Chapter 2
Capacity to Proceed

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Sections 15A-1001 through 15A-1009 of the North Carolina General Statutes (hereinafter G.S.) 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), *available at* www.ncids.org (select "Training & Resources," then "Reference Manuals").

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), *available at* www.ncids.org (select "Training & Resources," then "Reference Manuals").

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-207, "Motion and Order Appointing Local Certified Forensic Evaluator" (Jan. 2011); and AOC-CR-208, "Motion and Order Committing Defendant to Central

Regional Hospital – Butner Campus for Examination on Capacity to Proceed" (Jan. 2011). 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 at the time of release of this manual in Fall 2013. 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 apply to offenses committed on or after December 1, 2013. The discussion in this chapter includes "Legislative notes" describing the changes where applicable. For a further discussion of these changes, see *infra* Appendix 2-1, Summary of 2013 Legislation.

2.1 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 (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

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.

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 (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 (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).

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 (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 (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 (1989); *State v. Jenkins*, 300 N.C. 578 (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 (1981); *State v. O'Neal*, 116 N.C. App. 390 (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 (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 (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 (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 (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 infra* § 2.8B, 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 (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 (1992) (discussing circumstances that would support forced administration of antipsychotic drugs); *United States v. White*, 620 F.3d 401 (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. An uncodified section of S.L. 2013-18 (S 45) directs the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to adopt guidelines for the treatment of people who are involuntarily committed after a determination of incapacity to proceed. For a further discussion of capacity evaluations, see *infra* § 2.5, Examination by State Facility or Local Examiner.

D. 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 (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 (1989); *State v. Propst*, 274 N.C. 62 (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 State v. Silvers*, 323 N.C. 646 (1989) (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*, ___ N.C. App. ___, 729 S.E.2d 88 (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 (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*, ___ N.C. App. ___, 720 S.E.2d 884 (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; courts 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 *infra* Chapter 7, Speed Trial and Related Issues.

E. Compared to Other Standards

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 (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), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aojm9201.pdf.

Practice note: 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 *infra* in § 2.8, Procedure After Order of Incapacity) and are beyond the scope of this manual, *See* NORTH CAROLINA CIVIL COMMITMENT MANUAL Ch. 7 (Automatic Commitment—Not Guilty by Reason of Insanity) (UNC School of Government, 2d ed. 2011).

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 (1993).

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 *infra* "Capacity to represent self" in § 12.6C., Capacity to Waive Counsel.

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 (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 (1979); *State v. Thompson*, 287 N.C. 303 (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 (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).

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 manual 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), *available at* www.ncids.org (select "Training & Resources," then "Reference Manuals").

F. Burden of Proof

The defendant has the burden of persuasion to show incapacity to proceed. *See State v. Goode*, 197 N.C. App. 543 (2009); *State v. O'Neal*, 116 N.C. App. 390 (1994); *see also Medina v. California*, 505 U.S. 437 (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 (1996); *State v. Moss*, 178 N.C. App. 393 (2006) (unpublished) (following *Cooper*).

G. 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*, ___ N.C. App. ___, 729 S.E.2d 88 (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 (2005) (upholding retrospective capacity determination); *see also State v. Whitted*, 209 N.C. App. 522 (2011) (remanding to trial court to determine whether retrospective capacity hearing was possible).

2.2 Investigating Capacity to Proceed

A. Duty to Investigate

Counsel has a duty to make a "reasonable investigation" into a defendant's capacity to proceed. *See Becton v. Barnett*, 920 F.2d 1190 (4th Cir. 1990) (counsel must make reasonable investigation into defendant's capacity to proceed and must use reasonable diligence in investigating capacity; counsel may not rely on own belief that defendant was incapable of proceeding).

B. Significant Behaviors

Counsel should note unusual behaviors that 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). Counsel should assess the behavior or symptoms in terms of the statutory test for competency. *See supra* § 2.1B, Test of Capacity.

C. Sources of Information

It is impossible to generalize about the types of clients who may be incapable of standing trial. They may be charged with misdemeanors or serious offenses. Although more likely to be in jail, they may be able to navigate the requirements of pretrial release. To understand a client's condition or assess the evidence related to capacity to proceed, counsel may need to consider several sources of information.

Client interview. A face-to-face meeting—at which counsel can observe the client's speech, thinking, appearance, mannerisms, and other behavior—provides the best opportunity to assess the client's condition and its potential effect on capacity to proceed.

Medical history. Counsel should obtain the client's medical history, including any history of mental health treatment, and have the client sign several original release forms for medical and other records. (If you know the hospital or other facility that has the client's records, obtain the form release used by the facility to avoid potential objections by the facility that the form does not comply with HIPAA or other laws.) Because clients may not want to admit to mental health problems or may not be used to thinking in those terms, counsel may need to find alternative ways to phrase such questions.

Because of his or her mental state, a client may be unwilling or incapable of executing a release of information. In these circumstances, counsel should consider applying to the court ex parte for release of medical and other confidential records concerning the client. *See* MAITRI "MIKE" KLINKOSUM, NORTH CAROLINA CRIMINAL DEFENSE MOTIONS MANUAL 430–31 (2d ed. 2012) [hereinafter KLINKOSUM]; *see also infra* "Ex parte application" in § 4.6A, Evidence in Possession of Third Parties.

Witnesses. The defendant's family and friends may have helpful information about the defendant's condition. 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 (1989) (conviction vacated and case remanded for failure to allow defendant to present testimony of jail personnel who had observed him).

Commitment proceedings. The client may have been voluntarily admitted or involuntarily committed in the past. To obtain court records from prior proceedings, counsel may make a motion to the district court that heard the case. *See* G.S. 122C-54(d). Or, counsel may make a motion to the court in which the current criminal case is pending to compel production. *See generally infra* § 4.6A, Evidence in Possession of Third Parties. For medical records not in the court file, submit a release to the appropriate hospital or other facility. *See* G.S. 122C-53(i) (on client's request, facility "shall" disclose to client's attorney information relating to client).

Other records. Several other types of records may contain relevant information, including school, work, military, and juvenile records. In addition to these records, counsel should check the affidavit of indigency to see whether the client is receiving supplemental security income (SSI), which may be for a mental disability. To obtain SSI records, start with the local social security office where the client lives.

2.3 Deciding Whether to Question Capacity

Counsel should be aware of the potential repercussions, positive and negative, of questioning capacity and the potential options that best protect the client, such as obtaining funds for an evaluation by the defendant's own mental health expert before questioning capacity.

A. Ethical Considerations

When counsel must raise issue. There is general agreement that 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 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) (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; counsel may so move over the client's objection), *available at* www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html; 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).

Impact of client wishes. As in other matters, counsel should first try to discuss with the client 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."). If counsel explains to the client the need for an evaluation, the client may accede to the request.

In some instances, the client'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 (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).

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 (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, counsel may want to request the court to allow withdrawal 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).

B. Consequences of Questioning Capacity

Potential benefits. Some of the advantages of questioning capacity include:

- The examination may lead to needed treatment that the defendant could not otherwise obtain.
- A defendant found incapable of proceeding cannot be tried, precluding conviction and sentencing on the current charge. The case could be dismissed by the court or prosecutor in light of the findings of incapacity. *See generally* § 2.8F, Disposition of Criminal Case While Defendant Incapable to Proceed.
- Even if the defendant is found capable to proceed, the examination and hearing may generate evidence in support of a mental health defense, mitigating factors at sentencing, or a motion to suppress a confession on the ground that the defendant did not act knowingly and voluntarily. *See, e.g., State v. Bundridge*, 294 N.C. 45 (1978) (evidence of earlier incapacity to stand trial admissible to support insanity defense).
- Information about the defendant's mental condition may have a positive impact on plea discussions with the prosecutor.

Potential harms. Some of the harms that may result from questioning capacity include:

- The proceedings may result in disclosure of information damaging to the defendant, which may hurt plea negotiations, lead to further evidence, or be admissible at trial. *See infra* § 2.9, Admissibility at Trial of Results of Capacity Evaluation. In capital cases in particular, defense lawyers have voiced concern about the dangers of state-conducted capacity evaluations. *See, e.g.,* Welsh S. White, *Government Psychiatric Examinations and the Death Penalty*, 37 ARIZ. L. REV. 869 (1995) (analyzing reasons for defense opposition). If a state-conducted capacity evaluation is ordered, counsel may seek to minimize the risk by moving for an order limiting disclosure and use of the evaluation. *See infra* § 2.5E, Limits on Scope and Use of Examination; § 2.5F, Report of Examination.
- An evaluation of capacity to proceed before the defendant makes a motion for funds for a mental health expert of his or her own may hurt the defendant's chances of succeeding on the motion. *See infra* "Impact of capacity examination" in § 5.6A, Mental Health Experts.
- If found incapable of proceeding and involuntarily committed, the defendant could be confined for a longer period than if convicted, particularly if the underlying charge is a misdemeanor or the defendant does not have a significant criminal record.
- The defendant may be confined while awaiting a capacity evaluation or resolution of the capacity proceedings. *See generally* G.S. 15A-1002(b)(2) (court may commit defendant to state hospital for up to sixty days for evaluation, although stay is

ordinarily shorter); G.S. 15A-1002(c) (court may order defendant confined after evaluation and pending hearing).
- A finding of incapacity and subsequent involuntary commitment may stigmatize a defendant.

2.4 Obtaining an Expert Evaluation

A. Procedures to Obtain Expert Evaluation

There are three ways that counsel may obtain expert assistance to evaluate capacity.

Ex parte motion. The defendant may obtain 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 infra* § 5.5, Obtaining an Expert Ex Parte in Noncapital Cases. The 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. Once the expert has evaluated the defendant, counsel will be in a better position to determine whether there are grounds for questioning capacity to proceed.

One of the principal benefits of the above procedure is greater confidentiality. Because the motion is ex parte, it does not reveal to the prosecution that counsel has a question about the defendant's mental condition. Also, if counsel decides not to raise lack of capacity or call the expert as a witness, the prosecution generally does not have a right to discovery of the results of the expert's work. *See infra* "Nontestifying experts" in § 4.8C, Results of Examinations and Tests.

If the defendant's expert determines that the client is incapable of proceeding, counsel then may raise the question of capacity with the court. Counsel should consider drafting a motion to raise the issue rather than using the AOC form request and order, which by its terms seeks a local or state capacity examination. *See infra* § 2.5, Examination by State Facility or Local Examiner. The judge and prosecutor may be willing to accept that the defendant is incapable of proceeding without a further examination. *See* KLINKOSUM at 443–44 (discussing advantages to this approach).

Motion requesting court to appoint a particular expert. Theoretically, counsel could file a motion questioning the defendant's capacity to proceed and asking the court to appoint a particular expert to examine the defendant. *See* G.S. 15A-1002(b)(1) (court may appoint one or more impartial medical experts) [to be recodified as G.S. 15A-1002(b)(1a)]. Typically, however, the court refers the defendant to state or local mental health facilities for evaluations of capacity to proceed.

Motion for examination by local examiner or state facility. Counsel may begin the assessment of capacity to proceed by obtaining an examination of the defendant at a state or local mental health facility rather than moving for funds for an expert. *See infra* § 2.5,

Examination by State Facility or Local Examiner. In noncapital cases in which a judge is unwilling to authorize funds for an expert, examination by a local examiner or state facility may be the only means of obtaining an expert evaluation.

B. Choosing Which Motion to Make

In appropriate cases, counsel should consider obtaining an evaluation of the defendant by moving ex parte for funds for an expert rather than moving initially for an examination at a state or local mental health facility. In determining whether to seek funds for the defendant's own expert, counsel should consider factors such as the seriousness of the charges, the presence of mental health defenses and other mental health issues, the importance of keeping the defendant's statements confidential, the likelihood that the case will go to trial, and the opportunity to obtain an examiner who employs tools and techniques specifically tailored to the defendant's condition and who can conduct a comprehensive evaluation. *See also* KLINKOSUM at 441 (recommending that defense counsel seriously consider obtaining the services of a private mental health expert first; "[w]hile both types of evaluations (private vs. state) have attendant risks and benefits, in the author's experience, the risks involved in state-conducted mental health evaluations outweigh the benefits").

2.5 Examination by State Facility or Local Examiner

Counsel may begin the process for determining capacity to proceed by seeking an examination of the defendant at a state or local mental health facility (rather than moving for funds for an expert, discussed *supra* in "Ex parte motion" in § 2.4A, Procedures to Obtain Expert Evaluation.

A trial court can hold a hearing to determine a defendant's 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 (2011) (court not required to hold hearing before ordering capacity examination).

A. Moving for Examination

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). A court may be less receptive, however, to a last-minute motion for an initial examination. *See, e.g., State v. Washington*, 283 N.C. 175 (1973) (characterizing as "belated" a motion for initial examination two weeks before trial).

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-208, "Motion and Order Committing Defendant to Central Regional Hospital – Butner Campus for Examination on Capacity to Proceed" (Jan. 2011). The other is for an evaluation by a local facility (a local forensic examiner or screener). *See* AOC Form AOC-CR-207, "Motion and Order Appointing Local Certified Forensic Evaluator" (Jan. 2011).

Counsel should provide sufficient information to the court in support of the request for an examination, particularly if counsel anticipates resistance to the request. *See* G.S. 15A-1002(a) (requiring moving party to detail conduct in support of motion); *State v. Grooms*, 353 N.C. 50 (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 (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 (1979) (motion must contain sufficient detail to cause "prudent judge" to call for psychiatric examination before determining capacity); *State v. Robinson*, ___ N.C. App. ___, 729 S.E.2d 88 (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, counsel should ask the court to review that information in camera.

Subsequent examinations. A defendant may be able to obtain subsequent examinations if the report from the first examination has become stale or the defendant's condition has changed. *See supra* § 2.1D, Time of Determination.

Motion for examination by prosecutor or court. 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 detail 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 (1985) (disapproving of entry of order for examination without notice to defendant); *see also infra* § 2.9C, Fifth and Sixth Amendment Protections. *Cf. State v. Davis*, 349 N.C. 1 (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).

Practice note: If the court grants a motion by the prosecutor for a capacity examination, defense counsel should consider requesting that the scope of the examination be limited. *See infra* § 2.5E, Limits on Scope and Use of Examination.

The trial court has the power on its own motion to order an evaluation of the defendant's capacity to proceed. *See State v. Grooms*, 353 N.C. 50, 78 (2000). Further, the court is obligated to inquire into capacity, even in the absence of a request by the defense, if a bona fide doubt exists about the defendant's capacity to proceed. Such an inquiry may include an order for an examination. *See State v. Whitted*, 209 N.C. App. 522 (2011) (finding that trial court erred in failing to inquire); *State v. Snipes*, 168 N.C. App. 525 (2005) (stating principle but finding that evidence was insufficient to require trial court to inquire sua sponte into defendant's capacity to proceed).

B. Who Does Examination

Misdemeanors. If the underlying offense alleged is a misdemeanor, the defendant first must be evaluated by a local forensic screener. *See* G.S. 15A-1002(b)(1); *State v. Leyshon*, 211 N.C. App. 511, 521 (2011) (defendant correctly contends 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). The local screener may find the defendant capable or incapable of proceeding or may recommend that the defendant be evaluated further at a state psychiatric facility—that is, Central Regional Hospital in Butner, North Carolina. State examinations are discussed under "Felonies," below.

Local examinations tend to be short, consistent with the idea that they serve as a screening device. Local exams may last less than a day, primarily involving an interview of the defendant (which may take place at the jail if the defendant is incarcerated).

Legislative note: Effective for offenses committed on or after December 1, 2013, revised G.S. 15A-1002(b)(1) is recodified as G.S. 15A-1002(b)(1a) and, in conjunction with revised G.S. 15A-1002(b)(2), authorizes capacity examinations for misdemeanors by local examiners only. 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 infra* "During period of commitment" (Legislative note) in § 2.8E, Redetermination of Capacity. An uncodified section of S.L. 2013-18 (S 45) directs the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to adopt 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.

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). In requesting an examination, counsel should consider whether a local or state examination best meets the needs of the case. 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 is far shorter. Typically, an 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 may receive treatment as part of the commitment process. *See infra* § 2.8, Procedure 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* KLINKOSUM at 439; *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 evaluating the defendant. The AOC form order for a state facility examination authorizes the facility to obtain otherwise confidential information. *Compare* AOC-CR-208, "Motion and Order Committing Defendant to Central Regional Hospital - Butner Campus for Examination on Capacity to Proceed" (Jan. 2011) (so stating), *with* AOC-CR-207, "Motion and Order Appointing Local Certified Forensic Evaluator" (Jan. 2011) (no comparable language).

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.

C. Providing Information to Examiner

Whether a state or a local mental health facility evaluates the defendant, counsel should contact the examiner and ensure that he or she has access to relevant information about the defendant. Counsel may relate his or her observations of the defendant, identify people knowledgeable of the defendant's condition, transmit copies of relevant records, and provide other relevant information.

The AOC form for examinations at Central Regional Hospital states that counsel for the defendant must give "such records and information in counsel's possession as the

evaluator requests." *See* AOC-CR-208, "Motion and Order Committing Defendant to Central Regional Hospital – Butner Campus for Examination on Capacity to Proceed" (Jan. 2011). 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: 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.

D. 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 *infra* in § 2.5F, 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 infra* § 2.7D, Evidentiary Issues; § 2.9, 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).

E. 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 options for limiting the scope of an examination. For a discussion of the admissibility of the examination results, see *infra* § 2.7D, Evidentiary Issues; § 2.9, Admissibility at Trial of Results of Capacity Evaluation.

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 (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 (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), *available at* www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html.

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 (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). *Cf.* 2 NORTH CAROLINA DEFENDER MANUAL § 21.1 (Right to Be Present) (UNC School of Government, 2d ed. 2012). The *Davis* decision does not foreclose counsel from being present, however. Examiners still 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).

Court order limiting scope and use of examination. If counsel has concerns about the potential impact of a capacity examination beyond the proceedings to determine capacity, counsel may want to request a court 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 not be divulged to the prosecution. *But 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, in all cases in which counsel has concerns about disclosure of the examination report, counsel should consider requesting 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 infra* § 2.5F, Report of Examination.

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. Such a recording could assist counsel in cross-examining the State's expert, but it also could result in disclosure of potentially damaging information.

F. Report of Examination

Time of report. Currently, there is no statutory deadline for the completion of an examination report.

Legislative note: Effective for offenses committed on or after December 1, 2013, new 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.

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

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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 at 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).

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

Consequently, if defense counsel wants to limit disclosure of the examination report, counsel should 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. *Be sure the order is transmitted to the facility and examiners*. The current AOC forms for a capacity examination—AOC-CR-208 (Jan. 2011) for an examination at a state facility and AOC-CR-207 (Jan. 2011) 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. Counsel must move for a specific order restricting disclosure.

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 § 2.8E, 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

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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).

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 persons 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.

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 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.

G. 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 justifying 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 infra* § 2.9D, 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.

2.6 Post-Examination Procedure

A. After Examination Finding Defendant Capable to Proceed

G.S. 15A-1002(b) 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 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 (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 (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 (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 (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 following an examination in all cases. *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 to superior court judges that they "probably" should hold a hearing following a capacity examination), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/2_ripleyrand.pdf. If the court holds a hearing when the defense is not contesting the examiner's finding of capacity, it may be sufficient for 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). This approach may avert disclosure of the underlying report to the prosecution. Alternatively, the defense may ask the court to review the full capacity report in camera to limit disclosure of unnecessary information to the prosecutor.

B. After Examination Finding Defendant Incapable to Proceed

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

Dismissal. The prosecutor may agree to take a voluntary dismissal of the criminal case. Arrangement for treatment or other plans to address the defendant's condition may bolster negotiations with the prosecutor for dismissal. *See infra* § 2.8F, Disposition of Criminal Case While Defendant Incapable to Proceed.

Agreement not to contest incapacity order. The prosecutor may agree not to contest entry of an order finding the defendant incapable of proceeding, which triggers other procedures. For example, the court could issue a custody order requiring that the defendant be examined to determine whether involuntary commitment is appropriate. Further, the court or prosecutor may be willing to dismiss the criminal charges if an order of incapacity and a custody order are issued. *See* AOC-SP-304, "Involuntary Commitment Custody Order Defendant Found Incapable to Proceed" (Sept. 2003) (order combines both an incapacity and a custody order). For a discussion of procedures after the issuance of an order of incapacity to proceed, see *infra* § 2.8, Procedure after Order of Incapacity.

Practice note: If the prosecutor is unwilling to dismiss the criminal case and the defendant is incarcerated, there is ordinarily no reason to delay obtaining an order of incapacity to proceed. Without it, the defendant may languish in jail, unable to stand trial or enter a plea, because the examination indicates that he or she is incapable to proceed.

Hearing on capacity. If capacity is contested, counsel should request a formal hearing on the defendant's capacity to proceed if one is not automatically scheduled. *See infra* § 2.7, Hearings on Capacity to Proceed. If the court finds the defendant incapable of proceeding, the ensuing procedures are the same whether the hearing was contested or uncontested. *See infra* § 2.8, Procedure after Order of Incapacity.

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. Obtaining an early judicial determination of incapacity remains necessary, however, to protect the defendant's rights in the criminal case. *See infra* § 2.8F, Disposition of Criminal Case While Defendant Incapable to Proceed.

2.7 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 and counsel wants a hearing, counsel should 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 (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). *But see supra* § 2.6A, After Examination Finding Defendant Capable to Proceed (discussing cases recognizing that trial court sua sponte must hold capacity hearing when there is bona fide doubt about capacity).

Counsel is on strong legal ground when requesting a hearing. 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 (1966) (due process right to hearing on capacity); *State v. Propst*, 274 N.C. 62 (1968) (conviction vacated for failure to hold hearing); *State v. McGee*, 56 N.C. App. 614 (1982) (conviction vacated for failure to hold hearing); *Meeks v. Smith*, 512 F. Supp. 335 (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 (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 (1983). Generally, the court holds an evidentiary hearing, at which the parties may call and cross-examine witnesses and the court makes findings of fact. *See State v. O'Neal*, 116 N.C. App. 390 (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). It is for the court to resolve conflicts in the evidence. *See State v. Tucker*, 347 N.C. 235 (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 (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 (1981). The judge may not, however, submit the question of capacity to the *trial* jury. *See State v. Propst*, 274 N.C. 62 (1968).

Legislative note: Effective 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. The revised statute permits the parties to stipulate that the defendant is capable of proceeding but prohibits a stipulation to incapacity.

D. Evidentiary Issues

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, so counsel should continue to object when appropriate. *See State v. Willard*, 292 N.C. 567 (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* 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 cases below deal with some of the evidence issues that may arise.

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)(1) (local report admissible); G.S. 15A-1002(b)(2) (state report admissible); *see also State v. Taylor*, 304 N.C. 249 (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.

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 (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).

Lay opinion. Testimony by lay witnesses may support or even 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 (1989) (vacating conviction and remanding case for failure to allow defendant to present testimony of lay witnesses); *State v. Smith*, 310 N.C. 108 (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 (1977) (upholding finding of capacity to proceed based in part on testimony of lay witnesses).

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 (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*, ___ N.C. App. ___, 729 S.E.2d 88 (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 (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 is contrary to 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 (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 supra* § 2.1A, Requirement of Capacity (discussing prohibition on trial of defendant who is incapable of proceeding); "Motion for examination by prosecutor or court" in § 2.5A, Moving for Examination (discussing trial court's obligation to inquire into capacity even without request); § 2.7A, Request for Hearing (to same effect); *see also State v. Snipes*, 168 N.C. App. 525 (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, counsel should object to a finding of capacity to proceed on entry of the order and again at the beginning of trial.

2.8 Procedure After Order of Incapacity

Once the court enters an order that the defendant is incapable of proceeding, defense counsel must consider the interplay of (1) the criminal case, which remains pending in criminal court (district or superior) if not dismissed, and (2) involuntary commitment proceedings, which often ensue after an order finding a defendant incapable of proceeding in the criminal case and which are 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.

Although counsel appointed in the criminal case ordinarily does not represent the defendant in the commitment proceedings, those proceedings may bear on the criminal case. Defense counsel therefore should keep track of the commitment proceedings and coordinate with the defendant's commitment counsel. This section reviews the aspects of

the commitment proceedings most significant to criminal counsel. 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 (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), at 142–43 (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. These provisions, discussed below, ordinarily control the disposition of the case after a finding of incapacity to proceed. *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. These criteria 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).

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 current statute) to the clerk of court. The clerk, in turn, must provide written notice to the district attorney, defendant's attorney, and sheriff, which is a new requirement.

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 defendant's rights in the ensuing commitment process.

C. Commitment Procedure for Nonviolent Offenses

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 are still 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.

Second examination. If the local examiner finds grounds for inpatient commitment, the defendant is taken to a 24-hour facility, which must conduct a second examination within one day of the defendant's arrival at the facility. *See* G.S. 122C-266; *see also* 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. Contact information for special counsel may be found on the website of the Office of Indigent Defense Services, www.ncids.org (select "Defender Offices & Depts," then "Special Counsel").

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.

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 *infra* "During period of commitment" (Legislative note) in § 2.8E, Redetermination of Capacity.

D. Commitment Procedure for Violent Offenses

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 (1983).

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*, ___ N.C. App. ___, 730 S.E.2d 811 (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.*, 730 S.E.2d at 814 (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."

Practice note: Because the judge in the criminal case makes the initial commitment determination after finding the defendant incapable of proceeding, criminal counsel will be present and should be prepared to make arguments on the defendant's behalf about whether the offense should be designated as violent or nonviolent. The defendant may have little opportunity to address this critical question again. Because the commitment statutes do not contain an express provision permitting the commitment court to revisit the criminal court's designation, the commitment court may be unwilling to do so. (In *Murdock*, the defendant obtained reviewed of the criminal court's designation of the offense as violent by filing a petition for certiorari in the appellate division.)

No local examination. If the 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.

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 (1985).

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 *infra* "During period of commitment" (Legislative note) in § 2.8E, 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). If a defendant has been found incapable to proceed and is involuntarily committed, the defendant's capacity may be reassessed during the period of commitment.

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, new 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. To avoid the ping-pong effect described *infra* in § 2.8G, Problematic Cases, defense counsel may want to make a motion to the criminal court to require that a capacity examination be conducted during the period of commitment. If the defendant is committed at a state hospital, defense counsel may want to discuss this approach with the special counsel attorney representing the client.

At termination of commitment. Once the defendant no longer meets the criteria for inpatient commitment and is released (by the hospital or 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. Defense counsel has some options.

Dismissal of charges by court. Under G.S. 15A-1008, 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.

This statute makes 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 (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 supra* § 2.8A, 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. If defense counsel has difficulty having a motion to dismiss calendared and heard, counsel may be able to proceed by petition for writ of habeas corpus. *See In re Tate*, 239 N.C. 94 (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.

For a further discussion of the circumstances in which counsel may want to make a motion to dismiss on constitutional grounds, see *infra* "Permanently incapable or unrestorable defendants" in § 2.8G, Problematic Cases.

Legislative note: Effective for offenses committed on or after December 1, 2013, 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. 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." 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 1. or 3. from a dismissal with leave, discussed 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. Counsel seeking to arrange for treatment and other services may need to educate involved agencies and programs about the impact of a dismissal without prejudice. Counsel also may want to ask the court to indicate explicitly in an order dismissing a case on ground 1. or 3. that the case is no longer pending on entry of the order.

Dismissal of charges with leave by prosecutor. Under G.S. 15A-1009, 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 often 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* KLINKOSUM at 462 (explaining the problems associated with a dismissal with leave). Because it may limit treatment options, a dismissal with leave may not meet prosecutors' interests in reducing potential recidivism by the defendant. A better option for all concerned may be a voluntary dismissal of the case by the prosecutor, 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).

Practice note: If the prosecutor has taken a dismissal with leave, defendant may no longer be 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 supra* § 2.8D, Commitment Procedure for Violent Offenses (noting that dismissal of criminal charges does not remove House Bill 95 restrictions).

Legislative note: Effective for offenses committed on or after December 1, 2013, G.S. 15A-1009 is repealed. Thus, a prosecutor may no longer take a dismissal with leave. A prosecutor still may take a voluntary dismissal.

Pretrial release. If the defendant is not subject to inpatient involuntary commitment, 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 (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.

Jackson v. Indiana, 406 U.S. 715 (1972), would appear to require release, without conditions, when the defendant is unlikely to gain capacity. Any conditions on release would appear to be unenforceable since *Jackson* would not allow reincarceration for violation of the conditions.

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*, 406 U.S. at 740–41 (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 (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, it may be difficult for the defense to proceed with motions other than a motion to dismiss, which is specifically authorized by G.S. 15A-1009. If defense counsel wants to proceed on a motion that may limit prosecution of the case or otherwise benefit the defendant, such as a motion to suppress evidence essential to the State's case, counsel should base the request on the authority of *Jackson.*

Legislative note: Effective for offenses committed on or after December 1, 2013, G.S. 15A-1009 is repealed. Thus, a prosecutor may no longer take a dismissal with leave. A prosecutor still may take a voluntary dismissal.

Credit for time served. A defendant who is found incapable to proceed and is involuntarily committed should receive 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.

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 perhaps most importantly 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. Criminal counsel should discuss this approach with the defendant's counsel in the commitment case (usually, special counsel). 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 convince the criminal court to set pretrial release conditions that the defendant can satisfy, defense counsel may need to investigate available local resources and arrange for adequate treatment and supervision of the defendant. Again, defense counsel should discuss this approach with the defendant's commitment counsel, who may be able to help identify available local treatment resources and determine whether funding is available while criminal charges are pending.

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 supra* "During period of commitment" and "At termination of commitment" (Legislative notes) in § 2.8E, Redetermination of Capacity; *see also infra* Appendix 2-1, Summary of 2013 Legislation.

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. Defense counsel should make a motion to dismiss on statutory and constitutional grounds. *See supra* "Dismissal of charges by court" in § 2.8F, Disposition of Criminal Case While Defendant Incapable to Proceed.

Notwithstanding these legal requirements, a 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.)

Criminal counsel should discuss with commitment counsel potential options that may provide some assurance to the court of continued treatment and supervision of the defendant after release. Locating resources for this population can be challenging. If additional supervision is necessary, counsel may want to explore with the client the possibility of a guardianship, under which the guardian has authority to make treatment decisions for the client once the criminal and commitment cases end. Such an arrangement may help resolve the criminal and commitment cases but at the cost of infringement on the client's personal autonomy. Among other things, a guardian may agree 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), *available at* www.ncids.org (select "Training and Resources," then "Reference Manuals").

Legislative note: The 2013 legislation, discussed throughout this chapter, may address some of the concerns described above by, among other things, mandating dismissal of the charges if the defendant is unlikely to gain the capacity to proceed. *See supra* "Dismissal of charges by court" (Legislative note) in § 2.8F, Disposition of Criminal Case While Defendant Incapable to Proceed; *see also infra* Appendix 2-1, Summary of 2013 Legislation.

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.

2.9 Admissibility at Trial of Results 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. Although there are several arguments for excluding or at least limiting the use of the examination, counsel should anticipate the possibility that the contents and results of a court-ordered capacity examination, including the defendant's statements and examiner's opinions, may be admitted at trial. *See also State v. Allen*, 322 N.C. 176 (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 (1978) (finding of incapacity admissible at trial where defendant raised insanity defense).

For a discussion of potential ways to limit the capacity examination itself, see *supra* § 2.5E, 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 (1981), *abrogation on other grounds recognized by State v. Simpson*, 341 N.C. 316 (1995); *see also State v. Williams*, 350 N.C. 1 (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

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 (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).

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 (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 also 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 (1987); *State v. Huff*, 325 N.C. 1 (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).

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 (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 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), *available at* www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html; *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 (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).

If a waiver argument is made, several arguments may be made against it:

- 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 (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 (1978) (involuntary statements are not admissible for any purpose). For similar reasons, a defendant should 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 supra* § 2.1A, Requirement of Capacity; § 2.3A, Ethical Considerations; *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 (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 (1995) (citing *Simmons* with approval).
- The North Carolina courts should interpret North Carolina 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 (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 (which the court found to be in question when it ordered the capacity examination) precluded a knowing and voluntary waiver of rights.

Appendix 2-1
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 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.

Under the current statutes, if the judge finds that a person is incapable to proceed in the 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. An uncodified section of the legislation directs the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to adopt guidelines for the treatment of people who are involuntarily committed after a determination of incapacity to proceed.

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) [current subsection (1) is 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. An uncodified section of the legislation directs the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to adopt 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.

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 receiving or 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 want to ask the court to indicate explicitly in the order that the case is no longer pending on entry of the order.