Selected Mental Health Issues in Criminal Cases

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I. Capacity to Proceed

A. Requirement of Capacity

1. Standard: A defendant lacks the capacity to proceed in a criminal case if, by reason of mental illness or defect, he or she is unable to: understand the nature and object of the proceedings; comprehend his or her situation in reference to the proceedings; or assist in his or her defense in a rational or reasonable manner. G.S. 15A-1001(a). The question of capacity relates to the defendant's mental status at the time of the proceeding, not to his or her mental status at the time of the alleged offense.

2. Applicable to All Phases: Due process and North Carolina law prohibit the trial or punishment of a person who is incapable of proceeding. The question of the defendant's capacity to proceed may be raised at any time.

B. Procedure for Determining Capacity

1. Questioning Capacity: The defendant, prosecutor, or trial judge may question the defendant's capacity to proceed. Generally, when the defendant's capacity is questioned, the judge orders an evaluation of capacity. The pertinent AOC forms combine a motion questioning capacity and an order for an evaluation locally or at Central Regional Hospital depending on the offense. G.S. 15A-1002; AOC-CR-207, Motion and Order Appointing Local Certified Forensic Evaluator (Jan. 2011) (for misdemeanors or, if ordered by the judge, felonies); AOC-CR-208, Motion and Order Committing Defendant to Central Regional Hospital for Examination on Capacity to Proceed (Jan. 2011) (for misdemeanors after local exam or, if ordered by the judge, for felonies).

2. Determination of Incapacity: If following an evaluation of capacity the trial judge finds the defendant incapable of proceeding, the judge must determine whether there are reasonable grounds to believe the defendant meets the criteria for involuntarily commitment. The judge must make this determination regardless of the nature of the offense charged. If the judge finds grounds for commitment, the specific procedures in the ensuing commitment proceedings depend on whether the judge designates the crime as violent or nonviolent—for example, if the crime is designated as violent, a hospital may not release the defendant without a further court hearing. The criteria for continued commitment is the same—that is, whether the defendant is mentally ill and poses a danger to self or others. G.S. 15A-1003.

3. Termination of Criminal Proceedings: The judge *may* dismiss the criminal charges on any of the grounds specified in G.S. 15A-1008—for example, when the defendant has been deprived of his or her liberty for a period of time equal to or in excess of the maximum permissible period of

confinement for the offenses charged. The judge *must* release the defendant if the defendant is neither likely to gain capacity nor subject to civil commitment. *Jackson v. Indiana,* 406 U.S. 715 (1972).

C. Evidence Issues Involving Capacity Evaluation

1. At Capacity Hearing: A capacity evaluation is admissible at a capacity hearing, and the evaluator may testify about the evaluation. G.S. 15A-1002(b)(1). As with other expert testimony, discussed in VII.B., below, the expert may give an opinion about the ultimate issue to be decided—for example, whether the defendant is unable to understand the proceedings—but may not do so in the form of a legal conclusion—for example, whether the defendant has the capacity to proceed.

2. At Trial: The doctor-patient privilege does not protect the results of a court-ordered capacity evaluation. Generally, the Fifth Amendment privilege against self-incrimination precludes the use of a court-ordered capacity evaluation at trial except when the defendant offers expert testimony in support of a mental health defense. *See also State v. Atkins,* 349 N.C. 62, 107–08 (1998) (applying this exception to allow the State to use a capacity evaluation to rebut mental health evidence offered by the defendant at the sentencing phase of a capital trial). The Sixth Amendment right to counsel also precludes the use at trial of those portions of a capacity evaluation of which counsel for the defendant did not have notice—for example, inquiry into the circumstances of the alleged offense; however, even if counsel did not have notice of the scope of the evaluation, the evaluation is admissible to rebut expert testimony in support of a mental health defense. *See State v. Davis,* 349 N.C. 1, 43–44 (1998) (reaching this conclusion because counsel should have anticipated that the evaluation could be used to rebut a mental health defense).

D. Resources

Chapter 2, Capacity to Proceed, *in* JOHN RUBIN & ALYSON GRINE, NORTH CAROLINA DEFENDER MANUAL, VOL. 1 PRETRIAL (May 1998); Chapter 8, Commitment of Defendants Found Incapable of Proceeding, *in* BENJAMIN M. TURNAGE, JOHN RUBIN & DOROTHY T. WHITESIDE, NORTH CAROLINA CIVIL COMMITMENT MANUAL (2d ed. 2011); John Rubin, *Capacity and Commitment Flowchart* (Apr. 2010).

II. Capacity Issues During Criminal Investigation

A. Statements by the Defendant

1. Voluntariness: Under the Due Process Clause, a defendant's statement to law enforcement must be voluntary in all the circumstances, including circumstances related to the defendant's mental condition. *Compare, e.g., Davis v. North Carolina*, 384 U.S. 737 (1966) (holding in all the circumstances, including the defendant's low mentality, that the defendant's statements were the involuntary product of police coercion), *with State v. Fisher*, 158 N.C. App. 133 (2003)

(recognizing that mental illness may render a confession involuntary but finding that the circumstances supported the trial judge's determination that the defendant's confession was admissible in this case).

2. Knowing and Voluntary Waiver of *Miranda* Rights: In cases in which the police must give *Miranda* warnings, the defendant's mental condition is a factor to consider in determining whether he or she knowingly and voluntarily waived *Miranda* rights. *See, e.g., State v. Fincher,* 309 N.C. 1 (1983) (finding that a defendant's youth and mental retardation do not compel the conclusion that he or she could not validly waive *Miranda* rights, but stating that the characteristics of the defendant should be "carefully scrutinized" in such cases; holding that the totality of the circumstances supported the trial judge's determination that the defendant validly waived his rights in this case) (citation omitted).

B. Consent Searches and Voluntariness

A consent to search must be voluntary in all the circumstances, including circumstances related to the defendant's mental condition. *See, e.g., State v. James*, 118 N.C. App. 221 (1995) (recognizing limited mental capacity as factor in evaluating voluntariness of consent; finding that the circumstances supported the trial judge's determination that the defendant voluntarily consented to the search); G.S. 15A-221 (defining "consent" to search as a statement made "voluntarily" giving officers permission to search).

C. Resources

ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA at pp. 203–04, 533–34, 542 (4th ed. 2011); Chapter 14, Suppression Motions, *in* JOHN RUBIN & ALYSON GRINE, NORTH CAROLINA DEFENDER MANUAL, VOL. 1 PRETRIAL (July 2002).

III. Capacity Issues During Formal Proceedings

A. Waiver of Counsel

1. Capacity to Proceed: A defendant must have the capacity to proceed, as described in I., above, to waive the right to counsel.

2. Capacity to Represent Self: The U.S. Supreme Court has held that states may refuse to honor a defendant's waiver of counsel and request to proceed pro se at trial if the defendant is not capable of self-representation. The Court recognized that a defendant, although capable of proceeding, may not have the mental capacity to represent himself or herself at trial. *Indiana v. Edwards,* 554 U.S. 164 (2008). The N.C. Supreme Court appears to have taken the position that, although the trial judge must determine whether a waiver of counsel is knowing, voluntary, and intelligent, the judge has the discretion whether to conduct an *Edwards* inquiry and determine whether the defendant is capable of self-representation. *State v. Lane*, 365 N.C. 7 (2011).

3. Knowing and Voluntary Waiver of Counsel: In addition to having the capacity to proceed (and perhaps the capacity for self-representation), a defendant must knowingly and voluntarily waive counsel in accordance with constitutional and statutory requirements.

4. Resources: Chapter 12, Right to Counsel (§ 12.6, Waiver of Counsel, at pp. 28–34), *in* JOHN RUBIN & ALYSON GRINE, NORTH CAROLINA DEFENDER MANUAL, VOL. 1 PRETRIAL (May 1998).

B. Guilty Pleas

1. Capacity to Proceed: A defendant must have the capacity to proceed, as described in I., above, to waive the right to counsel.

2. Capacity to Plead Guilty: The standard for capacity to plead guilty is the same as the standard for capacity to proceed generally.

3. Knowing and Voluntary Entry of Plea: In addition to having the capacity to proceed, a defendant who wants to plead guilty must do so knowingly and voluntarily in accordance with constitutional and statutory requirements.

4. Resources: Chapter 23, Guilty Pleas (§ 23.4B, The Plea Procedure: Judge's Duty to Ensure Informed Choice, at pp. 64–67), *in* JULIE RAMSEUR LEWIS & JOHN RUBIN, NORTH CAROLINA DEFENDER MANUAL, VOL. 2 TRIAL (2d ed. 2012).

C. Decision Making

1. Concessions of Guilt: The North Carolina appellate courts continue to follow *State v. Harbison*, 315 N.C. 175 (1985), and require that the defendant consent to a concession of guilt during trial. If the assertion of a mental health defense effectively admits guilt to a greater offense, such as with a diminished capacity defense, the defendant may need to consent to the assertion of the defense.

2. Other Decisions: Under North Carolina law, if a defendant and his or her attorney reach an absolute impasse, the defendant's wishes control even as to strategic or tactical decisions. *But cf. State v. Jones,* ___ N.C. App. ___ (May 1, 2012) (holding that the absolute impasse rule does not require an attorney to take baseless positions). The North Carolina courts have not assessed whether ceding such authority to a marginally capable client is affected by the decisions in *Edwards* and *Lane* in III.A.2., above.

3. Resources: Chapter 28, Opening Statements (§ 28.6, Admissions of Guilt During Opening Statement, at pp. 170-73), and Chapter 33, Closing Arguments (§ 33.6, Admissions of Guilt During Closing Arguments, at pp. 305–07), *in* JULIE RAMSEUR LEWIS & JOHN RUBIN, NORTH CAROLINA DEFENDER MANUAL, VOL. 2 TRIAL (2d ed. 2012); Chapter 12, Right to Counsel (§ 12.8, Attorney-Client Relationship, at pp. 42–44), *in* JOHN RUBIN & ALYSON GRINE, NORTH CAROLINA DEFENDER MANUAL, VOL. 1 PRETRIAL (May 1998).

IV. Mental Health Defenses

A. Diminished Capacity

1. Definition: The defendant lacked the mental capacity to form the specific intent required for conviction of the charged offense.

2. Effect: The defense "negates" the specific intent required for conviction—that is, the defense prevents the State from proving beyond a reasonable doubt that the defendant had the specific intent required for conviction of the offense.

3. Offenses Affected: The defense is available against any offense that requires the State to prove specific intent, including first-degree murder (intent to kill), robbery (intent to commit larceny), indecent liberties (sexual purpose), and attempts (intent to commit crime). Generally, the effect is to reduce the charged offense to a lesser degree (for example, first-degree murder is reduced to second-degree murder), although in attempt cases no lesser offense may exist.

4. Burdens: The burden of production to obtain an instruction is on the defendant; the burden of persuasion is on the State to prove specific intent beyond a reasonable doubt.

5. Instructions: N.C.P.I—Crim. 305.11 (June 2009).

6. Resources: John Rubin, *The Diminished Capacity Defense*, ADMINISTRATION OF JUSTICE MEMORANDUM No. 92/01 (Sept. 1992).

B. Voluntary Intoxication

1. Definition: The defendant's ingestion of drugs or alcohol rendered him or her unable to form the specific intent required for conviction of the offense.

2. Effect: The defense "negates" the specific intent required for conviction—that is, the defense prevents the State from proving beyond a reasonable doubt that the defendant had the specific intent required for conviction of the offense.

3. Offenses Affected: The defense is available against any offense that requires the State to prove specific intent, including first-degree murder (intent to kill), robbery (intent to commit larceny), indecent liberties (sexual purpose), and attempts (intent to commit crime). Generally, the effect is to reduce the charged offense to a lesser degree (for example, first-degree murder is reduced to second-degree murder), although in attempt cases no lesser offense may exist.

4. Burdens: The burden of production to obtain an instruction is on the defendant (by showing through substantial evidence, in the light most favorable to the defendant, that he or she was "utterly incapable" of forming the specific intent required for conviction); the burden of persuasion is on the State to prove specific intent beyond a reasonable doubt.

5. Instructions: N.C.P.I—Crim. 305.10 (June 2009) and 305.11 (June 2009)

6. Resources: John Rubin, *The Voluntary Intoxication Defense*, ADMINISTRATION OF JUSTICE MEMORANDUM No. 93/01 (Apr. 1993).

C. Automatism (Unconsciousness)

1. Definition: The defendant, though capable of physical action, is not conscious of what he or she is doing. Unconsciousness as the result of voluntary ingestion of alcohol or drugs does not qualify. Dicta suggests that unconsciousness may not be raised if it results from insanity (*State v. Fields,* 324 N.C. 204 (1989)), but that dicta may not be a reliable basis for denying the defense.

2. Effect: The defense is a complete defense to the offense charged.

3. Offenses Affected: The defense is available against any offense except perhaps one in which the required mental state is recklessness or negligence and the defendant, knowing of his or her tendency to black out, puts himself or herself in a position where that tendency would be particularly dangerous, such as driving a car.

4. Burdens: The burden of production to obtain an instruction is on the defendant; the burden of persuasion is on the defendant unless the defense arises from the State's evidence, in which case the burden of persuasion is on the State to prove beyond a reasonable doubt that the defendant acted voluntarily.

5. Instructions: N.C.P.I.—Crim. 302.10 (June 2009).

6. Resources: Jeff Welty, *All You Need to Know about Automatism,* N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 14, 2011).

D. Involuntary Intoxication

1. Definition: As a general defense to an offense, the defendant, because of involuntary intoxication, must meet the standard for insanity. Few North Carolina cases have addressed the general defense of involuntary intoxication, but commentators have suggested this standard. *See* 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 176(c), at p. 341 (1984); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW at p. 1001 (3d ed. 1982). As a defense to an offense in which impairment is an element, the impairment need be involuntary only. *See* PERKINS at 999.

2. Effect: The general defense is a complete defense to the offense charged.

3. Offenses Affected: The general defense is available against any offense.

4. Burdens: The burden of production to obtain an instruction and the burden of persuasion to prove the defense to the satisfaction of the jury is on the defendant.

5. Instructions: There is no pattern instruction.

6. Resources: Shea Denning, *Is Automatism or Involuntary Intoxication a Defense to DWI,* N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 28, 2012).

E. Insanity

1. Definition: The defendant, by a defect of reason caused by disease or a deficiency of the mind, was incapable of knowing the nature and quality of his or her act or, if he or she did know, was incapable of distinguishing between right and wrong in relation to the act.

2. Effect: The defense is a complete defense to the offense charged. A defendant found not guilty by reason of insanity is subject to civil commitment proceedings as provided in G.S. 15A-1321.

3. Offenses Affected: The defense is available against any offense.

4. Burdens: The burden of production to obtain an instruction and the burden of persuasion to prove the defense to the satisfaction of the jury is on the defendant.

5. Instructions: N.C.P.I.—Crim. 304.10 (June 2009).

6. Resources: Chapter 7, Automatic Commitment—Not Guilty by Reason of Insanity, *in* BENJAMIN M. TURNAGE, JOHN RUBIN & DOROTHY T. WHITESIDE, NORTH CAROLINA CIVIL COMMITMENT MANUAL (2d ed. 2011).

V. Pretrial Procedure

A. Funds for Mental Health Expert

1. Extent of Right: An indigent defendant has a constitutional and statutory right to funds for an expert on a proper showing of need.

2. Application: In noncapital cases, an indigent defendant is entitled to apply ex parte for funds for a mental health expert in all cases and, if an open hearing would disclose confidential information, may apply ex parte for funds for other types of experts. In capital cases, a defendant must first apply to the Office of Indigent Defense Services (IDS) for funds for an expert; if IDS denies the request, the defendant may apply to the court for funds for an expert.

3. Required Showing: The defendant must make a "threshold showing of specific necessity" to obtain funds for an expert—that is, the defendant must make a preliminary, particularized showing of need.

4. Resources: Chapter 5, Experts and Other Assistance, *in* JOHN RUBIN & ALYSON GRINE, NORTH CAROLINA DEFENDER MANUAL, VOL. 1 PRETRIAL (MAY 1998); N.C. Commission on Indigent Defense Services, Part 2D: Appointment and Compensation of Experts and Payment of Other Expenses Related to Legal Representation in Capital Cases, at pp. 18–20 (May 2011).

B. Discovery

1. Notice of Defense: The defendant must give notice of all affirmative defenses if he or she has

requested and received discovery from the State and the State requests discovery (that is, if the State is entitled to reciprocal discovery). G.S. 15A-905(c)(1). The defendant must give notice of an insanity defense regardless of whether the defendant sought discovery from the State. G.S. 15A-959(a).

2. Notice of Expert Testimony: The defendant must give notice of any expert witnesses the defendant reasonably expects to call as a witness at trial if the State is entitled to reciprocal discovery. G.S. 15A-905(c)(2). The defendant must give notice of the intent to offer expert testimony relating to a mental disease, defect, or other condition bearing on whether the defendant had the mental state required for the offense charged regardless of whether he or she sought discovery from the State. G.S. 15A-959(b).

3 Disclosure of Examinations and Tests; Production of Report: The defendant must disclose to the State examinations and reports that the defendant intends to introduce at trial, or that were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to his testimony, if the State is entitled to reciprocal discovery. G.S. 15A-905(b). The defendant must furnish to the State a report of any expert the defendant reasonably expects to call at trial if the State is entitled to reciprocal discovery. G.S. 15A-905(c)(2). The State is not entitled to discovery of internal defense documents made by the defendant or by his or her attorneys or agents. G.S. 15A-906. For example, the State may not obtain the work of nontestifying defense experts unless a testifying expert bases his or her opinion on that work.

4. Examination of Defendant: If the defendant intends to rely on expert testimony in support of a mental health defense, the court may order the defendant to submit to a psychiatric examination at the State's request. *See State v. Boggess,* 358 N.C. 676 (2004).

5. Discovery by Defendant: Generally, defendants obtain mental health records without court involvement through a request and release to the custodian of the records. Some institutions may require a court order and, if an open hearing would disclose confidential information, a defendant may have grounds to apply ex parte for an order requiring production of the records.

6. Resources: Chapter 4, Discovery (§ 4.7A, Other Constitutional Rights: Evidence in Possession of Third Parties, at pp. 35–38, and § 4.9, Prosecution's Discovery Rights, at pp. 44–48), *in* 1 JOHN RUBIN & ALYSON GRINE, NORTH CAROLINA DEFENDER MANUAL, VOL. 1 PRETRIAL (May 1998); John Rubin, *Excerpts from Summaries of Legislation on Criminal Discovery* (2004 to 2011).

VI. Trial Procedure

A. Jury Selection

The parties may ask questions of prospective jurors about their attitudes toward mental health matters, such as mental illness and substance abuse. *See, e.g., State v. Avery,* 315 N.C. 1, 20 (1985) (recognizing that "in certain cases appropriate inquiry may be made in regard to whether a juror is

prejudiced against the defense of insanity," although holding in this case that the trial judge did not abuse his discretion in finding that questions were improper stake-out questions) (citation omitted).

B. Closing Arguments

Several cases concern the scope of prosecutors' closing arguments—for example, whether the arguments improperly denigrated mental health matters or the defendant's mental health experts—and are subject to general limits on closing argument.

C. Resources

Chapter 25, Selection of Jury, and Chapter 33, Closing Arguments, *in* JULIE RAMSEUR LEWIS & JOHN RUBIN, NORTH CAROLINA DEFENDER MANUAL, VOL. 2 TRIAL (2d ed. 2012).

VII. Evidence Issues

A. Lay Testimony

1. Basic Requirements: Unlike expert testimony, discussed in B., below, lay testimony must be based on the witness's personal knowledge. N.C. R. EVID. 602. A lay witness may give testimony in the form of an opinion if rationally based on the witness's perception and helpful to the jury. N.C. R. EVID. 701. The courts have sometimes characterized such opinion testimony by a lay witness as a "shorthand statement of fact."

2. Testimony about Mental State : Subject to the above requirements, a lay witness may testify about a person's mental condition—for example, whether a person was drunk—but may not offer an opinion requiring scientific knowledge or special expertise.

3. Resources: Chapter 11, Evidence (§ 11.9, Lay Witnesses, at pp. 350–54), *in* KELLA W. HATCHER, JANET MASON & JOHN RUBIN, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA (2011).

B. Expert Opinion

1. Basic Requirements: The requirements for admission of an expert's opinion may be shifting. The North Carolina Supreme Court has held that it does not follow the federal *Daubert* test for admission of expert testimony (*Howerton v. Arai Helmet, Ltd.,* 358 N.C. 440 (2004)), but revised N.C. Rule of Evidence 702, effective for actions arising on or after October 1, 2011, reflects the *Daubert* requirements. The revised rule may not have a significant effect on the admissibility of otherwise admissible expert psychological testimony. *See Foreman v. American Road Lines, Inc.*, 623 F. Supp. 2d 1327, 1335 (S.D. Ala. 2008) (finding no reason to believe that clinical psychologist's "combination of clinical observations, test results, and professional judgment in forming opinions concerning diagnostic impressions and recommendations . . . is scientifically suspect to the point of warranting *Daubert* intervention"); *U.S. v. West-Bey*, 188 F. Supp. 2d 576,

583 (D. Md. 2002) (observing that the "ferment" of *Daubert* appears to have bypassed psychiatric testimony in criminal matters).

2. Testimony about Mental State: An expert may testify to an ultimate issue in the case but may not do so in the form of a legal conclusion. For example, an expert could testify that the defendant did not have the capacity to plan but could not testify that the defendant lacked the capacity to premeditate and deliberate, a legal conclusion.

3. Basis of Opinion: An expert may testify to the basis of his or her opinion, including statements made by the defendant to the expert, regardless of whether the underlying information is inadmissible. The trial judge retains the discretion to limit testimony about the basis of an expert's opinion if the probative value is outweighed by its prejudicial effect, etc., under N.C. Rule of Evidence 403. The opposing party may cross-examine the expert about matters the expert considered and did not consider in forming his or her opinion.

4. Resources: Chapter 11, Evidence (§ 11.10, Expert Testimony, at pp. 354–61), *in* KELLA W. HATCHER, JANET MASON & JOHN RUBIN, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA (2011); Alyson Grine, *Legislative Change Regarding Expert Testimony,* FORENSIC SCIENCE IN NORTH CAROLINA, N.C. OFFICE OF INDIGENT DEFENSE SERVICES BLOG (Aug. 17, 2011) (discussing potential impact of revisions to Rule of Evidence 702); John Rubin, *The Voluntary Intoxication Defense*, ADMINISTRATION OF JUSTICE MEMORANDUM No. 93/01, at p. 8 (Apr. 1993); John Rubin, *The Diminished Capacity Defense,* ADMINISTRATION OF JUSTICE MEMORANDUM No. 92/01, at p. 4–5 (Sept. 1992).

VIII. Sentencing

A. Noncapital

1. Mitigating Factors: Mental condition insufficient to constitute a defense; age, immaturity, or limited mental capacity; duress. G.S. 15A-1340.16(e).

2. Resources: Robert L. Farb, *Appellate Cases: Structured Sentencing Act and Firearm Enhancement* (Feb. 1, 2010); ROBERT L. FARB, APPELLATE CASES ON AGGRAVATING AND MITIGATING FACTORS UNDER NORTH CAROLINA'S FAIR SENTENCING ACT (1995).

B. Capital

1. Mitigating Factors: Mental or emotional disturbance; age; impairment of capacity to appreciate criminality of conduct or conform conduct to requirements of law; duress. G.S. 15A-2000(f).

2. Resources: Chapter 6, Mitigating Circumstances, *in* ROBERT L. FARB, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK (2d ed. 2004).