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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-506

Filed 18 April 2023

Durham County, No. 19 JT 4, 5, 216

IN THE MATTER OF: S.G., K.G., S.G.

Appeal by Respondent-Mother from order entered 2 February 2022 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 11 January 2023.

*Lauren Vaughan for petitioner-appellee Durham County Department of Social Services.*

*Peter Wood for respondent-mother.*

*S. Wesley Tripp III for guardian ad litem.*

MURPHY, Judge.

When a party moves to continue a hearing concerning the termination of parental rights, there is no obligation for the trial court to hold an evidentiary hearing on that motion. Additionally, when a party fails to assert the constitutional underpinnings of a motion to continue, we will not address a constitutional issue for the first time on appeal. Finally, a party does not receive ineffective assistance of counsel due to the denial of its motion to continue when the party's attorney had

adequate time to prepare.

### **BACKGROUND**

This appeal arises out of Mother’s challenge to the trial court’s termination of her parental rights to her three children. On 14 January 2019, Durham County Department of Social Services filed a *Juvenile Petition* for both S.G. and K.G., alleging each was neglected and dependent. After the birth of a third child—also S.G.—DSS filed another juvenile petition alleging S.G. to be neglected and dependent. The trial court found all three children to be neglected and dependent, and the children were placed in the legal custody of DSS.

DSS subsequently moved the trial court to terminate Mother’s parental rights to all three children. On 19 April 2021, a guardian ad litem was appointed for Mother following a hearing on 29 May 2019, in which the trial court “determined [] Mother ha[d] a significant history of mental health issues and cognitive issues . . . render[ing] her incompetent for the purpose of effective assistance of her counsel in the matter before the Court.”

On 13 December 2021, after several continuances and a pretrial conference on 9 December 2021, the trial court held a hearing on the motion to terminate Mother’s parental rights to all three children. At the beginning of the hearing, Mother’s attorney moved to continue the hearing or bifurcate the permanent planning review hearing and the motion for the termination of Mother’s parental rights, stating:

I have[,] previous to Thursday afternoon of last week[, had]

*Opinion of the Court*

absolutely no contact with [Mother] whatsoever. Then there was a phone call and an attempt to call her back which was unsuccessful. I've not had an opportunity to meet with her or prepare with her or the guardian. The guardian and I unfortunately on Friday afternoon or fortunately were involved in a case in front of Your Honor and we could not attempt to meet with her on Friday.

I am asking the Court to consider because I have had no contact with her to, at the very minimum, bifurcate the matter because it is on for permanent planning review hearing and motion for termination of parental rights, if we could bifurcate it and proceed forward with the permanent planning review hearing as everything else was done prior to my tenure, and then I can at least prepare or attempt to prepare for the termination motion.

After Mother's attorney made this motion, the following exchange occurred:

THE COURT: That makes no sense.

[MOTHER'S ATTORNEY]: Well --

THE COURT: That -- that makes no sense.

[MOTHER'S ATTORNEY]: I -- she just reached out on Thursday. That is what I can tell you. And I got her her link and she's here now.

THE COURT: The whole point of pretrial is to let us know if you're ready or not.

[MOTHER'S ATTORNEY]: Well, I was going to withdraw, as you know, at pretrial because there had been no contact. Thursday afternoon, contact is made. You may want to speak with her. She is online. I was able to forward the link to her.

THE COURT: This is the third setting. When was she served?

[DSS ATTORNEY]: A while back, Your Honor, I believe.

[MOTHER'S ATTORNEY]: Yeah.

THE COURT: -- served. I mean, I'm confused. The whole purpose of pretrial is to tell me if you --

[DSS ATTORNEY]: Your Honor, I will agree that [Mother's Attorney] indicated that she had not heard from her client and she was planning on withdrawing.

[MOTHER'S ATTORNEY]: That's right.

[DSS ATTORNEY]: She specifically said that during her pretrial.

[MOTHER'S ATTORNEY]: That is correct. Thank you, [DSS Attorney]. And [DSS Attorney], I'm not sure if I've had an opportunity to make you aware. I know I did on another case of ours this week, but I don't know if I was able to because my time line was so tight from Thursday afternoon to Friday afternoon at 5:00, that I did not know if I made you aware of the fact that [Mother] did reach out to me Thursday afternoon while I was in trial. Then --

[DSS ATTORNEY]: I'll be honest. I don't recall if you did or if you didn't.

[MOTHER'S ATTORNEY]: I may not. It was happening so quickly and I was truly on the computer. But my plan was to withdraw.

THE COURT: What is y'all pleasure? I mean, I just --

[DSS ATTORNEY]: Your Honor, we would ask to proceed. We're ready to proceed. I -- it's -- Dr. April Harris-Britt is -- appears. I'll be -- she'll be my first witness. It's supposed to be --

THE COURT: I mean, I'm just so confused as to why -- I would never have made this like my first case.

[MOTHER'S ATTORNEY]: Well, it was supposed to be your first case, Judge, because I was withdrawing.

[DSS ATTORNEY]: Yes. I mean, Your Honor, you --

[MOTHER'S ATTORNEY]: Do you remember? I was withdrawing and it wasn't until Thursday afternoon after 4:00 PM, [Mother] called my office and I was in trial, in a hearing --

[DSS ATTORNEY]: You mean Friday afternoon.

[MOTHER'S ATTORNEY]: -- that I called her back.

[DSS ATTORNEY]: You mean Friday afternoon.

[MOTHER'S ATTORNEY]: I'm sorry. Friday afternoon. My days have run together, [DSS Attorney]. You can imagine.

[DSS ATTORNEY]: So I mean, I -- Your Honor, I absolutely under- -- -- I do understand [Mother's Attorney]'s position. I do, though, believe we can go forward. This thing has been noticed for a while. The fact that [Mother], herself, has chosen not to reach out to her attorney or at least the office of her attorney -- her previous attorney -- I know there's been a transition from one attorney to the next, but she's -- she knew that her -- her attorney was through the Public Defender's Office and she could have reached out to the Public Defender's Office and found [Mother's Attorney].

This matter has been continued and I believe because of Ms. Dover previously, but you know, Your Honor, we are -  
- we are ready to proceed and like you --

[MOTHER'S ATTORNEY]: I feel that that -- thank you, [DSS Attorney]. Just to let [DSS Attorney] know and thank you for remembering. I feel that it is in my job description since a client has reached out Friday afternoon, exchanged, I guess, messages, not really, but there was some telephonic attempts made and communication on Saturday morning with the -- I communicated with [Mother's GAL], who was gracious enough to answer the phone on Saturday morning and told her that this contact was made, and we discussed the matter.

*Opinion of the Court*

I had planned to withdraw and I think that it is prudent in my role that I at least ask for something to be done so I can have an opportunity to communicate with this individual who did not communicate with me until the last 48, I guess, business hours. But at pretrial, I was withdrawing.

Thank you, [DSS Attorney], again, for remembering that. It's up to you, Judge.

THE COURT: I just -- I mean, I --

[MOTHER'S ATTORNEY]: You can deny it, Judge, and you can say full steam ahead.

THE COURT: I just have a serious problem with this person showing up when she wants to, and I thought you were ready. Had you not received discovery and whatnot or had an opportunity to talk with her?

[MOTHER'S ATTORNEY]: I have not had an opportunity to talk with her because of the late hour she communicated with me, or called at least. I called her back, but for whatever reason --

[MOTHER]: (INDISCERNIBLE) I called you --

[MOTHER'S ATTORNEY]: Yes.

[MOTHER]: -- on Thursday, but you (INDISCERNIBLE) -  
-

THE COURT: I think --

[MOTHER]: -- called me back Friday.

THE COURT: Be quiet.

[MOTHER'S ATTORNEY]: I did.

THE COURT: You don't want to be interrupting and talking. Don't ever talk in my court unless somebody tells you to. Ever.

[Mother's GAL]: Your Honor, this is [Mother's GAL], if I may.

THE COURT: I -- my problem is if you and [Mother's GAL] have had an opportunity to chat in that she is the GAL for [] [M]other, it can go forward. I'm looking through the file --

[MOTHER'S ATTORNEY]: We have. [Mother's GAL] --

THE COURT: My problem is -- why I'm hesitant is that I'm looking through the file and I can't tell -- it says March of 2021. I'm not sure why it says [Mother's Previous Attorney] because he hasn't been here in a while.

[DSS ATTORNEY]: Yes, Your -- I think that was part of the reason why it got continued.

THE COURT: And then we have [Mother's Other Previous Attorney] and then we have (INDISCERNIBLE) and then the case has been continued (INDISCERNIBLE) trial.

[MOTHER'S ATTORNEY]: Well, I'll be candid. [Mother's GAL] and I have communicated about the matter and you know her reputation --

THE COURT: She is her GAL (INDISCERNIBLE). [Mother's GAL], I don't know what you were (INDISCERNIBLE).

[MOTHER'S ATTORNEY]: Say what, Judge? I'm sorry. You popped out.

THE COURT: I didn't understand what [Mother's GAL] was going to say. Ma'am? I'm trying to process this in my head. [Mother's GAL], what did you want to say?

[Mother's GAL]: Your Honor, I don't have much to add. I just wanted to let the Court know that we did attempt to reach [Mother] on Thursday and have, I guess, a conference with her and there was some issues as far as getting up with her. And I believe Friday, we were going to try to

*Opinion of the Court*

reach her again. [Mother's Attorney] and I were both in a hearing into late on Friday and I do -- I would support since [Mother's Attorney] has not spoken to [Mother] at an extensive length and we're talking about a TPR, I guess it's just my request --

THE COURT: See, what I'm processing for all intents and purposes is that you were the -- you are the stand in. That's why we have you for [Mother] as the GAL for her.

[MOTHER'S ATTORNEY]: Oh, [DSS Attorney] has a triangle.

THE COURT: I don't know why he has a triangle. I just -- I'm flabbergasted because I could have put this case further down. [GAL Attorney Advocate], I mean, I'm just -- I have too much (INDISCERNIBLE) --

[GAL ATTORNEY ADVOCATE]: I'm sorry, Your Honor, did you have a question for me or --

THE COURT: No. I am -- I will give you all a few minutes, but because we have [Mother's GAL] here representing her interests, I am ready to proceed.

[MOTHER'S ATTORNEY]: All right then, Judge.

THE COURT: I will give you -- and this was -- [Mother's GAL]'s been here for a good long time. So I'll give you until 9:45 if you want to go into a break-out room.

[MOTHER'S ATTORNEY]: Can we go to a break-out room, [Mother], [Mother's GAL], and I?

THE COURT: Go ahead and do it. We will put you three in a break-out room until 9:45 and then we'll be ready to proceed because [Mother's GAL]'s present and for all intents and purposes, she represents her and I'm satisfied with that.

[MOTHER'S ATTORNEY]: Thank you, Judge. Thank you --



THE COURT: So we will be at ease until 9:45.

[MOTHER'S ATTORNEY]: -- [DSS Attorney].

THE COURT: At that time, [DSS Attorney], we will proceed with this case.

Following this hearing, on 2 February 2022, the trial court entered an *Order Terminating Parental Rights* for all three children. Mother timely appealed the order.

### **ANALYSIS**

On appeal, Mother challenges only the trial court's denial of the motion to continue at the beginning of the termination hearing. As a result, we focus only on this issue. *See* N.C. R. App. P. 28(b)(6) (2023) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Mother's challenge to the trial court's denial of her motion to continue has three bases: (A) that the trial court could not have ruled on the motion to continue without hearing evidence; (B) that the trial court should have weighed the need for a continuance against the need for conducting the hearing immediately and granted the continuance; and (C) that Mother's right to effective assistance of counsel in the termination proceeding entitled her to the motion to continue so her attorney had essential time to prepare.

#### **A. Hearing Evidence**

Mother's first argument—that the trial court needed to hear evidence to

resolve the motion to continue—is based upon N.C.G.S. § 7B-1109(d), which states:

The court may for good cause shown continue the hearing for up to 90 days from the date of the initial petition in order to receive additional evidence including any reports or assessments that the court has requested, to allow the parties to conduct expeditious discovery, or to receive any other information needed in the best interests of the juvenile. Continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance.

N.C.G.S. § 7B-1109(d) (2021).

She also points us to the following cases:

“[B]efore ruling on a motion to continue the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice.” *Shankle v. Shankle*, 289 N.C. 473, 483[] . . . (1976); *see also In re D.W.*, 202 N.C. App. [624, 624 (2010)] (“When a trial court rules on a motion to continue, ‘[t]he chief consideration is whether granting or denying a continuance will further substantial justice.’”).

Mother misunderstands the statute and these holdings. The statute Mother points us to *permits* the trial court to *allow* a motion to continue a hearing for the evidentiary reasons listed.<sup>1</sup> Nothing in the statute *requires* the trial court to hear evidence prior

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<sup>1</sup> It is well established that “may” is permissive language, whereas “shall” is a mandate to courts. *See Campbell v. First Baptist Church of City of Durham*, 298 N.C. 476, 483 (1979) (“We recognize that . . . the use of ‘may’ generally connotes permissive or discretionary action and does not mandate or compel a particular act.”); *cf. State v. Inman*, 174 N.C. App. 567, 570 (2005) (“While, ordinarily, the word ‘must’ and the word ‘shall,’ in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory, and a failure to observe it fatal to the validity

to *denying* a continuance. *See generally* N.C.G.S. § 7B-1109(d) (2021).

Furthermore, although *Shankle* holds that trial courts should hear “the evidence pro and con” for a motion to continue, the case does not require an evidentiary hearing. Instead, this language reflects that the trial court should consider the grounds supporting the grant of a continuance and those undermining the grant of a continuance. *Shankle* indicates the rule that “before ruling on a motion to continue the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice” is merely a reformulation of the following:

In passing on the motion the trial court must pass on the grounds urged in support of it, and also on the question whether the moving party has acted with diligence and in good faith. In reaching its conclusion the court should consider all the facts in evidence, and not act on its own mental impression or facts outside the record, although it may take into consideration facts within its judicial knowledge. The motion should be granted where nothing in the record controverts a sufficient showing made by the moving party, but since motions for continuance are generally addressed to the sound discretion of the trial court a denial of the motion is not an abuse of discretion where the evidence introduced on the motion for a continuance is conflicting or insufficient. The chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice.

*Shankle*, 289 N.C. at 483 (marks omitted). Nothing in this rule statement suggests

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of the purported action, it is not necessarily so and the legislative intent is to be derived from a consideration of the entire statute.”), *disc. rev. denied*, 360 N.C. 652 (2006).

an evidentiary hearing is mandatory; rather, it indicates that the reasons for a continuance should be considered, along with reasons against, and weighed in light of all the facts in evidence. Indeed, citing this caselaw, our Supreme Court has approved of the denial of a motion to continue where “the District Court allowed both [the] defendant and the State to be heard on the motion to continue before ruling. No evidence was offered with regard to the motion.” *State v. T.D.R.*, 347 N.C. 489, 504 (1998) (citing *Shankle*, 289 N.C. at 483). Here, similarly, the parties presented arguments for and against, and neither party offered evidence. The trial court did not err in failing to hold an evidentiary hearing on the motion to continue.

### **B. Balancing**

Mother next argues that the trial court should have conducted a balancing test in accordance with *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), to determine whether to allow the motion to continue.

Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court’s ruling is not subject to review. If, however, the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable.

[Where a respondent does] not assert in the trial court that a continuance was necessary to protect a constitutional right[,] [w]e [] review the trial court’s denial of [a] motion to continue only for abuse of discretion. Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. Moreover, regardless of

whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error.

*In re A.L.S.*, 374 N.C. 515, 516-17 (2020) (marks and citations omitted).

As our Supreme Court recently stated,

[a] parent enjoys a fundamental right to make decisions concerning the care, custody, and control of his or her children under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Accordingly, as noted above, when the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. At an adjudicatory hearing, a respondent-parent must be afforded an adequate opportunity to present evidence enabling the trial court to make an independent determination regarding the facts pertinent to the termination motion.

*In re C.A.B.*, 381 N.C. 105, 112 (2022) (marks and citations omitted). Here, Mother's attorney requested a continuance of the hearing due to the lack of contact between herself and Mother. However, unlike in *In re C.A.B.*, Mother's attorney at no point invoked due process, the North Carolina Constitution, or the United States Constitution as a basis for the motion to continue. *See id.* at 113. As a result, we review the trial court's denial of the motion to continue for an abuse of discretion. *See In re A.M.C.*, 381 N.C. 719, 723 (2022) (holding that, where the respondent invoked a constitutional basis for the motion to continue for the first time on appeal, the "respondent ha[d] waived any argument that the denial of the motion to continue was

based on a legal issue implicating her constitutional rights”).<sup>2</sup>

The *Matthews v. Eldridge* balancing test concerns whether the requirements of due process under the constitution have been met. *See* 424 U.S. at 335. Considering Mother’s failure to assert a constitutional argument below, we decline to review this argument for the first time on appeal. *See In re A.L.S.*, 374 N.C. at 517 (declining to address an alleged constitutional basis for a motion to continue when it was not raised below, as “[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal”).

### **C. Effective Assistance of Counsel**

Lastly, Mother argues that her statutory right to effective assistance of counsel in a termination of parental rights hearing was infringed upon because the denial of the motion to continue left Mother’s attorney without adequate time to prepare a defense.

“A trial court’s ruling on a motion to continue ordinarily will not be disturbed absent a showing that the trial court abused its discretion, but the denial of a motion to continue presents a reviewable question of law when it involves the right to effective assistance of counsel.” *In re Bishop*, 92 N.C. App. 662, 666 (1989); *see also*

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<sup>2</sup> We note that, as in this case, *In re A.M.C.* concerned the adequacy of time to prepare for a termination of parental rights hearing. *Id.* (“Here, [the] respondent’s counsel did not assert in the trial court that a continuance was necessary to protect a constitutional right. Instead, he stated: ‘My reasoning behind the continuance. Last week was certainly [the] respondent’s more recent incarceration. And they did not provide me an opportunity to really prepare [the] respondent for today’s defense.’”).

*In re M.T.-L.Y.*, 265 N.C. App. 454, 460 (2019) (“Questions of law are reviewed *de novo*.”). “A parent in a termination of parental rights proceeding has a statutory right to counsel pursuant to N.C.G.S. § 7B-1101.1, which inherently requires effective assistance from that counsel.” *In re Z.M.T.*, 379 N.C. 44, 48 (2021); *see also* N.C.G.S. § 7B-1101.1(a) (2021).

To succeed in a claim for ineffective assistance of counsel, respondent must satisfy a two-prong test, demonstrating that (1) counsel’s performance was deficient; and (2) such deficient performance by counsel was so severe as to deprive respondent of a fair hearing. To make the latter showing, the respondent must prove that there is a reasonable probability that, but for counsel’s errors, there would have been a different result in the proceedings.

*In re Z.M.T.*, 379 N.C. at 48 (marks and citations omitted). “The right to effective assistance of counsel includes, as a matter of law, the right of client and counsel to have adequate time to prepare a defense.” *In re Bishop*, 92 N.C. App. at 666. “Unlike claims of ineffective assistance of counsel based on defective performance of counsel, prejudice is presumed in cases where the trial court fails to grant a continuance which is essential to allowing adequate time for trial preparation.” *Id.* (marks omitted) Nonetheless, “[w]here the lack of preparation for trial is due to a party’s own actions, the trial court does not err in denying a motion to continue.” *Id.*

Here, Mother’s attorney had an adequate amount of time to prepare. Mother was represented by the Public Defender’s Office throughout the duration of the pending motion to terminate her parental rights—a duration of time spanning from

4 January 2020 to 2 February 2022. Over these approximately two years, she had several attorneys; however, as of the pretrial hearing on 9 December 2021, her counsel was Catherine Constantinou. Constantinou appears to have made her first appearance at this hearing, and Mother was not present. On the day of the pretrial hearing, Constantinou was able to communicate with Mother's guardian ad litem, who had been appointed on 19 April 2021 and involved with the termination of parental rights<sup>3</sup> proceedings for nine months. At the pretrial hearing on 9 December 2021, Constantinou indicated that she would withdraw if she could not get in touch with Mother, implying she had been attempting to make contact.

However, after the pretrial hearing on 9 December 2021, Mother reached out to Constantinou by telephone and left a voicemail but did not respond to Constantinou's call back the following afternoon. On 10 December 2021, Constantinou subsequently communicated with the guardian ad litem again and discussed the matter, then unsuccessfully attempted to call Mother. On the morning of the hearing on 13 December 2021, the trial court set aside time for Constantinou and Mother's guardian ad litem to briefly meet with Mother in a private setting.

Considering these facts, we conclude Mother's attorney had ample time to

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<sup>3</sup> Furthermore, Mother's guardian ad litem made appearances in that capacity much earlier in the case—as early as the initial adjudication and disposition hearing for S.G. and K.G. on 1 August 2019. Additionally, the trial court determined that Mother required a guardian ad litem on 12 June 2019 and continued the 1 August 2019 hearing so Mother could be assigned and consult with a guardian ad litem.



prepare. Of particular importance is Constantinou's access to Mother's guardian ad litem. Mother's guardian ad litem had been involved in the case for over two years at the time of their discussions regarding the termination of parental rights hearing and, thus, had familiarity with Mother and her case. Constantinou's familiarity with the case and Mother served as a comprehensive substitute for access to Mother. The adequacy of this substitution is enhanced by our recognition in past cases that "the appointment of a guardian ad litem will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination." *In re J.A.A.*, 175 N.C. App 66, 71 (2005). Constantinou's ability to discuss Mother's case with Mother's guardian ad litem, who had prolonged and comprehensive interactions with Mother and her case and whose appointment substituted her judgment in litigation for that of Mother, supports the trial court's conclusion that Constantinou had adequate time to prepare for the hearing. This conclusion is further buttressed by Constantinou's private discussion with Mother and Mother's guardian ad litem on the morning of the hearing, providing Constantinou an opportunity to address any concerns with Mother directly.<sup>4</sup>

As Mother had adequate time to prepare, the motion to continue was not "essential" for Mother to receive effective assistance of counsel and the trial court did

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<sup>4</sup> We also note that any inadequacy in the time that Constantinou had to prepare for the hearing was due to Mother's unavailability, which would support the trial court's denial of the motion to continue. *In re Bishop*, 92 N.C. App. at 666 ("Where the lack of preparation for trial is due to a party's own actions, the trial court does not err in denying a motion to continue.").

not err in failing to grant a continuance. *See In re Bishop*, 92 N.C. App. at 666.

**CONCLUSION**

The trial court did not err in denying Mother's motion to continue because an evidentiary hearing is not required prior to the determination of such a motion. Mother waived any constitutional argument related to the motion to continue, and Mother did not receive ineffective assistance of counsel since her counsel had adequate time to prepare.

AFFIRMED.

Judges CARPENTER and GRIFFIN concur.

Report per Rule 30(e).