CAPACITY TO PROCEED

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Contents

I. Introduction. G.S. 15A-1001 through 15A-1009 contain the basic standards and procedures for challenging the competency, or capacity to proceed, of a defendant. These provisions deal with the three main phases of a capacity challenge: a psychiatric examination; a hearing to determine capacity; and proceedings after a determination of incapacity (that is, involuntary commitment and disposition of the criminal case). This chapter reviews all three phases. For a discussion of civil commitment procedures generally, see NORTH CAROLINA CIVIL COMMITMENT MANUAL (UNC School of Government, 2d ed. 2011).

This chapter addresses cases in which the defendant is being tried as an adult. For a discussion specific to cases in juvenile court, see NORTH CAROLINA JUVENILE DEFENDER MANUAL Ch. 7 (Capacity to Proceed) (UNC School of Government, 2008).

To access Administrative Office of the Courts (AOC) forms referenced in this chapter, visit the Judicial Forms Search page at www.nccourts.org/forms/formsearch.asp. Two forms frequently cited in the chapter are: AOC-CR-207A and AOC-CR-207B, "Motion and Order Appointing Local Certified Forensic Evaluator" (Dec. 2013); and AOC-CR-208A and AOC-CR-208B, "Motion and Order Committing Defendant to Central Regional Hospital – Butner Campus for Examination on Capacity to Proceed" (Dec. 2013). To access North Carolina State Bar ethics opinions and rules of professional conduct, visit www.ncbar.com/menu/ethics.asp.

Legislative note: This chapter reviews the procedures in effect both for offenses committed before December 1, 2013, and for offenses committed on or after that date. During the 2013 legislative session the General Assembly made several changes to the statutes governing capacity determinations and the ensuing proceedings for involuntary commitment of a person found incapable to proceed. *See* S.L. 2013-18 (S 45). These changes were limited to offenses committed on or after December 1, 2013. The body of the chapter describes the current procedures. The "Legislative notes" describe significant changes made by the 2013 legislation as well as the procedures in effect for offenses committed before December 1, 2013; cases involving such offenses may still be pending. For a summary of the changes in one place, see Appendix, Summary of 2013 Legislation.

II. Standard for Capacity to Proceed to Trial.

A. Requirement of Capacity. Due process and North Carolina law prohibit the trial and punishment of a person who is legally incapable of proceeding. *See* Drope v. Missouri, 420 U.S. 162, 171-72 (1975); G.S. Ch. 15A, art. 56 Official Commentary (recognizing that North Carolina statutes on capacity to proceed codify the principle of law that a criminal defendant may not be tried or punished when he or she lacks the capacity to proceed).

The requirement of capacity to proceed applies to all phases of a criminal case. No person may be "tried, convicted, sentenced, or punished" if he or she is

incapable of proceeding. G.S. 15A-1001(a).

B. Test of Capacity.

1. Generally. G.S. 15A-1001(a) sets forth the general standard of capacity to proceed. Under that statute, a defendant lacks capacity to proceed 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.

2. Mental Illness or Defect. The above test has two parts. First, the defendant must have a mental illness or defect. Conditions that do not constitute a mental illness or defect have been found not to be a basis for an incapacity finding. *See* State v. Brown, 339 N.C. 426, 433 (1994) (finding that trial court could conclude that defendant was capable of proceeding where capacity examination indicated that defendant's attitude, not a mental illness or defect, prevented him from assisting in his own defense); State v. Aytche, 98 N.C. App. 358, 361 (1990) (statute does not authorize general physical examination to see if physical problems exist). *But cf.* State v. McCoy, 303 N.C. 1, 18 (1981) (defendant was experiencing headaches as result of being wounded, suggesting that physical condition could be cause of incapacity, but evidence showed that the defendant still was capable of proceeding); 4 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 8A-6.4, at 89–90 (2d ed. 2002) (physical disorders may impinge on brain functioning to degree affecting defendant's mental capacity to stand trial).

3. Capabilities. Second, the mental disorder must render the defendant unable to perform at least one of the functions specified in G.S. 15A-1001(a). The existence of a mental disorder alone does not necessarily mean that the defendant is incapable of proceeding. *See* State v. Willard, 292 N.C. 567, 576-77 (1977) (amnesia does not per se render defendant incapable of proceeding, although temporary amnesia may warrant continuance of trial); State v. Coley, 193 N.C. App. 458, 463 (2008) (testimony that defendant suffered from dementia and an untreated mental illness not dispositive on issue of capacity in light of other evidence that defendant's mental deficits did not negate his capacity to stand trial), *aff'd per curiam*, 363 N.C. 622 (2009); State v. McClain, 169 N.C. App. 657, 663–65 (2005) (defendant's mental retardation did not necessarily render him incapable of proceeding).

This second part of the test for capacity is disjunctive. A defendant's inability to meet any one of the statutory conditions—ability to understand proceedings, comprehend situation, *or* assist counsel—bars further criminal proceedings. *See* State v. Shytle, 323 N.C. 684, 688 (1989); State v. Jenkins, 300 N.C. 578, 582-83 (1980).

The cases sometimes refer to a fourth condition of capacity: the ability to cooperate with counsel to the end that any available defense may be interposed. *See, e.g.,* State v. Jackson, 302 N.C. 101, 104 (1981); State v. O'Neal, 116 N.C. App. 390, 395 (1994). The supreme court has held that trial courts need not make a specific finding on this fourth condition. *See Jenkins*, 300 N.C. at 583 (decided in 1980). Nevertheless, the courts still appear to consider the condition to be a

requirement of capacity, treating it as a subset of the statutory test. *See, e.g., Shytle*, 323 N.C. at 688–89.

C. Medication. A defendant may have the capacity to proceed even though his or her capacity depends on medication. *See* State v. Buie, 297 N.C. 159, 161 (1979) (upholding finding that defendant was capable of proceeding and stating that the "fact that defendant was competent only as a result of receiving medication does not require a different result"); State v. Cooper, 286 N.C. 549, 566 (1975) (medication was necessary to prevent exacerbation of mental illness and did not dull defendant's mind), *disapproved on other grounds in* State v. Leonard, 300 N.C. 223 (1980); State v. McRae, 163 N.C. App. 359, 368 (2004) (defendant capable throughout trial while taking antipsychotic medication). *Cf.* State v. Martin, 126 N.C. App. 426 (1997) (defendant remained capable to proceed although he had stopped taking his medication for schizophrenia and his symptoms may have begun to return).

The North Carolina courts have not specifically addressed the use of forcible medication to make a defendant capable of proceeding. *See* State v. McRae, 139 N.C. App. 387, 392 (2000) (rejecting claim that defendant was involuntarily medicated because evidence about how medicine was administered was too speculative); State v. Monk, 63 N.C. App. 512, 516-17 (1983) (trial judge committed the defendant to Dorothea Dix Hospital for a capacity determination and ordered treating physician to administer medication needed to make defendant capable; defendant argued on appeal that forcible medication violated his constitutional rights, but court of appeals found it unnecessary to resolve question because medication had terminated three months before trial and defendant's right to appear before jury unimpaired by psychotropic drugs was not implicated).

One possible explanation for the absence of case law on this issue is North Carolina's approach to capacity determinations, which first involves an evaluation of the defendant's capacity to proceed and thereafter involuntary commitment and treatment. *See* Section VII.B., Initial Determination of Grounds for Involuntary Commitment. At one time, defendants evaluated for capacity at a state facility may have received treatment as part of the process. *See generally* G.S. 15A-1002(b)(2) (authorizing court to commit defendant to state facility for up to 60 days for "observation and treatment"). Now, however, treatment is generally not a component of the capacity evaluation process. If the defendant is found incapable to proceed and is thereafter involuntarily committed, he or she receives treatment as part of the commitment, which may include administration of medication without the defendant's consent. *See* G.S. 122C-57(e) (allowing forcible medication for involuntarily committed patient in circumstances specified). Although medication administered during an involuntary commitment may address the causes of the defendant's incapacity to proceed, the statute does not explicitly authorize forcible medication for that purpose.

For cases addressing the constitutionality of forcible medication, see Sell v. United States, 539 U.S. 166, 179-86 (2003) (U.S. Constitution allows the government to force a mentally ill defendant facing serious criminal charges to take antipsychotic drugs to render the defendant capable of standing trial if the treatment is medically appropriate, substantially unlikely to have side effects that would undermine fairness at trial, and the least intrusive way to further important government interests; forcible medication was impermissible in this case in absence of consideration of these interests); Riggins v. Nevada, 504 U.S. 127,

133-36 (1992) (discussing circumstances that would support forced administration of antipsychotic drugs); United States v. White, 620 F.3d 401, 410 (4th Cir. 2010) (concluding that government's interest in prosecuting defendant did not warrant forcible medication to make defendant capable to stand trial; special circumstances, including that defendant was nonviolent and had served a significant amount of her sentence, mitigated the government's interest). *See also* 4 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 8A-4.2, at 51–59 (2d ed. 2002 & Supp. 2012) (discussing the use of medication to achieve capacity to proceed).

Legislative note: Effective for offenses committed on or after December 1, 2013, G.S. 122C-54(b) requires the report of a capacity evaluation to include a treatment recommendation as well as an opinion on whether a defendant found incapable to proceed is likely to gain capacity. The treatment recommendation may be helpful in addressing an incapable defendant's condition during the ensuing commitment proceedings. The revised statute does not specifically authorize treatment or medication to restore capacity; however, in response to an uncodified section of S.L. 2013-18 (S 45), the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services adopted guidelines for the treatment of people who are involuntarily committed after a determination of incapacity to proceed. *See* Communication Bulletin # 140: Forensic Evaluator Guidelines (Dec. 3, 2013) [note that the portion of the bulletin on treatment guidelines was adopted by the Commission; the portion of the bulletin on training requirements has been withdrawn]. For a further discussion of capacity evaluations, see Section IV., Examination by State Facility or Local Examiner.

D. Self-induced Incapacity during Trial. A defendant may waive his or her right to be present in a non-capital case by voluntarily ingesting alcohol and other drugs during trial, even if the defendant's resulting condition raises an issue of capacity to proceed. State v. Minyard, ___ N.C. App. ___, 753 S.E.2d 176, 191 (2014); *see also* State v. Holland, ___ N.C. App. ___, 749 S.E.2d 464 (2013) (trial court was not required sua sponte to conduct capacity hearing when defendant did not appear for second day of trial because he was involuntarily committed; evidence supported finding by court, at later hearing on defendant's motion for appropriate relief, that defendant was feigning illness).

E. Time of Determination. The defendant's capacity to proceed is evaluated as of the time of trial or other proceeding. The question of capacity may be raised at any time by the defendant, court, or prosecutor. *See* G.S. 15A-1002(a); Drope v. Missouri, 420 U.S. 162, 178-79 (1975) (capacity issues may arise during trial). When the question of capacity arises before trial, the court should determine the question before placing the defendant on trial. *See* State v. Silvers, 323 N.C. 646, 653 (1989); State v. Propst, 274 N.C. 62, 69 (1968).

Because capacity to proceed is measured as of the time of the proceeding, more recent examinations or observations of the defendant tend to carry more weight. *See Silvers*, 323 N.C. at 654-55 (conviction vacated where trial court based finding of capacity entirely on psychiatric examinations three to five months before trial and excluded more recent observations by lay witnesses); State v. Robinson, 221 N.C. App. 509, 516 (2012) (trial judge erred in denying motion for capacity examination at beginning of trial; earlier evaluations

finding defendant capable indicated that his condition could deteriorate, and defense counsel's evidence in support of current motion for examination indicated that defendant's mental condition had significantly declined); State v. Reid, 38 N.C. App. 547, 549-50 (1978) (trial court's finding of capacity was not supported by evidence where State's expert testified as follows: defendant was suffering from chronic paranoid schizophrenia; defendant was capable of proceeding at time of examination two to three months earlier, but condition could worsen without medication; and State's expert had not reexamined defendant and had no opinion on defendant's capacity at time of capacity hearing).

Delays in evaluating and determining capacity may support a claim of a speedy trial violation. *See* State v. Lee, 218 N.C. App. 42, 53 (2012) (twenty-two month delay, including ten-month delay in holding of capacity hearing after psychiatric evaluation of defendant, prompted consideration of speedy trial factors, but court finds no speedy trial violation where record was unclear as to reasons for delay; court states that while troubled by delay in holding of capacity hearing, it could not conclude that delay was due to State's willfulness or negligence where, among other things, defendant repeatedly requested removal of trial counsel and victim was out of country for medical treatment for injuries). For a discussion of speedy trial requirements, see 1 NORTH CAROLINA DEFENDER MANUAL (PRETRIAL) Chapter 7, Speedy Trial and Related Issues (2d ed. 2013).

F. Compared to Other Standards.

1. Insanity and Other Mental Health Defenses. Incapacity to proceed refers to the defendant's ability to understand and participate in the trial and other proceedings. In contrast, the insanity defense turns on the defendant's state of mind at the time of the alleged offense. *See* State v. Propst, 274 N.C. 62, 70 (1968) (comparing capacity to proceed with insanity). Likewise, other mental health defenses to the charges, such as diminished capacity, turn on the defendant's state of mind at the time of the alleged offense. *See* John Rubin, *The Diminished Capacity Defense*, ADMINISTRATION OF JUSTICE MEMORANDUM No. 92/01 (Institute of Government, Sept. 1992). Evidence of incapacity to proceed may be relevant, however, to the defendant's state of mind at the time of the offense. *See, e.g., State v. Bundridge*, 294 N.C. 45, 51 (1978) (evidence of earlier incapacity to stand trial admissible to support insanity defense).

G.S. 15A-1321 provides for automatic commitment of a defendant found not guilty by reason of insanity (NGRI). The commitment procedures that apply following a NGRI plea or verdict differ in several respects from the procedures for defendants found incapable to proceed and involuntarily committed (discussed in Section VII., Commitment Procedures After Order of Incapacity) and are beyond the scope of this chapter, *See* NORTH CAROLINA CIVIL COMMITMENT MANUAL Ch. 7 (Automatic Commitment—Not Guilty by Reason of Insanity) (UNC School of Government, 2d ed. 2011).

2. Guilty Pleas. The standard of capacity to proceed for *pleading guilty* is the same as the standard for capacity to stand trial. The defendant need not have a higher level of mental functioning. To plead guilty, however,

the defendant also must act knowingly and voluntarily. *See* Godinez v. Moran, 509 U.S. 389, 400-01 (1993).

3. **Waiver of Counsel at Trial.** In *Godinez*, the U.S. Supreme Court held that the standard for waiving counsel is the same as the standard for capacity to stand trial. The defendant need not have a higher level of mental functioning, although still must act knowingly and voluntarily. *See also* G.S. 7A-457 (describing requirements for valid waiver of counsel).

   In *Indiana v. Edwards*, 554 U.S. 164 (2008), the Court qualified its holding in *Godinez*. The Court stated that the U.S. Constitution does not prohibit states from insisting on representation by counsel for those defendants who meet the standard for capacity to proceed but who suffer from a mental infirmity that impairs their ability to conduct trial proceedings themselves. Thus, despite a waiver of counsel, the trial court may require the defendant to be represented by counsel at trial. For a further discussion of this issue, see Jessica Smith, Counsel Issues, in this Benchbook.

4. **Waiver of *Miranda* Rights During Questioning and Other Rights During Investigation.** A defendant's mental impairment may render ineffective a waiver of *Miranda* rights during custodial interrogation. *See, e.g.,* State v. Thorpe, 274 N.C. 457, 462 (1968); *see generally* 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.9(a), at 817–20 (3d ed. 2007) [hereinafter LAFAVE, CRIMINAL PROCEDURE].

   A defendant's mental impairment also may bear on the voluntariness of a confession (*see, e.g.,* State v. Ross, 297 N.C. 137, 143 (1979); State v. Thompson, 287 N.C. 303, 318-19 (1975), *vacated on other grounds*, 428 U.S. 908 (1976)) or of a consent to search. *See, e.g.,* State v. McDowell, 329 N.C. 363, 377 (1991); *see generally* 2 LAFAVE, CRIMINAL PROCEDURE § 6.2(c), at 638–40 (citing factors relevant to voluntariness of confession), § 3.10(b), at 413 (factors relevant to voluntariness of consent).

5. **Incompetency to Manage Affairs.** The term *incompetent* is sometimes used interchangeably with *incapacity to proceed*, but the terms have distinct legal definitions. *Incompetent* refers to an individual who has been adjudicated, pursuant to the procedures in G.S. Chapter 35A, "Incompetency and Guardianship," incompetent to make or communicate important decisions concerning one's person, family, or property, and who has been appointed a guardian pursuant to that chapter. *See* G.S. 35A-1101(7), (8). For this reason, this chapter uses the terms *capacity* or *incapacity* to describe a criminal defendant's ability to proceed to trial, not *competency* or *incompetency*. For a further discussion of guardianship proceedings, see NORTH CAROLINA GUARDIANSHIP MANUAL (UNC School of Government, 2008).

G. Burden of Proof. The defendant has the burden of persuasion to show incapacity to proceed. *See* State v. Goode, 197 N.C. App. 543, 549 (2009); State v. O'Neal, 116 N.C. App. 390, 395 (1994); *see also* Medina v. California, 505 U.S. 437, 446 (1992) (burden of persuasion to show incapacity to proceed may be placed on defendant). The burden may be no higher than by the preponderance of the evidence. *See* Cooper v. Oklahoma, 517 U.S. 348, 362 (1996); State v. Moss, 178 N.C. App. 393, *4 (2006) (unpublished) (following *Cooper*).

H. Retrospective Capacity Determination. If an appellate court finds that the trial court erroneously failed to determine the defendant's capacity to proceed, the appellate court has two main options.

The first option is to remand for a new trial. *See* State v. Robinson, 221 N.C. App. 509, 516 (2012) (finding that "proper remedy" where trial court proceeds to trial notwithstanding evidence that the defendant was incapable of proceeding is to vacate the judgment and remand for a new trial if and when defendant is capable of proceeding; finding, however, that defendant's expert testified during trial that defendant was capable of proceeding and therefore trial court's error was not prejudicial and did not warrant vacating judgment).

The second option is to remand for the trial court to determine whether a retrospective capacity hearing is possible and, if so, determine whether the defendant was capable of proceeding to trial. This remedy is disfavored. *See* State v. McRae (McRae I), 139 N.C. App. 387, 392 (2000) (first North Carolina case on issue authorizing such a hearing, but stating that such a hearing may be conducted "only if a meaningful hearing on the issue of the competency of the defendant at the prior proceedings is still possible"); State v. McRae (McRae II), 163 N.C. App. 359, 367 (2004) (recognizing that "[t]his remedy is disfavored due to the inherent difficulty in making such *nunc pro tunc* evaluations[,]" but upholding trial court's holding of retrospective capacity hearing, including procedures followed during hearing, and affirming determination that defendant was capable to proceed); State v. Blancher, 170 N.C. App. 171, 174 (2005) (upholding retrospective capacity determination); *see also* State v. Whitted, 209 N.C. App. 522, 529 (2011) (remanding to trial court to determine whether retrospective capacity hearing was possible).

I. Role of Defense Counsel

1. Duty to Investigate. Defense counsel has a duty to make a "reasonable investigation" into a defendant's capacity to proceed. See Becton v. Barnett, 920 F.2d 1190, 1192 (4th Cir. 1990) (holding that counsel must make reasonable investigation into defendant's capacity to proceed and must use reasonable diligence in investigating capacity; remanded for hearing on defendant's claim of ineffective assistance of counsel).

2. Duty to Raise Issue. There is general agreement that defense counsel may not allow a client to proceed if counsel believes that the client is incapable of doing so. Commentators disagree to some extent, however, on the quantum of doubt that defense counsel must entertain. North Carolina has not specifically addressed the issue. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-4.2(c) & Commentary (1989) (defense counsel has a duty, as an officer of the court, to raise the issue of capacity to proceed if he or she has a "good faith doubt" as to the client's capacity; defense counsel may so move over the client's objection); Norma Schrock, Note, *Defense Counsel's Role in Determining Competency to Stand Trial*, 9 GEO. J. LEGAL ETHICS 639 (1996) (writer argues that counsel has duty to alert court to capacity issues, but acknowledges that duty arises only when counsel has a "reasonable doubt" as to competency); Rodney J. Uphoff, *The Decision to Challenge the Competency of a Marginally Competent Client: Defense Counsel's Unavoidably Difficult Position*, *in* ETHICAL PROBLEMS FACING THE

CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS at 30–47 (Rodney J. Uphoff ed., American Bar Association 1995) (writer argues that counsel may decline to raise capacity if raising issue would not be in client's best interest—for example, if counsel believes that accepting plea offer would be in client's best interest; writer hedges this advice, however, by stating that client must be "marginally competent"); *see also* North Carolina State Bar Ethics Opinion CPR 314 (1982) (opinion under former ethics code states that lawyer may not execute will for client whom lawyer knows to be incompetent; however, if reasonable people could differ about client's competency, lawyer does not necessarily act unethically by preparing will).

3. **Impact of Client Wishes.** As in other matters, defense counsel should first try to discuss with the defendant the issue of raising capacity and its consequences and, if possible, determine the client's wishes. N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.14(a) ("When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.").

   In some instances, the defendant's faculties may be so impaired that he or she cannot engage in a meaningful discussion with counsel. Counsel may question capacity without the client's assent or even over the client's objection. *See* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.14(b) (lawyer may take action to protect a client "[w]hen the lawyer reasonably believes that the client . . . cannot adequately act in the client's own interest"); North Carolina State Bar Ethics Opinion RPC 157 (1993) (counsel may take protective action on behalf of an incompetent client); United States v. Boigegrain, 155 F.3d 1181, 1188 (10th Cir. 1998) (majority recognizes that defense counsel, as officer of court, may raise issue of incapacity despite client's wishes; dissent concurs with general principle but argues that if defendant elects to defend capacity, defendant may be entitled to assistance of new counsel to present his or her position).

4. **Continued Representation of Defendant.** Questioning a client's capacity without the client's consent or over the client's objection does not necessarily require counsel to withdraw. *See* State v. Robinson, 330 N.C. 1, 11-12 (1991) (trial court's refusal to grant defendant's request to remove appointed counsel, who had questioned defendant's capacity without his consent, did not create conflict with defendant's fundamental rights or result in ineffective assistance of counsel). Nevertheless, if the relationship with the client breaks down as a result of such a request and new counsel would be better able to serve the client, the court may grant a request by counsel to withdraw and appoint new counsel. *See generally* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.16(b) (grounds for requesting withdrawal).

J. Role of Prosecutor. The role of the prosecutor is discussed in this chapter where pertinent.

III. Procedures to Obtain Expert Evaluation. There are three main ways an expert may become involved in evaluating a defendant's capacity.

A. Funds for Mental Health Expert for Defendant. The defendant may seek the assistance of a mental health expert by filing an ex parte motion with the court or, in capital cases, with the Office of Indigent Defense Services (IDS). *See* 1 NORTH CAROLINA DEFENDER MANUAL (PRETRIAL) § 5.5, Obtaining an Expert Ex Parte in Noncapital Cases (2d ed. 2013). Such a motion does not ask the court to determine the defendant's capacity. Rather, it seeks funds for counsel to hire an expert of counsel's choosing to provide assistance on all applicable mental health issues. The expert's work is funded by the Office of Indigent Defense Services. Defendants tend to make these motions in more serious cases but are not precluded from doing so in other cases.

The defendant may later raise the question of capacity in reliance on the expert's evaluation. If the prosecutor disputes the expert's findings or the court finds it necessary, the court may order a further examination of the defendant before determining capacity. *See* Section IV., Examination by State Facility or Local Examiner. If the defendant does not question the defendant's capacity and does not rely on the expert as a witness, the State ordinarily does not have a right to discovery of the defense expert's work. *See* 1 NORTH CAROLINA DEFENDER MANUAL (PRETRIAL) § 4.8C, Prosecution's Discovery Rights (2d ed. 2013).

B. Appointment of Particular Expert by Court. Theoretically, the court may appoint a particular expert to examine the defendant if his or her capacity to proceed is in question. *See* G.S. 15A-1002(b)(1a) (court may appoint one or more impartial medical experts); *see also* G.S. 15A-1002(b2)(3) (setting deadline for reports of such experts). [For offenses committed before December 1, 2013, the court's authority to appoint an independent expert was codified as G.S. 15A-1002(b)(1).] The expert's work would be funded by the Administrative Office of the Courts. *See* G.S. 7A-314(d) (expert witness acting on behalf of court shall be paid in accordance with rules established by AOC). This procedure rarely occurs.

C. Examination by Local Examiner or State Facility. The assessment of capacity to proceed often begins with a motion by defense counsel for an examination of the defendant at a state or local mental health facility. State exams occur at Central Regional Hospital in Butner, North Carolina, operated by the North Carolina Department of Health and Human Services (DHHS). Local exams are conducted by forensic evaluators, registered with and paid by the Division of Mental Health, Developmental Disabilities and Substance Abuse Services within DHHS. *See* 10A N.C. Admin. Code 27A.0207. This procedure is discussed in detail below.

IV. Examination by State Facility or Local Examiner.

A. Motions for Examination by Defense Counsel. Defense counsel often begins the process for determining capacity to proceed by seeking an examination of the defendant at a state or local mental health facility. A trial court may hold a hearing to determine capacity without a psychiatric examination. *See* G.S. 15A-1002(b) (so indicating). Generally, however, the court will order an examination first. *See also* State v. Leyshon, 211 N.C. App. 511, 521 (2011) (court not

required to hold hearing before ordering capacity examination).

1. **No time limit.** There is no formal time limit on a motion questioning a defendant's capacity and requesting an examination. Lack of capacity may be raised at any time. *See* G.S. 15A-1002(a) ("[t]he question of the capacity of the defendant to proceed may be raised at any time"). *Cf.* State v. Washington, 283 N.C. 175, 185 (1973) (finding that trial court did not abuse discretion in ruling that defendant failed to provide sufficient evidence to warrant capacity examination; court characterized as "belated" defendant's motion, which was for initial examination and was filed two weeks before trial, but did not reject motion for that reason).
2. **Contents of motion.** Counsel may obtain a state or local examination by filing a motion questioning the defendant's capacity to proceed and asking that the defendant be evaluated. Two different form motions are available. One is for an evaluation by Central Regional Hospital in Butner, North Carolina, the state hospital that performs capacity evaluations. *See* AOC Form AOC-CR-208A and AOC-CR-208B, "Motion and Order Committing Defendant to Central Regional Hospital – Butner Campus for Examination on Capacity to Proceed" (Dec. 2013). The other is for an evaluation by a local facility (a local forensic examiner or screener). *See* AOC Form AOC-CR-207A and AOC-CR-207B, "Motion and Order Appointing Local Certified Forensic Evaluator" (Dec. 2013).

   Counsel should provide sufficient information to the court in support of the request for an examination. *See* G.S. 15A-1002(a) (requiring moving party to detail conduct in support of motion); State v. Grooms, 353 N.C. 50, 78 (2000) (where defendant demonstrates or matters indicate that there is a significant possibility that defendant is incapable of proceeding, trial court must appoint expert to inquire into defendant's mental health; evaluation not required in this case); State v. Rouse, 339 N.C. 59, 88 (1994) (during sentencing phase of capital case, defense counsel requested evaluation of client's capacity following suicide attempt or "gesture"; court upheld trial court's denial of request, finding that single incident without more did not require as matter of law expert evaluation of capacity), *overruled on other grounds by* State v. Hurst, 360 N.C. 181 (2006); State v. Taylor, 298 N.C. 405, 409-10 (1979) (motion must contain sufficient detail to cause "prudent judge" to call for psychiatric examination before determining capacity); State v. Robinson, 221 N.C. App. 509, 516 (2012) (trial judge erred in denying motion for capacity examination). If the showing contains confidential information, such as information obtained in the course of privileged attorney-client communications, the court can review the information in camera.
3. **Subsequent Examinations.** A defendant may move for a subsequent examination if the report from the first examination has become stale or the defendant's condition has changed. *See* Section II.E., Time of Determination.

B. Motion for Examination by Trial Court. At any time during the proceedings, the trial court has the power on its own motion to raise the question of the capacity of the defendant to proceed and order an evaluation. G.S. 15A-1002(a), G.S. 15A-1002(b)(1). Further, the court has a constitutional obligation to inquire into capacity, even in the absence of a request by the defense, if there is "substantial evidence before the court" indicating that the defendant may lack the

capacity to proceed. *See* State v. Badgett, 361 N.C. 234, 259 (quotation omitted). Courts sometimes describe the "substantial evidence" standard as requiring evidence sufficient to create a "bona fide doubt" as to the defendant's capacity. *See, e.g.*, State v. Whitted, 209 N.C. App. 522, 528 (2011); State v. Staten, 172 N.C. App. 673, 678 (2005).

C. Motion for Examination by Prosecutor. The prosecution may raise the question of capacity and request a capacity examination. As with a motion by the defendant for an examination, the prosecutor must describe the specific conduct warranting an examination. *See* G.S. 15A-1002(a).

The defense should be given notice of a motion by the prosecution for a capacity examination. *See* State v. Jackson, 77 N.C. App. 491, 496 (1985) (disapproving of entry of order for examination without notice to defendant); *see also* Section VIII.C., Fifth and Sixth Amendment Protections. *Cf.* State v. Davis, 349 N.C. 1, 16-19 (1998) (court modified previous order for capacity examination, without notice to defendant, by directing that examination take place at Dorothea Dix Hospital rather than at Central Prison and by designating a different Dix examiner to do the examination than the one initially designated; court found that hospital, not prosecutor, requested modification, that defendant was represented by counsel at the hearing at which the court first ordered the capacity evaluation, and that in these circumstances modification of the order did not violate defendant's right to fair trial).

D. Sources of Information. In determining whether to order a capacity examination, unusual behaviors by the defendant may be signs of incapacity to proceed (delusions, memory problems, puzzling medical complaints, peculiar speech patterns, difficulties in maintaining attention, etc.). For a comprehensive discussion of mental disorders, see DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-5 (5th ed. 2013). The court should assess the behavior or symptoms in terms of the statutory test for capacity. *See* Section II.B., Test of Capacity.

The court may have an opportunity to observe such behaviors at various stages of the proceedings. *See, e.g.*, State v. Whitted, 209 N.C. App. 522, 527-28 (2011) (defendant made emotional outburst after opening statements, refused to return to court on third day of trial, chanted loudly after being forcibly returned to court, and was strapped to gurney making loud outbursts during sentencing); State v. Ashe, __ N.C. App. __ , 748 S.E.2d 610, 614 (2013) (nonsensical interruption of a witness by defendant, unusual interruption of voir dire of a different witness, and spontaneous interjection of unusual statement during court's recitation of defendant's presence for the record).

Defense counsel's interactions with and observations of the defendant's behavior may be a useful source of information. For cases discussing the relevance of such observations, see Section VI.D.5., Counsel's Observations.

Jailers, law-enforcement officers, and court personnel also may have had an opportunity to observe the defendant. *See, e.g.,* State v. Silvers, 323 N.C. 646, 653-54 (1989) (conviction vacated and case remanded for failure to allow defendant to present testimony of jail personnel who had observed him).

For a discussion of evidence issues at capacity hearings, see Section VI.D., Evidentiary Issues.

E. Defendants on Pretrial Release. In some instances, a defendant is on pretrial

release when a motion for a capacity examination is made. The capacity statutes do not specifically address the procedure to follow. Based on the court's authority to order an examination, the court likely has the authority to order the sheriff to take the defendant into custody and transport him or her to the examination. *Cf.* G.S. 15A-1002(b)(2) (providing that sheriff shall return defendant when notified that examination at state facility is completed). The court is not required to order custody, however. An examination may not occur immediately. If satisfied that the defendant will make himself or herself available, the court may order that the defendant present himself or herself for the exam, or that the sheriff pick up the defendant, once the exam is scheduled.

F. Who Does Examination.

1. Misdemeanors. If the underlying offense alleged is a misdemeanor, the defendant may only be evaluated by a local forensic screener. *See* G.S. 15A-1002(b)(1a), G.S. 15A-1002(b)(2).

Local examinations tend to be short, lasting less than a day and primarily involving an interview of the defendant (which may take place at the jail if the defendant is incarcerated). To obtain a more thorough evaluation, the court may order the release of confidential information to the local evaluator, such as school records, mental health records, and juvenile records, after notice to the defendant and an opportunity to be heard. The AOC form for local examinations for misdemeanors (discussed in Section IV.G., below) authorizes a local examiner to obtain such information but, unless modified, does not require the examiner to do so.

Legislative note: For offenses committed before December 1, 2013, the defendant must first be evaluated by a local forensic screener, who may find the defendant capable or incapable of proceeding or may recommend that the defendant be evaluated further at a state psychiatric facility. After this exam, the court may order an examination at the state psychiatric facility—that is, Central Regional Hospital in Butner, North Carolina. State v. Leyshon, 211 N.C. App. 511, 521 (2011) (defendant correctly contends [under law then in effect] that a person charged with misdemeanor must have local examination before court may commit him or her to state facility for examination, but issue was moot).

For offenses committed on or after December 1, 2013, the statute no longer authorizes an examination at a state psychiatric facility for a misdemeanor following a local examination. This change may free up resources to meet the requirement under the legislation that capacity examinations be conducted during the commitment process. *See* "During period of commitment" (Legislative note) in Section VII.E., Redetermination of Capacity.

In response to an uncodified section of S.L. 2013-18 (S 45), the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services proposed rules requiring forensic evaluators appointed under G.S. 15A-1002(b) to meet specified requirements, such as training to be credentialed as a certified forensic evaluator and

attendance at continuing education seminars. *See* Communication Bulletin # 140: Forensic Evaluator Guidelines (Dec. 3, 2013). The proposed rules have been withdrawn and additional rules have not yet been adopted (the portion of the bulletin on treatment guidelines was adopted by the Commission).

2. Felonies. If the underlying offense alleged is a felony, the court may order a local evaluation or may order the defendant to a state psychiatric facility (Central Regional Hospital) without a local evaluation. To order the defendant to a state psychiatric facility without a local evaluation first, the court must find that a state facility examination is more appropriate. *See* G.S. 15A-1002(b)(2). Considerations include the defendant's previous contacts with the facility, the expertise of the examiners, etc.

State examinations may last longer than local exams. Under G.S. 15A-1002(b)(2), the court may commit the defendant to a state facility for up to sixty days. This authorization allows for a more thorough evaluation, including potentially an interview of the defendant, interviews of family members, review of mental health, school, and other records, and testing and observation of the defendant. In authorizing a longer evaluation period, the N.C. General Assembly also may have contemplated that defendants receive treatment at the state facility (G.S. 15A-1002(b)(2) states that the court may commit the person for "observation and treatment").

As a practical matter, however, the typical state facility examination of the defendant is far shorter. Typically, the in-person portion of the evaluation does not involve an inpatient stay or treatment and may last no more than a day. (If the defendant is found incapable to proceed and thereafter involuntarily committed, he or she would receive treatment as part of the commitment process. *See* Section VII., Commitment Procedures After Order of Incapacity.) Court system actors have coined the term "drive-by evaluations" for these shorter capacity evaluations because law enforcement drives the defendant to and from the state facility on the same day. *See* MAITRI "MIKE" KLINKOSUM, NORTH CAROLINA CRIMINAL DEFENSE MOTIONS MANUAL 439 (2d ed. 2012). *Cf.* State v. Robertson, 161 N.C. App. 288, 291–92 (2003) (capacity evaluation of 1 hour and forty minutes on second day of trial was not inadequate; capacity statutes do not require minimum period of observation). Typically, state facility examiners gather background information before conducting an in-person examination. See Section IV.G., below.

Delays may occur in scheduling a capacity examination at the state facility, during which time the defendant may not have adequate treatment. As a result, defendants in need of immediate treatment are sometimes involuntarily committed on petition of the jail or other interested person under the usual involuntary commitment procedures.

G. Providing Information to Examiner. Effective for offenses committed on or after December 1, 2013, revised G.S. 15A-1002(b)(4) authorizes the judge who orders a capacity examination to order the release of relevant confidential information to the examiner, including the warrant or indictment, the law enforcement incident report, and the defendant's medical and mental health

records. The revised subsection includes a requirement that the defendant receive notice and an opportunity to be heard before release of the records. The subsection also states that it does not relieve the court of its duty to conduct hearings and make findings required under relevant federal law before ordering the release of any private medical or mental health information or records related to substance abuse or HIV status or treatment. The AOC forms for both local and state examinations authorize the examiner to obtain this information. AOC-CR-207B, "Motion and Order Appointing Local Certified Forensic Evaluator" (Dec. 2013); AOC-CR-208B, "Motion and Order Committing Defendant to Central Regional Hospital – Butner Campus for Examination on Capacity to Proceed" (Dec. 2013).

The AOC form for examinations at Central Regional Hospital (AOC-CR-208B) also states that counsel for the defendant must give "such records and information in counsel's possession as the evaluator requests." The form recognizes that this requirement does not "require counsel to divulge any information, documents, notes, or memoranda that are protected by attorney-client privilege or work-product doctrine."

Legislative note: For offenses committed before December 1, 2013, the AOC form for evaluations at Central Regional Hospital, AOC-CR-208A, includes the above language, apparently based on the court's inherent authority and in recognition of the need for the information.

H. Confidentiality. Subject to certain exceptions, an examination at a state or local mental health facility is confidential. *See* G.S. 122C-52 (right to confidentiality). Disclosure is allowed in specified circumstances, including to a client as defined in the statutes, to others pursuant to a written release by the client or legally responsible person, in certain court proceedings, and for treatment and research. *See* G.S. 122C-53 through G.S. 122C-56. For criminal law purposes, the most significant of these exceptions are as follows:

- The facility may provide a report of the examination to the court and prosecutor in the circumstances described in Section IV.J., Report of Examination. *See* G.S. 122C-54(b).
- The results of the examination, including statements made by the defendant, may be admissible at subsequent court proceedings. *See* Section VI.D., Evidentiary Issues; Section VIII., Admissibility at Trial of Results of Capacity Evaluation; *see also* G.S. 122C-54(a1) (use in involuntary commitment proceedings).
- The facility may disclose otherwise confidential information if a court of competent jurisdiction orders disclosure. *See* G.S. 122C-54(a).

I. Limits on Scope and Use of Examination. A central part of any court-ordered examination, whether by Central Regional Hospital or a local mental health facility, is the interview of the defendant. The interview likely will cover the alleged offense, as the defendant's understanding of the allegations may bear on his or her capacity to proceed. Discussed below are common issues regarding the scope of an examination. For a discussion of the admissibility of the examination results, see Section VI.D., Evidentiary Issues; Section VIII., Admissibility at Trial of Results of Capacity Evaluation.

1. **Refusal to Discuss Offense.** The North Carolina courts have not specifically addressed the impact of a defendant's refusal to discuss the alleged offense when the examination concerns only capacity to proceed. *Cf.* State v. Davis, 349 N.C. 1, 43–44 (1998) (noting that defense counsel advised defendant not to discuss the facts of the alleged offense with the examiner during the capacity evaluation). The defendant's refusal may result in an incomplete report, however, and make it difficult to determine capacity.

   The repercussions of noncooperation may be greater in cases in which the defendant has raised an insanity or diminished capacity defense. Once the defendant gives notice of an intent to rely on an insanity defense, the State may request that he or she be examined concerning his or her state of mind at the time of the offense. *See* State v. Huff, 325 N.C. 1, 36-37 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990). The court of appeals has also held that a trial court may order a psychiatric examination when the defendant gives notice of intent to use expert testimony in support of a diminished capacity defense. *See* State v. Clark, 128 N.C. App. 87, 94-95 (1997). If the court orders such an examination and the defendant refuses to cooperate, the prosecution may have grounds for moving to exclude the defendant's expert testimony (although probably not lay testimony) on the mental health defense. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-6.4 (1989).

2. **Presence of Counsel.** The North Carolina Supreme Court has held that there is no constitutional right to the presence of counsel at an examination concerning capacity to proceed. *See* State v. Davis, 349 N.C. 1, 20 (1998) (trial court did not violate defendant's Sixth Amendment right to counsel by refusing to allow defense counsel to be present during capacity examination). The *Davis* decision does not foreclose counsel from being present, however. Examiners may allow counsel to be present, at least during the interview portion of the evaluation. The trial court also appears to have the discretion to order that counsel be permitted to attend. *See* Timothy E. Travers, Annotation, *Right of Accused in Criminal Prosecution to Presence of Counsel at Court-Appointed or -Approved Psychiatric Examination*, 3 A.L.R.4th 910 (1981) (observing that some cases have held that although defendant did not have absolute right to presence of counsel, trial court had discretion to allow counsel to be present).

3. **Court Order Limiting Scope and Use of Examination.** In appropriate circumstances, a trial court may enter an order explicitly limiting the scope and use of the examination. For example, such an order might provide that the examiner is to report on the issue of capacity only and is not to inquire into any area not necessary to that determination; that the results are to be used for the determination of capacity only and for no other purpose; and that information obtained during the evaluation regarding the offense may only be divulged as directed by the court. *Cf.* State v. Davis, 349 N.C. 1, 40–44 (1998) (trial court limited scope of capacity examination to issue of capacity, but at trial defense counsel presented mental health defenses and defense expert relied on capacity examination in forming opinion; permissible for prosecution to use information from capacity examination to cross-examine defense expert).

Additionally, defense counsel sometimes may request that the evaluation report be submitted to the defense and to the court only and that it remain sealed until ordered disclosed by the court. *See* Section IV.J., Report of Examination.

4. **Videotaping of Examination.** Standard 7-3.6(d) of the ABA Criminal Justice Mental Health Standards (1989) states that the defendant should have the right to have a court-ordered capacity evaluation initiated by the prosecution recorded on audiotape or videotape.

J. Report of Examination.

1. **Time of Report.** Effective for offenses committed on or after December 1, 2013, G.S. 15A-1002(b2) requires that examination reports be completed within specified time limits—for example, thirty days following the completion of a capacity examination in a felony case. The statute allows the court to grant extensions of time for good cause up to a maximum limit. The statute does not set deadlines for the holding of the examinations. Nor does it specify a remedy for the failure to submit an examination report within the statutory time limit.

   For offenses committed before December 1, 2013, there is no statutory deadline for the completion of an examination report. A court may have the inherent authority to set a deadline, however.

2. **Potential Need for Motion Limiting Disclosure.** The current practice on disclosure of capacity examination reports may not match the law on the issue. The applicable statutes appear to provide that the report of examination is supposed to go to the court and defense counsel first and, if capacity is still questioned and further proceedings are necessary, only then to the prosecutor.[1] In practice, however, it appears that Central

1. G.S. 15A-1002(d) provides that after a capacity examination, a copy of the examination report is to be provided by the facility to the clerk of court in a sealed envelope addressed to the attention of the presiding judge, along with a covering statement indicating the fact of the examination and conclusion about the defendant's capacity to proceed. The statute also states that a copy of the report is to be provided to defense counsel or to the defendant if not represented by counsel. G.S. 15A-1002(d) then states that "if the question of the defendant's capacity to proceed is raised at any time, a copy of the full report must be forwarded to the district attorney." This statutory scheme appears to contemplate that the court and the defense are to get a copy of the report automatically after a capacity examination, but the prosecutor is to get a copy of the report only if capacity is questioned after the examination and further court proceedings are necessary. At that point, the prosecutor is entitled to otherwise confidential information in order to prepare and respond. The initial request for a capacity examination by a defendant does not appear to be the equivalent of raising the question of the defendant's capacity for purposes of triggering disclosure to the prosecutor. Otherwise, it would be unnecessary for the statute to establish separate procedures for disclosure of the report to the court and defendant, on the one hand, and to the prosecutor, on the other. *See also* JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK 34 (UNC School of Government, 3d ed. 2013) (noting that statute may allow the State access to capacity report only if the defendant persists in questioning capacity after return of the report; also noting that the court may have discretion to order earlier disclosure).

The legislative history of G.S. 15A-1002(d) reinforces that the General Assembly intended to limit the prosecution's access to capacity evaluations. Previously, the statute provided for reports to be sent automatically to the defense and prosecution. *See* 1979 N.C. Sess. Laws Ch. 1313 (S 941) (title of act states that it is "[a]n act to require that copies of pretrial mental examinations be sent to the district attorney"). In 1985, however, the General Assembly added the current language of the statute as part of a bill entitled: "An act to provide that an indigent defendant's competency evaluation report will not be forwarded to the district attorney." 1985 N.C. Sess. Laws Ch. 588 (S 696).

Regional Hospital automatically sends its examination report to the court, defense counsel, and prosecutor. Some local forensic examiners may have adopted the same practice.

Consequently, defense counsel sometimes may ask, when requesting a capacity evaluation, that the court enter a specific order prohibiting the facility and its examiners from disclosing the evaluation to the prosecutor except on further order of the court. The AOC forms for a capacity examination—AOC-CR-208A and AOC-CR-208B (Dec. 2013) for an examination at a state facility and AOC-CR-207A and AOC-CR-207B (Dec. 2013) for a local examination—provide that the examination report is to be sent to the court and defense counsel only. The AOC forms do not appear to have affected disclosure practices, however.

Legislative note: Effective for offenses committed on or after December 1, 2013, G.S. 15A-1004(c) and G.S. 122C-278 expand the circumstances in which the defendant's capacity must be re-examined following an incapacity determination. (For a discussion of the re-examination requirement, see *infra* "During period of commitment" (Legislative note) in Section VII.E., Redetermination of Capacity.) The revised statutes provide for disclosure of re-examination reports as provided in G.S. 15A-1002. *See* G.S. 15A-1004(c) ("A report of the examination shall be provided pursuant to G.S. 15A-1002"); *see also* G.S. 122C-278 ("the respondent shall not be discharged . . . until the respondent has been examined for capacity to proceed and a report filed with the clerk of court pursuant to G.S. 15A-1002"). Unless defense counsel obtains an order limiting disclosure, re-examination reports likely will go to the court, defense counsel, and prosecutor. Automatic disclosure may be permissible under G.S. 15A-1002 because the defendant's capacity will necessarily have been questioned when the court initially determined that the defendant was incapable to proceed; also, as a practical matter, most re-examinations may take place at state facilities, which likely will follow the current practice of disclosing reports to the prosecutor unless the court has limited disclosure.

Effective for offenses committed on or after December 1, 2013, revised G.S. 15A-1002(d) also requires that the covering statement that

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A second statute, G.S. 122C-54(b), provides a limited exception to the obligations of facilities to maintain the confidentiality of capacity evaluations. G.S. 122C-54(b) authorizes disclosure of a capacity evaluation to the court, prosecutor, and defendant's attorney "as provided in G.S. 15A-1002(d)." In 2003, the General Assembly amended G.S. 122C-54(b) as part of a larger act dealing with mental health system reform. *See* 2003 N.C. Sess. Laws Ch. 313, sec. 2 (H 826). Previously, G.S. 122C-54(b) stated that a facility "may" send the capacity report to the specified people as provided in G.S. 15A-1002(d). As revised, G.S. 122C-54(b) provides that the facility "shall" send the report as provided in G.S. 15A-1002(d). Thus, revised G.S. 122C-54(b) requires, rather than merely permits, facilities to disclose capacity evaluations as provided in G.S. 15A-1002(d). Facilities appear to be relying on the change of "may" to "shall" to justify automatic disclosure of examination reports to the court, defense, and prosecution. The revised statute, however, continues to be keyed to the requirements and restrictions in G.S. 15A-1002(d) and does not appear to broaden the circumstances in which prosecutors are to receive capacity reports. Nor, unlike previous legislative changes, does the title of the 2003 act indicate that the revised language should be construed as making such a change.

The 2013 legislative changes revised G.S. 15A-1002(d) to refer to the requirements of G.S. 122C-54(b), but this change does not appear to be substantive.

accompanies the report be provided to the sheriff who has custody of the defendant. The revised statute does not authorize disclosure of the report itself to the sheriff.

K. Disclosure of Underlying Information. If necessary to the proper administration of justice, the court may compel disclosure of information concerning the examination in addition to the report itself. *See* State v. Williams, 350 N.C. 1, 19–23 (1999) (statute allowing disclosure of report does not preclude trial court from compelling disclosure of additional information concerning the examination, in this case the complete file of Dorothea Dix Hospital concerning the defendant; it also was permissible for trial court to require the Dix examiners to confer with the prosecutor to the same extent that they had conferred with defense counsel). In *Williams,* the circumstances of disclosure were narrow. At the time the court compelled disclosure, the defendant had indicated that he intended to call a mental health expert at the capital sentencing proceedings. *See* Section VIII.D., Rebuttal of Mental Health Defense. When the defendant advised the trial court that he was not going to call a mental health expert, the trial court precluded the State from using any information it had obtained from the defendant's expert, including the Dix reports on which the expert based his report. The trial court only allowed the prosecution to introduce evidence of an altercation that had occurred at Dix for the purpose of rebutting evidence offered by the defendant that he had acted with respect and honor while at Dix.

V. Post-Examination Procedure.

A. After Examination Finding Defendant Capable to Proceed. G.S. 15A-1002(b)(1) states that a hearing "shall" be held after a court-ordered capacity examination, but some cases indicate that the defendant may waive the right to a hearing by not requesting one. The court must initiate a hearing on its own motion only when the evidence suggests that the defendant is incapable of proceeding. *See, e.g.,* State v. King, 353 N.C. 457, 465–67 (2001) (defendant waived statutory right to hearing by failing to question capacity; trial court nevertheless has constitutional duty to institute capacity hearing if there is substantial evidence that defendant is incapable of proceeding, but evidence in this case did not require trial court to act on its own motion); State v. Young, 291 N.C. 562, 567-69 (1977) (defendant waived statutory right to hearing by failing to request one following capacity examination finding defendant capable to proceed; no constitutional violation by trial court's failure to hold hearing on own motion); State v. Blancher, 170 N.C. App. 171, 173-74 (2005) (finding that trial court did not err in failing to hold capacity hearing where, other than statement of defense counsel in earlier motion for evaluation, there was no evidence that defendant was unable to assist his counsel); State v. McRae, 139 N.C. App. 387, 391 (2000) (although defendant did not request capacity hearing, trial court had duty to conduct such hearing where bona fide doubt existed as to defendant's capacity); Meeks v. Smith, 512 F. Supp. 335, 338 (W.D.N.C. 1981) (setting aside state court conviction on ground that incapable defendant may not waive right to capacity determination).

As a practical matter, courts may opt to hold a hearing in all cases following an examination. *See* Ripley Rand, *Guilty Pleas and Related Proceedings Involving Defendants with Mental Health Issues: Best Practices*, at 2 (Superior Court Judges Conference, Fall 2008) (suggesting that superior court judges "probably" should hold a hearing following a capacity

examination). If the court holds a hearing when the defense is not contesting the examiner's finding of capacity, defense counsel might ask the court to review the "covering statement" indicating the examiner's conclusion that the defendant is capable of proceeding to trial. *See* G.S. 15A-1002(d) (requiring that report include covering statement). Defense counsel may make this request to avert disclosure of the underlying report to the prosecution. Alternatively, the defense may ask the court to review the full capacity report in camera.

B. After Examination Finding Defendant Incapable to Proceed.

A number of alternatives are possible after an examination finding the defendant incapable to proceed.

1. **Dismissal.** The prosecutor may agree to take a voluntary dismissal of the criminal case. *See* Section VII.F., Disposition of Criminal Case While Defendant Incapable to Proceed.
2. **Agreement Not to Contest Incapacity Order.** The prosecutor may not contest entry of an order finding the defendant incapable of proceeding, which triggers other procedures. Thereafter, the court could issue a custody order requiring that the defendant be examined to determine whether involuntary commitment is appropriate. *See* AOC-SP-304A and AOC-SP-304B, "Involuntary Commitment Custody Order Defendant Found Incapable to Proceed" (Dec. 2013). For a discussion of procedures after the issuance of an order of incapacity to proceed, see Section VII., Commitment Procedures After Order of Incapacity.
3. **Hearing on Capacity.** A party may request a formal hearing on the defendant's capacity to proceed if one is not automatically scheduled. *See*Section VI., Hearings on Capacity to Proceed.
4. **Involuntary Commitment.** When the examination report indicates that the defendant is incapable of proceeding, G.S. 15A-1002(b1) appears to allow involuntary commitment proceedings to be instituted before the issuance of a court order finding the defendant incapable of proceeding. Such a procedure may result in needed treatment more quickly. A judicial determination of incapacity remains necessary, however, to safeguard the defendant's rights in the criminal case. *See* Section IX.F., Disposition of Criminal Case While Defendant Incapable to Proceed.

VI. Hearings on Capacity to Proceed.

A. Request for Hearing. A hearing on capacity to proceed may be automatically calendared on receipt of the examiner's report, but if one is not calendared a party may specifically request one. Some cases have upheld the court's failure to hold a hearing for counsel's failure to make a specific request for one or failure to supply sufficient supporting detail. *See* State v. Rouse, 339 N.C. 59, 88-89 (1994) (counsel moved for examination during trial, but motion did not specifically request hearing and did not genuinely call defendant's capacity into question), *overruled on other grounds by* State v. Hurst, 360 N.C. 181 (2006). If there is substantial evidence of incapacity, however, the cases indicate that the court must hold a hearing, with or without a request. *See* Section V.B., After Examination Finding Defendant Capable to Proceed (discussing cases).

The main area in which trial courts are prone to reversal is for failure to order a hearing. *See, e.g.,* Pate v. Robinson, 383 U.S. 375, 385 (1966) (due process right to hearing on capacity); State v. Propst, 274 N.C. 62, 69-70 (1968)

(conviction vacated for failure to hold hearing); State v. McGee, 56 N.C. App. 614, 618 (1982) (conviction vacated for failure to hold hearing); Meeks v. Smith, 512 F. Supp. 335, 338 (W.D.N.C. 1981) (hearing required by due process and North Carolina law); G.S. 15A-1002(b) (hearing mandatory when question of capacity arises); United States v. Mason, 52 F.3d 1286, 1293 (4th Cir. 1995) (in federal cases, party requesting hearing need not demonstrate incapacity conclusively and need only provide "reasonable cause" that defendant may be incapable of proceeding).

B. Notice of Hearing. The parties are entitled to reasonable notice of a hearing on capacity. *See* G.S. 15A-1002(b); State v. Wolfe, 157 N.C. App. 22, 30–33 (2003) (defense counsel did not receive examiner's report until shortly before hearing, but court finds that counsel could have obtained report earlier with minimal effort; court also finds that counsel had opportunity to read report before hearing and offered no evidence).

C. Nature of Hearing. A hearing on capacity to proceed may vary in its formality. At a minimum, the hearing must afford the defendant the opportunity to present any evidence relevant to capacity to proceed. *See* State v. Gates, 65 N.C. App. 277, 283 (1983). Generally, the court holds an evidentiary hearing, at which the parties may call and cross-examine witnesses.

For offenses committed before December 1, 2013, findings of fact were encouraged but not required. *See* State v. O'Neal, 116 N.C. App. 390, 395-96 (1994) ("better practice" is for judge to make findings); *see also* State v. Coley, 193 N.C. App. 458, 462–63 (2008) (while better practice is for trial court to make own findings of fact, not prejudicial for trial court to adopt examiner's findings), *aff'd per curiam*, 363 N.C. 622 (2009).

For offenses committed on or after December 1, 2013, revised G.S. 1002(b1) requires the court to make findings of fact to support its determination of capacity or incapacity to proceed.

It is for the court to resolve conflicts in the evidence. *See* State v. Tucker, 347 N.C. 235, 242 (1997) (trial court's finding that defendant was capable of proceeding was upheld; two examiners concluded that defendant was malingering and was capable of proceeding, and one concluded that he was incapable but may be malingering); State v. Heptinstall, 309 N.C. 231, 234 (1983) (stating general principle). Although unlikely to occur, a judge may impanel a special jury to determine capacity to proceed. *See* State v. Jackson, 302 N.C. 101, 104 (1981). The judge may not, however, submit the question of capacity to the *trial* jury. *See* State v. Propst, 274 N.C. 62, 69 (1968).

Legislative note: Effective for offenses committed on or after December 1, 2013, G.S. 15A-1002(b1) permits the parties to stipulate that the defendant is capable of proceeding but prohibits a stipulation to incapacity. A trial judge should be wary of accepting a stipulation to capacity, without hearing evidence and making findings, particularly if he or she has concerns about the defendant's capacity to proceed.

D. Evidentiary Issues.

1. Generally. The rules of evidence are more relaxed at a hearing on capacity to proceed because a judge, not a jury, ordinarily decides

capacity. The judge may not base findings on inadmissible evidence, however. *See* State v. Willard, 292 N.C. 567, 574-75 (1977) (court states that judge is presumed to have disregarded incompetent evidence, but "safer practice" is for court to adhere to rules of evidence at hearing on pretrial motion); *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 5, at 16–17 (7th ed. 2011) (noting pretrial proceedings at which rules of evidence do not apply pursuant to Rule 104(a) and Rule 1101; hearing on capacity is not one of proceedings listed as exempt from rules of evidence). The discussion below deals with some of the evidence issues that may arise.

2. **Examination Results.** Either party may call the examiner who performed a court-ordered examination, and the examiner's report is admissible on the question of capacity to proceed. *See* G.S. 15A-1002(b)(1a) (local report admissible); G.S. 15A-1002(b)(2) (state report admissible); *see also* State v. Taylor, 304 N.C. 249, 271 (1981) (permitting disclosure of capacity report to prosecutor for use at capacity hearing), *abrogation on other grounds recognized by* State v. Simpson, 341 N.C. 316 (1995).

Legislative note: Effective for offenses committed on or after December 1, 2013, G.S. 15A-1002(b)(1) is recodified as G.S. 15A-1002(b)(1a) and states that the court may call the examiner appointed under that subsection with or without the request of the parties. This revision does not appear to change existing law.

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3. **Expert Opinion.** An expert may give his or her opinion on whether the defendant is able to perform the functions listed in G.S. 15A-1001(a)—that is, understand the proceedings, comprehend the situation, and assist in the defense. The expert may specifically use those terms in testifying. The expert may not testify, however, that the defendant is or is not "competent" or does or does not have the "capacity to proceed," as those terms are considered improper legal conclusions. *See* State v. Smith, 310 N.C. 108, 114 (1984). Studies have indicated that courts follow the expert's opinion in over 90% of the cases. *See* SAMUEL JAN BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 703 (American Bar Foundation, 3d ed. 1985).

4. **Lay Opinion.** Testimony by lay witnesses may support or override expert testimony. Lay witnesses may relate their observations of and dealings with the defendant. Further, if they have a reasonable opportunity to form an opinion, lay witnesses may give their opinion about whether the defendant is able to perform the functions in G.S. 15A-1001(a). *See* State v. Silvers, 323 N.C. 646, 653-54 (1989) (vacating conviction and remanding case for failure to allow defendant to present testimony of lay witnesses); State v. Smith, 310 N.C. 108, 114 (1984) (lay witness may testify in terms of factual descriptions in statute but may not give legal conclusion on whether person has capacity to proceed); State v. Willard, 292 N.C. 567, 574 (1977) (upholding finding of capacity to proceed based in part on testimony of lay witnesses).

5. **Counsel's Observations.** Defense counsel may offer his or her own observations of the defendant, although such evidence alone may be unpersuasive. *See, e.g.*, State v. McRae, 163 N.C. App. 359, 369 (2004)

("Because defense counsel is usually in the best position to determine that the defendant is able to understand the proceedings and assist in his defense, it is well established that significant weight is afforded to a defense counsel's representation that his client is competent."); State v. Gates, 65 N.C. App. 277, 283 (1983) (finding defendant capable where record consisted of defense counsel's statement that he and defendant had not had meaningful communication and defendant's statements about his drug use and marital problems but no medical evidence); *see also* State v. Robinson, 221 N.C. App. 509, 516 (2012) (finding that trial judge erred in denying motion for capacity examination in light of defense counsel's affidavit of his client's deteriorating mental condition).

An unpublished court of appeals opinion suggests that a trial judge may preclude the defendant's attorney from offering evidence about his or her client's mental condition. *See In re* H.D., 184 N.C. App. 188, *5 (2007) (unpublished) (counsel's statement that he felt juvenile lacked capacity was not competent evidence and did not provide basis for reversing finding of capacity; court also found no error in trial court's ruling that counsel could not testify about his juvenile client's capacity unless he withdrew from representation). This opinion seems inconsistent with the opinions cited above. *See also* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R.1.14(c) (lawyer is impliedly authorized to reveal confidential information about client with diminished capacity to extent reasonably necessary to protect client's interest); R. 3.7(a)(3) (lawyer may act as advocate at trial in which lawyer is likely to be necessary witness if disqualification of lawyer would work substantial hardship on client).

E. Objection to Finding of Capacity. In *In re Pope*, 151 N.C. App. 117, 119 (2002), a case in which the juvenile respondent's attorney filed a motion alleging incapacity to proceed, the court held that counsel had waived the issue for appeal by not objecting to the trial judge's finding of capacity after the hearing or objecting to capacity at the adjudicatory hearing. It seems unlikely that this procedure would be followed in adult criminal cases, which would resurrect the requirement that counsel state an "exception" to the court's ruling, at least in capacity matters. Further, it seems doubtful that a criminal defendant (or a juvenile respondent) can waive the issue of capacity if there is a genuine question about capacity. *See generally* Section II.A., Requirement of Capacity (discussing prohibition on trial of defendant who is incapable of proceeding); Section IV.B., Motion for Examination by Trial Court (discussing trial court's obligation to inquire into capacity even without request); Section VI.A., Request for Hearing (to same effect); *see also* State v. Snipes, 168 N.C. App. 525, 528-30 (2005) (reviewing trial court's failure to inquire sua sponte into defendant's capacity to proceed notwithstanding defense counsel's failure to raise issue).

Nevertheless, to ensure that the issue is preserved for appeal, some defense counsel may object to a finding of capacity to proceed on entry of the order and again at the beginning of trial.

VII. Commitment Procedures After Order of Incapacity. Once the court enters an order that the defendant is incapable of proceeding, involuntary commitment proceedings often ensue. Commitment proceedings typically begin with the criminal court in which the defendant was found incapable; thereafter, the commitment process is handled in civil

district court. This section uses the terms *criminal court* or *judge in the criminal case* when discussing decisions made on the criminal side, and uses the term *district court* or *commitment court* when discussing decisions made on the commitment side.

This section reviews the aspects of the commitment proceedings most significant to court actors involved in the criminal case. For a further discussion of commitment procedures for a defendant found incapable to proceed, see NORTH CAROLINA CIVIL COMMITMENT MANUAL §§ 8.6 through 8.12 (UNC School of Government, 2d ed. 2011).

A. Constitutional Backdrop. In *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), the Court found equal protection and due process violations in the indefinite confinement of a defendant found incapable of standing trial. The Court held that, unless the defendant is civilly committed, the State may hold a defendant no longer than a "reasonable period of time" to determine whether he or she will gain capacity to stand trial. If the defendant is neither likely to gain capacity nor subject to civil commitment, he or she must be released. *See also* NORTH CAROLINA CIVIL COMMITMENT MANUAL § 8.5B (Criminal Court Procedure) (UNC School of Government, 2d ed. 2011) (discussing *Jackson* holding).

In response to *Jackson*, North Carolina adopted procedures for the civil commitment of a defendant found incapable of proceeding. *See* G.S. Ch. 15A, art. 56 Official Commentary. In 2013, the General Assembly revised the procedures, bringing them closer in line with the requirements of *Jackson*. These provisions, discussed below, ordinarily control the disposition of the case after a finding of incapacity to proceed. For offenses committed before December 1, 2013, *Jackson* issues still may arise with "permanently incapable" or "unrestorable" defendants, such as defendants who are mentally retarded (as in *Jackson*) or have brain damage or dementia.

B. Initial Determination of Grounds for Involuntary Commitment. G.S. 15A-1003 provides that if the criminal court judge finds the defendant incapable of standing trial, the judge *must* decide whether there are reasonable grounds to believe that the defendant meets the criteria for inpatient or outpatient involuntary commitment under art. 5, part 7 in G.S. Ch. 122C.

The criteria for commitment differ from the standard of capacity to stand trial. For inpatient commitment (confinement at a 24-hour facility), the standard is mentally ill and dangerous to self or others. For outpatient commitment (periodic outpatient treatment), the standard is mentally ill and in need of treatment to prevent deterioration that would result in dangerousness. *See* G.S. 122C-261(b). Confusion sometimes exists about whether the court must consider commitment for an offense considered to be "nonviolent," a designation discussed in Section VII.C., below. G.S. 15A-1003(a) states that if a defendant is found incapable of proceeding, "the presiding judge . . . shall determine" whether grounds exist for commitment. This requirement applies whether the charged offense is a felony or misdemeanor or is designated as a violent or nonviolent offense for commitment purposes. The seriousness of the offense still may bear on whether the defendant meets the dangerousness criteria for commitment. (The State sometimes chooses to dismiss charges if the evaluation concludes that the defendant is incapable of proceeding. This occurs most often in misdemeanor cases. If the State dismisses the criminal case, the requirement for the court to consider commitment may not apply because there is no longer a "presiding judge" in the criminal case.)

If the criminal court judge finds grounds for involuntary commitment, the

judge issues an order to have the defendant taken into custody for examination (a custody order). On entry of the custody order, the defendant becomes a respondent in the involuntary commitment proceeding as well as a defendant in the criminal case until the charges are resolved. At several points in the ensuing commitment process, the defendant may be returned to jail to await further action in the criminal case. The court's order must require the hospital or other institution that has custody of the defendant to report to the clerk if the defendant is to be released from the hospital or institution. G.S. 15A-1004(c); *see also* G.S. 15A-1006 (similar requirement).

Legislative note: Effective for offenses committed on or after December 1, 2013, revised G.S. 15A-1006 provides that if the defendant has gained capacity while committed, the institution having custody of the defendant must provide written notice (not merely "notice" as under the previous version of the statute) to the clerk of court. The clerk, in turn, must provide written notice to the district attorney, defendant's attorney, and sheriff.

After issuance of a custody order, the commitment proceedings go down one of two tracks, discussed in subsections C. and D., below, depending on whether the offense is designated as violent or nonviolent. (Subsection D., below, discusses the definition of "violent offense.") This designation, which is made by the judge in the criminal case, may significantly affect the ensuing commitment process.

C. Commitment Procedure for Nonviolent Offenses.

1. First Examination. In cases involving nonviolent offenses, the defendant is examined locally, which should occur within a day or two after issuance of the custody order. *See* G.S. 122C-261(e) (requiring law enforcement officer or other authorized person to take defendant into custody within 24 hours after issuance of custody order); G.S. 122C-263(c) (requiring examination within 24 hours after law enforcement presents the person for examination). This initial examination may take place in the physical presence of the examiner or through the use of telemedicine procedures. *See* G.S. 122C-263(c). The examiner may find:

- no grounds for commitment,
- grounds for outpatient commitment only, or
- grounds for inpatient commitment.

If the local examiner finds grounds for inpatient commitment, the defendant receives a second examination, discussed below, at a 24-hour facility.

If the examiner does not find grounds for inpatient commitment, the next step depends on whether criminal charges remain pending. If criminal charges are no longer pending, the defendant is released. (If the examiner finds no grounds for inpatient commitment but recommends outpatient commitment, the defendant is released but additional commitment proceedings may take place. *See, e.g.,* NORTH CAROLINA CIVIL COMMITMENT MANUAL § 2.3L (Outpatient Commitment: Examination and Treatment Pending Hearing) (UNC School of Government, 2d ed. 2011).) If the defendant has pending charges and has not obtained pretrial release, the defendant is returned to jail to await further action in

the criminal case.

2. **Second Examination.** If the local examiner finds grounds for inpatient commitment, the defendant is taken to a 24-hour facility. The 24-hour facility must conduct a second examination within one day of the defendant's arrival at the facility, but delays may occur in taking the defendant to a 24-hour facility. *See* G.S. 122C-266(a) (requiring examination within 24 hours of arrival); G.S. 122C-263(d)(2) (person may be detained for up to seven days after issuance of custody order if 24-hour facility is unavailable). The second examiner has the same options as above. If the examiner finds no grounds for commitment or grounds for outpatient commitment only, the defendant is released (back to jail if criminal charges are still pending and the defendant has not obtained pretrial release). If the facility has recommended inpatient commitment, the facility holds the defendant pending a hearing in district court, to be held within ten working days of the day the defendant was taken into custody. The hearing is ordinarily held in the county in which the 24-hour facility is located. *See* NORTH CAROLINA CIVIL COMMITMENT MANUAL § 2.6B (Venue and Transfer of Venue) (UNC School of Government, 2d ed. 2011).

   The second examination may occur at any 24-hour facility described in G.S. 122C-252 (including university and veterans hospitals). Usually, the defendant goes to one of the three regional state hospitals (Broughton in Morganton, Cherry in Goldsboro, or Central Regional Hospital in Butner). Each of the regional state hospitals has special counsel to represent respondents held there. Appointed counsel represent respondents at other facilities.

3. **Hearing on Inpatient Commitment.** At the district court hearing on inpatient commitment, the judge has the same options as above—no commitment, outpatient commitment, or inpatient commitment. The first two options require the defendant's release (back to jail if criminal charges are still pending and the defendant has not obtained pretrial release). The judge may order inpatient commitment for an initial period of up to ninety days and may order inpatient commitment for six-month and one-year periods thereafter. *See* G.S. 122C-271; G.S. 122C-276.

4. **Termination of Inpatient Commitment.** When a defendant charged with a nonviolent offense no longer meets the criteria for inpatient commitment, the hospital must release the defendant (back to jail if criminal charges are still pending and the defendant has not obtained pretrial release). *See* G.S. 122C-277(a). The hospital must notify the clerk of court if the defendant is to be released. *See* G.S. 15A-1004(c). In cases in which the defendant has been committed after being found incapable to proceed for a nonviolent offense, the release determination may be made by a district court judge at a hearing on continued inpatient commitment *or* by the hospital without a hearing.

Legislative note: Effective for offenses committed on or after December 1, 2013, G.S. 15A-1004(c) and G.S. 122C-278 expand the circumstances in which the defendant's capacity must be re-examined following an incapacity determination and before termination of commitment proceedings and release of the defendant. For a further discussion of the

re-examination requirement, see "During Period of Commitment" (Legislative note) in Section VII.E.1., Redetermination of Capacity.

D. Commitment Procedure for Violent Offenses.

1. Purposes. The commitment procedures for defendants charged with violent offenses are similar to those for defendants charged with nonviolent crimes, discussed in subsection C., above, but special rules apply to keep defendants charged with violent offenses in continuous custody. A defendant subject to these special rules is sometimes referred to as a "House Bill 95," a reference to the bill enacted in 1981 that revised the applicable statutes in G.S. Ch. 122C. The procedures have been upheld against equal protection and due process challenges. *See In re* Rogers, 63 N.C. App. 705, 706-07 (1983).

2. Meaning of Violent Offense. The criminal court, after finding that a defendant is incapable to proceed and meets the criteria for involuntary commitment, designates the offense as violent or nonviolent. G.S. 15A-1003(a).

The term violent offense is not specifically defined in the pertinent statutes. All provide only that certain procedures must be followed, discussed below, if the defendant is "charged with a violent crime, including a crime involving assault with a deadly weapon." *See, e.g.*, G.S. 15A-1003(a). Reviewing this language, the court in *In re* Murdock, 222 N.C. App. 45, 50 (2012), considered whether this determination should be based on the elements of the charged offense or the underlying facts. The court took a dual approach. It held that courts are generally limited to looking at the elements of the crime. A crime is "violent" only if it has as an element "the use, attempted use, threatened use, or substantial risk of use of physical force against the person or property of another." *Id.* (citation omitted). *Murdock* also held that courts may look at the underlying facts to determine whether the charged offense involved assault with a deadly weapon. The court so ruled because the statutes include as a violent crime an offense "involving" assault with a deadly weapon; therefore, the General Assembly intended for courts to examine whether the underlying facts "involved" such an assault. In *Murdock*, the court concluded that the charged offenses—possession of a firearm by a felon and resisting an officer—did not have violence as an element but the underlying facts involved an assault with a deadly weapon and the trial court did not err by designating the offense as a "violent crime."

Because the judge in the criminal case makes the initial commitment determination after finding the defendant incapable of proceeding, defense counsel and the prosecutor will be present and able to make arguments about whether the offense should be designated as violent or nonviolent. This question may not arise again because the commitment statutes do not contain an express provision permitting the commitment court to revisit the criminal court's designation and the commitment court may be unwilling or unable to do so. (In *Murdock*, the defendant obtained review of the criminal court's designation of the offense as violent by filing a petition for certiorari in the appellate division.)

3. No Local Examination. If the criminal court finds that the defendant is incapable of proceeding, that grounds exist for involuntary commitment, and that the offense is a "violent crime," a law-enforcement officer must

take the defendant directly to a 24-hour facility. *See* G.S. 15A-1003(a). No local examination occurs, unlike the procedure for nonviolent offenses.

4. **No Release Pending Hearing.** The 24-hour facility must hold the defendant pending a hearing in district court to determine whether the defendant meets the criteria for commitment. *See* G.S. 122C-266(b). The facility may not release a defendant charged with a violent offense on finding that he or she does not meet inpatient commitment criteria, as the facility can for a defendant charged with a nonviolent offense.

   Even if the criminal charges are dismissed during the pendency of commitment, the hospital may not release the defendant without a hearing. *In re* Rogers, 78 N.C. App. 202, 204-05 (1985).

5. **Termination of Commitment.** Typically, the State is represented at the district court commitment hearing by a staff attorney assigned to the facility by the Attorney General's Office. G.S. 122C-268(b). In cases in which the offense has been designated as violent, the prosecutor in the criminal case may opt to represent the State's interest at the district court hearing. *See* G.S. 122C-268(c); *see also* G.S. 122C-276(d) (rehearings on continued inpatient commitment are subject to the same procedures as for initial hearings).

   The hearing is typically held in the county where the facility is located. *See* G.S. 122C-269(a). On motion of "any interested person," venue may be moved to the county in which the person was found incapable of proceeding. *See* G.S. 122C-269(c). The motion to move venue is heard by the commitment court; there is no statutory authority for the criminal court to issue an order "retaining venue" of the commitment proceedings.

   If the district court after hearing terminates inpatient commitment, a defendant charged with a violent offense may be released only to the custody of a law-enforcement agency. *See* G.S. 15A-1004(c).

Legislative note: Effective for offenses committed on or after December 1, 2013, G.S. 15A-1004(c) and G.S. 122C-278 expand the circumstances in which the defendant's capacity must be re-examined following an incapacity determination and before termination of commitment proceedings and release of the defendant. For a further discussion of the re-examination requirement, see "During Period of Commitment" (Legislative note) in Section VII.E.1., Redetermination of Capacity.

E. Redetermination of Capacity The criminal court may redetermine capacity at any time during the pendency of the criminal case. *See* G.S. 15A-1007(b).

1. **During Period of Commitment.** If the criminal court finds a defendant incapable to proceed and subject to commitment, the court's orders must require the hospital or institution to report periodically to the clerk regarding the condition of the defendant and immediately if the defendant gains the capacity to proceed. *See* G.S. 15A-1004(d) (so stating and also requiring the hospital or institution to report on the likelihood of the defendant's gaining capacity if the hospital or institution is able to make such a judgment); *see also* G.S. 15A-1006 (requiring report to clerk when defendant gains capacity to proceed). On receiving a report that the

defendant has gained capacity, the court may hold a supplemental hearing to determine the defendant's capacity. *See* G.S. 15A-1007(a).

Legislative note: Effective for offenses committed on or after December 1, 2013, G.S. 122C-278 requires a capacity examination before discharge from a hospital or termination of outpatient commitment *if* the person was found incapable to proceed, was referred by the court for civil commitment proceedings, and was committed for either inpatient or outpatient treatment. The statute does not distinguish between nonviolent and violent offenses. An examination finding a defendant incapable to proceed does *not* itself authorize continued commitment; the person still must meet the criteria for commitment on an inpatient or outpatient basis.

Revised G.S. 15A-1004(c) appears to contain a broader re-examination requirement. That statute, as revised, states that if the defendant is placed in the custody of a hospital or other institution in a proceeding for involuntary commitment, the court "shall also order that the defendant shall be examined to determine whether the defendant has the capacity to proceed prior to release from custody." A defendant may be in the "custody" of a hospital within the meaning of the revised statute when he or she is taken to a 24-hour facility for a second examination to determine the appropriateness of commitment or, in the case of an offense designated as violent, when taken directly to a 24-hour facility for examination. Such a requirement would be broader than the one in G.S. 122C-278, which requires a re-examination of capacity only after the person is actually committed.

For cases involving offenses committed *before* December 1, 2013, re-examination of capacity during the period of commitment is not mandatory. The parties may ask the criminal court to require that a re-examination of capacity be conducted during the period of commitment.

2. At Termination of Commitment. Once the defendant no longer meets the criteria for inpatient commitment and is released (by the hospital or by a district court following a hearing, depending on the case), the criminal court may reassess the defendant's capacity to proceed. *See* G.S. 15A-1007(a), (b) (authorizing court to hold supplemental hearings on capacity). The reassessment may involve the same procedures as those followed when the defendant's capacity was initially assessed, including a new evaluation of capacity by a local or state examiner and a hearing on capacity in criminal court.

Legislative note: Effective for offenses committed on or after December 1, 2013, revised G.S. 15A-1007(a) requires the district attorney to calendar a supplemental hearing no later than thirty days after receiving notice that the defendant has gained the capacity to proceed. This hearing requirement applies when the defendant is found incapable, is committed, and is later released from commitment. It also appears to apply when the defendant is found incapable, is referred for commitment proceedings, and is found not to be subject to commitment. New G.S.

15A-1007(d) provides that if the court determines in a supplemental hearing that the defendant has gained the capacity to proceed, the case must be calendared for trial at the earliest practicable time. Continuances of more than sixty days beyond the trial date may be granted only in extraordinary circumstances and when necessary for the proper administration of justice.

F. Disposition of Criminal Case While Defendant Incapable to Proceed. The criminal case is not completely held in abeyance while the defendant lacks capacity to proceed. Some of the procedures differ depending on the date of the offense.

1. Dismissal of Charges by Court for Offenses Committed before December 1, 2013. Under G.S. 15A-1008 as then written, the criminal court may dismiss the criminal charges against a defendant who is incapable of proceeding if:

1. it appears to the court's satisfaction that the defendant will not gain the capacity to proceed;
2. the defendant has been deprived of his or her liberty for a period equal to or greater than the maximum permissible period of confinement for the alleged offense; or
3. five years have expired in the case of a misdemeanor, and ten years have expired in the case of a felony, calculated from the date of the determination of incapacity to proceed.

These provisions make dismissal discretionary with the judge. When the defendant is unlikely to gain capacity, however, constitutional grounds may require dismissal. In *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), the U.S. Supreme Court held that a defendant unlikely to gain capacity must be released if he or she does not meet civil commitment standards. *See* Section VII.A., Constitutional Backdrop. The Court did not decide whether the criminal charges also must be dismissed, but it suggested that leaving charges open indefinitely might violate speedy trial and due process rights. *See also* Klopfer v. North Carolina, 386 U.S. 213 (1967). If a defense motion to dismiss is not calendared for hearing, the defendant may be able to proceed by petition for writ of habeas corpus. *See In re* Tate, 239 N.C. 94, 97 (1953).

A special AOC form has been created to ensure that a defendant has counsel in the criminal case to advance these arguments. Criminal counsel originally appointed to represent a defendant would appear to have an obligation to continue representing the defendant in the criminal proceedings. In some instances, however, criminal counsel may no longer be in the case—for example, if the prosecutor has dismissed the case with leave or the defendant has been involuntarily committed for a long time. The form, AOC-SP-210, "Petition and Appointment of Defense Counsel for Committed Respondent Charged with Violent Crime" (Apr. 2008), allows special counsel representing a defendant in commitment proceedings to petition the court to appoint criminal counsel if the defendant is no longer represented by original criminal counsel.

2. Dismissal by Court for Offenses Committed on or after December 1, 2013. Current G.S. 15A-1008 revises the grounds for dismissal by the

court of charges against a defendant found incapable to proceed. The biggest change is that dismissal is mandatory, not discretionary, if any of the grounds exist. The substance of the second ground, but not the first and third, was also changed to specify the length of imprisonment required to mandate dismissal. The grounds are:

1. it appears to the satisfaction of the court that the defendant will not gain the capacity to proceed;
2. the defendant has been deprived of his or her liberty, as a result of incarceration, involuntary commitment to an inpatient facility, or other court-ordered confinement, for a period equal to or greater than the maximum permissible term of imprisonment permissible for prior record Level VI for felonies or prior conviction Level III for misdemeanors for the most serious offense charged; or
3. five years have expired in the case of a misdemeanor, and ten years have expired in the case of a felony, calculated from the date of the determination of incapacity to proceed.

If the ground for dismissal is 2., the dismissal is "without leave." G.S. 15A-1008(b). This phrasing apparently means that the case is dismissed with prejudice and cannot be refiled. If the ground for dismissal is 1. or 3., the dismissal is "without prejudice to the refiling of the charges" by the giving of written notice by the prosecutor. G.S. 15A-1008(c). The "without prejudice" phrasing appears to distinguish a dismissal under 1. or 3. from the former dismissal with leave, discussed further below. When a case is dismissed with leave, the case may be viewed as still pending, a circumstance that has caused some agencies and programs to take the position that the defendant is not qualified to obtain funding for treatment or other services. A dismissal without prejudice to refiling, in contrast, contemplates that the State may refile the charges but, until it does so, no case is pending. To maximize the availability of treatment and services, the parties may ask the court to state explicitly in an order dismissing a case on ground 1. or 3. that the case is no longer pending on entry of the order.

A special AOC form, AOC-SP-210A and AOC-SP-210B, "Petition and Appointment of Defense Counsel for Committed Respondent Charged with Violent Crime" (Dec.2013), has been created to ensure that a defendant has counsel in the criminal case to advance these arguments. This form is discussed in Section VII.F.1., above.

3. Dismissal by Prosecutor For Offenses Committed before December 1, 2013. Under G.S. 15A-1009 as then written, the prosecutor may dismiss the charges with leave after an order of incapacity to proceed. A dismissal with leave removes the case from the docket, but outstanding process retains its validity and need not be refiled; any statute of limitations is also tolled. The prosecutor may reinstitute charges by filing written notice with the defendant, defendant's counsel, and clerk of court.

This option may seem beneficial on the surface—for the defendant, because it is a "dismissal"; and for the prosecutor, because it allows reinstitution of the charges by the filing of a written notice. In actuality, because of the indefinite nature of a dismissal with leave, the potential harms may outweigh any benefits. Some agencies and

programs may consider that the criminal charges remain pending if dismissed with leave, making it difficult for the defendant to qualify or obtain funding for needed treatment or other services. *See* MAITRI "MIKE" KLINKOSUM, NORTH CAROLINA CRIMINAL DEFENSE MOTIONS MANUAL 462 (2d ed. 2012) (explaining the problems associated with a dismissal with leave). Because it may limit the availability of treatment, a dismissal with leave may not meet prosecutors' interests in reducing potential recidivism by the defendant. In lieu of a dismissal with leave, a prosecutor may take a voluntary dismissal of the case, which means that the case is no longer pending. If the defendant gains capacity, the prosecutor still may refile the charges. There is no time limit on refiling in felony cases; in misdemeanor cases, the charges generally must be refiled within two years of the date of the offense.

If the prosecutor takes a dismissal with leave rather than a voluntary dismissal, the defendant still may seek dismissal by the court. *See* G.S. 15A-1009(f). A dismissal by the court supersedes a dismissal with leave by the prosecutor. *See* G.S. 15A-1009(e).

If the prosecutor has taken a dismissal with leave, it is not clear whether the defendant remains subject to pretrial release conditions because G.S. 15A-1009(b) states that outstanding process retains its validity "with the exception of any appearance bond." In practice, however, commitment facilities may return the defendant on release from commitment to the custody of law enforcement. If the criminal offense was designated as a violent offense when the defendant was initially found incapable of proceeding, the commitment facility must return the defendant on release from commitment to law-enforcement custody. *See* Section VII.D., Commitment Procedure for Violent Offenses (noting that dismissal of criminal charges does not remove House Bill 95 restrictions).

4. **Dismissal by Prosecutor for Offenses Committed on or after December 1, 2013.** G.S. 15A-1009 has been repealed. A prosecutor therefore may no longer take a dismissal with leave. A prosecutor still may take a voluntary dismissal.

5. **Pretrial Release.** If the defendant is not subject to inpatient involuntary commitment and the criminal charges remain pending, the criminal court may allow pretrial release, including allowing release of the defendant to the custody of a person or organization agreeing to supervise the defendant. *See* G.S. 15A-1004(b); *see also* State v. Gravette, 327 N.C. 114, 117 (1990) (person or organization taking custody of defendant must consent; court could not require probation department to supervise defendant who was incapable of proceeding while on pretrial release). Thus, if inpatient commitment is not imposed, is terminated, or is converted to outpatient commitment, the defendant can obtain release by satisfying the conditions of pretrial release.

6. **Other Motions.** While a defendant is incapable of proceeding, G.S. 15A-1001(b) permits the court to go forward with any motions that defense counsel can make without the assistance of the defendant. *See also* Jackson v. Indiana, 406 U.S. 715, 740–41 (1975) (indicating that counsel may proceed even with dispositive motions that do not require the defendant's assistance, such as a motion challenging the sufficiency of the indictment). *Cf.* Ryan v. Gonzalez, ___ U.S. ___, 133 S. Ct. 696, 700 (2013) (death row inmates were not entitled under federal statutes to stay

of habeas proceedings when incapable of proceeding; claims were resolvable on record whether or not defendants were capable of proceeding).

If the prosecutor has dismissed the case with leave (permissible only for offenses committed before December 1, 2013), G.S. 15A-1009 specifically authorizes the court to dismiss the charges on motion by the defendant or on the court's own motion. For other potentially dispositive motions (such as those mentioned in *Jackson v. Indiana*, above), North Carolina's statutes do not address the court's authority to act while a case is in "leave" status.

7. **Credit for time served.** A defendant who is found incapable to proceed and is involuntarily committed would appear to be entitled to credit for time served while committed or otherwise confined. *See* G.S. 15-196.1. No appellate cases appear to have addressed the issue, however.

G. Problematic Cases. In many instances, the treatment received by a defendant while committed will address the causes of his or her earlier incapacity to proceed and will allow the criminal proceedings to go forward after the commitment ends. Cases sometimes bog down, however, leaving defendants in legal limbo. Two recurring problems and suggested approaches are discussed below.

1. **Ping-pong Defendants.** The first problem involves what are sometimes called "ping-pong" defendants. Thus, a defendant is found incapable to proceed in the criminal case and is involuntarily committed on an inpatient basis. Once the defendant no longer meets the criteria for inpatient commitment, he or she is released. If criminal charges are still pending and the defendant has not met pretrial release conditions, the defendant returns to jail. When the defendant first returns to jail, he or she may be capable to proceed but then may decompensate and become incapable again while waiting for the criminal case to be resolved. (In some instances, the treatment received by the defendant while committed will address acute mental health problems, resulting in release because the defendant is no longer dangerous to self or others, but the treatment may not make him or her capable of proceeding according to the test in criminal cases.) The process then begins again, with the defendant evaluated for capacity, recommitted if incapable, released from the hospital once he or she no longer meets inpatient commitment criteria, and so on. *See* Ann L. Hester, Note, *State v. Gravette: Is There Justice for Incompetent Defendants in North Carolina*, 69 N.C. L. REV. 1484 (1991) (criticizing the capacity-commitment loop).

This ping-ponging may have several negative effects. It extends the defendant's detention and delays resolution of the criminal case for all concerned; increases transaction costs because the defendant must be examined multiple times and law enforcement must transport the defendant to and from the examinations; and may adversely affect the mental health of the defendant, whose condition improves and deteriorates again and again.

The criminal justice and mental health systems have come up with some ways to keep the defendant from returning to jail and decompensating during the pendency of the criminal case. First, a defendant may be able to agree not to contest continued commitment and

remain at the commitment hospital and receive treatment there until capable to proceed in the criminal case. Some criminal court judges have entered orders directing commitment hospitals to retain custody of defendants who are not yet capable to proceed or who are capable but may decompensate if returned to jail. Such orders may not be statutorily permissible, however, because a commitment hospital may keep a person under inpatient involuntary commitment only if the person meets the criteria for that commitment, not because he or she is incapable to proceed or may become incapable to proceed.

Second, a commitment hospital may find that although the defendant no longer meets the grounds for inpatient commitment, he or she meets the standard for outpatient commitment—essentially, that the defendant is mentally ill and in need of treatment to prevent deterioration that would result in dangerousness. *See* G.S. 122C-263(d)(1); G.S. 122C-266(a)(2). Outpatient commitment requires the person to receive psychiatric treatment in the community. To implement outpatient commitment, the criminal court may be asked to set pretrial release conditions that allow for the defendant's release from jail and placement in treatment.

If a defendant is unable to meet pretrial release conditions and needs greater mental health treatment than the jail can provide, the criminal court could enter a "safekeeping order," transferring the defendant to a unit of the state prison system designated by the Division of Adult Correction (DAC). *See* G.S. 162-39(d); G.S. 148-32.1(b3)(2). The current facilities designated for mental health treatment are Central Prison and the N.C. Correctional Institution for Women in Raleigh. If the defendant requires this level of treatment, however, commitment to the mental health system may be more appropriate than placement with DAC. Further, local jails may be reluctant to support this option because they are statutorily obligated to pay the costs of the defendant's stay in the state prison facility.

Legislative note: The 2013 legislation, discussed throughout this chapter, may address some of these issues by requiring, among other things, capacity examinations before release from commitment and expedited handling of the case once the defendant gains capacity. *See* "During Period of Commitment" and "At Termination of Commitment" (Legislative notes) in Section VII.E., Redetermination of Capacity; *see also infra* Appendix, Summary of 2013 Legislation. The 2013 legislation does not authorize continued commitment until the defendant regains capacity; the defendant still must meet the criteria for commitment.

2. **Permanently Incapable or Unrestorable Defendants.** A second problem involves defendants whose condition will not improve—for example, defendants with mental retardation, brain damage, or dementia. No matter how many times they go through the capacity-commitment loop, people with these conditions may never gain the capacity to proceed in the criminal case. These defendants also may not meet the criteria for inpatient commitment because they do not suffer from a mental illness.

The remedy provided by the law in these cases is dismissal of the criminal case or at least release of the defendant. *See* "Dismissal of Charges by Court" in Section VII., Disposition of Criminal Case While Defendant Incapable to Proceed.

The criminal judge may have concerns about dismissing charges against a defendant alleged to have committed a dangerous offense. The judge presiding over the civil commitment proceedings also may be reluctant to find that the person no longer meets the criteria for commitment. (The State may argue, for example, that a person who is mentally retarded and charged with a dangerous offense may not be released from commitment because he or she also suffers from a mental illness and, based on the nature of the charged offense, presents a danger to others.) Because of these concerns, judges sometimes ask the parties to present a plan for continued treatment and supervision of the defendant after release.

Locating resources for this population can be challenging. One option that may be explored is the possibility of a guardianship, under which the guardian has authority to make treatment decisions for the defendant once the criminal and commitment cases end. Such an arrangement may help resolve the criminal and commitment cases, but it would have to meet the standards for guardianship and the resulting curtailment of the defendant's personal autonomy. If appointed, a guardian may consent, among other things, to voluntary admission of the person to a mental health facility for treatment. *See* NORTH CAROLINA CIVIL COMMITMENT MANUAL Ch. 5 (Voluntary Admission of Incompetent Adults) (UNC School of Government, 2d ed. 2011). For a further discussion of guardianship proceedings and their impact, see NORTH CAROLINA GUARDIANSHIP MANUAL Ch. 1 (Overview of Adult Guardianship) (UNC School of Government, 2008).

3. **Capacity Restoration Classes or Groups.** For some defendants found incapable to proceed, the State hospitals may provide "capacity restoration" classes or groups during their hospitalization. These classes offer instruction on such matters as basic court procedures, the roles of the defense attorney, prosecutor, and judge, and the nature of criminal charges. Opinions vary on the nature and value of these efforts.

VIII. Admissibility at Trial of Capacity Evaluation.

A. Generally. The admissibility at trial of the results of a court-ordered capacity examination is a complicated topic, reviewed briefly below. In some instances, it is permissible for the State to offer at trial the contents and results of a court-ordered capacity examination, including the defendant's statements and examiner's opinions; in some instances, the examination is not admissible. *See also* State v. Allen, 322 N.C. 176, 183 (1988) (prosecutor could cross-examine defense expert at pretrial hearing on motion to suppress about capacity report; defense expert had reviewed report and disagreed with it [although not discussed in the opinion, prosecutor likely could have used the report, under the authorities discussed in subsection D., below, to rebut the defendant's claim that his mental infirmity rendered the confession involuntary]).

The results of the capacity evaluation may be used as well by the defense if relevant to the trial of the case. *See* State v. Bundridge, 294 N.C. 45, 51 (1978) (finding of incapacity admissible at trial where defendant raised insanity defense).

For a discussion of limits on the capacity examination itself, see Section IV.I., Limits on Scope and Use of Examination.

B. Effect of Doctor-Patient Privilege. The doctor-patient privilege does not protect the results of a court-ordered evaluation of capacity to proceed. *See* State v. Taylor, 304 N.C. 249, 271 (1981), *abrogation on other grounds recognized by* State v. Simpson, 341 N.C. 316 (1995); *see also* State v. Williams, 350 N.C. 1, 21 (1999) (to extent doctor-patient privilege exists, G.S. 8-53.3 authorizes court to override privilege if necessary to proper administration of justice).

C. Fifth and Sixth Amendment Protections.

1. Fifth Amendment. Subject to a significant exception for rebuttal of a mental health defense (discussed in subsection D., below), the Fifth Amendment privilege against self-incrimination applies to evaluations of capacity to proceed and precludes use of the results at the guilt-innocence or sentencing phase of a trial. *See* Estelle v. Smith, 451 U.S. 454, 462-69 (1981).

Although *Estelle* was a death penalty case, the principle should apply to noncapital cases as well. Also, although *Estelle* involved a capacity examination initiated by the court, it should make no difference whether the court, prosecutor, or defendant requests the examination. *See* Witt v. Wainwright, 714 F.2d 1069, 1076 (11th Cir. 1983), *rev'd on other grounds*, 469 U.S. 412 (1985).

2. Sixth Amendment. The Sixth Amendment right to counsel precludes a psychiatric examination of the defendant without notice to defense counsel of the scope and nature of the examination. *Estelle* relied on this additional ground in holding that the results of a capacity examination were inadmissible at trial, reasoning that the defendant was denied the assistance of his attorney in deciding whether to submit to the examination. *Estelle*, 451 U.S. 454, 470–71; *see also* Powell v. Texas, 492 U.S. 680, 686 (1989) (reversing conviction on Sixth Amendment grounds because defendant did not have notice that capacity evaluation would inquire into future dangerousness for purposes of capital sentencing proceeding). This protection is limited by the exception for rebuttal of a mental health defense, discussed in subsection D., below.

D. Rebuttal of Mental Health Defense. If the defendant relies on a mental health defense at trial and presents expert testimony in support of the defense, the results of a court-ordered capacity examination are admissible to rebut the testimony. The courts have held that the Fifth Amendment does not apply in this instance. *See* Buchanan v. Kentucky, 483 U.S. 402, 423 (1987); State v. Huff, 325 N.C. 1, 44 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990); *see also* State v. Davis, 349 N.C. 1, 40–42 (1998) (in capital case in which defendant relied on defenses of insanity and diminished capacity at guilt-innocence phase and defense expert relied on capacity examination in forming opinion, Fifth Amendment did not bar prosecution from using statements made by defendant during the capacity evaluation to cross-examine defendant's mental health expert at sentencing); State v. Atkins, 349 N.C. 62, 107–08 (1998) (no violation of Fifth Amendment by prosecution's use of capacity examination to rebut mental health evidence offered by defendant at sentencing phase of capital trial; the court

found that defendant presented a defense strategy alleging a learning disorder, an adjustment disorder, and disturbances of emotion and conduct; the defendant's mental health expert also relied on the capacity report as a basis for his opinion). For the same reasons, the Fifth Amendment does not preclude the State's use of a court-ordered capacity examination if the defendant relies on expert testimony in support of a voluntary-intoxication defense. *See* Kansas v. Cheever, ___ U.S. ___, 134 S. Ct. 596 (2013) ("The rule of *Buchanan*, which we reaffirm today, is that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal").

The courts also have held that the Sixth Amendment does not bar use of capacity examination results because counsel should anticipate and advise the client that the examination could be used to rebut a mental health defense. *See* State v. Davis, 349 N.C. 1, 43–44 (1998) (reaching this conclusion notwithstanding that the trial court apparently limited the scope of the capacity evaluation to a determination of capacity only); State v. McClary, 157 N.C. App. 70, 77–79 (2003) (following this reasoning and finding no Sixth Amendment violation). *But see* Delguidice v. Singletary, 84 F.3d 1359, 1362-63 (11th Cir. 1996) (defense counsel did not have notice that capacity evaluation would concern sanity).

Under the reasoning of *Buchanan* and *Huff*, the Fifth Amendment may still protect the examination results if the defendant relies on a mental health defense but does not introduce expert testimony. *See* State v. Williams, 350 N.C. 1 (1999) [discussed further under subsection E., below].

Courts have also held that the prosecution may only offer evidence from a capacity evaluation to rebut the mental condition raised by the defendant; the evidence cannot be submitted on the issue of guilt. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-3.2 & Commentary (1989) (citing cases); *see also* 5 LAFAVE, CRIMINAL PROCEDURE § 20.5(c), at 481 (discussing similar limitation on prosecution's use of court-ordered mental health examination after defendant gives notice of mental health defense). A jury may have difficulty grasping this distinction, however, even with a limiting instruction.

E. **Rebuttal of Other Evidence.** In *State v. Williams*, 350 N.C. 1, 21–23 (1999), the defendant decided not to put on any expert mental health testimony during either the guilt-innocence or sentencing phase of a capital trial; and the trial court granted the defendant's request to preclude the prosecution from using evidence of the capacity evaluation of the defendant. The court held, however, that the defendant opened the door to the prosecution's use of a portion of the capacity evaluation by introducing evidence during sentencing that he had acted respectfully while in jail awaiting trial. The trial court therefore did not err in allowing the prosecution to bring out evidence that the defendant had threatened to fight two staff members while at Dorothea Dix Hospital. *Cf.* State v. Harris, 323 N.C. 112, 128-29 (1988) (State could not cross-examine defendant at trial about fight he got into with another patient while at Dorothea Dix Hospital for capacity evaluation; fight was not relevant to defendant's credibility under Evidence Rule 608(b), and State articulated no reason for admitting evidence under Rule 404(b)).

F. **Waiver.** *Estelle* and other U.S. Supreme Court decisions involving psychiatric examinations suggested in dicta that a defendant might be able to waive his or

her Fifth Amendment rights after proper *Miranda*-style warnings. In none of those cases, however, did the U.S. Supreme Court actually allow admission of the evaluation results on waiver grounds, and the dicta from the cases may be a dead letter. Most cases, including those in North Carolina, have found that the prosecution may use evidence from a capacity examination only when necessary to rebut a mental health defense by the defendant. *See* Robert P. Mosteller, *Discovery against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567, 1615 n.159 (1986) (suggesting that more reasonable reading of *Estelle* is that prosecution's use of psychiatric examination is limited to responding to mental health defense raised by defendant).

Several arguments exist against a waiver theory:

- By ordering the defendant to submit to a capacity evaluation, the court effectively has compelled the defendant to cooperate with the examiners; therefore, the examination results may not be used against the defendant except to rebut a mental health defense. *See generally* Kastigar v. United States, 406 U.S. 441, 444-45 (1972) (if the State compels testimony, neither the testimony nor its fruits may be used in a criminal prosecution); Mincey v. Arizona, 437 U.S. 385, 398 (1978) (involuntary statements are not admissible for any purpose). For similar reasons, a defendant does not lose constitutional protections by being the one who moves for a capacity evaluation. A defendant cannot be said to have waived such rights by asserting the right not to be tried while incapable, and defense counsel may be obligated to raise capacity even without the client's consent. *See* Section II.A., Requirement of Capacity; Section II.I.2., Role of Defense Counsel – Duty to Raise Issue; *see also* United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984) (en banc) (Scalia, J., plurality opinion) (decision analyzes why trial judge may order psychiatric examination and prosecution may use results to rebut insanity defense; court finds that it is at best fiction to say that defendant knowingly and voluntarily waives Fifth Amendment rights by pleading insanity).
- A defendant may not be required to surrender one constitutional right (the right against self-incrimination) to gain the benefit of another (the right not to be tried while incapable to proceed). *See* Collins v. Auger, 428 F. Supp. 1079, 1083 (S.D. Iowa 1977) (defendant is entitled to examination to determine capacity to stand trial; if the giving of a *Miranda* warning made the defendant's statements admissible, the defendant would be placed in a situation where he must sacrifice one constitutional right to claim another), *rev'd on other grounds*, 577 F.2d 1107 (8th Cir. 1978) (agreeing with principle and finding further, contrary to lower court, that use of defendant's statements to psychiatrist to establish guilt was not harmless error and warranted vacating of conviction); *see also generally* Simmons v. United States, 390 U.S. 377, 394 (1968) (finding it "intolerable" that defendant would have to give up Fifth Amendment right against self-incrimination to assert Fourth Amendment claim); State v. White, 340 N.C. 264, 274 (1995) (citing *Simmons* with approval).
- Some jurisdictions have interpreted their law as prohibiting the use of a capacity evaluation at trial except to rebut a mental health defense. *See* JOHN PARRY, MENTAL DISABILITY LAW: A PRIMER 67 (American Bar Association, 5th ed. 1995) (some jurisdictions, by statute or court decision, limit admissibility of capacity evaluations).

- Facilities ordinarily do not adequately advise defendants of their right to remain silent, and defendants' cooperation with examiners does not constitute a waiver of their right to remain silent. *See, e.g.*, State v. Huff, 325 N.C. 1, 39-41 (1989) (facility made inconsistent statements to defendant about confidentiality of examination; court did not address whether warnings were sufficient or whether defendant waived rights), *vacated on other grounds*, 497 U.S. 1021 (1990).
- The defendant's mental condition may preclude a knowing and voluntary waiver of rights.

Appendix
Summary of 2013 Legislation

Background

During the 2013 legislative session the General Assembly made several changes to the statutes governing capacity determinations and the ensuing proceedings for involuntary commitment of a person found incapable to proceed. *See* S.L. 2013-18 (S 45). The changes, which apply to offenses committed on or after December 1, 2013, grew out of a study committee, co-chaired by Senator Shirley Randleman, a former Superior Court Clerk who had encountered some of the difficulties described below. The study committee consisted of representatives from the courts, prosecution, law enforcement, defense bar, mental health system, and School of Government as well as members of both the House and Senate.

Generally, if a judge finds that a person is incapable to proceed in a criminal case, the judge may refer the person for civil commitment proceedings. The proceedings then focus primarily on whether the person meets the criteria for commitment—for inpatient commitment, whether the person is mentally ill and dangerous to self and others. Generally, once a person no longer meets the criteria for commitment, the commitment terminates and the criminal case resumes. If the person has not met pretrial release conditions, he or she returns to jail. Termination of commitment does not necessarily ensure that the person is capable of proceeding in the criminal case, however. Although the person's mental health may have improved during the commitment process, his or her condition may deteriorate after returning to jail, rendering him or her incapable of proceeding in the criminal case. Or, even though released from commitment, the underlying conditions that rendered the person incapable of proceeding in the criminal case may not have been fully addressed. In those circumstances, the capacity-commitment process begins again, with the person cycling through a capacity evaluation, commitment if found incapable, release to jail if no longer subject to commitment, and so on.

In various ways, the legislative changes seek to better integrate the criminal capacity and civil commitment procedures without altering the basic criteria for commitment. To be involuntarily committed and treated in a state psychiatric facility, the person still must meet the mental illness and dangerousness requirements for commitment. The revised statutes do not authorize commitment on the basis that a person is incapable of proceeding; nor do they specifically authorize treatment of a person's incapacity during commitment. However, the revised statutes seek to increase communication between criminal and civil court participants; generate more information about the defendant's capacity to proceed before commitment terminates; expedite proceedings to avoid ping-ponging of defendants between the criminal justice and mental health systems; and set more definite termination dates for the proceedings. Below are highlights of the legislative changes.

Review of Legislative Changes

All of the changes described below are effective for offenses committed on or after December 1, 2013. (They are also described in the body of this chapter where applicable.)

Requirement of recommendation in report. If a capacity examination concludes that a defendant is incapable of proceeding, the report must indicate whether the person is likely to gain capacity and include a treatment recommendation for addressing the person's incapacity, which presumably will be available to and can be considered by treating professionals during the commitment process. *See* G.S. 122C-54(b). The revised statute does not specifically authorize

treatment or medication to restore capacity; however, in response to an uncodified section of S.L. 2013-18 (S 45), the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services adopted guidelines for the treatment of people who are involuntarily committed after a determination of incapacity to proceed. *See* Communication Bulletin # 140: Forensic Evaluator Guidelines (Dec. 3, 2013) [the portion of the bulletin on treatment guidelines was adopted by the Commission; the portion of the bulletin on training requirements was withdrawn].

Elimination of second capacity examination in misdemeanor cases. In misdemeanor cases, only local examiners may perform court-ordered capacity examinations. The court may no longer order a capacity examination at a state hospital following a local examination, *See* G.S. 15A-1002(b)(1a) and (2) [previous subsection (1) was recodified as subsection (1a)]. This change may free up resources to meet the requirement, discussed below, that capacity examinations be conducted before a person is released from commitment. In response to an uncodified section of S.L. 2013-18 (S 45), the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services proposed rules requiring forensic evaluators appointed under G.S. 15A-1002(b) to meet specified requirements, such as training to be credentialed as a certified forensic evaluator and attendance at continuing education seminars. *See* Communication Bulletin # 140: Forensic Evaluator Guidelines (Dec. 3, 2013). The proposed rules have been withdrawn and additional rules have not yet been adopted (the portion of the bulletin on treatment guidelines was adopted by the Commission).

Release of confidential records. The judge who orders a capacity examination must order the release of relevant confidential information to the examiner, including the warrant or indictment, the law enforcement incident report, and the defendant's medical and mental health records. The defendant is entitled to notice and an opportunity to be heard before release of the records. *See* G.S. 15A-1002(b)(4). The subsection also states that it does not relieve the court of its duty to conduct hearings and make findings required under relevant federal law before ordering the release of any private medical or mental health information or records related to substance abuse or HIV status or treatment.

Hearing and findings. Revised G.S. 15A-1002(b)(1a) states that the court may call the examiner appointed under that subsection to testify at a capacity hearing with or without the request of the parties. This revision does not appear to change existing law. Revised G.S. 15A-1002(b1) requires the court to make findings of fact to support its determination of capacity or incapacity to proceed; this subsection also states that the parties may stipulate that the defendant is capable of proceeding but may not stipulate to incapacity.

Time limits on completion of reports. The examiner who performs the capacity examination must submit his or her report within specified time limits—for example, in a felony case, within thirty days of completion of the examination. *See* G.S. 15A-1002(b2). The statute allows the court to grant extensions of time for good cause up to a maximum limit. The statute does not set deadlines for the holding of the examinations, however.

Notice to sheriff. The covering statement that must accompany a capacity examination report, indicating the examiner's opinion about capacity, must be provided to the sheriff who has custody of the defendant. The sheriff does not receive the report itself. *See* G.S. 15A-1002(d).

Capacity examinations during commitment. If a person is found incapable of proceeding and involuntarily committed, either on an inpatient or outpatient basis, a capacity examination must be conducted before commitment is terminated and the person discharged. G.S. 122C-278.

This provision does not authorize continued hospitalization or outpatient treatment solely on the basis that a person is incapable of proceeding; the person still must meet the criteria for involuntary commitment on an inpatient or outpatient basis.

Revised G.S. 15A-1004(c) appears to contain a broader re-examination requirement. That statute, as revised, states that if the defendant is placed in the custody of a hospital or other institution in a proceeding for involuntary commitment, the court "shall also order that the defendant shall be examined to determine whether the defendant has the capacity to proceed prior to release from custody." A defendant may be in the "custody" of a hospital within the meaning of the revised statute when he or she is taken to a 24-hour facility for a second examination to determine the appropriateness of commitment or, in the case of an offense designated as violent, when taken directly to a 24-hour facility for examination. Such a requirement would be broader than the one in G.S. 122C-278, which requires a re-examination of capacity only after the person is actually committed.

Reporting on status of defendant. If the defendant gains capacity after being committed, the institution having custody of the defendant must provide written notice to the clerk of court (not merely "notice" as under the previous version of the statute). The clerk, in turn, must provide written notice to the district attorney, defendant's attorney, and sheriff, which is a new requirement. G.S. 15A-1006.

The revised statutes also require that reports of re-examination be provided according to the terms of G.S. 15A-1002. *See* G.S. 15A-1004(c) ("A report of the examination shall be provided pursuant to G.S. 15A-1002."). G.S. 15A-1002 has required and continues to require that examiners provide reports of their examinations to the court and defense attorney. It has been less clear when examiners may provide reports to prosecutors. G.S. 15A-1002(d) has permitted and continues to permit disclosure of the report to the prosecutor if the question of the defendant's capacity "is raised at any time." The language and legislative history of G.S. 15A-1002(d) suggest, however, that this phrase contemplates disclosure only if capacity is questioned after the initial examination and further court proceedings are necessary, at which the examination report is a central consideration. Central Regional Hospital and possibly other examiners do not share this view and routinely provide a copy of the examination report to the court, defense attorney, and prosecutor at the same time (unless the defense attorney has obtained a specific order from the court limiting disclosure). Re-examination reports will likely be disclosed in the same fashion (unless defense counsel obtains an order limiting disclosure).

Supplemental hearings on capacity. After receiving notice that the defendant has gained the capacity to proceed, the district attorney must calendar a supplemental hearing on capacity within thirty days. G.S. 15A-1007(a). This hearing requirement applies when the defendant is found incapable, is committed, and is later released from commitment. It also appears to apply when the defendant is found incapable, is referred for commitment proceedings, and is found not to be subject to commitment.

Expedited trial. If the court determines in a supplemental hearing that the defendant has gained the capacity to proceed, the case must be calendared for trial at the earliest practicable time. Continuances of more than sixty days beyond the trial date may be granted only in extraordinary circumstances and when necessary for the proper administration of justice. G.S. 15A-1007(d).

Repeal of dismissal with leave. G.S. 15A-1009 has permitted prosecutors to dismiss cases "with leave" if a person is found incapable to proceed. This provision has proved troublesome because agencies and programs have viewed the criminal case as still pending, which may

disqualify the defendant from obtaining funding for needed treatment and services. The legislation repeals the statute. A prosecutor still may take a voluntary dismissal.

Mandatory dismissal. G.S. 15A-1008 has allowed but not required the court to dismiss the charges against an incapable defendant on any of the grounds indicated in that statute. The biggest change to the statute is that dismissal is mandatory, not discretionary, if any of the grounds exist. The substance of the second ground, but not the first and third, was also changed to specify the length of imprisonment required to mandate dismissal.

An incapable defendant is entitled to dismissal under the revised statute if:

1. it appears to the satisfaction of the court that the defendant will not gain the capacity to proceed;
2. the defendant has been deprived of his or her liberty, as a result of incarceration, involuntary commitment to an inpatient facility, or other court-ordered confinement, for a period equal to or greater than the maximum permissible term of imprisonment permissible for prior record Level VI for felonies or prior conviction Level III for misdemeanors for the most serious offense charged; or
3. five years have expired in the case of a misdemeanor, and ten years have expired in the case of a felony, calculated from the date of the determination of incapacity to proceed.

If the ground for dismissal is 2., the dismissal is "without leave." This phrasing apparently means that the case is dismissed with prejudice and cannot be refiled. If the ground for dismissal is 1. or 3., the dismissal is "without prejudice to the refiling of the charges" by the giving of written notice by the prosecutor. The "without prejudice" phrasing appears to distinguish a dismissal under either 1. or 3. from a dismissal with leave, discussed above. When a case is dismissed with leave, the case may be viewed as still pending. A dismissal without prejudice to refiling, in contrast, contemplates that the State may refile the charges but, until it does so, no case is pending. Defense counsel seeking to arrange for treatment and other services may need to educate involved agencies and programs about the meaning of a dismissal without prejudice. In seeking a dismissal order on ground 1. or 3., defense counsel also may ask the court to indicate explicitly in the order that the case is no longer pending on entry of the order.