

House Bill 1104 (S.L. 2026-38)

Separate Pathways for Capacity Restoration and Involuntary Commitment of Defendants Found Incapable to Proceed

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Background

The intersection of criminal justice and mental health has drawn considerable attention since August 2025 when DeCarlos Brown, a man with a criminal history and a history of mental illness, was charged with killing Iryna Zarutsky by stabbing her to death on a light rail train in Charlotte. The North Carolina General Assembly responded quickly with legislation and study directives, discussed in the accompanying footnote.¹

Receiving less attention was another act in 2025 dealing with an intersection point between criminal justice and mental health—namely, treatment for defendants found incapable to proceed in criminal cases. North Carolina has provided treatment of an incapable defendant, including treatment and education to restore capacity, via involuntary commitment. In [S.L. 2025-27](#) (H. 576), the General Assembly enacted G.S. 122C-256 approving pilot capacity restoration programs for incapable defendants, separate from commitment, through the North Carolina Department of Health and Human Services (DHHS). The act also directed DHHS and the North Carolina Administrative Office of the Courts (AOC) to report by January 1, 2026, about a permanent process for capacity restoration apart from involuntary commitment. See Sec. 6.1(b) of S.L. 2025-27. The product of the committee’s work, proposed legislation creating a new capacity restoration pathway and making other changes to the capacity and commitment statutes, became part of [S.L. 2026-38](#) (H. 1104) (hereinafter House Bill 1104 for ease of reference). (There is

1. In 2025, soon after Iryna Zarutsky was killed, the General Assembly enacted Iryna’s Law, [S.L. 2025-93](#) (H. 307), restricting pretrial release for defendants; requiring judicial officials to undertake additional steps in setting pretrial release conditions, including referring defendants for mental health examinations when certain indicators are present; and directing further study of the intersection of criminal justice and mental health. Later in 2025, in [S.L. 2025-97](#) (S. 449), the General Assembly postponed until December 1, 2026, the portion of Iryna’s Law requiring a mental health assessment before release of a defendant. See also [S.L. 2026-38](#) (H. 1104) (postponing assessment requirement further until Dec. 1, 2028). For a further discussion of Iryna’s law, see Brittany Brommell, [Iryna’s Law and Pretrial Release](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2026/02 (Mar. 2026). Also in 2025, the General Assembly created the House Select Committee on Involuntary Commitment and Public Safety (House Select Committee) to examine the intersection of criminal justice and mental health. After hearing from several experts and stakeholders, the House Select Committee submitted its recommendations for reform and additional study. See [Report to the 2026 Session of the 2025 General Assembly](#) (Apr. 14, 2026).

not a separate committee report.) These changes become effective December 1, 2026, and apply to initial and supplemental capacity hearings on or after that date.

This summary reviews the key features of the capacity and commitment changes in House Bill 1104. Other sections of the bill are described briefly in the accompanying footnote.² This area of the law is continuing to evolve. If you have questions, concerns, or comments, please contact me at rubin@sog.unc.edu.

The AOC is expected to promulgate new forms reflecting these changes. For additional details about the capacity and commitment process, this summary refers to my 2025 bulletin on capacity to proceed. See John Rubin, [*Capacity to Proceed in Criminal Cases in North Carolina*](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2025/06 (Oct. 2025) (hereinafter *Capacity Bulletin*).

Statutory Authorization for Capacity Restoration Pathway

In cases involving a defendant found incapable to proceed in a criminal case, a central concern of the criminal justice system has been to restore the defendant's capacity to proceed. The North Carolina statutes have not contained an explicit procedure for capacity restoration, however. Rather, the statutes have authorized the criminal court to order involuntary commitment if it finds that an incapable defendant meets the criteria for commitment. If committed to one of the three state hospitals in North Carolina—Broughton Hospital in Morganton, Central Regional Hospital in Butner, or Cherry Hospital in Goldsboro—the defendant then receives capacity restoration programming.

A primary objective of the capacity and commitment changes in House Bill 1104, contained in Section 13 of the bill, is to establish a procedure for capacity restoration separate from involuntary commitment. Revised G.S. 15A-1001, the opening section of the article on incapacity to proceed (Art. 56 of Ch. 15A), states that “[i]t is State policy” that capacity restoration services should be provided to a defendant who is incapable to proceed. The revised statute recognizes the practical limits on these services, stating in general that they should be provided when “feasible and appropriate” and in “as efficient and timely a manner as possible.” See G.S. 15A-1001(c). Revised G.S. 15A-1001 authorizes different modalities for capacity restoration, including education about the criminal justice

2. In addition to the changes to the capacity process (and the postponement of the mental examination requirement in Iryna's Law, discussed in note 1, above), House Bill 1104 requires various studies, pilot programs, and plans related to the intersection of criminal justice and mental health, including further study of the intersection of capacity and commitment by UNC's North Carolina Collaboratory, with a report due March 1, 2027. The School of Government is involved with that study and others. Some of the studies reflect the recommendations submitted by the House Select Committee, discussed in note 1, above. House Bill 1104 also modifies several statutes on outpatient commitment, effective for proceedings on or after December 1, 2026.

system, psychoeducation about the defendant's condition, and mental health treatment and counseling. See G.S. 15A-1001(d). For acts or omissions in connection with capacity restoration that are not grossly negligent, the revised statute grants immunity from civil liability. See G.S. 15A-1001(e).

As with the decision to initiate involuntary commitment of an incapable defendant, the decision to order capacity restoration rests with the court in the criminal case. References in this summary to the "court" are to the criminal court unless otherwise noted.

Capacity restoration, whether during commitment or in a separate capacity restoration program, occurs under the auspices of DHHS. G.S. 122C-256 has authorized DHHS, and LME/MCOs (Local Management Entity/Managed Care Organizations) in consultation with DHHS, to contract with providers for pilot capacity restoration programs in local jails for in-custody defendants (referred to as detention center capacity restoration programs or DCCRPs) and community-based programs for defendants who are not in custody (referred to as community-based capacity restoration programs or CBCRPs). The revised statute adds authorization for inpatient-based capacity restoration programs (IBCRPs) and requires the State psychiatric hospitals to make these programs available regardless of whether the person meets involuntary commitment criteria. See G.S. 122C-256(d). The title of G.S. 122C-256 continues to refer to these programs as "pilot programs," but the text of the statute is not time-limited. The criteria for the programs are discussed further below.

An uncodified section of House Bill 1104—that is, a provision that carries the force of law but was not made part of the General Statutes—directs DHHS to adopt and publish on its website guidelines for DCCRPs, CBCRPs, and IBCRPs that incorporate best practices for capacity restoration. See also *Advoc. Ctr. for Elderly & Disabled v. La. Dep't Health & Hosps.*, 731 F. Supp. 2d 603, 621 (E.D. La. 2010) (holding that jail-based treatment program for incapable defendants is subject to due process requirement that program bear reasonable relationship to restoring defendants' capacity and determining whether they are restorable; finding that scant services provided by program infringed on defendants' due process rights).

Initial Steps to Determine Capacity

Capacity examination and report. The initiation of the process for determining capacity remains unchanged. G.S. 15A-1002 continues to provide that the court may order an examination of a defendant's capacity, referred to as a forensic examination, if the defendant's capacity is at issue. A new subsection, G.S. 15A-1002(b3), requires examiners to include the following information in their report if they conclude that the defendant is not capable to proceed:

- an opinion about the causes of the defendant’s mental illness or condition;
- an opinion about whether the defendant is able to gain capacity in the foreseeable future and whether capacity restoration services would likely aid the defendant in gaining capacity;
- any recommended treatment or education needed for the defendant to gain capacity and, if known, the availability of such services;
- a recommendation of the appropriate clinical setting for capacity restoration services; and
- any other opinions or recommendations ordered by the court or that the examiner believes necessary for the court’s consideration.

Forensic reports have often included much of this information, but new G.S. 15A-1002(b3) specifically requires it, including a recommendation of the appropriate clinical setting for restoration—that is, community, jail, or inpatient. If the examiner is unable to provide any of the information, the examiner must state the reasons in the report. The new subsection also approves the practice of conducting forensic examinations remotely by video-teleconference.

New G.S. 15A-1002(b3) places a significant restriction on reports by local capacity examiners, who conduct examinations of defendants charged with misdemeanors as well as examinations of defendants charged with felonies when the court opts for a local examination initially. The revised statute states that “[l]ocal evaluators may not make a recommendation of non-restorability.” Restricting the information permitted from local evaluators may turn out to make it harder for a court to make a finding about the defendant’s restorability, a precondition for ordering restoration, discussed below. The restriction also raises questions about how local examiners should navigate the new requirement that they include in their report a recommendation of the appropriate clinical setting for restoration, discussed above, if they conclude that the defendant is not restorable.

G.S. 15A-1002(c) continues to allow the court to enter temporary orders for confinement or security of the defendant pending a determination of capacity, which implies that the court also may allow pretrial release. Revised G.S. 15A-532 adds that pretrial release is governed by Article 26, which governs pretrial release generally, and by Article 56, which governs capacity to proceed determinations. The new language states that it applies to defendants found incapable to proceed, but courts likely have the pretrial release options available under Article 26 while the defendant awaits a capacity examination and determination. For a further discussion of pretrial release, see [Capacity Bulletin](#), § V.G. Pretrial Release.

Determination of capacity. G.S. 15A-1002(b)(1) continues to require a hearing after a forensic examination, although as under the current statute the parties may stipulate that the defendant is capable to proceed. The statute also continues to require the court to make findings of fact about its capacity determination. Findings appear to be required, or at least they remain advisable, if the parties stipulate to capacity. *See also State v. Myrick*, 277 N.C. App. 112 (2021) (finding that court erred in not making findings that defendant was capable to proceed in case in which prosecutor and defense counsel requested that court find defendant not guilty by reason of insanity and enter commitment order). The revised subsection adds an explicit requirement that if the court determines that the defendant is incapable to proceed, it must ensure that a record of the determination is transmitted to the National Instant Criminal Background Check System pursuant to G.S. 14-409.43(a)(5), which may affect the person’s eligibility to possess a firearm.

Placement in Capacity Restoration Program

Program options. The new pathway for capacity restoration, separate from civil commitment, appears in revised G.S. 15A-1003. Revised G.S. 15A-1003(b) provides that if the court, pursuant to G.S. 15A-1002, finds that a defendant is incapable to proceed and is restorable, the court must order that the defendant enroll in a capacity restoration program unless an exception applies. The court must find that the defendant is “reasonably likely to gain capacity to proceed” and is restorable “within the foreseeable future.”

If the court makes the required restorability finding, it has three restoration program choices—a community-based, jail-based, or inpatient program as defined in G.S. 122C-256, discussed above. Participation in the pilot capacity restoration programs in the community and in jail has depended on the defendant’s consent. Amended G.S. 15A-1003(b) authorizes a court to order participation, although as a practical matter the defendant may need to be amenable to restoration services. G.S. 122C-256 does not specify the number or location of jail or community-based restoration programs, leaving those determinations to DHHS. For now, the permanent restoration programs are the same as the pilot programs previously established by DHHS, described below.

Revised G.S. 122C-256 also adds authorization for inpatient restoration at the state hospital without involuntary commitment. Until now, inpatient restoration has only occurred following involuntary commitment to the state hospital.

The criteria for the three types of restoration programs are as follows:

- The court must order a community-based program if the defendant is eligible for pretrial release and a program is reasonably available based on geographic location, program capacity, and any other relevant factor. The court may include, as a condition of pretrial

release, a custody release of the defendant to a designated person or organization agreeing to supervise the defendant. Working with different providers, DHHS has established three community-based programs in the following counties—Cumberland (by [CommuniCare](#)), Wake (by [Elwyn](#)), and Mecklenburg (by [Atrium](#)). These programs may be able to provide services to an “out of county” defendant by providing some services, such as legal education, virtually and coordinating with the defendant’s local provider for treatment. Some defendants also may have reliable transportation to travel to the community-based restoration office. More information about these programs is available on the [DHHS website](#).

- The court must order a jail-based program if the defendant is in pretrial custody and a program is reasonably available. Working with the provider Recovery Solutions, DHHS has established jail-based programs in Pitt and Mecklenburg counties. These programs, known as NC RISE (Restoring Individuals Safely and Effectively), accept in-custody defendants from other counties if the sheriff in the transmitting county signs a memorandum of understanding with the host sheriff. The [DHHS website](#) lists thirty-three counties that are participating in addition to Pitt and Mecklenburg and includes a form memorandum of understanding for each of those counties.
- The court may order inpatient restoration if it determines that the most appropriate setting for capacity restoration is in an inpatient setting other than through involuntary commitment and an inpatient program is reasonably available. Inpatient restoration occurs at one of the three state hospitals. The particular hospital appears to depend on the county in which the criminal case is being heard. See [10A N.C. Admin. Code 28F .0101](#).

If the court orders the defendant to participate in any of these programs, the court also must issue any other orders to safeguard the defendant and protect the public and ensure and provide for the defendant’s return for trial if the defendant gains the capacity to proceed. See G.S. 15A-1003(b)(5). This provision and a specific provision on return of the defendant for trial once capable (G.S. 15A-1004, discussed below) do not mandate any particular requirement. Presumably, the court’s order would depend on the program it requires.

G.S. 15A-1003(c) states that referral to a restoration program may be waived if no program is reasonably available, if the defendant is expected to gain capacity without the need for capacity restoration, or for other good cause. In that instance, the statute provides that the court must issue any further orders to safeguard the defendant and protect the public and may review and modify the defendant’s conditions of release.

If the court finds that the defendant is not likely to gain capacity in the foreseeable future, the court may not order that the defendant receive restoration services and instead must consider whether G.S. 15A-1008, discussed below, requires dismissal of the charges on the basis that the defendant is unlikely to gain capacity. See G.S. 15A-1003(d). The statute empowers the court to review and modify the defendant's conditions of release pending further determinations pursuant to G.S. 15A-1008 or other hearing. *Id.*

Duration of restoration efforts. If the court orders participation in any of the three types of restoration programs, G.S. 15A-1003(b)(4) requires the court to specify the duration of restoration efforts and sets a maximum initial term of four months. The statute directs the court, in setting the duration of restoration, to take into account the defendant's mental condition, prognosis for gaining capacity, nature of the criminal charges, nature of the restoration program, and any other relevant factors. The court may extend restoration for additional four-month terms following a supplemental hearing under new G.S. 15A-1007(e), discussed further below, if the court finds that continued participation is reasonably likely to restore the defendant's capacity.

G.S. 15A-1007(e) does not specify a maximum time limit for restoration except if the defendant is charged with misdemeanors only. The statute provides that the maximum total period of restoration for misdemeanors may not exceed 12 months. Dismissal of the charges, discussed below, may be required before then, particularly for defendants who are in custody awaiting or receiving restoration services.

Under the applicable statutes, G.S. 15A-1003(b) and G.S. 15A-1007(e), wait times do not count toward these statutory maximums. Wait times for evaluation and treatment of incapable defendants have spurred litigation across the country, including in North Carolina where a civil suit for injunctive relief is pending. See *Disability Rights North Carolina v. N.C. Dep't Health & Hum. Servs.*, 2026 WL 880084 (M.D.N.C. Mar. 30, 2026) (denying preliminary injunction to require capacity evaluation and initiation of treatment within 14 days of respective court orders for evaluation and treatment; and denying motion to dismiss plaintiff's due process claims and second claim for failure to reasonably accommodate under Americans with Disabilities Act). The federal magistrate's recommendation in the case, which the federal district court adopted as modified, cites several decisions from other states over wait times. See Memorandum Opinion and Recommendation of United States Magistrate Judge, 2025 WL 1665327 (M.D.N.C. June 12, 2025). For selected decisions, see the accompanying footnote.³

3. Litigation in other states has involved both civil and criminal cases. Some cases have involved requests for injunctive relief requiring quicker placement in capacity restoration programs. Compare, e.g., *Ward ex rel. v. Muth*, 2026 WL 1974743 (W.D. Tex. July 7, 2026) (granting permanent injunction requiring Texas to admit

G.S. 15A-1008 places an outer time limit on court-ordered participation in a capacity restoration program, including waiting time. It requires dismissal of the criminal charges if restoration is unlikely, the defendant has been in custody for the maximum for the most serious charge, or the case has been pending for five years for misdemeanors and ten years for felonies. See *also* G.S. 15A-1003(d) (requiring court to consider dismissal under G.S. 15A-1008 if the defendant is unlikely to gain capacity); G.S. 15A-1007(e) (providing that enrollment in capacity restoration program does not preclude dismissal under G.S. 15A-1008). For a further discussion of grounds for dismissal, see [Capacity Bulletin](#), §X.B. Dismissal of Charges.

Involuntary Commitment Option

G.S. 15A-1003(a) has provided that, if a court finds the defendant incapable to proceed, it must consider whether the defendant meets the criteria for involuntary commitment. That step initiates an evaluation by a commitment examiner, separate from the forensic capacity examination, to determine whether an incapable defendant requires inpatient or outpatient treatment. Commitment also has become an avenue for criminal courts to obtain capacity restoration. Except through the pilot capacity restoration programs established by DHHS, restoration has occurred at one of the three state hospitals following involuntary commitment.

New G.S. 15A-1003(e) continues to give criminal courts the option to order commitment of an incapable defendant. The new subsection provides that, in addition to ordering the defendant to participate in a restoration program, the criminal court may initiate involuntary commitment proceedings at any time. With the existence of a separate restoration pathway, however, courts may resort to commitment less often.

defendants to state hospital within 21 days of capacity restoration orders; ordering compliance with injunction within four years) *with Glendening ex rel. v. Howard*, 707 F. Supp. 3d 1089 (D. Kan. 2023) (denying preliminary injunction), *appeal dismissed by stipulation of parties*, 2024 WL 5330348 (10th Cir. 2024).

Some cases have involved requests in criminal prosecutions for dismissal of the charges and other relief. See, e.g., *United States v. Rendon-Romero*, 738 F. Supp. 697 (E.D.N.C. 2024) (denying motion to dismiss criminal charges where government admitted defendant to program within one month of deadline set by court); *United States v. McCarthy*, 703 F. Supp. 3d 1377 (M.D. Fla. 2023) (granting dismissal without prejudice of charges against terminally ill defendant held in custody for over five months, which was longer than the permissible four-month initial period of restoration under federal law, and observing that “for this defendant, those violations mean a likely life sentence without a trial”); *United States v. Reeves*, 690 F. Supp. 3d 531 (W.D.N.C. 2023) (denying “extraordinary remedy” of dismissal but noting that it may be appropriate for “grossly shocking and outrageous misconduct”; refusing to order immediate admission of defendant to facility, which “would arbitrarily leapfrog” the defendant over other defendants; and ordering government to report to court on status of admission and observing that “[a]bsent a showing that Defendant's due process rights are no longer being violated, the Indictment is subject to dismissal without further notice”).

New G.S. 15A-1003(e) is similar to G.S. 15A-1003(a), but it spells out the process for commitment in more detail. The statute makes clear that for a court to order commitment, it must find reasonable grounds to believe that the defendant is mentally ill and dangerous as described in G.S. 122C-261. Thus, a defendant's lack of capacity or the need for restoration alone is not a basis for commitment.

The new subsection continues to distinguish between nonviolent and violent offenses and maintains the current description of violent offense. For a discussion of the meaning of the term, see [Capacity Bulletin](#), § IX.D. Commitment for Violent Offenses: Statutory Procedures and Current Practices. If the charge is for a nonviolent offense, a local hospital is tasked with initially examining and treating the defendant. Not all local hospitals may be willing to do so, however. See [Capacity Bulletin](#), § IX.C. Current Practices for Nonviolent Offenses.

If the charge is for a violent offense, the statute requires law enforcement to take the defendant directly to a 24-hour facility. State hospitals are the only 24-hour facilities that accept these cases. Recognizing that state hospitals have been unable to admit defendants right away, new G.S. 15A-1003(e)(2) provides for law enforcement to take the defendant there "as soon as space is available." Presumably, if the defendant's condition changes while awaiting admission and the defendant no longer meets commitment criteria, the court may reconsider its commitment order.

G.S. 15A-1003(e)(3) and (4) give the court the authority to issue temporary detention orders and set pretrial release conditions as appropriate in cases in which it uses the commitment pathway instead of the restoration pathway. See *also* [Capacity Bulletin](#), § V.G. Pretrial Release (discussing similar pretrial release provisions under current statutes).

G.S. 15A-1003(e)(5) provides that evidence at the hearing on capacity to proceed is admissible in commitment proceedings.

G.S. 15A-1003(e)(6) requires that the treatment plan during commitment include capacity restoration. Unlike the new provisions on capacity restoration programs in G.S. 15A-1003(b), discussed above, G.S. 15A-1003(e) does not specify time limits on capacity restoration during commitment; however, it states that "a defendant's lack of capacity to proceed, standing alone, does not constitute an independent basis for continued civil commitment." G.S. 15A-1003(e)(6). If the charges are dismissed, the hospital's obligation to provide capacity restoration appears to end under revised G.S. 15A-1008(e), discussed further below under "Dismissal of Charges."

A notable difference between the consideration of commitment in new G.S. 15A-1003(e) and G.S. 15A-1003(a), which House Bill 1104 retains, is that new subsection (e) provides

that the court “may” consider commitment after finding a defendant incapable and “may” initiate commitment proceedings if the defendant meets the criteria for commitment while subsection (a) provides that the court “shall” do so. Whether the difference in language is consequential is not clear. To the extent the language conflicts, subsection (e) could be viewed as controlling because it is the newer and more detailed provision on the subject.

Unlike the restoration pathway, the commitment pathway does not require the court to review the status of restoration at specific intervals. When the court has initiated commitment for an incapable defendant, it may wish to schedule return hearings at similar intervals or sooner as appropriate.

Follow-up Examinations and Reports after Incapacity Determination

G.S. 15A-1004 has contained provisions for follow-up examinations of incapable defendants and reporting to the criminal court. House Bill 1104 completely rewrites the statute to create one set of requirements for the restoration pathway and another set of requirements for the commitment pathway. These requirements are effectuated by court order incorporating them.

New G.S. 15A-1004(a) requires a restoration program to report to the clerk of court every 60 days on the condition of the defendant. The report must include a statement about the likelihood the defendant will gain capacity during the remaining period of restoration. If the defendant gains capacity to proceed, the program must report immediately to the clerk of court. G.S. 15A-1004(a)(1). The program also must report immediately to the clerk if it appears that the defendant is not a suitable candidate for restoration, requires restoration in a different setting, or poses an unnecessary risk of danger to program personnel. G.S. 15A-1004(a)(2).

In cases in which commitment proceedings have been instituted, new G.S. 15A-1004(b) places reporting obligations on the hospital, institution, or provider (referred to as hospital) that has custody or care of an incapable defendant. Subdivision (b)(1) requires hospitals to report to the clerk of court whenever the defendant will not be involuntarily committed, will be discharged or released from involuntary commitment, or will go from inpatient to outpatient commitment—in other words, whenever the defendant will be released from the hospital. G.S. 15A-1004(b)(2) and (3) require the hospital to report to the clerk of court about the defendant’s capacity as well as submit other reports required by Ch. 122C, Art. 5, Part 7, which addresses involuntary commitment of people with a mental illness. It is not clear whether the obligations to report on the defendant’s capacity apply to all hospitals or only state hospitals. G.S. 15A-1004(b)(4) provides that if a defendant charged with a violent offense is released from a hospital, release must be into the custody of a specified law

enforcement agency. This provision appears to apply to state hospitals only, which are the only hospitals that house these defendants. If the commitment order does not designate to whom the defendant should be released, as may occur in cases involving nonviolent charges, the hospital may release the defendant to whomever is determined appropriate.

G.S. 15A-1004(c) contains a new reporting requirement when the court places the defendant in secure custody of a person or organization as a condition of release. It is not clear whether “secure custody” differs from a custody release under G.S. 15A-534(a)(3), one of the pretrial release statutes. The person or organization supervising the defendant must report to the clerk immediately if it appears that the defendant has gained capacity. The court also may require the person or organization to report to the clerk periodically on the defendant’s condition and the defendant’s likelihood of gaining capacity to the extent qualified to do so.

Return for Supplemental Hearings and Trial

G.S. 15A-1006 and G.S. 15A-1007 have provided for the return of a defendant when the defendant gains capacity to proceed and for supplemental hearings. House Bill 1104 completely rewrites these statutes and elaborates on the procedures to follow.

G.S. 15A-1006 addresses the procedures that apply when the clerk of court receives notice that the defendant has likely gained the capacity to proceed. Under G.S. 15A-1006(a), the clerk must notify the prosecutor and defense attorney within 72 hours of receiving this notice. The case then must proceed to hearing as provided in G.S. 15A-1007. If the court ordered the defendant to participate in a capacity restoration program under G.S. 15A-1003(b), the order remains in effect.

G.S. 15A-1006(b) provides that if the defendant is charged with a violent offense and has likely gained the capacity to proceed, the clerk must notify the sheriff, who must return the defendant for hearing as provided in G.S. 15A-1007. Pending the hearing, a defendant who is in custody may be required to participate in capacity restoration services if reasonably available.

G.S. 15A-1007 addresses the circumstances in which a court may hold a supplemental hearing and enter further orders. G.S. 15A-1007(a) places the responsibility on the prosecutor, after receiving notice from the clerk that the defendant has likely gained the capacity to proceed, to calendar the matter for hearing within 30 days or at the next available term of court. The court also may order a supplemental hearing on its own motion or on the motion of the defendant’s attorney, as well as on the motion of the prosecutor, to inquire into the defendant’s condition or consider dismissal of the charges under G.S. 15A-1008.

Consistent with the initial capacity inquiry under G.S. 15A-1002(b1), the parties may stipulate to capacity but not incapacity. New G.S. 15A-1007(a) states that if the parties stipulate to capacity, the judge may review additional evidence, including new evaluation reports. The statute also states that the court may determine capacity without a hearing if the parties stipulate to capacity, but conducting a hearing seems the better practice and may be constitutionally required. See *State v. Cooke*, ___ N.C. App. ___, 928 S.E.2d 361 (2026) (holding that when the defendant remains under an unvacated incapacity order, the court is obligated to hold a hearing before the case proceeds). Findings of fact also may be required. See G.S. 15A-1002(b1) (requiring findings of fact at initial capacity determination); *State v. Myrick*, 277 N.C. App. 112 (2021) (finding that trial judge erred in failing to make findings that defendant was capable to proceed). The formality of the hearing may vary. See *State v. Flow*, 384 N.C. 528, 547 (2023) (observing that no particular proceeding is mandated as long as the defendant has the opportunity to present any relevant evidence).

G.S. 15A-1007(b) provides that if the defendant is found to have gained capacity, the case must be calendared for trial at the earliest practicable time, with continuances of more than 60 days for extraordinary circumstances only and when necessary for the proper administration of justice. The court must issue a written order stating the grounds for any such continuance. Pending further proceedings, the court may order the defendant to receive capacity restoration services if reasonably available and reasonably necessary to prevent the defendant's capacity from deteriorating.

G.S. 15A-1007(c) requires the court to hold a supplemental hearing within a reasonable time if a capacity restoration program has not reported to the clerk about the defendant's capacity before the end of the court-ordered period of restoration or if it appears that any of the conditions for dismissal of the criminal charges apply. The statute also requires a supplemental hearing every four months if the court has not required capacity restoration services or if the defendant has been found not likely to gain capacity and the charges have not been dismissed. To facilitate compliance with these requirements and better keep track of the defendant's condition, the court may want to adopt the practice of setting a return hearing date at each hearing it holds.

G.S. 15A-1007(e) describes the actions a court may take at a supplemental hearing. It authorizes the court to order participation in a capacity restoration program if it finds that it is reasonably likely that the defendant will gain the capacity to proceed in the foreseeable future. It allows the court to extend the time for capacity restoration if it finds that continued participation is likely to restore the defendant's capacity. The statute limits the duration of each extension and the overall length of restoration for misdemeanors, discussed above under "Placement in Capacity Restoration Program: Duration of

restoration efforts.” The court also may institute involuntary commitment proceedings if the defendant meets the criteria for commitment, discussed above under “Involuntary Commitment Option.” If the defendant has been discharged from involuntary commitment and the charges have not been dismissed, the court may order participation in a capacity restoration program.

Dismissal of Charges

The General Assembly retained G.S. 15A-1008, which describes circumstances in which the court must dismiss criminal charges against an incapable defendant and whether the dismissal is with or without prejudice. See also [Capacity Bulletin](#), § X.B. Dismissal of Charges (discussing grounds for dismissal). The statute continues to provide that dismissal may be on the motion of the court, the defendant’s attorney, or the prosecutor and that dismissal by the court under these provisions is not subject to expunction under G.S. 15A-146, the statute on expunging dismissed charges.

New G.S. 15A-1008(e) incorporates a provision added in 2025 to require the court, on motion of the prosecutor, to consider commitment of an incapable defendant before dismissing the charges. [S.L. 2025-93](#), sec. 7.(a) (H. 307) (adding a less-detailed provision as G.S. 15A-1003(a1), repealed by House Bill 1104). New subsection (e) elaborates on the requirement and accompanying procedures, discussed below.

Subsection (e) provides that if the court finds reasonable grounds that the defendant meets the criteria for involuntary commitment and determines that the defendant is charged with a violent offense, law enforcement must take the defendant directly to a 24-hour facility—in practice, state hospitals only. The subsection does not expressly include the safety valve added to G.S. 15A-1003(e)(2), discussed above, providing for law enforcement to take the defendant to the state hospital when space is available. Whether the difference in language is consequential is not clear.

In cases involving violent offenses, subsection (e) also provides that a court may make “appropriate orders for the temporary detention of the defendant pending that proceeding.” If this provision means only that the court may order the defendant detained pending the “proceeding” in which it rules on dismissal of the charges, the provision is akin to other provisions on the court’s authority over pretrial release of a defendant found incapable to proceed, discussed above. With delays in admission to the state hospitals, however, the provision may have been intended to give the court greater authority to order detention after dismissing the charges. The extent of this additional authority is not clear. It probably cannot rest on the court’s authority in the criminal case—it would seem impermissible for a court to deny a person liberty on the basis of criminal charges that are no longer pending.

Rather, the court's authority would appear to depend on the authority granted to it in G.S. 15A-1008(e) to initiate commitment proceedings. G.S. 15A-1008(e) states that the proceedings upon dismissal are in accordance with Part 7 of Article 5 of Ch. 122C. Those provisions allow a person to be detained during commitment proceedings, but subject to limitations. See G.S. 122C-263(a) (allowing person to be detained while awaiting first examination but not in jail); G.S. 122C-263(d)(2) (allowing person to be detained at site of first examination for up to seven days if 24-hour facility is not available and for additional 7-day periods on initiation of new commitment proceedings). These limitations do not align with the commitment process for violent offenses, however, which skips the usual commitment steps and requires that the defendant be taken directly to a 24-hour facility.

Another question concerns the state hospitals' responsibility to assess the defendant's capacity after dismissal of the criminal charges. New G.S. 15A-1008(e) provides that commitment proceedings after dismissal are in accordance with G.S. 15A-1003(e)(1), (2), (3), and (5), which govern cases in which an incapable defendant is committed. Not included is subdivision (6) of G.S. 15A-1003(e), which requires capacity restoration efforts to continue as long as the defendant is committed. Such efforts, therefore, do not appear to be required after dismissal of the charges. G.S. 15A-1008(e) also provides that commitment proceedings after dismissal are in accordance with Part 7 of Article 5 of Chapter 122C. Included in that part is G.S. 122C-278, which requires reexamination of the defendant's capacity and reporting to the criminal court before discharge from the hospital. The rationale for these requirements after dismissal of the charges is unclear.

Last, G.S. 15A-1008(e) does not resolve a lingering question about the status of incapable defendants who have been charged with a violent offense. The statute provides for the defendant to go directly to the state hospital, bypassing an initial commitment examination at a local hospital. The commitment statutes also include several provisions that maintain the criminal court's involvement after admission of a defendant to the state hospital—for example, allowing the district attorney to represent the State at subsequent commitment hearings (held in district court and governed by the commitment provisions in Ch. 122C) and requiring release of the defendant to the custody of law enforcement if commitment is terminated. See [Capacity Bulletin](#), § IX.D. Commitment for Violent Offenses: Statutory Procedures and Current Practices. Once criminal charges are no longer pending, the rationale for these additional provisions is unclear.

Compelled Medication

In *Sell v. United States*, 539 U.S. 166 (2003), the U.S. Supreme Court recognized “that an individual has a ‘significant’ constitutionally protected ‘liberty interest’ [under the Due Process Clause of the U.S. Constitution] in avoiding the unwanted administration of

antipsychotic drugs.” 539 U.S. at 178 (quoting *Washington v. Harper*, 494 U.S. 210, 221 (1990)). North Carolina has not had a statute addressing compelled medication to restore capacity. New G.S. 15A-1010 provides that authority subject to limitations.

New G.S. 15A-1010(a) begins by stating that an incapable defendant may not be compelled to take medication to gain or maintain capacity except as authorized under G.S. 15A-1010(b). Subsection (b) provides that a court may compel medication of an uncooperative defendant for the purpose of gaining or maintaining capacity if the court finds by clear and convincing evidence, in writing, the following factors:

- The defendant is charged with a serious offense against person or property, with no special circumstances apparent that lessen the importance of the government’s interest in bringing the defendant to trial.
- The proposed treatment is reasonable and appropriate for the mental health condition of the defendant and is consistent with accepted medical standards.
- The proposed treatment will not cause an unnecessary risk to the defendant’s physical or mental health.
- The proposed treatment is necessary insofar as it is substantially likely to render the defendant capable and less intrusive means would not further this interest.
- The proposed treatment is substantially unlikely to have side effects that undermine the fairness of the defendant’s trial.

These factors are drawn from the considerations identified in *Sell* as constitutionally necessary to compel medication to restore capacity. Although no North Carolina appellate decisions have addressed the *Sell* factors, several federal cases, including by the Fourth Circuit Court of Appeals, have done so. See [Capacity Bulletin](#), § II.C. Medication.

If ordered by the court, administration of treatment must be at the direction and under the supervision of a licensed medical professional. G.S. 15A-1010(c). The court must review and authorize the treatment before it is implemented and may impose any conditions necessary to protect the rights of the defendant and ensure the safety of others, not inconsistent with accepted medical standards. *Id.* The court’s order may provide for alternative courses of treatment in the discretion of the licensed medical professional treating the defendant as long as the court has reviewed each course of treatment and found that each satisfies the requirements for compelled medication. G.S. 15A-1010(d). The court may review and amend orders for compelled medication on the court’s motion, the motion of the prosecutor or the defendant’s attorney, or on notice by the treatment provider to the clerk of court. G.S. 15A-1010(e).

G.S. 15A-1010(f) provides that the statute does not preclude medication of a person who has been involuntarily committed if authorized under Ch. 122C. See G.S. 122C-57(e) (allowing compelled medication for an involuntarily committed patient in the circumstances specified). Compelled medication for the purpose of restoring capacity, however, must satisfy the requirements of new G.S. 15A-1010, whether part of a capacity restoration program or involuntary commitment.

G.S. 15A-1010(g) provides immunity under G.S. 15A-1001(e), discussed above, for treatment compelled under G.S. 15A-1010.

Effective Date

The above provisions apply to any initial or supplemental capacity hearing conducted on or after December 1, 2026. This language may address an inconsistency created by legislation enacted by the General Assembly in 2013, [S.L. 2013-18](#) (S. 45), which made several changes to North Carolina's capacity and commitment procedures. The effective-date clause in the 2013 act made the changes effective for offenses committed on or after December 1, 2013. As a result, offenses before that date are subject to one set of procedures and offenses after that date are subject to different procedures. By making the changes in House Bill 1104 applicable to hearings on after December 1, 2026, the General Assembly may have created a unified set of procedures for all matters heard on or after that date.