we proceeded with hearings.

17. On July 28, 2020, during the Carrier Clinic hearings, I had sound issues that again required multiple phone calls to get assistance so that court could proceed.

18. On August 21, 2020, during the Rutgers hearings, a doctor who was called as the State's main witness for a case lost control of his temper. Unhappy with how the hearing was going, he began screaming and yelling, and he was posturing over the client's head towards the computer screen. Alarmed by his conduct, the judge ordered him to leave the room; he did not listen. The judge told him he was in contempt of court and fined him a few hundred dollars. That did not stop the doctor. The judge again told him he was in contempt of court and raised the amount of the fine. Again, that did not stop the doctor. The child got up from the chair and left the room. The doctor continued yelling. Had there been a sheriff's officer in the room, as there would be if we were in person, the conduct of the doctor undoubtedly would not have continued as long as it did, and myself and the sheriff's officer could have ensured the clients safety.

19. On August 24, 2020, during the Carrier Clinic hearings, I observed private defense counsel clipping his fingernails during hearings. No conduct like that has ever taken place in a courtroom.

20. On October 2, 2020, during the Rutgers hearings, county counsel, for the first time since going virtual in April 2020, appeared via video.

21. On December 29, 2020, during the Carrier Clinic hearings, the hospital was having issues with connecting to the internet and Microsoft Teams.

22. On February 5, 2021, during the Rutgers hearings, the power in my home went out, and I lost connection to the hearings. After regaining connection, I lost connection again,

with one hearing left. At that point, to finish the last hearing to conclude the day, I had to participate via my cell phone, outside on the front porch.

23. On April 27, 2021, during the Carrier Clinic hearings, there was an older adult client that had trouble hearing. Typically, in the courtroom setting, the court will provide the client with a device to assist in hearing. Being virtual, that did not happen. After each person's testimony, the judge kindly allowed me to summarize and slowly repeat the testimony to the client. This took a lot of time to do.

24. On May 11, 2021, during the Carrier Clinic hearings, we had a lot of technology issues. The hospital was having their internet worked on by an outside agency, the fire alarms were being tested on the units, there was trouble locating a doctor to appear for testimony, and Court Smart was having difficulty picking up the testimony taking place during the hearings.

25. On May 14, 2021, during the Rutgers hearings, there were technology issues with everyone's voices echoing, forcing us to pause after every few words spoken, unable to express a complete thought or sentence. Court Smart was having difficult picking up the testimony with all the echoing.

26. On July 9, 2021, there was a 30+ minute delay to beginning the hearings at Rutgers due to issues connecting to Court Smart. For one individual hearing, I asked the court clerk to call in the parents of the adolescent I was representing, as he wanted them to listen in, and they wanted to be present. The judge did not allow that call to be made, solely because the calendar was running late, and he had another court calendar to get to. The parents were not permitted to be present.

27. On July 23, 2021, during the Rutgers hearings, there were problems with connecting to Court Smart, causing delay. Additionally, the video displays of the clients were

very dark, as we had learned from prior experiences that having the lights on in that room of the hospital caused interference with sound.

28. Throughout the pandemic, staff at both Carrier Clinic and Rutgers have actively made efforts to accommodate not only the remote hearings, but also the interviews of clients so that I can adequately prepare for court. We have worked together to develop a plan, many times the hospital having to obtain new technology and additional staff members for the hearings to continue.

29. My communications with hospital staff have brought to my attention the additional stress and increased fatigue that these remote hearings cause. Many staff members are being pulled from their daily responsibilities to assist with these hearings and interviews, which more often than not, have taken anywhere from one to eight hours to complete. While I am extremely thankful for their continued assistance, it does not take away the guilt I feel that they must take on these extra tasks, thereby losing time for their daily professional responsibilities, which may affect our clients in the long run.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Kelli-Ann Dreisbach
Kelli-Ann Dreisbach, Esq.
Assistant Deputy Public Defender
Division of Mental Health Advocacy

Dated: August 5, 2021

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By: Christina Salabert, Esq.
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Certification of Christina Salabert, Esq.

I, Christina Salabert, being of full age, do hereby certify as follows:

1. I am an Assistant Deputy Public Defender for the New Jersey Office of the Public Defender. I am assigned to the Central Regional Office of Mental Health Advocacy and have been in this office since 2015.
2. Since the beginning of the pandemic, I have been the primary attorney for the Ann Klein Forensic Center/ Trenton Psychiatric Hospital court calendar on Wednesdays. Remote proceedings do not save time; in person court lasted about four hours, but now, court stretches beyond that, averaging six to eight hours each week.
3. There are always technical issues, including but not limited to internet capabilities and technological mishaps. There were days when the hospital staff had difficulty logging on or having camera access, causing credibility concerns. Clients were unable to view proceedings, doctors struggle with accessing the hearing.
4. On multiple occasions there were internet problems; both in my office and at my private residence. The hospital frequently runs into connectivity problems based on the patient locations. Doctors and other ancillary staff would lose signal or have severely unstable

9. On April 14th, 2021, In the Matter of VH, he postured in the corner of his room with his back to laptop/Court, unmoving. Despite my explanation of his right to appear, and that if he did not wish to appear, he could say so. During his hearing, he turned to rush the laptop, slammed, and broke it. Again, no time for me to try to speak with him or address whatever dissatisfaction he may have had regarding what was said.
10. On a weekly basis, family and supportive persons participate virtually, either through audio only, or video and audio. The number of participants at any given moment makes it difficult to determine who is on and who is supposed to on for what hearing. There were times when we noticed too late that a prior client's family member was still in the proceeding despite having moved onto another matter. This problem does not exist when we hold these hearings in person.
11. Furthermore, because testimony from friends and family is so vital, especially when it comes to a client on CEPP status, it is necessary to have the capabilities for them to be heard. However, many times testimony did not make it on record because of technical issues on both sides of the equation, and/or not owning a smart phone to be present in the hearing. Trying to explain to a person calling in how to unmute themselves can take time, and even then, is not always successful.
12. These issues occur on a constant basis, and when I obtained transcripts for cases, many had multiple points that were unreadable, that did not capture what transpired during the hearing and are virtually unusable in motion and/or appellate practice.
13. In my capacity, I have also covered different hospitals and outpatient commitment programs. During those hearings, we have run into similar issues regarding connectivity issues. I have covered the calendar at Rutgers on January 22, 2021. This calendar is

mostly minor clients. Despite providing explanations regarding the proceedings and the procedure of same; many of my clients appeared on camera nervous, confused, and scared. As minors, having the ability for an in-person hearing helps them understand what is going on and my being there in person provides reassurance.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/S/ Christina Salabert
Christina Salabert, Esq.
Assistant Deputy Public Defender

Dated: July 27, 2021

CERTIFICATION OF Renee Bissonnette, Esq.

In Support of Returning to In Person Hearings for Civil Commitments

I, Renee Bissonnette, am of lawful age and do certify and say:

1. I am an Assistant Deputy Public Defender for The Division of Mental Health, Central Region.
2. Pursuant to N.J.S.A. 52:27EE-29 – 31, I represent clients on all civil commitment related statuses in hospitals and programs located in the counties of Ocean, Monmouth, Mercer, Hunterdon, Somerset, and Warren.
3. I am submitting this certification as a respectful request that the AOC reconsider the decision to continue civil commitment hearings remotely, as outlined in the Notice to the Bar: "Future of Court Operations – Remote and In-Person Proceedings."
4. For the last fifteen months I have been representing clients at remote hearings via Teams and Zoom. It is my belief this is to the detriment of our client's rights, as well as to the integrity of the court process.
5. At numerous involuntary civil commitment hearings I felt my ability to adequately represent my client was compromised due to the hearing being remote. Of import, many witnesses that were presented for testimony did not have access to a device which would allow them to appear by video, and thus testimony was taken over the phone. I believe many of these witnesses' testimony would have been found to be more credible had the judge had the opportunity to see them testify in person.
6. I also believe the integrity of inpatient and outpatient civil commitment hearings is

undermined by nature of remote hearings. During the past year I have observed Judges speaking to spouses, texting, emailing, and doing numerous other tasks not related to the hearing, while hearings were taking place.

7. The nature of remote hearing makes then difficult to ensure they are held *in camera*. I have observed Judges, attorneys and court staff speaking to people off screen during hearings – likely meaning that said individual could also hear what was taking place in the hearing. There is no way to adequately protect the privacy our clients are entitled to while operating remotely.

8. Since hearings have gone remote, there has been a deterioration of many Involuntary Outpatient Commitment (IOC) programs. Patients used to appear at the superior courthouse for their hearing, now they are given the option to appear by video (if able) or call in to attend their hearing, but the vast majority do not. It seems that without any in-person contact with the court system, the strength of the IOC has been weakened. Moreover, many patients report increased anxiety at the thought of having to appear on video as the reason they want their appearance waived.

9. On a weekly basis we still struggle with technical issues. Poor Wi-Fi connections often lead to the video "freezing." Not only does this unnecessarily lengthen the hearings, but often judges indicate they couldn't hear something or it skipped and needed things repeated. I believe there is often testimony that falls through the cracks because of this. Additionally, transcripts from remote hearings often contains "[indiscernible]" excessively, therefore the proceedings are not being adequately recorded.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Renee Bissonnette, Esq.
Signature: Renée Bissonnette
Date: 7/27/21

Joseph E. Krakora, Esq.
Public Defender
Office of the Public Defender
Division of Mental Health and Guardianship Advocacy
25 Market Street
P.O. Box 854 Trenton, NJ 08628
By: Shannon Dolan Esq.,
Assistant Deputy Public Defender
Attorney Identification No.: 244042017

CERTIFICATION

I, Shannon Dolan, am of lawful age and do certify and say:

1. I am an Assistant Deputy Public Defender for the New Jersey Office of the Public Defender, Division of Mental Health, Central Region.

2. The Division of Mental Health is authorized to provide legal representation to individuals in a variety of legal matters. N.J.S.A. 2A: 52:27; EE-29,30 &31. In this capacity, I primarily handled civil commitment hearings at Trenton Psychiatric Hospital on Thursdays during the pandemic.

3. Virtual civil commitment hearings have been unduly burdensome to our clients and did not provide fair hearings.

4. On April 9, 2020, virtual court lasted from 9 a.m. until about 5 p.m. which is unusual for civil commitment calendars at Trenton Psychiatric Hospital and caused some clients to miss hearings because it interrupted their meal schedules.

5. On April 23, 2020, the civil commitment Judge's computer crashed prior to the hearings, resulting in many delays including but not limited to a 7.5-hour long court day.

6. On May 19, 2020, there was a power outage and remote proceedings had to continue by phone causing another prolonged day.

7. On May 21, 2020, and numerous other occasions, I needed to speak to my client separate from a court proceeding. Unfortunately, due to the circumstances, we were unable to have a completely confidential conversation. On most occasions, a cell phone was provided to the client, or we communicated via a cell phone in the room. This jeopardizes not only confidentiality but also lengthens the court proceedings. Sometimes, clients became upset in court and we are unable to reassure them. On many other occasions, clients were muted, and we were unaware of their wish to speak to us.

8. In virtual hearings, it is often hard to hear who is speaking. Witnesses speak over attorneys. We continually receive doctors' reports later than usual. Doctors interject more frequently out of turn, all problems stemming from the lack of formality in remote hearings.

9. On July 30, 2020, there was a severe breakdown in communication and technology. County Counsel had technology issues delaying the proceedings. Case workers from Involuntary Outpatient Commitment programs were told they did not have to appear. The Court noted the issues and stated: "It's 10 minutes to 3, I've never had a calendar go this long."

10. On September 3, 2020, I argued a motion for reconsideration during our regularly scheduled commitment hearings. During the motion, multiple investigators and attorneys from our office attempted to observe. However, some were continually kicked out of the "Teams" meeting. This is an ongoing issue with Teams, it is almost impossible to see who is in the waiting room and who is in the courtroom. This is of particular concern because civil commitment hearings are "in camera" proceedings. Remote hearings violate confidentiality.

11. I have observed Judges often speaking to their spouse and pets in the middle of court proceedings. Doctors are often observed testifying outside or in their cars, rather than in a confidential office. Sometimes, cameras do not work, and hospital witnesses do not appear by video. This makes it difficult for clients and their attorneys to know to whom they are speaking. It violates confidentiality of the proceedings. Judges are not fully assessing credibility when appearances are made by phone only.

12. On September 17, 2020, C.D.'s mother wished to be present for the court hearing but had trouble logging into Teams. I have seen this issue occur many times. In S.O.'s matter, his parents did not have access to a computer or smart phone (due to financial reasons). Prior to virtual hearings, his parents attended most hearing at Trenton Psychiatric Hospital. This not only was unfair to S.O.'s parents but interfered with S.O.'s ability to present his case. His mother was forced to testify via telephone only and had difficulty hearing the proceeding and questions asked of her.

13. Virtual hearings place a burden on clients and clients' families; mainly a financial burden, in that if family members do not have access to a smart phone or computer, they are unable to see their loved ones in court, or fully participate in court.

14. Many transcripts of remote proceedings are incomplete, containing missing text labeled "indiscernible" or just incorrectly interpreting the hearings. For example, statutes cited by myself and others are usually incorrectly transcribed.

15. Some judges do not know how to use technology. I have observed judges have difficulty with their camera, spending an entire calendar with only their nose and forehead in view. Occasionally, the judges would walk away from the computer screen in the middle of a hearing.

16. I observed County Counsel making tea during the proceedings and cause disruption by not muting. Eating and drinking while on screen causes disruptions in the proceedings.

17. In my view, remote hearings severely jeopardize the integrity of civil commitment proceedings. In some instances, clients refuse to come to court knowing they will see a Judge only on a computer screen. For them, court does not feel "real."

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

/s/ Shannon Dolan, Esq.
Signature: Shannon Dolan
Date: 7/28/21

State of New Jersey

Phil Murphy
Governor

Sheila Oliver
Lt. Governor

Office of the Public Defender
Division of Mental Health Advocacy
CARL J. HERMAN, *Director*
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Gibbsboro, New Jersey 08026
(856) 346-8020 Fax: (856) 346-8055

Joseph E. Krakora
Public Defender

I, Amy B. DeNero, upon her oath, certifies as follows:

1. I am an Assistant Deputy Public Defender of the Office of the Public Defender, Division of Mental Health Advocacy - Southern Region.

2. In my capacity, I represent civil committees at their civil commitment hearings at various inpatient psychiatric hospitals in Southern New Jersey as well as at outpatient civil commitment hearings in Atlantic County.

3. I am writing this certification in response to the AOC's July 2021 "Notice to the Bar - Future of Court Operations - Remote and In-Person Proceedings" to request that the AOC direct that all Civil Commitment Hearings proceed in-person rather than remotely.

4. During the Covid-19 pandemic, I have represented patients at various hospitals in South Jersey at their civil commitment hearings which have all proceeded remotely via Microsoft Teams.

5. During this timeframe, I have encountered multiple issues with the remote hearing format that have negatively affected my clients' ability to receive adequate and fair hearings.

6. A significant issue is the ongoing technical problems that

occur during remote hearings. Over the last 16 months, the judges, county counsel, the hospital staff/witnesses and myself have all experienced technical difficulties including witnesses, counsel or the judge inexplicably dropping from a Teams video and the audio or the video freezing or cutting in and out. I have also frequently witnessed the camera being held too close to a doctor's face or the video panning around a room only periodically showing the witness as well as doctors appearing to have rolled out of bed for court.

7. These frequent technical issues have unnecessarily prolonged the hearings, created distractions and caused parties to have to repeat testimony, attorneys to have to repeat direct/cross examination and arguments and judges to have to repeat rulings. This disrupts the natural flow of a hearing and, importantly, potentially hinders the Court's ability to properly assess the credibility and content of the testimony.

8. Another issue I have encountered at one of our hospitals is counsel only appearing via telephone rather than video via Microsoft Teams. This has been confusing to some of our mentally ill clients as they do not understand who county counsel is or what their role is at their hearings.

9. It has also been especially difficult to conduct remote hearings where the client requires an interpreter. These hearings are extremely complicated and chaotic compared to in-person proceedings as the interpreter is on video and not directly next to the client in person. During such hearings, I have experienced

the Court frequently reminding witnesses and counsel to slow down when speaking or allow the interpreter to actually interpret what is being said. This significantly prolongs hearings and, again, negatively affects the flow of the hearing allowing the potential for an ineffective hearing.

10. Another issue with remote hearings is reduced access to our clients during a proceeding. During an in-person hearing, our clients are seated next to us and can communicate with us during the hearing with minimal interruption to the proceedings. In the case of a remote hearing, we must stop the proceedings and telephone our clients to speak privately. This again disrupts the flow of the hearings.

11. Another significant issue is our clients' ability to adequately participate in remote hearings. During the pandemic, I have had multiple clients who, as a result of symptoms of their mental illness or other physical limitations, were unable or unwilling to come to the computer for hearings. Such clients had difficulty understanding why someone is calling them or requesting that they appear in the front of a laptop to talk about or participate in their court hearings.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/S/ Amy B. DeNero
Amy B. DeNero, Esq.
Assistant Deputy Public Defender

Dated: July 28, 2021

State of New Jersey
Office of the Public Defender
Division of Mental Health Advocacy
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LORRAINE HUNTER-HOILIEN, *Deputy*
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Phil Murphy
Governor

Sheila Oliver
Lt. Governor

Joseph E. Krakora
Public Defender

I, Purificacion Flores, Esq., of full age, certifies as follows:

1. I am an attorney licensed to practice law in the State of New Jersey and work as an Assistant Deputy Public Defender for the New Jersey Office of the Public Defender. I am assigned to the Southern Regional Office of the Division of Mental Health Advocacy.

2. Pursuant to N.J.S.A. 52:27EE-29 to -31, I represent indigent persons who are diagnosed with a mental illness at their civil commitment hearings. I also represent them in matters related to their inpatient hospital confinement and in matters related to their programs in the community as it impacts their liberty interests. I have been representing clients at civil commitment hearings since October 2001.

3. I am the primary attorney assigned to handle inpatient civil commitment hearings at the Virtua Willingboro Hospital Behavioral Health Units. I have been in this role since December

2017. On or about March 16, 2020, all in person civil commitment hearings were suspended due to the Covid-19 pandemic and the government's stay at home order.

4. I am submitting this certification in response to the AOC's July 2021 "Notice to the Bar - Future of Court Operations - Remote and In-Person Proceedings" to respectfully request the AOC direct all Civil Commitment Hearings proceed in-person instead of remotely.

5. Remote civil commitment hearings were initiated on or about April 2020, to preserve the due process rights or our clients despite the challenges presented by the health emergency brought on by the Covid-19 pandemic. For sixteen months, civil commitment hearings proceed remotely via Microsoft Teams

6. Technical difficulties negatively impacted proceedings because audio or video functions would stop or not function properly. Clients could not see nor hear the judge and vice versa. Internet access and connectivity relied heavily on the adequacy of each participant's computer or IT department.

7. During the Covid-19 pandemic, participants have lost power requiring an alternate method to re-establish connectivity, thus disrupting and delaying court proceedings. At other times, the video output would freeze requiring a delay, while the participant logged off then back on to the proceedings. At times, the court clerk had to stop the hearings because a recorder malfunctioned, thus losing testimony which would need to be

recreated. Audio feedback was a common problem requiring interruptions and repetition from either the Judge, expert witness, or counsel. At times, audio quality was so poor our clients had difficulty hearing the Judge render his ruling.

8. Remote participation erodes effective representation of my clients because I am unable to privately speak directly to them during the hearing. Provision of a mobile device allowing for private conversations during the hearing was cumbersome and confusing for our clients. During in-person hearings, I am seated next to my client which allows for communication with minimum disruptions. Remote hearings are especially difficult for non-English speaking clients. Interpreters would need to interrupt or request speakers to slow down in order for them to repeat what was said about them. Remote hearings negatively impact our clients' ability to understand or fully grasp the proceedings and it erodes our ability of adequate representation.

9. Throughout the pandemic, the hospital staff have diligently accommodated remote hearings as required, but our clients are at the mercy of their resources which may be lacking in some regards. The Judge often requests the expert witness move the computer so that our client is visible on the screen. During the remote hearings, the expert witness was using his personal computer because the hospital computer was not working. Also, if our client was hard of hearing, their matter would need to be adjourned until appropriate methods were put in place to allow

them to adequately participate in their hearing. I have recently been able to conduct in-person interviews of clients confined to Virtua Willingboro and noticed a marked improvement in their understanding of the proceedings.

10. These issues brought to light from remote hearings have unnecessarily prolonged the hearings or contributed to the continued misperception that our clients should not be afforded full due process protections because they are diagnosed with a mental illness. Continuation of remote hearings further stigmatizes our clients as secondary citizens not worthy of the full panoply of judicial review in favor of administrative ease. Remote civil commitment hearings will result in legitimizing the derogation of our clients' right to liberty.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date: July 29, 2021

Respectfully Submitted,

/s/ Purificacion Flores, Esq.
Purificacion Flores, Esq.
Assistant Deputy Public Defender
NJ ATTY ID#: 015911997

PHIL MURPHY
Governor

State of New Jersey
Office of the Public Defender
Division of Mental Health Advocacy
CARL J. HERMAN, *Director*
LORRAINE H. HOILIEN, *Managing Attorney*
20 Clementon Road, 3rd Floor
Gibbsboro, New Jersey 08026
856-346-8020

JOSEPH E. KRAKORA
Public Defender

I, Jeanne Stahl, being of full age, do hereby certify as follows:

1. I am an Assistant Deputy Public Defender for the New Jersey Office of the Public Defender. I am assigned to the Southern Regional Office of Mental Health Advocacy.
2. I am the primary attorney assigned to handle inpatient civil commitment hearings at Hampton Behavioral Health Center. I have been in this role since May 2021. Prior to May, starting in November 2020, I was assigned as the second attorney at the same hospital.
3. We have been using remote proceedings at Hampton Behavioral Health Center from November 2020 to present.
4. There are periodic technical issues on all sides. All parties at times speak while muted.
5. Recently, in July, due to technical issues, the audio recording was not working during part of a hearing, and an attempt had to be made by the parties to reconstruct what they had said for the record.

6. Throughout the past nine months, many of the parties have experienced internet difficulties, such as slow and unstable connections, which delayed the hearings.
7. Throughout the past nine months many clients have had difficulty hearing and understanding the proceedings. Some of the older clients are hard of hearing. I have had clients stand up to leave thinking the proceedings are over, and others stay seated not understanding the hearing is complete.
8. The hearings periodically start before the client has arrived. It is not always evident to some of the parties when the client is entering the room to attend the hearing.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ *Jeanne E. Stahl*
Jeanne E. Stahl, Esq.
Assistant Deputy Public Defender

Dated: August 2, 2021

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
Office of the Public Defender
Division of Mental Health Advocacy
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(856) 346-8020 Fax: (856) 346-8055

JOSEPH E. KRAKORA
Public Defender

Certification of Brian Patrick Hughes, Esq.
In Support of Returning to In Person Hearings for Civil Commitments

I, Brian Patrick Hughes, am of lawful age and do certify and say:

1. I am an Assistant Deputy Public Defender for The Division of Mental Health, Southern Region.

2. Pursuant to N.J.S.A. 52:27EE-29 - 31, I represent clients on all civil commitment related statuses in hospitals and programs located in the counties of Camden, Gloucester, Burlington, Cumberland, Salem, and Atlantic, and Cape May.

3. I am submitting this certification as a respectful request that the AOC reconsider the decision to continue civil commitment hearings remotely, as outlined in the Notice to the Bar: "Future of Court Operations - Remote and In-Person Proceedings."

4. For the last fifteen months I have been representing clients at remote hearings via Teams and Zoom. It is my belief this is to the detriment of my client's rights, as well as to the integrity of the commitment process.

5. At numerous involuntary civil commitment hearings, I felt my ability to adequately represent my client was compromised due to the hearing being remote. Of import, many witnesses that were presented for testimony did not have access to a device which would allow them to appear by video, and thus testimony was taken over the phone. I believe many of these witnesses' testimony would have been found to be more credible had the judge had the opportunity to see them testify in person.

In addition, many clients were said to waive their appearance by hospital staff absent independent corroboration and only to later claim that they had no such wishes.

6. I also believe the integrity of inpatient and outpatient civil commitment hearings is undermined by the nature of remote hearings. Participants tend to be doing other things or are distracted or are distracting.

7. The nature of remote hearings makes it difficult to ensure that they are held *in camera*. I have many times heard participants other than myself speaking to unknown persons during the proceedings. Likely, those unknown persons could perceive the hearing. Without question my client's privacy rights were violated.

8. In particular, 'intensive outpatient commitment' hearings have deteriorated vis-à-vis due process. For instance, in Gloucester County my clients, prior to the pandemic, used to appear in person, and now they appear by telephone. While other counties have my clients appear *via FaceTime;* still, even that has the bundle of problems set forth above.

9. Regularly, we deal with technical issues like frozen screens and delays and poor audio quality. Not only does that affect that trial level due process but even more than that, transcripts come back as useless with 'indiscernible' after 'indiscernible'.

10. Just two weeks ago, I had a client at Buttonwood hospital for an initial hearing. That client is diagnosed with 'bipolar disorder' also known as 'manic depression'. The client testified and I would have certainly advised him by whispering in his ear: not to do so. But I had no way of stopping the proceedings and consulting with him. The client insisted on testifying after the Judge invited him to do so. While his testimony as it would read in a transcript was not necessarily harmful or helpful to him or to the state, I believe it undermined his case because what for someone else in another type of proceeding would've come across as a person who was vigorously standing up for themselves and neophyte to the courtroom, came across as behaviorally supportive of a 'bipolar one' diagnosis, simply in the rapidity of my client's speech.

11. First my client's right to an attorney in the hearing was undermined. Second, it's very possible that in a live setting it would've come across much different where the judge would've been able to: through physical observation and from experiential expertise in judging mental health cases make the distinction between someone who is elevated or manic and someone who is simply sticking up for themselves in a stressful situation. There's no doubt in my mind that on that day the virtual setting was a disservice to him.

I swear that the foregoing statements by me are true and I am aware that if any are willfully false, I am subject to punishment.

BRIAN PATRICK HUGHES, ESQUIRE
Assistant Deputy Public Defender
NJ Bar 00946-2002

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

JOSEPH E. KRAKORA
Public Defender

State of New Jersey
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August 1, 2021

I, Patrick Hurst, Esquire, being of age, do hereby certify as follows:

1. I am an attorney and an Assistant Deputy Public Defender 2, employed in the Office of the Public Defender, Division of Mental Health, assigned to the Southern Region. I have been employed with the OPD in this capacity since 2001.

2. I am the primary attorney assigned to handle admission to, treatment in and discharge from the state psychiatric hospital, Ancora Psychiatric Hospital (APH).

3. I am also assigned to represent Krol clients, inside and out of APH.

4. All the clients I represent and all of the hearings I represent clients at, are court hearings directly dealing with the constitutional right to liberty or freedom, which is being denied by the State. They deal with the fundamental right for freedom and the very narrow, statutory state criteria which must be strictly adhered to in order for the State to continue to deny my clients that cherished right.

4. Our office began remote proceedings on or around April 1, 2020.

5. I was not present when the platforms for doing remote hearings were implemented, due to military service.

6. I re-joined the office in July 2020 and began doing remote court hearings for our civilly committed clients at APH and elsewhere.

7. APH has done its best to address all the complained about technical issues which existed at the outset of doing these types of hearings on this different platform.

8. APH civil commitment hearings involve many doctors, many social workers on CEPP calendar days and many clients residing in one of 5 different buildings on their campus.

9. There were and still are technical issues and at times, those issues slow down the hearing process. However, the doctors, even after a year plus using this platform, do not seem to take the court proceeding seriously. Doctors and adversarial counsel no longer wear

any sort of suit or courtroom respectful attire. Decorum is sorely lacking. I have had doctors, who are about to testify about their recommendations before the court, providing testimony from their car, in their offices where other people are located and with background screens which are lovely but not found in any courtroom.

10. There have been times the doctors have clearly been communicating with someone else, either in person or on their telephone and I have had to ask during their testimony, with whom are you speaking to. Along the same lines, there have many times in which the doctor is reviewing documents or looking at a computer screen during their testimony, which we know is not supposed to occur and against the rules of evidence during testimony.

11. There have been internet issues and frankly finding the clients to come to the room where the computer is set up at times is a challenge.

12. Hearing and recording the proceedings have been an issue as well. There are a lot of {sic} in the transcripts.

13. When interpreters are involved, it almost becomes unsustainable. In person, these issues become moot.

14. Please note, all our agency's clients have Axis I diagnoses from the DSM V and most have some sort of paranoia as a significant symptom of their illness. That paranoia is compounded when they must interview via telephone or by computer platform and others must be present in the room with them while they try to provide vitally important or private information to me, their counsel, in hopes I can assist them at their next court civil commitment hearing.

15. During the court proceedings, again our clients see a computer screen and I am sure cannot, at times, differentiate who is who, state counsel, judge, doctor, etc. It stands to reason that our clients should know who is present, right? But when they never have met their doctor in person on the unit because of the way hospitals conduct their team meetings, it becomes problematic. Most of my clients erroneously believe their treating doctors, the ones that are mandated to testify, are the medical doctors or psychologists that see them on the unit and that is simply not the case.

16. Finally, I wholeheartedly believe the compelling nature of what trials stand for is lost when using these types of platforms for trial. My clients face a loss and continued loss of their fundamental right freedom at each and every hearing while they are committed in a psychiatric hospital. Due process can hardly be met when everyone except me in the courtroom, treats the proceeding as a cavalier chore which must be accomplished. And trying to make an impassioned argument, full of zeal and citing statutory and case law, seems to be lost when made through an instrument versus in person and live.

17. I have been a prosecutor for the military trying felony cases, including murder, and I have done thousands of civil commitment cases. The courtroom is sacred and should not

be supplanted when such fundamental rights are at stake. The rules of evidence are lax, objections are hard to get through, people speaking over people, interpreters not getting it at all, etc.

18. Lastly, your ability as a good attorney to read the room, or the jury or the witness is completely lost by virtual hearings. We all receive sensory information through five senses; sight, smell, sound, taste and touch. The most important to us as trial lawyers during trials is that of sight and sound. A measure of those is lost when doing virtual hearings.

I certify the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 2 AUG 2021

PJH

Patrick J. Hurst, Esquire
Assistant Deputy Public Defender 2
ID Number 0005801995

State of New Jersey
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PHIL MURPHY
Governor
SHEILA OLIVER
Lt. Governor

JOSEPH E. KRAKORA
Public Defender

I, Emily Preziosa, being of full age, do hereby certify as follows:

1. I am an Assistant Deputy Public Defender for the New Jersey Office of the Public Defender. I am assigned to the Central Regional Office of Mental Health Advocacy.

2. I am the primary attorney assigned to handle inpatient civil commitment hearings at the Monmouth Medical Center Southern Campus/Barnabas Behavioral Health and outpatient civil commitment hearings for Ocean IOC. I have been in this role since September 2019.

3. We began remote proceedings on April 1, 2020, due to the COVID-19 pandemic and the government's stay at home order.

4. There have been extensive technical issues from all sides. The hospital runs into problems with their camera equipment, sometimes taking over fifteen minutes to restart and reinstall the software, particularly occurring on April 23, 2020, May 7,

2020, May 28, 2020, June 18, 2020, and September 3, 2020. Any time there were technological issues at the hospital, proceedings were further delayed as they had to wait for specific staff to come and address the issues and make attempts to resolve same.

5. About once a month since our remote proceedings began, County Counsel's wife would return home and would be visible in the background, disrupting the hearings and infringing on clients' rights to confidential hearings. On April 30, 2020, County Counsel's wife utilized an ice maker which caused further disruption to the hearings.

6. Throughout the last year and a half, all parties have experienced internet troubles, ranging from slow, unstable connections to complete power outages which further delayed hearings. Specifically, April 30, 2020, Judge Kerr lost power at her residence and was required to utilize her smartphone in order to move forward. I have lost power on multiple occasions, including but not limited to June 11, 2020, October 14, 2020, and December 10, 2020, both in the office and at my residence. On these occasions I had to utilize my smartphone to move forward with my clients' hearings. At no time during the pandemic has my hospital lost power or internet.

7. There have been frequent problems with the recording device, and on April 9, 2020, when the device would not record, we utilized recording the hearings through Teams to avoid an unnecessary adjournment. When we request there be a

playback, the audio is difficult to hear. There has not yet been a need to request a transcript, but the court has expressed concerns on multiplate occasions that if one was needed, it would likely be indiscernible and useless, rendering any appeal or motion for reconsideration to be problematic.

8. On countless occasions screens froze, testimony was missed, and therefore witnesses had to repeat sections of testimony and attorneys had to repeat arguments. As recently as May 13, 2021, Judge Kerr's screen turned into a pixelated mess with no ability to fix same, despite logging off and logging back on. It took over twenty minutes for it to return to normal.

9. As recently as July 22, 2021, clients are struggling to comprehend the remote proceeding procedure. My client, D.H. was unable to understand County Counsel said throughout the hearing. Many who have hearing problems had difficulty following along, despite the computer being moved accordingly and volume increased. On May 6, 2021, client C.H. required an assisted listening device during her hearing, and despite all efforts made, the staff at the hospital still had to repeat what was said because the audio on the computer was not clear for the device to pick up accurately.

10. On May 7, 2020, when the AOC required remote proceedings involving ASL interpreters to utilize Scopia, the hearing was stalled and then adjourned for my client, M.R., who required ASL interpreters, because County Counsel was not able to comprehend the separate link for the hearing, despite the Ocean County Superior Court

IT department attempting to assist virtually. M.R. had to wait until May 11, 2020, to have her initial hearing.

11. County Counsel continues to have issues navigating the remote proceedings, struggling to mute and un-mute himself, losing his video, most recently on May 26, 2021, where his technical issues caused a delay in the proceedings.

12. Overall, for my Ocean IOC hearings specifically, the amount of client presence has significantly decreased since conducting remote proceedings. When clients do request to appear for their hearings, they are troubled with the technology, many do not have access to video capabilities and appear by phone. The Judge is unable to make credibility determinations, and the clients have difficulty understanding the procedure despite being advised of same prior to the hearing.

13. As recently as July 21, 2021, a client participating by phone for his IOC hearing struggled to understand testimony due to residual paranoia from his mental illness. M.I. required frequent assurances regarding who each individual testifying was but remained paranoid that even the Judge was not being truthful.

14. In my capacity, I have also covered for inpatient civil commitment hearings at Jersey Shore Medical Center on occasion, the most recent being June 2, 2021. During that remote proceeding, the Judge failed to wear his robe, and was in a rush to speed along the hearings that morning because he was away for golf outing. This behavior gave the appearance that the Judge was not attentive during the hearings,

which severely impacts the requirement that civil committees be entitled to a fair hearing.

15. Throughout the pandemic, the hospital staff has gone above and beyond accommodating remote hearings and providing the technology required for those hearings to continue, but they are dealing with increased fatigue having to continue to provide additional staff to assist with remote hearings, both with the technological aspect and the transportation aspect to accommodate hearings on multiple units.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/S/ Emily C. Preziosa
Emily C. Preziosa, Esq.
Assistant Deputy Public Defender

Dated: July 27, 2021

Doe v. State

Supreme Court of Florida

May 11, 2017, Decided

No. SC16-1852

Reporter
217 So. 3d 1020 *; 2017 Fla. LEXIS 1057 **; 42 Fla. L. Weekly S 553; 2017 WL 1954981

JOHN DOE, Petitioners, vs. STATE OF FLORIDA, Respondent.

Prior History: **[**1]** Application for Review of the Decision of the District Court of Appeal — Certified Great Public Importance. Second District - Case No. 2D16-1328. (Lee County).

Doe v. State, 210 So. 3d 154, 2016 Fla. App. LEXIS 14483 (Fla. Dist. Ct. App. 2d Dist., Sept. 28, 2016)

Case Summary

Overview

HOLDINGS: [1]-The Court held that all individuals subject to Baker Act, *§ 394.467, Fla. Stat.*, involuntary commitment for inpatient placement of persons with mental illness hearings have a right to have a judicial officer physically present at their Baker Act commitment hearing, subject only to their consent to the contrary; [2]-As a result, the Court quashed the decision of the Second District allowing the county court judge in petitioners' cases to preside over their involuntary commitment hearings remotely.

Outcome
Second District's decision quashed.

Counsel: Howard L. "Rex" Dimmig, II, Public Defender, and Robert A. Young, General Counsel, Tenth Judicial Circuit, Bartow, Florida, for Petitioners.

Pamela Jo Bondi, Attorney General, Tallahassee, Florida; and Caroline Johnson Levine, Assistant Attorney General, Tampa, Florida, for Respondent.

Peter P. Sleasman and Kristen Cooley Lentz of Disability Rights Florida, Gainesville, Florida, for Amicus Curiae Disability Rights Florida.

Amy Singer Borman, General Counsel, Fifteenth Judicial Circuit, West Palm Beach, Florida, for Amicus Curiae Honorable Jeffrey J. Colbath, Chief Judge of the Fifteenth Judicial Circuit.

Judges: PARIENTE, J. LABARGA, C.J., and LEWIS, QUINCE, and LAWSON, JJ., concur. CANADY, J., concurs in result with an opinion, in which POLSTON, J., concurs.

Opinion by: PARIENTE

Opinion

[*1022] PARIENTE, J.

At the heart of this case is the right of an individual to have a judicial officer physically present at hearings held to determine whether the individual may be involuntarily committed to a mental health facility or hospital pursuant to *section 394.467, Florida Statutes* (2016) ("the Baker Act"). **[**2]** *Doe v. State, 210 So. 3d 154 (Fla. 2d DCA 2016)*.[1] Although the panel of the Second District Court of Appeal expressed serious concerns over the practice, which a judicial officer instituted via e-mail, providing for the remote appearance of judicial officers at Baker Act hearings, only the dissent explained that this practice violates the basic constitutional principle that "a judge's physical presence is simply a constituent component of his or her ministerial duty to preside over a trial or evidentiary hearing." *Id. at 168* (Lucas, J., dissenting). We agree that the process instituted in the Twentieth Judicial Circuit by a single judicial officer denied Petitioners their right to have a judicial officer physically present at their Baker Act commitment hearings.[2] Accordingly, we quash **[*1023]** the Second District's decision below.[3]

FACTS AND PROCEDURAL BACKGROUND

The case currently before this Court was initiated before the Second District through the filing of fifteen petitions by individuals seeking some form of relief in the court from an ad hoc procedure instituted by an individual county court judge via an e-mail, which stated: "Per Judge Swett he will be doing Baker Acts beginning this Friday via Polycom. Thank You." **[**3]** The procedure, instituted without notice, would allow the county court judge to preside over involuntary

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[1] In its decision, the Second District Court of Appeal certified the following question of great public importance:

> DOES A JUDICIAL OFFICER HAVE AN EXISTING INDISPUTABLE LEGAL DUTY TO PRESIDE OVER *SECTION 394.467* HEARINGS IN PERSON?

Doe, 210 So. 3d at 159. We have jurisdiction. *See art. V, § 3(b)(4), Fla. Const.*

[2] Disability Rights of Florida, Inc. filed an amicus brief on behalf of Petitioners, contending that the use of videoconferencing equipment in Baker Act hearings is not only against longstanding judicial policy but also would be injurious to the condition of many patients. Disability Rights of Florida, Inc. is the designated voice for those with mental illness in Florida and has a longstanding interest in ensuring that the involuntary commitment procedures are fair and protect the rights of individuals with mental illness.

Additionally, the Honorable Jeffery J. Colbath, Chief Judge of the Fifteenth Judicial Circuit, filed an amicus brief on behalf of the State, arguing that the use of videoconferencing equipment was within the discretion of the trial judge and explaining the pilot program for the use of videoconferencing equipment during Baker Act hearings currently being implemented in the Fifteenth Judicial Circuit. Judge Colbath filed his amicus brief, in part, to advise this Court of the significant impact that an affirmative answer to the certified question would have on the administration of not only the Fifteenth Judicial Circuit, but on all circuit courts throughout the state, and to advocate for the adoption of rules of procedure to govern the remote appearance of judicial officers in future proceedings.

[3] Initially, this Court denied Petitioners' Motion to Stay the proceedings below. However, after hearing oral argument, this Court vacated its earlier order and stayed the proceedings.

commitment hearings remotely.[4] Very little factual or procedural background exists because, as the Second District explained:

> At the time the petitions at issue were filed with this court, the petitioners were awaiting their Baker Act hearings. The petitioners and the State, as respondent in these cases, have provided this court with the recent history giving rise to these petitions. The judge and magistrate currently assigned to preside over Baker Act hearings in Lee County had recently announced, via e-mail, that they would no longer be commuting to the receiving facilities to hold the statutorily required hearing in person. Instead, the judicial officers would preside remotely from the courthouse via videoconference equipment while the patients, witnesses, and attorneys would continue to be physically present at the receiving facility. It is this new procedure that the petitioners challenge, asking this court to require the judicial officers to be physically present for the hearings "as required by law."

Id. at 156. (majority) Ultimately, the Second District held:

> In sum, while we question **[**4]** the wisdom of holding these hearings remotely, we conclude that the decision to preside over a Baker Act hearing remotely via videoconference equipment is within the discretion of the court. There is no ministerial, indisputable legal duty clearly established in the law which requires judicial officers presiding over involuntary inpatient placement hearings pursuant to *section 394.467* to be physically present with the patients, witnesses, and attorneys.

Id. at 159.

Judge Wallace wrote a concurring opinion, in which he expressed his belief that the manner in which the trial judge exercised his authority to conduct involuntary placement hearings was unwarranted, and conducting such hearings remotely is inappropriate and ill-advised. *Id.* (Wallace, J., concurring). He also suggested that the appropriate rules committees of The Florida Bar promptly draft and submit rules delineating the types of proceedings that a **[*1024]** judge may conduct remotely by videoconference and those that judges may not. *Id.* (Wallace, J., concurring). Initially, Judge Wallace took issue with the implementation of videoconferencing through the use of e-mail, rather than through an administrative order from the Chief Judge. *Id. at 160-61* (Wallace, J., concurring). **[**5]** Judge Wallace argued that conducting Baker Act hearings remotely was ill-advised for three reasons: (1) potential difficulties, including equipment malfunctions and the inability of counsel to approach the bench for private conversations; (2) the circuit court disregarded the opinion of a subcommittee appointed by this Court in 1997 to conduct a comprehensive study on the administration of the Baker Act and its impact on patients, in which it recommended against conducting such hearings via videoconference; and (3) the circuit court disregarded an attempt by this Court to use a similar procedure for juvenile hearings that ultimately failed. *Id. at 163-67* (Wallace, J., concurring).

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[4] Circuit courts have jurisdiction over Baker Act hearings, however they are permitted by statute to either appoint a magistrate to preside over the hearings, *see § 394.467(6)(a)3., Fla. Stat.* (2016), or "[t]he chief judge of a circuit may authorize a county court judge to order emergency hospitalizations pursuant to part I of chapter 394 in the absence from the county of the circuit judge." *§ 26.012(4), Fla. Stat.* (2016).

Additionally, Judge Lucas wrote a dissenting opinion, arguing both that judicial officers have a ministerial duty to preside over Baker Act hearings in person and that the majority improperly looked to procedural rules as a potential basis for granting mandamus relief. *Id. at 166-67* (Lucas, J., dissenting). As to the first point, Judge Lucas reasoned:

> In gleaning the extent of the judicial duty at issue here, we can, and should, look to the constitutional right of access to courts, precedent that expressly tethers a judge's physical **[**6]** presence to a constitutional right, and the entirety of tradition and history. These bedrock principles, drawn together, fill the dearth of authority that my colleague, Judge Wallace, apprehends. But if there is any silence in the law on this issue, it must surely be ascribed to the fact that a judge or magistrate's personal attendance at trial has been the assumed norm for as long as there have been courts and judges. In my view, a judge's physical presence is simply a constituent component of his or her ministerial duty to preside over a trial or evidentiary hearing.

Id. at 168.

THE BAKER ACT

This case involves proceedings used to involuntarily commit mentally ill individuals under *section 394.467, Florida Statutes*. *Section 394.467*, also known as the Baker Act, governs the involuntary inpatient placement of persons with mental illness.[5] *Subsection (1)* lays out specific criteria the State must prove to order the involuntary inpatient placement of an individual, including that the individual has either refused or is unable to consent to voluntary treatment, that the individual is either incapable of surviving alone or that there is a substantial likelihood that in the near future the individual will inflict serious bodily harm on himself or herself or others, **[**7]** and that all available less-restrictive treatment alternatives that would offer an opportunity for improvement of the individual's condition have been judged inappropriate. *§ 394.467(1)(a)-(b), Fla. Stat.* (2016).

The Baker Act also requires an evidentiary hearing to be conducted for involuntary inpatient placement. *See § 394.467(2)*, *(6)*. Recognizing the need for immediate action, the statute specifies that "[t]he court shall hold the hearing on involuntary inpatient placement within 5 court working days, unless a continuance is granted." *§ 394.467(6)(a)1*. Additionally, **[*1025]** "[w]ithin 1 court working day after the filing of a petition for involuntary inpatient placement, the court shall appoint the public defender to represent the person who is the subject of the petition, unless the person is otherwise represented by counsel." *§ 394.467(4)*. The statute requires, "Except for good cause documented in the court file, the hearing must be held in the county or the facility, as appropriate, where the patient is located, must be as convenient to the patient as is consistent with orderly procedure, and *shall be conducted in physical settings not likely to be injurious to the patient's condition* ." *§ 394.467(6)(a)2*. (emphasis added). Finally, the statute allows for a magistrate, rather than a judge, **[**8]** to preside at the hearing:

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[5] This Court has not currently promulgated procedural rules specifically governing Baker Act proceedings.

> The court may appoint a magistrate to preside at the hearing. One of the professionals who executed the petition for involuntary inpatient placement certificate shall be a witness. The patient and the patient's guardian or representative shall be informed by the court of the right to an independent expert examination. If the patient cannot afford such an examination, the court shall ensure that one is provided, as otherwise provided for by law. The independent expert's report is confidential and not discoverable, unless the expert is to be called as a witness for the patient at the hearing. The testimony in the hearing must be given under oath, and the proceedings must be recorded. The patient may refuse to testify at the hearing.

§ 394.467(6)(a)3.[6]

It is clear that the Legislature recognized that individuals subject to the Baker Act are among the most vulnerable in our society. The Baker Act has built-in safeguards, including the requirement that hearings be conducted at the institution where the patient is placed and in a manner not likely to be injurious to the patient's condition.

The State is correct that *section 394.467* does not specifically require that Baker Act hearings be **[**9]** presided over by a judicial officer who is physically present. However, it is not unsurprising that the statute does not include such a requirement because judicial officers have always presided over evidentiary hearings in person. Additionally, the rights of the patients subject to involuntary commitment hearings are not limited to the protections provided for in the statute. Rather, in light of the serious deprivation of liberty associated with involuntary commitment hearings, important constitutional rights also govern these hearings.

CURRENT STATE OF THE LAW

"[A] deprivation of liberty by commitment to a mental institution cannot be accomplished without due process of law." *Jordan v. State, 597 So. 2d 352, 353 (Fla. 1st DCA 1992)* (citing *O'Connor v. Donaldson, 422 U.S. 563, 580, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975)*; *Shuman v. State, 358 So. 2d 1333 (Fla. 1978)*; *In re Beverly, 342 So. 2d 481 (Fla. 1977)*). "The gravity of the matters considered at a Baker Act hearing requires the trial court to conduct the proceedings in a fair and neutral manner." *Id.* Moreover, "[t]hose whom the state seeks to involuntarily commit to a mental institution are entitled to **[*1026]** the protection of our Constitutions, as are those incarcerated in our correctional institutions." *Shuman, 358 So. 2d at 1335*. "Because involuntary commitment is a substantial deprivation of liberty at which fundamental due process protections must attach, the patient cannot be denied **[**10]** the right to be present, to be represented by counsel, and to be heard." *Ibur v. State, 765 So. 2d 275, 276 (Fla. 1st DCA 2000)*.

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[6] The magistrate's findings are subject to judicial review. *See In re Drummond, 69 So. 3d 1054, 1056-57 (Fla. 2d DCA 2011)*. Again, there are no separate rules regarding the procedure for filing exceptions to a magistrate's Baker Act findings unlike in other contexts under the Florida Rules of Civil Procedure, the Florida Family Law Rules of Procedure, and the Florida Rules of Juvenile Procedure. *See Fla. R. Civ. P. 1.490(i)* (requiring that parties file exceptions to the magistrate's report within ten days after it is served); *Fla. Fam. L. R. P. 12.490(f)* (same); *Fla. R. Juv. P. 8.257(f)* (same).

Individuals subject to Baker Act commitment hearings are entitled to the strict enforcement of their fundamental due process rights. These rights include: the right to an attorney, the right to testify, present evidence, and confront and cross examine witnesses, and the right to be present at the commitment hearing. *See id.* Courts must be especially careful to protect those due process rights when dealing with a vulnerable segment of the population and making a decision that ultimately results in a "massive curtailment of liberty." *Humphrey v. Cady, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)*.

The right to be present at an involuntary commitment hearing is a fundamental due process right. *Mouliom v. Ne. Fla. State Hosp., 128 So. 3d 979, 981 (Fla. 1st DCA 2014)*. While a patient may waive the right to be personally present, a court must certify that the waiver is knowing, intelligent, and voluntary. *Id.* The requirement of physical presence, which is not disputed by any of the parties, would be meaningless if the judicial officer, or the finder of fact and ultimate decision-maker, is not also present in the hearing room.

Convenience of the judicial officer is insufficient to justify the violation of an individual's constitutional rights. Indeed, **[**11]** the Amicus Brief of the Fifteenth Judicial Circuit offers no reason other than expediency for desiring a pilot program allowing for the remote appearance of judicial officers via videoconferencing technology. By contrast, the Amicus, Disability Rights of Florida, Inc., offers compelling argument as to why the remote appearance of judicial officers is harmful to patients and ultimately does not satisfy their right to be physically present and aware of the proceedings at the Baker Act hearing:

> Utilization of videoconferencing may depersonalize the proceedings and may heighten a patient's perception that the proceeding was unfair. In addition, the fact that Baker Act hearings are the only adjudicatory hearings that are required to be done by video conference sends a message to the participants that these proceeding are not worthy of the court's time. A patient's perception of the fairness of these hearing is not just an esoteric concern. It may have an impact on their treatment and conduct. *See Morrissey v. Brewer, 408 U.S. 471, 484, 92 S. Ct. 2593, 2602, 33 L. Ed. 2d 484 (1972)* (noting that "society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to **[**12]** arbitrariness.").

Br. of Amicus Curiae, Disability Rights Florida, Inc. (Dec. 12, 2016) at 14. Indeed, a report from the Florida Supreme Court Commission on Fairness also recommended that such involuntary inpatient placement hearings be conducted in as formal a manner as possible, in an effort to ensure that the patient is aware of the proceeding and its possible consequences, stating:

> [T]he chief judge of each circuit court [should] require involuntary placement hearings held at mental health receiving facilities to be conducted in a room that is set up in the manner of a courtroom. If possible, that room should not be used for any other patient purposes. The presiding officer should wear a robe. United States and Florida flags should be present. **[*1027]** Formal courtroom decorum should be observed. Patients should be dressed in street clothing. Food, drink, and side conversations should be prohibited. The presiding officer, state attorney, public defender, and other participants should introduce themselves prior to each case. Moreover, rules of evidence and procedure should be observed.

Florida Supreme Court Comm'n on Fairness, *Judicial Administration of the Baker Act and Its Effect on Florida's* ***[**13]*** *Elders; Report & Recommendations of the Subcommittee on Case Administration*, 31-32 (1999).

Additionally, longstanding traditions compel the personal attendance of judicial officers at trials and evidentiary hearings over which they preside. There is no explicit rule or constitutional right requiring a judicial officer's physical presence at Baker Act proceedings—likely because judicial officers have always, until the recent advent of technology, been required to be physically present in the courtroom to preside over cases which are assigned to them. Moreover, as this Court explained in *Brown v. State, 538 So. 2d 833 (Fla. 1989)*, "the presence of a judge during trial is a fundamental right." *Id. at 835*. Though this Court has not explicitly stated that judicial presence is required at evidentiary hearings, unless the parties agree otherwise, longstanding tradition and notions of justice compel such a requirement. A judicial officer should be physically present to preside over any matter that could lead to the "massive curtailment of [an individual's] liberty." *Humphrey, 405 U.S at 509*.

As Petitioners note, the remote presence of judicial officers could likely be injurious to the patient's condition. As Disability Rights of Florida, Inc., explains:

> This consideration **[**14]** of the patient's needs in the setting of the hearing is unique to commitment hearings. The "physical setting" of the hearing undoubtedly includes such things as whether the judge is physically present at the hearing or participating by a television screen. The use of videoconferencing carries a great potential for harming the patient's condition. There is substantial evidence that use of videoconferencing will cause patients confusion about the proceeding, discourage participation, cause exacerbation of symptoms, and may have significant ramifications regarding a patient's willingness to accept treatment once committed. All of these outcomes could negatively affect this vulnerable population.

Br. of Amicus Curiae, Disability Rights Florida, Inc. (Dec. 12, 2016) at 11. Although the State and the Amicus, the Honorable Jeffery J. Colbath, cite to the improvement in video technology and practices in other jurisdictions that use video hearings, our concern continues to be the effect of remote videoconferencing—essentially judicial appearance by television—on the patient.

Moreover, it is no solution to the problem to allow a patient to be brought to the courthouse if he or she objects, as **[**15]** the Fifteenth Circuit has proposed in its pilot program. The Legislature has expressed a clear preference in *section 394.467* that hearings be conducted at the patient's facility in a manner that would not likely be injurious to the patient's condition. Moreover, as was mentioned at oral argument, oftentimes when mentally ill patients are transported to the circuit court, they are transported and treated via the same process and procedures used for criminal inmates. Judicial expediency will never justify such treatment of some of our State's most vulnerable citizens.

Turning to the applicable Rule of Judicial Administration, specifically, Florida Rule of Judicial Administration 2.530 **[*1028]** states:

(a) Definition. Communication equipment means a conference telephone or other electronic device that permits all those appearing or participating to hear and speak to each other, provided that all conversation of all parties is audible to all persons present.

(b) Use by All Parties. A county or circuit court judge may, upon the court's own motion or upon the written request of a party, direct that communication equipment be used for a motion hearing, pretrial conference, or a status conference. A judge must give notice to the parties and consider any objections **[**16]** they may have to the use of communication equipment before directing that communication equipment be used. The decision to use communication equipment over the objection of parties will be in the sound discretion of the trial court, except as noted below.

(c) Use Only by Requesting Party. A county or circuit court judge may, upon the written request of a party upon reasonable notice to all other parties, permit a requesting party to participate through communication equipment in a scheduled motion hearing; however, any such request (except in criminal, juvenile, and appellate proceedings) must be granted, absent a showing of good cause to deny the same, where the hearing is set for not longer than 15 minutes.

(d) Testimony.

(1) *Generally.* A county or circuit court judge, general magistrate, special magistrate, or hearing officer may allow testimony to be taken through communication equipment if all parties consent or if permitted by another applicable rule of procedure.

(2) *Procedure*. Any party desiring to present testimony through communication equipment shall, prior to the hearing or trial at which the testimony is to be presented, contact all parties to determine whether each party **[**17]** consents to this form of testimony. The party seeking to present the testimony shall move for permission to present testimony through communication equipment, which motion shall set forth good cause as to why the testimony should be allowed in this form.

(3) *Oath*. Testimony may be taken through communication equipment only if a notary public or other person authorized to administer oaths in the witness's jurisdiction is present with the witness and administers the oath consistent with the laws of the jurisdiction.

(4) *Confrontation Rights*. In juvenile and criminal proceedings the defendant must make an informed waiver of any confrontation rights that may be abridged by the use of communication equipment.

(5) *Video Testimony*. If the testimony to be presented utilizes video conferencing or comparable two-way visual capabilities, the court in its discretion may modify the procedures set forth in this rule to accommodate the technology utilized.

Rule 2.530 was adopted by this Court in 1985. *See* *The Fla. Bar Re: Fla. R. Jud. Admin., 462 So. 2d 444 (Fla. 1985)*. When adopting the rule, this Court stated:

> The rule is intended to formally adopt standard procedures for using communication equipment which we are advised is currently **[**18]** being informally used in many courts

> within the state. Because we saw merit and urgency in the proposal but did not wish to adopt it as an emergency rule without the advice of The Florida Bar and interested individuals, we referred the proposal to the Committee for expeditious consideration. We have since received input from **[*1029]** that Committee, from The Florida Bar Board of Governors, from circuit and county judges, and from other interested individuals. There is general agreement that such a rule should be adopted but some disagreement as to the scope and content of the rule. We have carefully considered the various comments and recommendations submitted to us and concluded that we should adopt the appended rule.

Id. at 445.

The State contends that neither this rule nor any other rule of law that currently exists, governs the remote appearance of judicial officers at all hearings throughout the state, not just Baker Act hearings. In fact, by the State's reasoning, it is within the judicial officer's discretion whether to preside over criminal trials remotely. The State's arguments are without merit.

Rule 2.530(d)(1) speaks directly to the issue at hand because it explicitly "allow[s] testimony to be taken through communication **[**19]** equipment if all parties consent or if permitted by another applicable rule of procedure." Further, Rule 2.530(b) only allows courts to "direct that communication equipment be used for a motion hearing, pretrial conference, or a status conference." The State contends that all that is required by this rule is that the patient and the rest of the participants to the hearing, including the witnesses, are physically present in the same room. However, the opposite is true. When a witness is not in the same room as the person who will ultimately be deciding the outcome of the case, and to whom the testimony is directed, in this case the judge or magistrate, regardless of where the rest of the participants in the hearing or trial are, the witness is testifying through communication equipment. Such testimony is specifically disallowed under the rule, unless all of the parties consent.

It is also clear that, in adopting Rule 2.530, the Court intended to permit the use of communication equipment, over the objection of the parties, only in the three enumerated instances. Specifically, this Court stated: "There is general agreement that such a rule should be adopted but some disagreement as to the scope and content of **[**20]** the rule. We have carefully considered the various comments and recommendations submitted to us and concluded that we should adopt the appended rule." *The Fla. Bar Re: Fla. R. Jud. Admin., 462 So. 2d at 445*. Thus, this Court made clear that it was presented with various options as to how broadly the rule should be written, but ultimately decided to limit the use of communication equipment to only three instances. Additionally, this Court has since not amended the rule to expand these instances. *See In re Amend. to the Fla. R. Jud. Admin., 73 So. 3d 210 (Fla. 2011)*; *Amend. To Family Law R. of P. 12.650 (override of family violence indicator) & Fla. R. Jud. Admin. 2.071 (use of communication equipment), 766 So. 2d 999 (Fla. 2009)*; *In re Amend. to the Fla. R. Jud. Admin. (Two-Year Cycle), 915 So. 2d 157 (Fla. 2005)*; *Amend. to the Fla. R. Jud. Admin., 780 So. 2d 819 (Fla. 2000)*.

THIS COURT'S PREVIOUS EXAMINATION OF THE USE OF REMOTE CONFERENCING IN JUDICIAL HEARINGS

This Court previously considered the efficacy of using videoconferencing technology with another group of vulnerable individuals—juveniles. As noted by Judge Wallace's concurring opinion, in 1999, this Court adopted *Rule of Juvenile Procedure 8.100(a)*, allowing on an interim basis the remote appearance of judges for juvenile detention hearings. *See Amend. to Fla. R. Juv. P. 8.100(a), 753 So. 2d 541 (Fla. 1999)*. The procedure was not created in each circuit on an ad hoc basis. Rather, the rule **[*1030]** was first proposed in 1996, adopted on an interim **[**21]** basis in 1999, and finally repealed in 2001, all by action from this Court, with input from the legal community directly impacted by the rule. *See Amend. to Fla. R. Juv. P. 8.100(a), 796 So. 2d 470, 471 (Fla. 2001)*. When considering the rule, this Court authorized chief judges in various circuits to conduct one-year pilot programs and required that each Chief Judge send a report to the Court detailing the positive and negative impacts of the proposal at the end of the year. *Id. at 472*. After reviewing the results of the pilot program, as well as looking to the comments of several independent sources about the positive and negative effects of the program, this Court ultimately decided to repeal the rule, concluding:

> In sum, "Florida's oft-repeated pledge that 'our children come first' cannot ring hollow in—of all places—our halls of justice." *[Amend. to Fla. R. Juv. p. 8.100(a), 753 So. 2d] at 545*. Not simply allowing, but mandating that children attend detention hearings conducted through an audio-visual device steers us towards a sterile environment of T.V. chamber justice, and away from a system where children are aptly treated as society's most precious resource. It is time that we understand that these youths are individuals and require sufficient **[**22]** resources if we are to expect a brighter tomorrow. We recognize our children may be familiar with computers, television, and related technology; however, such familiarity does not decrease the need for personal interaction and may very well be one of many complex reasons we should require more personal attention to our youth. Personalized attention and plans are necessary to properly address the multiple and complex problems facing today's children. The juveniles that become involved in this process have, at some point, allegedly failed to make the right decision and we must not compound the problem by subjecting them to a system that has lost its humanity and become an emotional wasteland. In our view, solutions to many of the troubling issues in our criminal justice system may be found in proper, early, individualized intervention in a young life and not in the mechanical and robotic processing of numbers. Respect for the individual begets respect while we fear coldness and sterility may breed contempt.

Id. at 475-76 (footnote omitted). It is evident that the special status of juveniles within our society was the driving force behind this Court's ultimate decision not to adopt *Rule 8.100(a)* on a permanent **[**23]** basis.

Moreover, this Court has previously examined the efficacy of the remote appearance of judicial officers in Baker Act proceedings. As Judge Wallace explained in his concurring opinion:

> A subcommittee appointed by the Florida Supreme Court in 1997 conducted a comprehensive study of the administration of the Baker Act and its impact on patients, particularly Florida's elderly population. The subcommittee released its report on December 28, 1999 (the Report).
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> . . . .

> In the Report, the subcommittee addressed the conduct of involuntary placement hearings by video. The subcommittee noted that when involuntary placement hearings are held in receiving facilities—as is the case here—patients frequently do not understand that a formal court hearing is taking place. *Report* at 19. The subcommittee devoted a separate section of the Report to a consideration of the effects of conducting involuntary placement hearings on a population of vulnerable patients by video. *Id.* at 31-32.

[*1031] *Doe, 210 So. 3d at 163-64* (Wallace, J., concurring) (citation omitted). Indeed, as Judge Wallace recognized, the Subcommittee noted the following evidence regarding the negative effects of conducting Baker Act hearings remotely:

> Martha Lenderman pointed out **[**24]** that some individuals' mental health problems include symptoms of paranoia. These persons may react negatively to video hearings. Some individuals with mental illnesses may be too confused to understand a procedure involving a video hearing. Further, the presiding officer may be limited in observing the situation when confined to viewing only what a camera is focused on. Ms. Lenderman warned that video be used with caution, if at all, for involuntary placement hearings.
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> Vince Smith, of the Mental Health Program Office in the Department of Children and Families, was concerned that use of video may increase the number of individuals who decline to participate in their involuntary placement hearings. Winifred Sharp, a Judge on the Fifth District Court of Appeal, observed that it would be very difficult to make a video proceeding look or feel like a formal court hearing, and therefore the chance that a patient might not understand a court proceeding is occurring would continue to present a challenge.

Id. at 164. Much like the present case, the only evidence offered to the Subcommittee in favor of the remote appearance of judicial officers was "that video hearings may be a convenient and less costly **[**25]** alternative for involuntary placement hearings." Florida Supreme Court Comm'n on Fairness, *Judicial Administration of the Baker Act and Its Effect on Florida's Elders; Report & Recommendations of the Subcommittee on Case Administration*, 31 (1999). Ultimately the Subcommittee "strongly recommend[ed] *against* the use of video for involuntary placement hearings." *Id.* at 32.

THIS CASE

In the present case arising out of the Twentieth Judicial Circuit, a single county court judge, in an e-mail—which stated in its entirety "Per Judge Swett he will be doing Baker Acts beginning this Friday via Polycom. Thank You."—declared a new policy that Baker Act hearings would be conducted remotely via videoconferencing equipment. There is no evidence in the record, other than a suggestion for judicial efficiency and cost savings from the Amicus of the Fifteenth Judicial Circuit, as to why such a proceeding is necessary in Lee County. Further, Petitioners in this action have all objected to the use of videoconferencing equipment for Baker Act hearings in their respective cases. Based upon the above analysis, and because Petitioners have objected to the use of such equipment and have not waived their physical presence at their **[**26]** Baker Act proceedings, the judicial officers presiding over their hearings are required to appear in person, in "physical settings not likely to be injurious to the patient's condition." *§ 394.467(6)(a)2., Fla. Stat.*

Moreover, it is troubling that such an important policy decision, fraught with real life consequences for some of our society's most vulnerable citizens, was handed down in a one sentence e-mail without any real explanation or judicial avenue for challenge. Rule 2.530 was adopted in an attempt to stop such ad hoc use of communications equipment throughout the circuit courts. *See* *The Fla. Bar Re: Fla. R. Jud. Admin., 462 So. 2d at 445* ("The rule is intended to formally adopt standard procedures for using communication equipment which we are advised is currently being informally used in many courts within the state."). Should courts wish to implement and utilize new technology, then, at the very least, policies and procedures for such use should be adopted through a formal administrative order, subject to certiorari **[*1032]** review in the appellate courts. *See* *Fla. R. App. P. 9.100(c)* (stating that where no written orders have been rendered, the appellate courts lack jurisdiction to consider petitions for writs of certiorari).

CONCLUSION

In sum, Petitioners, as well as **[**27]** all individuals subject to Baker Act hearings, have a right to have a judicial officer physically present at their Baker Act commitment hearing, subject only to their consent to the contrary. Likewise, a judicial officer's physical presence over such hearings is a constituent component of his or her ministerial duty to preside over a trial or evidentiary hearing. Individuals subject to Baker Act commitment proceedings are individuals who likely have a serious mental illness, and they are among the State's most vulnerable citizens. The language in the Baker Act reflects the Legislature's acknowledgment that these individuals are entitled to heightened consideration regarding the manner in which the hearing will be conducted. *See* *§ 394.467(6)(a), Fla. Stat.* Such heightened consideration rightfully includes the physical presence of judicial officers in the hearing room. Accordingly, the decision of the Second District below in *Doe* is quashed and the proceedings are remanded to the Second District for instructions not inconsistent with this opinion.

It is so ordered.

LABARGA, C.J., and LEWIS, QUINCE, and LAWSON, JJ., concur.

CANADY, J., concurs in result with an opinion, in which POLSTON, J., concurs.

Concur by: CANADY

Concur

CANADY, **[**28]** J., concurring in result.

I agree that the decision of the Second District Court of Appeal should be quashed because the practice at issue here is in violation of the trial court's indisputable legal duty under Florida Rule of Judicial Administration 2.530(d)(1). That rule precludes the taking of testimony through communication equipment without the consent of all the parties in the absence of some other

rule authorization. Here, there was no consent and no other rule authorization for the trial court's conduct.

I therefore would rephrase the certified question as follows:

> Does Florida Rule of Judicial Administration 2.530(d)(1) require that a judge be physically present to preside over involuntary inpatient placement hearings under *section 394.467, Florida Statutes* (2016), unless the parties agree that the judge may participate by way of communication equipment?

And I would answer the rephrased question in the affirmative.

In my view, the issue presented by this case is readily resolved by the text of Rule 2.530(d)(1).

POLSTON, J., concurs.

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