

STATE OF NEW HAMPSHIRE

MERRIMACK, SS

6th Circuit – Probate – Concord

In Re Kenneth Hart
Petition Pursuant to RSA 135-C:36

Docket No.: _____

PETITION FOR INVOLUNTARY ADMISSION OF KENNETH HART

NOW COMES, New Hampshire Department of Corrections (“DOC”), Deborah Green as a Senior Psychiatric Social Worker, by and through the New Hampshire Office of the Attorney General, respectfully represents that Kenneth Hart, an inmate at the New Hampshire State Prison for Men, following his release in September 2018, requires admission to the New Hampshire Hospital, on an involuntary basis, for treatment of mental illness and further states as follows:

1. Kenneth Hart is currently incarcerated at the New Hampshire State Prison for Men in Concord, New Hampshire (NHSP-Men). He has been under the control and custody of the DOC for approximately 20 years.

2. The attorney for the petitioner is the Office of the Attorney General, 33 Capital Street, Concord, NH 03301.

3. This Court has jurisdiction because the subject matter of the petition is an involuntary admission pursuant to RSA 135-C:34-54 and the respondent is currently housed in Concord.

4. Kenneth Hart is presently in such a mental condition as a result of mental illness as to create a potentially serious likelihood of danger to himself or others as evidenced in Attachment A to this petition and as witnessed by the following persons:

Deborah Green - Senior Psychiatric Social Worker, NHSP-Men.

Dr. Daniel Potenza – Medical Director of Forensic Services, DOC, Concord

The petitioner reserves the right to amend the petition to include witnesses to acts that occurred post-filing of the petition.

5. The certificate of the examining physician, Dr. Potenza, is attached as Attachment B.
6. Guardian over the respondent's person is: Office of the Public Guardian, Mark Feigl.

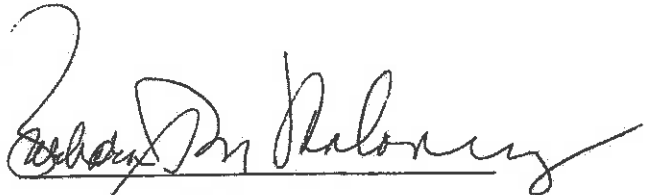
WHEREFORE, the Department of Corrections asks this Honorable Court:

- A. Hold a hearing to determine whether this Court Shall order the above-named Kenneth Hart to be involuntary admitted to the State's mental health system; and
- B. Grant other such relief as justice may require.

STATE OF NEW HAMPSHIRE
CIRCUIT COURT
6th Circuit - Probate Division - Concord

The 6th Circuit - Probate Division - Concord received the forgoing petition on the 20 day of July, 2018. The court hereby orders Kenneth Hart to make him self available for psychiatric examination by Dr. Balmett prior to said date of hearing. The above named psychiatrist has the authority to interview the patient's treatment team and to review all of the patient's mental health records.

Dated: 7/20/18


Barbata A. M. Maloney, Judge

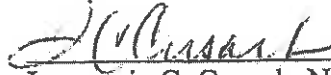
Respectfully submitted,

STATE OF NEW HAMPSHIRE
DEPARTMENT OF CORRECTIONS

By its attorney,

GORDON J. MACDONALD
ATTORNEY GENERAL

Dated: 7/20/18



Lynmarie C. Cusack, N.H. Bar No. 11266
Senior Assistant Attorney General
Department of Justice
Civil Bureau
33 Capitol Street
Concord, NH 03301
(603) 271-3650

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this 20th day of July 2018, postage prepaid, to the plaintiff:

Kenneth Hart, Inmate #73581
NH State Prison for Men
P.O. Box 14
Concord, NH 03302-0014

Mark Feigl
Office of Public Guardian
2 Pilsbury Street, Suite 400
Concord, NH 03301



Lynmarie C. Cusack, NH Bar No. 11266

Attachment A

Attachment A

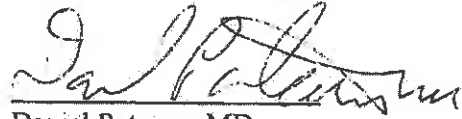
Kenneth Hart is currently a person under the control of the Department of Corrections, having been sentenced to 10 to 20 years at the New Hampshire Prison for Men and is also under the guardianship of the Office of Public Guardian. Mr. Hart is currently diagnosed with schizophrenia and living in the general population of the prison. Mr. Hart's actions over the past six months indicate that he is incapable of adequately managing life, and that he is in such mental condition as a result of his schizophrenia as to create a potentially serious likelihood of danger to himself or to others if left untreated after release from his current sentence.

1. Mr. Hart is on Haloperidol Decanoate, a biweekly intramuscular injection, for treatment of his mental health diagnosis. Without the medication, Mr. Hart has previously shown a rapid decompensation which makes him a danger to himself or others. Mr. Hart, given his failure to accept his mental illness, begrudgingly takes his medication, but does so solely because of his guardian. He repeatedly reveals his intentions to end his medication.
2. Mr. Hart refuses to work with staff to make a release plan in preparation of his complete release from confinement date in September 2018. On June 13, 2018, Mr. Hart's case manager attempted to engage him in the process of discussing release planning. Mr. Hart refused this meeting and has thus far made no plans for release, and likewise continues to evade any planning.
3. Within the past six months, Mr. Hart has been placed in observation status as he appeared to be decompensating by engaging in injurious behaviors. Mr. Hart, for example, showed signs of deterioration regarding his daily functioning when he received a disciplinary report for fighting, wrote to the warden requesting officers stop using "body language" when interacting with him, and generally refused to participate in his mental health care, as well as the aforementioned planning for release.
4. Mr. Hart has no insight to his mental illness. He was appointed a guardian in 2002 and has consistently been diagnosed with a psychotic disorder due to his extreme paranoia. Since 2002, Mr. Hart has consistently denied his illness and expressed a desire to eliminate all medications. On April 30, 2018 Mr. Hart refused to attend his May 1st mental health evaluation and stated that he refused to participate in any mental health evaluations. Mr. Hart also refuses to allow for blood work to be completed, given a false belief that the lab work could be tampered with and his DNA captured and used in some manner to convict him.
5. These behaviors and the concern that once released without appropriate mental health treatment lead to the need to step Mr. Hart down through the state's mental health system so that he can properly engage in the community.

Attachment B

PHYSICIAN'S STATEMENT

Kenneth H. Hart was examined on this 19th day of July 2018 and was found to be of such mental condition as a result of mental illness as to create a potentially serious likelihood of danger to himself or others. I recommend Mr. Hart be involuntarily committed to a designated receiving facility, such as New Hampshire Hospital, and when clinically appropriate to be placed on a conditional discharge.

A handwritten signature in cursive script, appearing to read "Daniel Potenza", written in black ink.

Daniel Potenza, MD

R. Joffree Barnett, M.D.
P.O. Box 104
New Castle, NH 03854
r.joffree.barnett.md@gmail.com

PSYCHIATRIC EVALUATION

Name: Kenneth Hart
Case Number: 317-2018-IN-00253
Date of Birth: 7/21/1960
Date of Evaluation: 7/30/2018

Identifying and Referral Information:

Kenneth Hart is a 57-year-old male who is currently an inmate in the New Hampshire State Prison. He is about to be released in September. He has a long history of Schizophrenia and is now referred for an independent evaluation to determine the need for involuntary civil commitment pursuant to RSA 135-C.

Sources of Information:

State Prison mental health and secure psychiatric unit (SPU) records
Incident report from 3/20/2018
Competency evaluation from Dr. Drukteinis, 7/6/1999
Psychiatric evaluation for guardianship by Dr. Drummond, 7/16/2002
Evaluation of Kenneth Hart

Past and Present History:

Mr. Hart has been incarcerated since 1998 after an arrest and conviction for aggravated felonious sexual assault. He received a 10-20 year sentence and was eligible for parole in 2009. However he has not participated in the Sex Offender Treatment program offered at the prison and thus his incarceration has been extended to his full sentence. He will be released in September of 2018.

Mr. Hart is a high school graduate with some participation in college at Blackburn College in Chicago. He reportedly has 2 brothers and 3 sisters. Contact with the family indicated that he had a period of homelessness in New York. They also

indicated that family members were fearful of him. Reportedly he had an earlier psychiatric hospitalization in Virginia.

Mr. Hart has an extensive prior legal history that occurred in multiple states prior to his current incarceration. In 1989, he was arrested in New York for 3rd degree Burglary. In Illinois he was arrested for retail theft. In Massachusetts he was arrested for harassment. In Virginia he was arrested for trespassing. In New Jersey he was arrested for 2 counts of possession of a dangerous drug and possession of stolen property. In North Carolina he was arrested in 1991 for disorderly conduct and obstruction and delay of an officer. In 1995 he was arrested for an assault with intent to cause serious injury. He pled to a class A misdemeanor and was jailed for 30 days. There were multiple other reports of charges but no convictions appear in the record. These included fighting, criminal trespass, possession of a weapon and destruction of contraband.

Mr. Hart was admitted in the SPU 4 times. The first occurred in 2000. He received the diagnosis of Delusional Disorder and Personality Disorder. He was subsequently transferred to the state of Florida but returned after 9 months reportedly due to inability to manage him in the settings he was placed in. He was readmitted to the SPU from 2001-2008. He has had 2 subsequent admissions to the SPU, from January to April of 2011 and from December of 2011 to August of 2013. His later diagnoses have been Paranoid Schizophrenia and Antisocial Personality Disorder. Since his last release from the SPU, he has been in the general population.

Mr. Hart's SPU stays were characterized by resistance to or noncompliance with medication. He had a paranoid delusion that unspecified people were going to kill him. He believed that the staff and guards of the SPU were deliberately withholding things he requested (such as his legal documents) or opportunities to go to the library. He has believed that the water was poisoned and that the guards would sneak into his cell at night and grab his genitals. Often he would refuse to meet with his treatment team due to his paranoia. He feared for his life that they were out to get him. He viewed himself as an innocent black man in a white world. He believed that the only resolution of the situation was for them to kill him or for him to win his recurring attempts to appeal his case. During one brief period his medication was discontinued on or about 2011. He decompensated markedly. He was unable to engage in self-care and his paranoid psychosis returned requiring readmission to the SPU. During the longer stays at the SPU he expressed fears of not being safe if transitioned to less restrictive units. There were several incidents

decompensated. He described the legal bind he perceived he was in. He wanted to contest and plead to terminate guardianship. However, the guards did not allow all of the legal papers that he had accumulated, so he could not plead his case appropriately. He reviewed aspects of the original charge that led to his incarceration. He felt that the legal system did not provide him any chance. He argued the justification of not cooperating with the sex offender treatment program because he did not commit a crime. "It was consensual". He appears to be unaware of the resulting contradiction. He was willing to serve the additional 7 years of his sentence even though this meant taking medication he felt he did not need. It also meant that he has to be under the influence and absolute control of the individuals (criminal justice system) he is suspicious of, which has unjustly incarcerated him.

He denied any suicidal or homicidal ideas. He denied any auditory or visual hallucinations. When asked about any fears for his safety he went into a long explanation of prison culture. He acknowledged a recent "fight" but minimized this. He stated that they were able to work this out, disagreements in jail "are settled" this way.

Throughout the interview he was alert and oriented. His recent and remote memory is intact. His insight and judgment were poor.

Diagnosis:

Schizophrenia

Conclusion And Recommendations:

Mr. Hart has a lengthy history of psychosis with paranoid delusional thinking. This meets the criteria of a mental illness as defined by RSA 135-C: 2.

Mr. Hart has demonstrated a variety of past aggressive antisocial behavior prior to his current incarceration. During the florid aspects of his psychoses there have been several aggressive incidents towards others. Mr. Hart has no insight into the nature of his mental illness. When he decompensated and his psychosis returned off of medication, he was unaware of his deterioration in function or increased paranoia and the need for treatment. While he has improved enough to be in the general population, he continues to deny the existence of his mental illness, the need for ongoing medication and treatment and maintains a suspicious and

at the height of his psychosis in which he has threatened to harm a female guard, body slammed a guard against the wall and an earlier incident in which he was tazered and restrained. He has often refused more regular medical treatment (such as dental care) unless he has had a specific illness or injury. He has refused steadfastly to get blood work believing that his DNA would be used against him in another false legal charge.

Eventually, he stabilized on long acting injectable antipsychotic medication enough to be transferred to less restrictive settings. During his time in the general population, he has persistently refused to engage in mental health or sexual offender treatment. He has complied with his antipsychotic injections bi-monthly but only because his guardian requires this. Attempts to engage him in transitional, release planning have been refused.

Several recent incidents have happened that raise concerns about his stability. He was fired from his longstanding job (he had had it since 2015) for his inability to work with others. He made a complaint that guards were using inappropriate body language that he found either threatening or offensive. In March he was placed on a behavioral watch after an incident with another inmate. He grabbed him around the throat and jabbed the other inmate's head with his finger.

Mental Status:

Mr. Hart came to the interview cooperatively when notified. He was dressed in Prison clothing, was well groomed and looked his stated age. The interviewer introduced himself and the purpose of the interview. Mr. Hart stated he had no knowledge of the upcoming probate proceeding. He wanted to see a copy of the court order, which was shown to him. He took some time to examine the document. He asked where on the paper my appointment was. This was pointed out to him. In due course he returned the document and agreed to a conversation.

He spoke in a fluent, understandable manner. He denied any disturbance of mood. He did state that he was "angry" that he was not told of the hearing. His affect was restricted and his interpersonal manner was guarded. He "can't talk to clinicians. They already decide the agenda. They don't know half." He does not believe he has a mental illness and minimizes his prior history of placement in the Secure Psychiatric Unit (SPU) of the state prison. "I'm not schizophrenic. They have the delusion". "You're medicating me and I'm normal". His placement at the SPU was "underhanded devilry", he did not know any better. He does not believe that he

decompensated. He described the legal bind he perceived he was in. He wanted to contest and plead to terminate guardianship. However, the guards did not allow all of the legal papers that he had accumulated, so he could not plead his case appropriately. He reviewed aspects of the original charge that led to his incarceration. He felt that the legal system did not provide him any chance. He argued the justification of not cooperating with the sex offender treatment program because he did not commit a crime. "It was consensual". He appears to be unaware of the resulting contradiction. He was willing to serve the additional 7 years of his sentence even though this meant taking medication he felt he did not need. It also meant that he has to be under the influence and absolute control of the individuals (criminal justice system) he is suspicious of, which has unjustly incarcerated him.

He denied any suicidal or homicidal ideas. He denied any auditory or visual hallucinations. When asked about any fears for his safety he went into a long explanation of prison culture. He acknowledged a recent "fight" but minimized this. He stated that they were able to work this out, disagreements in jail "are settled" this way.

Throughout the interview he was alert and oriented. His recent and remote memory is intact. His insight and judgment were poor.

Diagnosis:

Schizophrenia

Conclusion And Recommendations:

Mr. Hart has a lengthy history of psychosis with paranoid delusional thinking. This meets the criteria of a mental illness as defined by RSA 135-C: 2.

Mr. Hart has demonstrated a variety of past aggressive antisocial behavior prior to his current incarceration. During the florid aspects of his psychoses there have been several aggressive incidents towards others. Mr. Hart has no insight into the nature of his mental illness. When he decompensated and his psychosis returned off of medication, he was unaware of his deterioration in function or increased paranoia and the need for treatment. While he has improved enough to be in the general population, he continues to deny the existence of his mental illness, the need for ongoing medication and treatment and maintains a suspicious and

paranoid stance towards efforts to ease his transition back to the community. In the absence of ongoing supervision there is a serious likelihood of noncompliance, recurrence of his psychosis and thereby dangerous behavior towards others. It is my opinion that Mr. Hart meets the criteria for an involuntary commitment as defined by RSA 135-C: 34.

I would recommend a 5-year period of commitment. I would also recommend a very gradual transition back to the community. Mr. Hart needs to demonstrate the capacity to function in gradually less restrictive settings. I would recommend first a transition to New Hampshire Hospital, then to Transitional housing and then to a supervised living situation in the community affiliated with a Community Mental Health Center. Should he go directly to the community it is my opinion that the potential for relapse and dangerous behavior is much higher.

Respectfully submitted,

R. Joffree Barnett, M.D.

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT**

6th Circuit - Probate Division - Concord
32 Clinton Street
Concord NH 03301

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

**SHANE R. STEWART, ESQ
TARBELL & BRODICH PA
45 CENTRE STREET
CONCORD NH 03301**

Case Name: **Involuntary Admission of Kenneth Hart, Inmate #73581**
Case Number: **317-2018-IN-00253**

On August 31, 2018, Judge Barbara Maloney issued orders relative to:

Involuntary Admission

see order

Any Motion for Reconsideration must be filed with this court by September 10, 2018. Any appeals to the Supreme Court must be filed by September 30, 2018.

August 31, 2018

Sharon A. Richardson
Clerk of Court

C: Kenneth Hart, Inmate #73581; Deborah Robinson; Lynmarie C. Cusack, ESQ

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT**

6th Circuit - Probate Division - Concord
32 Clinton Street
Concord NH 03301

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

INVOLUNTARY ADMISSION ORDER

Case Name: **Involuntary Admission of Kenneth Hart**
Case Number: **317-2018-IN-00253**

After a hearing held on August 30, 2018, and upon due consideration of the foregoing petition, the written report of the examining psychiatrist, the demeanor of the parties and all the evidence, the Court finds by clear and convincing evidence that Kenneth Hart is in such mental condition as a result of mental illness as to create a potentially serious likelihood of danger to himself and others and the Court hereby orders that the said Kenneth Hart be admitted to New Hampshire Hospital (NHH), Concord, New Hampshire on an involuntary basis for a period of **Two (2) years** pursuant to New Hampshire Revised Statutes Annotated 135-C.

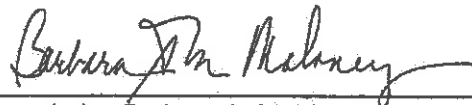
FINDINGS:

1. Kenneth Hart is diagnosed with Schizophrenia. He has a lengthy history of psychosis with paranoid delusional thinking.
2. He is completing his sentence at the State Prison where he has been since 2000.
3. In 2002, he received a Guardian, Office of Public Guardian, (OPG). He is currently trying to have the guardianship terminated.
4. Kenneth Hart has no insight into his mental illness. He told the court appointed psychiatrist, Dr. Joffree Barnett, that he "--is not schizophrenic", that the clinicians have the delusion but he was being medicated although he is normal.
5. Kenneth Hart has been admitted to the Secure Psychiatric Unit at Department of Corrections (SPU) 5 times since 2000. Two of the admissions were for extended (years) periods of time. He is now on medication and residing in general population.
6. He acknowledged to Dr. Barnett an incident in March, 2018 where he grabbed another inmate around the throat for touching his radio cord. He was placed on a Behavioral Watch. He was fired from his longstanding job at the prison in June, 2018. Mr. Hart then sent a note to administration requesting that security officers refrain from using inappropriate 'body language' to communicate.
7. The Court appointed Psychiatrist testified to his opinion that Kenneth Hart meets the dangerousness standard in that the danger stems from Kenneth Hart's lack of Insight and judgment regarding the need for medication. He has not collaborated with other medical services that would benefit him, for example of

- dentistry. Dr. Barnett stated considerable concern over any prospect of the guardianship being vacated.
8. Deborah Green, LICSW, Administrator of Mental health Service for DOC, has known Kenneth hart since 2002. She has been his direct clinician and continues to see him and supervise the direct care clinicians. She testified that he receives injectable medication, (Haldol Decanoate) every two weeks. Per her testimony, he has refused to come to the majority of appointments for shots in the past 12 months. When he refuses, a representative from his treatment team then goes to his housing unit to speak with him. He comes under objection, stating that he doesn't want to see them and they should stop harassing him.
 9. Ms. Green testified that Kenneth Hart has refused blood work of any kind since 2002 because he is afraid the blood will be used in the system against him. She testified that it has been explained to him many times that the blood work is valuable to determine if he is getting the correct dose of medication.
 10. Ms. Green further testified that Kenneth Hart refuses to engage in discharge planning. She stated that without a plan in place with appointments with clinicians and a place to live, Kenneth Hart will not have access to the Haldol injection.
 11. His treating Psychiatrist at the Department of Corrections, Dr. Dan Potenza, Psychiatric Medical Director for Department of Corrections, testified that Kenneth Hart benefits from the medication however he refuses to participate in any treatment or discharge planning. There are statements in the record from Kenneth Hart, that he will not take medication when he is discharged. Dr. Potenza further testified that he treated Kenneth Hart prior to the guardianship, while he was refusing all medication. He testified that when Mr. Hart is not on medication he becomes less organized and becomes more legally focused (challenging his conviction, the guardianship) and does not take care of his hygiene. Dr. Potenza described him as neglecting his hygiene and collecting his urine. Dr. Potenza observed during this time Mr. Hart's extreme withdrawal from other inmates and clinical staff. Dr. Potenza testified that in the past 12 months, Kenneth Hart has made threats against others.
 12. Both the court appointed psychiatrist and the treating clinician at NHH have the opinion that there is no less restrictive setting for the Respondent at this time than NHH.

August 31, 2018

Date



Judge Barbara A. M. Maloney

You have a right to appeal this Order. To claim you appeal, you must file a Notice to Appeal, accompanied by 8 copies of the Notice to Appeal, with the Clerk of the New Hampshire Supreme Court within thirty (30) days of the date this Order was sent to you. Any appeal to the New Hampshire Supreme Court should be addresses as follows:

Clerk of Court, New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

6 September 2018

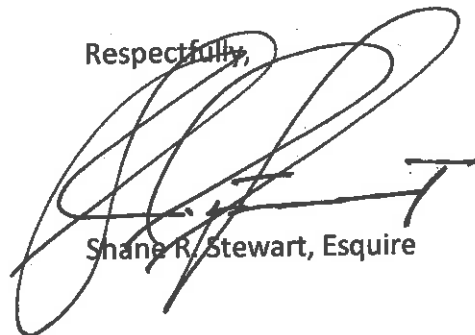
6th Circuit Probate Division—Concord
32 Clinton Street
Concord, NH 03301
ATTN: Robert

**IN RE: Involuntary Admission of Kenneth Hart
Docket #317-2018-IN-00253**

Dear Robert:

Enclosed please find our Motion to Reconsider for filing with the Court

Respectfully,



Shane R. Stewart, Esquire

cc: Attorney Cusack
Mark Feigl, OPG
Client

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

6th CIRCUIT PROBATE DIVISION

IN RE: Involuntary Admission of Kenneth Hart

Docket #317-2018-IN-00253

MOTION TO RECONSIDER

NOW COMES the Respondent, Kenneth Hart, by and through his attorney, Shane R.

Stewart, Esquire.

IN FURTHERANCE of this Motion, the Respondent states as follows:

1. "A motion for reconsideration allows a party to present points of law or fact that the Court has overlooked or misapprehended." Webster. v. Town of Candia, 146 N.H. 430, 444 (2001) (citing Smith v. Shepard, 144 N.H. 262, 264 (1999)). This motion does both.
2. Given the time constraints for filing this motion, the statements contained herein are made without the benefit of an audio recording or transcript of the August 30, 2018 hearing, and, therefore, made from memory and to the best of undersigned counsel's belief and knowledge.
3. What the Respondent finds contrary to the law about the Court's order dated August 31, 2018 (Maloney, J.) (hereafter "Court Order"), which resulted in his two-year involuntary admission to New Hampshire Hospital, is that the Court did not properly apply or enforce the New Hampshire Rules of Evidence (hereafter "NHRE"), and made findings based on the testimony of three experts (two psychiatrist and one clinical social worker) who had no relevant personal knowledge (NHRE 602) of the alleged dangerous acts of the Respondent, and their testimony violated the rules of hearsay (NHRE 801 and 803).

The decision of *In Re B.T.*, 153 N.H. 255, 261 (2006), said it best: “[w]e may not, therefore, order an involuntary admission based solely on the existence of a mental illness. RSA 135-C:34 requires clear and convincing proof of specific acts demonstrating actual or likely serious bodily injury.” Contrary to the clear holding of *In Re B.T.*, such proof of specific acts demonstrating actual or likely serious bodily injury (or present dangerousness) were not testified to by competent witnesses at the final hearing here, or such testimony was inappropriately considered by the Court over Respondent counsel’s contemporaneous objections based on the applicable rules of evidence. See generally NHRE 1101 (proposition made by Respondent’s counsel at the final hearing that the rules of evidence applied to the proceeding). In sum, the Petitioner produced insufficient evidence to support its petition for the involuntary commitment of Respondent, and the findings and rulings of law by the Court were unlawful as they lacked evidential support or were tainted by error of law.

4. The Court Order at paragraph 6 states that the Respondent “acknowledged” an incident in March 2018 where he allegedly grabbed another inmate around the throat. The record, however, shows that on cross examination Dr. Barnett’s memory (and his report) of such an acknowledgment by the Respondent’s were wholly lacking. Accordingly, the Court’s finding that the Respondent acknowledged a dangerous act was not supported by the evidence.

5. The Court Order at paragraph 7 states the Respondent “meets the dangerousness standard in that the danger stems from Kenneth Hart’s lack of insight and judgment regarding the need for medication.” Such a finding by the Court is not supported by proof of a specific act of dangerousness. *In Re B.T.* 153 N.H. at 261; *In Re Christopher K.*, 155 N.H. 219, 222-23

(2007). The witnesses at the final hearing testified that the Respondent had a guardian over his person to make his medical decisions. Moreover, lacking insight and judgment regarding the need for medication is an obtuse form of dangerous and does not qualify as a specific act of dangerousness pursuant to RSA 135-C:34 and the case law cited in this paragraph.

6. The Court Order at paragraphs 8 and 9 find that the Respondent failed to keep “the majority of appointments for shots in the past 12 months” and “refused blood work.” Failure to keep medical appointments and refusal of blood work, given the Respondent’s circumstances, were not dangerous acts. *See In Re B.T.* 153 N.H. at 261; *In Re Christopher K.*, 155 N.H. at 222-23.

7. The Court order at paragraph 11 finds that “Dr. Potenza described him [Respondent] as neglecting his hygiene and collecting his urine.” However, the record will reflect Dr. Potenza was describing events from 2013 or earlier, and these events were too remote in time to be considered as probative evidence of a dangerous act or mental condition. *In Re Farsi*, 132 N.H. 478, 485-86 (1989). In addition, “Dr. Potenza testified that in the past 12 months, Kenneth Hart has made threats against others.” Without denying Dr. Potenza made this statement, the statements were shown to not be based on Dr. Potenza’s personal knowledge, but instead on information Dr. Potenza either read or heard from others. The documents Dr. Potenza read were not admitted as evidence and the “others” he spoke to did not testify at the final hearing. These statements by Dr. Potenza were contemporaneously objected to by Respondent’s counsel (based on the lack of personal knowledge and hearsay grounds, not subject to a hearsay exception) and should not have been considered by the Court to support its decision on dangerous conduct.

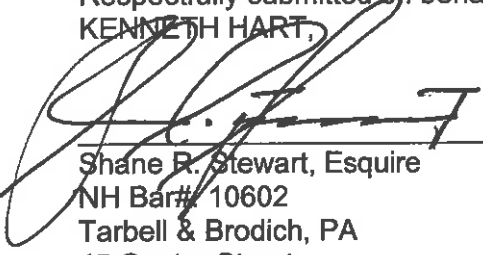
8. Opposing counsel was not contacted or asked to assent to this motion given its nature.

WHEREFORE, the Respondent respectfully requests the Honorable Court:

- A. Grant this Motion for Reconsideration;
- B. Dismiss the Petition for Involuntary Admission;
- C. For such other and further relief as is just and equitable.

6 August 2018

Respectfully submitted on behalf of
KENNETH HART,



Shane R. Stewart, Esquire
NH Bar# 10602
Tarbell & Brodich, PA
45 Centre Street
Concord, NH 03301

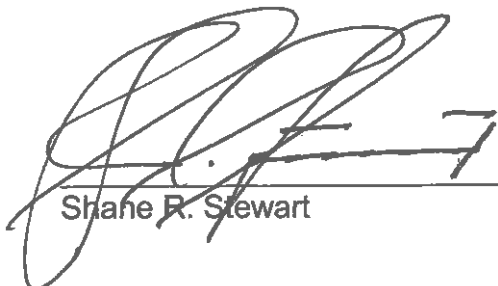
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this 6th day of August 2018, postage prepaid, to the following interested parties

Kenneth Hart, Inmate #73581
NH State Prison for Men
PO Box 14
Concord, NH 03302-0014

Mark Feigl
OPG
2 Pillsbury Street, Suite 400
Concord, NH 03301

Lynmarie C. Cusack, Esquire
Department of Justice – Civil Bureau
33 Capitol Street
Concord, NH 03301



Shane R. Stewart

STATE OF NEW HAMPSHIRE

MERRIMACK, SS

6th CIRCUIT PROBATE – CONCORD

In Re Kenneth Hart

Docket No.: 317-2018-IN-00253

**PETITIONER’S OBJECTION TO RESPONDENTS’ MOTION FOR
RECONSIDERATION**

NOW COMES, New Hampshire Department of Corrections (“DOC”), Deborah Green as a Senior Psychiatric Social Worker, by and through the New Hampshire Office of the Attorney General, and respectfully objects to respondent’s Motion to reconsider, as follows:

1. Counsel for the respondent filed a motion for reconsideration which was received in the Office of the Attorney General on September 10, 2018. The motion argues that the Court’s order (*Maloney, J.*) civilly committing the respondent to New Hampshire Hospital for a period of two years is contrary to law where there is insufficient evidence of dangerousness and the court improperly allowed hearsay evidence to support an act of dangerousness.

2. Contrary to Respondent’s assertions, the court did not err in its decision relative to “specific acts of dangerousness” or the admission of testimony of the chief psychiatrist, the independent examining psychiatrist or the head clinical social worker of outpatient services at the prison. Simply put, there is sufficient evidence in the record to support “dangerousness.”

3. RSA 135-C:34 indicates the “standard to be used by a court... in determining whether a person should be admitted to a receiving facility for treatment on an involuntary basis shall be whether the person is in such mental condition as a result of

mental illness as to create a potentially serious likelihood of danger to himself or to others.” RSA 135-C:34.

4. Under that standard the court need not have evidence of a “specific act” of physical dangerousness despite Respondent’s assertion. Indeed Respondent mischaracterizes current precedent in this area citing to *In Re B.T.*, 153 N.H. 255, 261 (2006) and *In Re Christopher K.*, 155 N.H. 519, 222-23 (2007).

5. The New Hampshire Supreme Court in *B.T.* gave guidance as to the interpretation of the phrase “danger to himself or others” under the RSA 135-C:34, where the legislature did not define the phrase, as it did for involuntary emergency admissions under RSA 135-C:27.

6. The Court concluded that there cannot be an “involuntary commitment without clear and convincing evidence of specific acts or actions demonstrating a potentially serious likelihood of dangerousness.” *In Re B.T.*, 153 N.H. at 262. Danger to self or others means ... “a lack of capacity to care for one’s own welfare such that there is a likelihood of serious debilitation if admission is not ordered.” *Id.*, at 260.

7. The evidence in the record supports such dangerousness even without direct evidence that the respondent grabbed another person by the throat. The evidence for example demonstrated that the respondent will not take his medication on a voluntary basis, refuses medical treatment such as blood work, will not engage in discharge planning including finding a place to live when his criminal sentence expires in September, and will not have a plan in place to pay for or receive the required medication that keeps his schizophrenic condition controlled. *See* Order ¶¶7-11.

8. The testimony from Dr. Barnett, Dr. Potenza and Ms. Green clearly indicated that the respondent would refuse any medication when his criminal sentence expired and was on his own in a community. As Dr. Potenza testified, without such medication the respondent would decompensate, and his paranoia would expand thereby creating not only a serious danger for respondent in dealing with others, but also a potential danger to others given his inability to understand social cues. Dr. Potenza also testified, given his experience with the respondent in the past when not on medications, respondent would neglect his hygiene and collect and store his own urine.

9. While in isolation these issues may not in every instance, constitute a danger, a rational fact finder could weigh the specific actions of related to care and find by clear and convincing proof that the respondent lacks capacity for his own welfare such that a likelihood of serious debilitation could occur if admission is not ordered. *See Id.*, at 260; *see also, In re B.T.*, Case No. 2007-0465, 2008 WL 11258704 (May 19, 2008).

10. Respondent instead focuses on the evidentiary quality of the testimony and suggests that the witness must have direct knowledge of dangerousness. This is not the law in New Hampshire. Expert witnesses may introduce hearsay evidence to explain the basis of their opinions. *Carignan v. New Hampshire Intern. Speedway, Inc.*, 151 N.H. 409, 417 (2004) citing *Brown v. Bonnin*, 132 N.H. 488, 493 (1989).

11. Dr. Potenza and Dr. Barnett both testified that the respondent's mental health record indicated that in the last year the respondent made threats against other individuals. Likewise, Dr. Barnett testified that he had read an incident report that reflected that respondent placed his hands around the throat of another person. Both psychiatric experts could rely on that information to form a basis about the dangerousness

of the individual given all of the circumstances that were known about the individual and his illness. No testimony from an eyewitness is necessary, where the specific act of “throat grabbing” was not relied on as an act of dangerousness. Dangerousness does not only stem from a physical assault.

12. Nothing suggested that the court accepted the evidence of threatening another as direct evidence that respondent did in fact threaten or place his hands on the throat of another.

13. Respondent also takes issue and claims an error of law where the court allegedly allowed “hearsay” evidence. It is unclear as to whether in a proceeding under RSA 135-C:34 the rules of evidence apply. RSA 135-C:43 discusses the conduct of the hearing but does not suggest that the evidentiary rules apply. *Comp.* RSA 464-A:8, IV (rules of evidence shall apply in guardianship cases, and no hearsay evidence is admissible); *see also* Circuit Court – Probate Division Rule 63-A.

14. To the extent that the rule against hearsay applies in an involuntary commitment proceeding, whether the statement offered into evidence constitutes hearsay is a question for the trial court, whose decision will not be overturned unless clearly erroneous. *State v. Sampson*, 132 N.H. 343 (1989) (applying hearsay to criminal case).

15. In this case the throat grabbing incident was testified to by Dr. Barnett whose report indicates that Plaintiff acknowledged doing so. Such an acknowledgement would not be hearsay as it would be considered an admission of a party opponent. N.H. R. Ev. 801(d)(2). The incident report did not come into evidence which described the incident, nor did the mental health note that referenced the reporting of the incident.

16. Such a mental health note or even the incident report might have been allowed as an exception to hearsay as a business or medical record where such records are sufficiently trustworthy. *See* N.H.R. Ev. 803 (4), (6). Nonetheless the evidence was not admitted.

17. Even if the court accepted the testimony relating to the event in error, such acceptance is harmless where there is no indication that such a statement affected the outcome of the case. *See id.*, at 348.

18. The overwhelming evidence of dangerousness relative to debilitation provides ample support for the conclusions reached by the court. Therefore, reconsideration is not warranted.

WHEREFORE, the New Hampshire Department of Corrections respectfully requests that this Honorable Court:

- A. Deny Respondents' Motion to Reconsider, and
- B. Grant other relief as deemed just and fair.

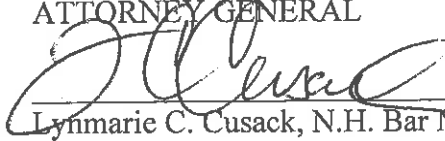
Respectfully submitted,

STATE OF NEW HAMPSHIRE
DEPARTMENT OF CORRECTIONS

By its attorney,

GORDON J. MACDONALD
ATTORNEY GENERAL

Dated: 9/18/18

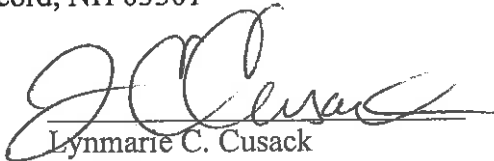


Lynmarie C. Cusack, N.H. Bar No. 11266
Senior Assistant Attorney General
Department of Justice
Civil Bureau
33 Capitol Street
Concord, NH 03301
(603) 271-3650

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this 18th day of September 2018, postage prepaid, to the respondent and counsel:

Shane Stewart, Esquire
Tarbell and Brodich, PA
45 Centre Street
Concord, NH 03301



Lynmarie C. Cusack