

# DETENTION ADVOCACY

Eric J. Zogry  
Juvenile Defender  
Office of the Juvenile Defender  
123 West Main Street  
Suite 410  
Durham, NC 27701  
(919) 560-5931  
[Eric.J.Zogry@nccourts.org](mailto:Eric.J.Zogry@nccourts.org)  
[www.ncids.org](http://www.ncids.org)

## I. Introduction

Detention advocacy is one of the most important skills to possess to effectively represent juveniles alleged to be delinquent. Because juveniles, unlike their adult counterparts in criminal court, are not guaranteed bail, secure custody is a unique area in which attorneys must be trained. The statutory language can be confusing, and in some cases, contradictory, and many times it is the juvenile's defense counsel who must advocate the law in a manner to protect their client's rights. There are four instances in which a juvenile may be confined in a detention center. Under an order for *secure custody*, a juvenile may be held in detention pending a hearing or other event in three stages – pre-adjudication, post-adjudication/pre-disposition, and post-disposition. A juvenile may also be held in detention as a consequence of disposition, called *intermittent confinement*.<sup>1</sup>

## II. Secure Custody

The ability to post bail is one of the federal and state constitutional rights not afforded juveniles (see *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428 (1967), see also N.C. G.S. 7B-2405 (6)). North Carolina statutory law controls the conditions under which a juvenile may be held in secure custody. There are three procedural stages at which a juvenile may be held pending a hearing or other court action. A juvenile may be held in detention *pre-adjudication*, pending a hearing on the merits. After an adjudication hearing, a juvenile may be held in detention pending the dispositional hearing, or *pre-disposition*. After the court enters disposition, a juvenile may be held *post-disposition* pending a placement becoming available.

### A. Pre-Adjudication

#### 1. How a Juvenile is Detained

A juvenile may be held in secure custody pending any hearing on the merits, including a probable cause hearing, transfer hearing, or adjudicatory hearing. Juveniles are usually detained via a valid secure custody order issued by the court, but there are three circumstances in which a juvenile may be detained without a court order. A juvenile may be detained by a law enforcement officer if grounds exist for arresting a juvenile under the same circumstances that grounds would exist for arresting an adult. A juvenile may also be detained if there is a reasonable belief that the juvenile is an undisciplined juvenile. Finally, a juvenile may be detained if grounds exist that the juvenile has absconded from a youth development center or detention center. N.C.G.S. 7B-1900. Once the juvenile has been placed in detention without a court order, the person placing the juvenile in custody must notify the parent/guardian and advise them of their right to be present at the secure custody hearing. The juvenile must be released if the person who placed the juvenile in custody believes that the juvenile no longer needs to be detained. The detaining authority then must request that a petition be drawn against the juvenile. If the court counselor approves the petition, the judge or delegated authority (chief court counselor or staff) shall be contacted to determine the need for continued custody. If a petition is not filed, the juvenile must be released within 12 hours (except on weekends and holidays, which can be extended to 24 hours). N.C.G.S. 7B-1901.

---

<sup>1</sup> Also, an undisciplined juvenile may be detained under certain situations (such as running away from home or being found in violation of a court order), and a juvenile may be detained as a consequence for being found in direct contempt of court.

If a request is made for secure custody once a petition is filed, the court **shall first** consider release to the parent/guardian. The order for secure custody shall issue only if both of the following requirements are made:

- there is a **reasonable, factual** basis to believe the matters alleged in the petition are true, **and** one of the following circumstances exist:
  - the juvenile is charged with a felony and has demonstrated that the juvenile is a danger to property or persons;
  - the juvenile has demonstrated that the juvenile is a danger to persons and is charged with either (i) a misdemeanor at least one element of which is assault on a person or (ii) a misdemeanor in which the juvenile used, threatened to use, or displayed a firearm or other deadly weapon;
  - the juvenile has demonstrated that the juvenile is a danger to persons and is charged with a violation of G.S. 20-138.1 or G.S. 20-138.3;
  - the juvenile has willfully failed to appear on a pending delinquency charge or on charges of violation of probation or post-release supervision, providing the juvenile was properly notified;
  - a delinquency charge is pending against the juvenile, and there is reasonable cause to believe the juvenile will not appear in court;
  - the juvenile is an absconder from (i) any residential facility operated by the Department or any detention facility in this State or (ii) any comparable facility in another state;
  - there is reasonable cause to believe the juvenile should be detained for the juvenile's own protection because the juvenile has recently suffered or attempted self-inflicted physical injury. This detention can be for no more than 24 hours, the juvenile must have been refused admission from an appropriate hospital, and must receive continuous supervision while in custody;
  - the juvenile is alleged to be undisciplined by due to being a runaway and is inappropriate for or refuses nonsecure custody. The court must find that the juvenile needs secure custody for up to 24 hours, excluding weekends and holidays, or where circumstances require, for no more than 72 hours to evaluate the juvenile's need for medical or psychiatric treatment or to facilitate reunion with the juvenile's parent or guardian;
  - the juvenile is alleged to be undisciplined and has willfully failed to appear in court after proper notice; the juvenile shall be brought to court as soon as possible and in no event should be held more than 24 hours, excluding weekends and holidays or where circumstances require for no more than 72 hours.

## 2. Court Hearings to Determine the Need for Continued Custody

Once a juvenile has been detained and not released, a hearing must be held within **five** calendar days to determine whether or not the juvenile should be released. This hearing cannot be continued or waived. N.C.G.S. 7B-1906(a). Generally, it is at this stage of the proceedings that the attorney appointed to the juvenile first meets the juvenile and begins to get details of

the allegations against the juvenile. At this first meeting with the juvenile, the attorney should try to ascertain the juvenile's home situation, and explain under what conditions the court may be willing to release the juvenile. The juvenile may want to talk about the allegations, and the attorney may need to focus the juvenile on securing the juvenile's release. The attorney also usually meets the parent or guardian at this stage. This meeting can be crucial to the client's release because, in practice, the court will not release a juvenile to their parent/guardian's custody unless the parent or guardian has the ability to supervise the juvenile and also *is willing to supervise the juvenile at home*. The attorney should assess the possibility of the juvenile returning home, inform the parent or guardian about the status of the case, and if need be try to convince the parent or guardian to accept the juvenile back home. Usually, the parent or guardian is unfamiliar with the juvenile system, and may want the juvenile detained for short period of time to "learn a lesson" or "think about what the juvenile has done." The attorney should explain the likelihood of future release if the parent or guardian presents as resistant at the initial hearing, or ask the parent or guardian to consider under what conditions (curfew, house arrest) the parent or guardian would accept the child back in the home. At the five-day hearing, the attorney should (1) review whether or not the court has a legal basis to keep the juvenile in detention and (2) present to the court alternatives to detention. If the attorney believes that the court does not have a legal basis to hold the juvenile, the attorney should challenge the court's decision. Some examples of challenges the attorney may consider:

- In the section referring to felony allegations, does "has demonstrated" include the instant charge?
- Do all felonies inherently pose a "danger to persons or property" (i.e., possession of cocaine)?
- If you are representing a juvenile charged with 20-138.1, make a motion to dismiss as there is no specific juvenile disposition for the crime.
- Note that the **prosecutor**, not the court counselor (who sometimes makes the argument for the State), has the burden of proving that no less intrusive restraint is necessary to secure the juvenile. N.C.G.S. 7B-1906(d).
- Also note that the court is not bound by the rules of evidence (N.C.G.S. 7B-1906(d)), so the attorney for the juvenile, as well as the State, can present evidence which would not be allowed in an adjudication hearing, but may help secure the juvenile's release.
- Are the facts, as stated on the petition, without any other evidence presented, sufficient "evidence relied upon" to continue a juvenile in secure custody? N.C.G.S. 7B-1906(a).
- The attorney should also be prepared to offer to the court alternatives to the juvenile's detention. Note the appropriate restrictions the court may impose on a juvenile under N.C.G.S. 7B-1906(f). The court may impose appropriate restrictions on the liberty of a juvenile who is released from secure custody, including: (1) Release on the written promise of the juvenile's parent, guardian, or custodian to produce the juvenile in court for subsequent proceedings; (2) Release into the care of a responsible person or organization; (3) Release conditioned on restrictions on activities, associations, residence, or travel if reasonably related to securing the juvenile's presence in court; or (4) Any other conditions reasonably related to securing the juvenile's presence in court. Some jurisdictions employ a program called "alternatives to detention", or "ATD," which involves a court counselor keeping daily contact with the juvenile during his or her release. If your jurisdiction doesn't have this system, consider suggesting to the

court that your client will call or otherwise contact the intake counselor at specified times during the juvenile's release. Make sure you know if your jurisdiction uses electric house arrest, or whether or not a temporary shelter is available. If appropriate, consider recommending to the court that your client stay with other relatives pending the next court hearing, especially if your client is charged with an offense where someone in the household is a victim. Make sure to offer to the court house arrest in exchange for release. House arrest usually requires that the juvenile remain at home, in the house at all times unless at school, work, or accompanied by a parent or other responsible adult. If the juvenile has been suspended from school, make sure you communicate to the court what alternatives are available. Be prepared to argue against confinement as an "educational placement" if no alternative educational options exist.

Another strategy is to present your client's positive history to the court. If your client has little or no prior juvenile court history, focus the court on that information. If your client has a prior court history, but has never missed a court date without reason, bring these facts to the court. Make sure to also emphasize strong family support – the court appreciates a good support system that will ensure your client's presence in court. If your client has other support in the community, such as school assistance, mental health or social service involvement, the court may feel more comfortable releasing the juvenile into a system of care.

If the court determines that custody should continue, the court may make those findings in writing supported by findings of fact, which shall include the evidence relied upon in making the decision, and the purposes which continued custody is to achieve. N.C.G.S. 7B-1906(g). Hearings to determine the need for continued custody should be held at intervals of no more than **ten** calendar days. N.C.G.S. 7B-1906(b). These hearings should not be waived, unless agreed to by the juvenile, and with an agreement from the state to receive something in return, such as moving up a court date, promising an incentive in a plea bargain, etc.

### 3. Secure Custody Pending Probation or Post-Release Violation Hearings

The Juvenile Code is very specific as to what conditions a juvenile may be held pending a probation or post-release supervision violation hearing. Under N.C.G.S. 7B-1903(d), a juvenile may be held pending these hearings but "only if the juvenile is alleged to have committed acts that damage property or injure persons." This is a critical part of secure custody law that is routinely neglected in secure custody hearings. Many times, a juvenile who is on probation is alleged to have violated probation for leaving home without permission, or for running away from their placement. In other instances, the juvenile may be alleged to have missed days from school. Often, the petition for an alleged violation is filed and the juvenile is placed in secure custody. But if the juvenile is not alleged to have either 1) injured persons or 2) damaged property, the juvenile must be released. The court may not hold a juvenile under N.C.G.S. 7B-1903(b) (4) (cause to believe that the juvenile will not appear in court) because it only applies to juveniles who have a delinquency charge pending against them, not to juveniles who have already been adjudicated.

## B. Post-Adjudication/Pre-Disposition

Under N.C.G.S. 7B-1903(c), the court may order the juvenile placed in secure custody pending the dispositional hearing. In juvenile court, after adjudication, the court may continue disposition (see N.C.G.S. 7B-2406 generally). Frequently, the court does not proceed directly to disposition after adjudication. There may be many reasons for not proceeding, including awaiting an evaluation of the child, granting time for evidence that needs to be gathered and presented, etc. The most common reason for continuing disposition is if a juvenile and parent/guardian have not met with the intake court counselor prior to adjudication. In some instances, the court orders the juvenile to be placed (or remain) in detention pending the dispositional hearing.

The Code is silent on reasons the court must show in order to place a juvenile in detention pending disposition, only that the court must make written findings of fact which “shall include the evidence relied upon in reaching the decision and the purposes which continued custody is to achieve” N.C.G.S. 7B-1906(g). More distressing is that some courts do not afford juveniles the right to have their secure custody reviewed every ten days during this period of confinement per N.C.G.S. 7B-1906(b).<sup>2</sup> Because the court has this sweeping authority, seeming without the opportunity for review, juvenile defense counsel rate this scenario as among the most contentious in juvenile court.

The arguments as to whether N.C.G.S. 7B-1906(b) applies to N.C.G.S. 7B-1903(c) are fairly straightforward. The State usually argues that if one section was meant to apply to the other, the sections would be contained within the same statute. Defense counsel, however, should counter this claim by making an argument for common sense and fundamental fairness. Defense counsel could argue that it doesn’t make sense for the statute to allow for review of custody during one phase of the proceeding and not the other. Notice how N.C.G.S. 7B-1906(g) refers to “the criteria G.S. 7B-1903,” not just to 7B-1903(b). Furthermore, it could be argued that it isn’t fair for a juvenile to be afforded the right to review his or her custody before responsibility is found and not after it is found. There is no compelling reason why a juvenile should not be allowed to show to the court why the juvenile cannot be released to the community prior to disposition as well as prior to adjudication.

## C. Post-Disposition

Also under N.C.G.S. 7B-1903(c), the court may order secure custody pending placement of the juvenile as ordered as part of disposition. At this stage counsel faces the same problem as described in the pre-detention setting: does the requirement for review hearings under N.C.G.S. 7B-1906(b) apply? Unfortunately, some placements can take a long time, even months, to materialize, while the juvenile remains in detention with no services or treatment. Juvenile defense counsel should always consider arguing that a juvenile pending placement is also entitled to 10-day review hearings. One factor in favor of this argument is the construction of the statutes. Notice that even though N.C.G.S. 7B-1903(c) refers to dispositions, it is found in Article 19 of the Code, “Temporary Custody; Secure and Nonsecure Custody; Custody Hearings.” Post-disposition custody is not addressed in Article 25, “Dispositions.” Therefore, defense counsel could argue that because post-disposition custody is found

---

<sup>2</sup> Recently, the Court of Appeals has ruled that a juvenile does have a right to a ten day review hearing, but the decision has been stayed pending a hearing for discretionary review in the Supreme Court, *In re D.L.H.*, 679 S.E.2d 449, 2009 N.C. App. LEXIS 1175 (N.C. Ct. App., 2009).

within Article 19, all of the rules of Article 19 should apply to all instances of custody, including the right to review hearings.

### III. Intermittent Confinement

Under the dispositional alternatives provided under N.C.G.S. 7B-2506, a juvenile may be sent to detention as “intermittent confinement.” If disposition is entered under Level 1 sanctions, a juvenile may be confined “not more than five 24-hour periods,” N.C.G.S. 7B-2506(12). If disposition is entered under Level 2 sanctions, a juvenile may be confined “for a term of up to 14 24-hour periods,” N.C.G.S. 7B-2506(20). Note that the court can’t “stack” detention time from a previous order with a current order.<sup>3</sup> Either under Level 1 or Level 2 the timing of the confinement is at the discretion of the court, meaning the court can enter the days consecutively, on weekends, etc. Note that under N.C.G.S. 7B-2506(20), the imposition of the Level 2 term cannot be imposed consecutively with any confinement imposed under Level 1. The court must also specify the terms of the confinement, and may not delegated the placing of a juvenile in confinement to any party, *In the Matter of Jessica Renea Hartsock*, 158 N.C. App. 287, 580 S.E.2d 395 (2003). Counsel should be aware that in some jurisdictions, the court will order that the juvenile be placed in detention “at the discretion of the court counselor.” Under *Hartsock*, the court may not delegate it authority to impose intermittent confinement.<sup>4</sup>

Juveniles may also be ordered intermittent confinement as a result of violating probation. Under N.C.G.S. 7B-2510 (e), the court may order, as part of a new disposition, twice the time in detention that is authorized under the dispositional section. If a juvenile is continued under a Level 1 disposition, the juvenile may receive up to 10 days of intermittent confinement. If a juvenile is continued under a Level 2 disposition, the juvenile may receive up to 28 days of intermittent confinement. Another sanction the court may impose as a disposition for violating probation is entering a disposition at the next higher level on the disposition chart, N.C.G.S. 7B-2510 (e). It is unclear, however, whether a court can both raise disposition to the next higher level *and* impose twice the time of confinement allowed by statute. For example, if a juvenile is on probation under a Level 1 disposition and violates probation, may the court enter a Level 2 disposition and then order 28 days of confinement?

### IV. Other Confinement Issues

#### A. Credit for time served

The juvenile code does not address the concept of credit for time served. However, the North Carolina Court of Appeals appears to have determined that juveniles should receive credit for time served as a result of two decisions, *In Re Allison*, 143 N.C. App. 586, 547 S.E.2d 169 (2001) and *In the Matter of R.T.L.*, 2007 N.C. App. LEXIS 1025 (unpublished opinion).

---

<sup>3</sup> See *In the Matter of M.B.*, 2009 N.C. App. LEXIS 324, (unpublished opinion).

<sup>4</sup> But see *In the Matter of J.J.*, 2008 N.C. App. LEXIS 2065 (unpublished opinion), where the Court of Appeals held that the fact that the trial court conditioned the length of detention time on whether or not a juvenile drug treatment court accepted the juvenile was not an impermissible delegation of authority.

In *Allison*, the juvenile had been committed to training school, released on conditional release status, and violated the requirements of the conditional release, as well as being alleged to have committed new criminal offenses. After admitting the violation and being adjudicated delinquent of the charges, the juvenile remained in a detention center while pending disposition. The trial court ordered that the juvenile be re-committed for violating the conditions of conditional release and receive a new commitment for the adjudication on the criminal charges. The juvenile appealed, arguing that she should have received credit against her commitments for the time spent in detention pending disposition. The Court of Appeals found that the time spent in detention pending the re-commitment to training school could be counted against the remaining time to be served on the original commitment, but under N.C.G.S. 15A-196.1, she was not able to receive credit against her new commitment. In *R.T.L.*, the Court held that the juvenile was entitled to a sentencing credit for time spent in detention prior to adjudication. The Court stated that under *Allison* the Court had previously determined that the provisions of G.S. 15-196.1 (credit for time served) apply to juvenile offenders.<sup>5</sup>

There are three situations in which an attorney in delinquency court may consider requesting credit for time served. The first instance is when a juvenile is ordered days in detention as part of disposition, and has already spent time in detention pre-adjudication or post-disposition. The second instance is when a juvenile is committed to a youth development center and has spent time in detention prior to commitment. If an attorney requests credit for time served on a commitment, the attorney should request that the judge specify the amount of detention time served in the dispositional order so that the administrators at the youth development center are fully knowledgeable about the juvenile's prior confinement when determining a date of a release for the juvenile. The third instance in which an attorney should request credit for time served is when a juvenile is transferred to superior court. If requested, superior court judges typically grant the time spent in detention towards an active sentence in the Department of Corrections.

#### B. Confinement pending appeal

Under N.C.G.S. 7B-2605, if a juvenile enters notice of appeal, the release of the juvenile “should issue in every case unless the court orders otherwise.” The court may enter a temporary order effecting the custody or placement of the juvenile if the court finds it to be in the best interest of the juvenile or the State, but the reasons must be “compelling” and must be stated in writing.

This section of the Code does not specify whether “release” of the juvenile refers to detention or commitment, but an attorney for the juvenile should argue that the section can apply to either. A scenario may arise where a juvenile has been adjudicated, disposition has been entered, but the juvenile is pending placement in a group home or other facility that is not yet available. Sometimes the court places no timetable on how long the juvenile should remain in detention pending placement, and as was discussed above in section II. C., the Code is unclear as to whether or not the juvenile is guaranteed review of secure custody hearings. A case in the Court of Appeals can take up to a year to be decided. Therefore, if an attorney appeals a matter to the Court of Appeals and the juvenile is in detention, the attorney should always move the court to release the juvenile pending the appeal.

---

<sup>5</sup> A third decision, *In re D.L.H.*, 679 S.E.2d 449, 2009 N.C. App. LEXIS 1175 (N.C. Ct. App., 2009), determined that any time in detention counts towards time in intermittent confinement. However, the decision has been stayed pending a hearing for discretionary review in the Supreme Court.

The language in this section is a very powerful tool to juvenile defense counsel. The language indicates intent to allow the juvenile's freedom first ("should issue in every case unless..."), and the attorney should always argue that it is in the juvenile's best interest not to be confined. The attorney should provide the court with a plan and reasons as to why the juvenile can remain in the community safely. If the court does intend to keep the juvenile confined pending appeal, ensure that the court makes its findings in writing, both to force the court to reconsider its decision, and to preserve the record for appeal.

