Not Just the Capacity to Proceed:
Mental Capacity Issues From Investigation Through Trial

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In the past decade, the percentage of North Carolina prison inmates with mental disabilities has increased at a disproportionately high rate, with an estimated 30 percent of the inmates in our prison system identified as having a mental health concern. *Edwards, Mental Health Diagnoses in the Prison Population, N.C. Department of Correction, August 2007.* Nationally, it is estimated that the percentage of seriously mentally ill prison and jail inmates has nearly tripled in the last decade. *Torrey, et al., More Mentally Ill Persons Are in Jails and Prisons Than Hospitals: A Survey of the States, National Sheriff's Association and Treatment Advocacy Center, May 2010.* This drastic increase is attributed to the deinstitutionalization of mental patients and the reduction in outpatient services. *Id.*

This paper will address legal issues that arise in criminal cases in which the defendant has a cognitive disability, or mental illness, or both. In addition to considering the defendant's capacity to proceed to trial, a trial judge may need to consider the defendant's mental capacity to voluntarily waive his right to counsel at trial, to voluntarily waive his Miranda rights during custodial interrogation, and to voluntarily consent to a search and/or voluntarily answer questions in a non-custodial encounter with law enforcement officers.

Capacity to Proceed

Before a defendant may proceed to trial, due process requires that the trial court determine whether he has the mental capacity to proceed. Generally, this standard requires that the defendant:

1. Is able to understand the nature and the object of the proceedings against him; and
2. Is able to comprehend his own situation in reference to the proceedings; *and*
3. Is able to assist in his defense in a rational and reasonable manner.

N.C. Gen. Stat. § 15A-1001; *State v. Jenkins*, 300 N.C. 578, 581-83 (1980); *State v. Shytle*, 323 N.C. 684, 688-89 (1989). The burden rests upon the defendant to prove his mental incapacity, usually by a preponderance of the evidence. *State v. Goode*, 197 N.C. App. 543, 549 (2009).

As interpreted by the United States Supreme Court, the federal constitution requires a similar, two-pronged due process standard that the defendant:

1. Has a rational as well as factual understanding of the proceeding against him or her; and

2. Is able to consult with his or her lawyer with reasonable degree of rational understanding.

Dusky v. United States, 362 U.S. 402 (1960); *Drope v. Missouri*, 420 U.S. 162 (1975).

The terms "competency" and "incompetency", on the one hand, and the terms ""capacity" and "incapacity," on the other, are used interchangeably by appellate courts, even though they have legally distinct definitions. Competency refers to a person's ability to make or communicate important decisions concerning his/her person, family, or property, and is considered in guardianship proceedings. *See* N.C. Gen. Stat. § 35A-1101(7) *&* (8); Rubin, N.C. Defender Manual Vol. 1, Pretrial, Section 2-8 (2nd ed. 2013), http://sogpubs.unc.edu//electronicversions/pdfs/ncdefmanualvone2013.pdf. Although it is imprecise, this paper will use the terms respectively as written in appellate decisions.

North Carolina statute provides that "[w]hen the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1002(b) (2013). The trial court has a duty to conduct a hearing, *sua sponte*, and determine the defendant's mental competency -- *i.e.* capacity -- to proceed whenever there is substantial evidence before the court that the defendant *may* lack the necessary capacity. *State v. Heptinstall*, 309 N.C. 231, 235-36 (1983). *See also State v. Badgett*, 361 N.C. 234, 258 (2007) (hearing required where judge has a "*bona fide* doubt" about capacity); *State v. Grooms*, 353 N.C. 50, 78 (2000) (where evidence indicates a "significant possibility" that defendant is incompetent to proceed, trial court must order a competency evaluation). This duty is imposed on the trial court during all stages of criminal proceedings, including during trial. *Drope*.

No particular procedure is required for the hearing, and the method of inquiry "is still largely within the discretion of the trial judge." *State v. Robinson*, 729 S.E.2d 88, 94 (N.C. App. 2012) (quoting *State v. Gates*, 65 N.C. App. 277, 282 (1983). A report by a mental health examiner is admissible on the question of capacity to proceed. See N.C. Gen. Stat. § 15A-1002(b)(1) (local examiner's report); N.C. Gen. Stat. § 15A-1002(b) (state examination report). The court and counsel for all parties should have access to reports from court-ordered evaluations of the defendant's mental condition for the purpose of determining whether the defendant has the capacity to proceed. *See State v. Taylor*, 304 N.C. 249, 271-72 (1981).

The decision to order a mental health evaluation of the defendant's capacity is within the trial court's discretion. *State v. Gates*, 65 N.C. App. 277, 283 (1983). However, the low burden of proof for the defendant to demonstrate incapacity should be considered by the trial court in making this decision, and findings of fact regarding

observations and evidence of the defendant's mental state, both during the hearing and later in trial if the case proceeds, will reduce the risk of a reversal.

Effective for defendants charged with committing offenses on or after December 1, 2013, revised N.C. Gen. Stat. § 1002(b1) requires the trial court to make findings of fact to support its determination of capacity to proceed. The revised statute permits the parties to stipulate that the defendant is capable of proceeding but prohibits them to stipulate that the defendant lacks that capacity.

Earlier this month, in *State v. Shannon Devon Ashe*, No. COA13-298 (October 1, 2013), the Court of Appeals ordered a new trial for a defendant who contended his statutory and constitutional due process rights were violated by the trial court's failure to conduct a competency hearing at the beginning of the defendant's trial on assault and habitual felon charges and at the beginning of a re-trial on the habitual felon charge. The defendant waived his statutory rights because his counsel did not request a hearing. However, the court held that the trial court erred in failing to conduct a *sua sponte* hearing, identifying the following "substantial evidence that the defendant may have been incompetent" at the outset of the trial and re-trial: an extensive history of mental health treatment; diagnoses including schizophrenia; symptoms including psychosis and hallucinations; conduct including disruptive behavior that prompted his counsel to request arm and leg restraints during the trial; and the defendant's comments to the court, to a juror, and to a witness. *Ashe*, slip op. at 7. The court noted an absence in the record in the initial trial of an extended colloquy with the trial court or testimony by the defendant that demonstrated his capacity, slip op. at 8, and followed the United States Supreme Court's holding in *Drope* that even one of these factors may, in some circumstances, suffice to require a competency hearing. Slip op. at 9, quoting *Drope*, 420 U.S. at 180. The *Ashe* court also noted that during his re-trial on the habitual felon charge (the jury in the first trial deadlocked on that issue), the defendant addressed the trial court in a rambling and incoherent manner and defendant's counsel informed the trial court that defendant had not been medicated for two weeks. Slip op. at 10. Finally, the court noted that during his sentencing, the defendant gave a long, rambling, and incoherent statement "that did not clearly demonstrate his understanding of the proceedings, though he did use several phrases relevant to sentencing." *Id.*

Ashe follows other recent decisions holding that trial courts have failed to order further evaluations of defendants previously found to be capable of proceeding to trial. *See State v. Whitted*, 209 N.C. App. 522, 529 (N.C. App. 2011) (although trial court conducted appropriate inquiry at outset of trial to find the defendant capable to proceed, trial court failed to conduct a further inquiry when, days later during trial, defendant engaged in outbursts that necessitated the court ordering her to be physically restrained in the courtroom); *State v. McRae* (*McRae II*), 163 N.C. App. 359, 369 (2004) (trial court was required *sua sponte* to conduct a second hearing during a trial, after previously finding the defendant capable to proceed, because of significant evidence that arose days into the trial). *But see State v. King*, 353 N.C. 457, 467 (2001) (prior treatment for depression and suicide attempts, without more, and in light of defense counsel's

statement that he was not concerned about his client's capacity to proceed, did not constitute "substantial evidence" requiring court to require a hearing *sua sponte*).

In *State v. Blancher*, 170 N.C. App. 171 (2005), the court had ordered an evaluation of the defendant, who had a history of closed head injuries, prior to trial, but the evaluation was not completed because the defendant was refused admission to the hospital. Neither defendant nor his counsel informed the trial court that the evaluation had not been completed. Neither counsel nor the court raised the issue of the defendant's mental capacity at trial. After the defendant was found guilty of common law robbery, and before the trial court proceeded with a habitual felon charge, defendant claimed his counsel had been ineffective. The trial court allowed trial counsel to withdraw, appointed new counsel, and ordered a mental capacity evaluation, which was completed four months later. *Id.* at 173-74. Following that evaluation, the court conducted a hearing to determine the defendant's capacity in the prior trial – a retrospective hearing – and to determine whether the defendant had the capacity to proceed in the habitual felon trial. At the retrospective hearing, the defendant's counsel from the first trial testified that the defendant had been able to aid in his defense and understood the proceedings against him. The court determined that the defendant was and had been capable of proceeding, impaneled a new jury, and tried the defendant on the habitual felon charge, of which he was convicted. Id. The Court of Appeals held that the trial court did not abuse its discretion in determining that a meaningful competency hearing could be held retrospectively and in concluding that the defendant had the capacity to proceed, both in the initial trial and the habitual felon trial. *Id*. at 174.

In *State v. Robinson*, 729 S.E.2d 88 (2012), the trial court conducted a hearing on the first day of trial on defendant's motion for further mental health evaluation to determine his capacity to proceed. The defendant's IQ level was 68, in the mildly mentally retarded range. Reports based on evaluations a few months after the defendant was arrested opined that the defendant was competent to proceed, although one examiner noted that the defendant "should be assessed further if he exhibits changes in his cognitive functioning." *Id*. at 95. A psychiatrist who evaluated the defendant a year later, a few months prior to trial, also opined that the defendant was competent to proceed, but noted that "should his overall symptom picture worsen to any appreciable degree as the stress of trial builds, he could easily decompensate to the extent that he would be viewed as not capable of proceeding." The psychiatrist recommended that the defendant's condition be monitored closely as the case proceeded. *Id*.

On the first day of trial, the defendant's counsel reported a substantial deterioration in his client's ability to carry on a rational conversation or discuss any of the important issues involved in the defense of his case. The trial court denied the motion, found that the defendant was capable of proceeding, and the defendant was ultimately convicted of first-degree murder. The Court of Appeals held that the evidence presented to the trial court indicated a "'significant possibility'" that the defendant may have been incompetent to proceed to trial and that the trial court abused its discretion in

denying the motion for an additional evaluation. *Id*. at 96. The appellate court nonetheless found the abuse of discretion to have been harmless, because the same psychiatrist who had recommended closely monitoring the defendant's condition testified on the fourth day of trial that he was not currently concerned with the defendant's capacity.

The *Robinson* court, following other decisions, gave significant weight to the affidavit of defense counsel 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." *Id*., quoting *McRae II*, 163 N.C. App. at 369. *See also State v. Gates*, 65 N.C. App. 277 (1983). It appears from *Ashe* and *Robinson* that counsel's expressed concern about the defendant's mental state is given more weight by the appellate court than counsel's failure to note any concerns. This approach may signal a departure from earlier cases, or simply a difference in the evidence in these cases. *Cf McRae II*, 163 N.C. App. at 369 (holding that defense counsel's failure to raise the issue of competency at trial was "competent evidence" supporting the trial judge's determination that the defendant was competent.)

In cases in which the defendant has a significant history of mental illness or has been identified as having an intellectual disability, the most prudent approach for the trial court is to address the issue of the defendant's capacity to proceed prior to trial, plea proceeding, and/or sentencing hearing. If a previous examination indicates that the defendant lacks capacity, the trial court should conduct a hearing and carefully examine all relevant information. If records before the court, either from treatment or a forensic evaluation, provide evidence regarding the defendant's mental capacity, and if the trial court is inclined to make findings consistent with findings in the most reports, expert testimony may not be required. On the other hand, if the defendant has not previously been examined, or has not recently been examined, the defendant's conduct before the trial court and the observations of the defendant's counsel necessarily carry more weight, and if that evidence suggests that the defendant may not be capable to proceed, the safest course for the trial court is to order an evaluation.

In sum, with respect to the trial court's duty to insure that a criminal defendant has the mental capacity to proceed, one size does not fit all. The extent and nature of the trial court's inquiry and, if a hearing proceeds, the evidence necessary to consider, depend upon counsel's initial representation, the defendant's documented mental health history, and other information in the court file. Sample questions for the court to ask counsel and the defendant are on the following page. Depending upon the answer to any given question, additional questions may be necessary.

Questions the trial court poses to defense counsel should include the following:

How long have you represented the defendant?

Over that period, how many times have you met with the defendant?

When was your most recent conversation with the defendant?

Have you observed any variation in your client's ability to engage in conversations with you? If so, please describe.

Without disclosing the content of your conversations, based on your observations, does the defendant appear to understand the charges against him? Have you been able to discuss any possible defenses with the defendant?

Has your client said anything in your communications that causes you concern about his/her ability to understand the nature and object of this proceeding? …. to understand his/her situation relative to the proceeding? …. to assist in his/her own defense in a rational and reasonable manner?

Questions the trial court poses to the defendant should include the following:

Do you understand why you are here today?

Do you understand that you are charged with.…?

Do you understand that a person convicted of these charges can be sentenced to.…?

Do you understand who the person sitting beside you is? What is that person's job?

Do you understand who the person at the other table is? What is that person's job?

Without telling me what you have discussed with your lawyer, do you understand what he/she tells you about your case?

If the information provided by counsel and the defendant, combined with the most recent report of a mental health examiner, or the absence of any mental health assessment suggesting a concern, support findings of the three elements of capacity to proceed listed above, the trial court's inquiry is complete, and the findings should be made on the record.

If the information provided does not allow the trial court to make the necessary findings, the court should consider whether further evidence is required to determine the defendant's capacity to proceed. An expert witness, including a medical professional who was appointed to evaluate the defendant's capacity, can provide opinion testimony regarding the defendant's ability to meet the three criteria of mental capacity to proceed. Revised N.C. Gen. Stat. § 15A-1002(b)(1a) provides that, for defendants charged with offenses committed on or after December 1, 2013, the trial court may call for testimony from an examiner appointed to evaluate the defendant's capacity.

For more detailed discussions of the capacity to enter a guilty plea, including a more thorough list of suggested questions, including questions and findings related to medications, see Judge Ripley Rand, Guilty Pleas and Related Proceedings Involving Defendants with Mental Health Issues: Best Practices, Fall 2008 Superior Court Judges Conference, http://www.sog.unc.edu/sites/www.sog.unc.edu/files/ripleyrand.pdf, and John Rubin's N.C. Defender Manual, Chapter 2 (2nd edition 2013), http://sogpubs.unc.edu//electronicversions/pdfs/ncdefmanualvone2013.pdf. Other resources for related issues include sections from the new online Benchbook – or the old online Survival Guide -- on Motions to Suppress and Counsel Issues and a PowerPoint presentation by Judge Paul Gessner, Mental Retardation in Capital Cases, June 2010.

Capacity to Waive the Right to Representation by Counsel

The United States Supreme Court has long held that the federal constitutional standard for the capacity to waive the right to representation by counsel is the same as the standard for capacity to proceed. *Indiana v. Edwards*, 554 U.S. 164 (2008). North Carolina's appellate courts have long held, however, that defendants capable of proceeding nonetheless may not have made a knowing and intelligent waiver of the right to counsel. *See State v. Thomas*, 331 N.C. 671, 676-78 (1992) (mentally ill defendant who asserted a right to "participate in my own trial as co-counsel" had not voluntarily and intelligently waived his right to representation); *State v. Gerald*, 304 N.C. 511 (1981) (mentally ill defendant with IQ of 65, who said the courtroom made him dizzy and he wanted to get the proceeding over with, did not intelligently waive his right to representation).

In *Indiana v. Edwards*, the Supreme Court acknowledged that there is a "gray area" of defendants competent enough to stand trial but not competent to conduct trial proceedings by themselves. 554 U.S. at 174. In *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993), the Court determined that a state court could, consistent with the federal constitution, allow a "gray area" defendant to represent himself and enter a guilty plea. The *Edwards* Court noted that in *Godinez*, it had not considered whether the constitution allows a state court to deny such a defendant the right to self-representation. The *Edwards* Court noted that because the federal constitutional standards for determining the capacity to proceed includes considering the defendant's capacity to consult with counsel, those standards don't necessarily answer the question of whether a defendant has the capacity to proceed without counsel. The *Edwards* Court declined to adopt a different federal constitutional standard to answer that question, but it held that the constitution permits state courts to insist upon representation by counsel for those competent enough to stand trial "but who still suffer from mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Id.* at 177.

Prior to *Edwards*, North Carolina statute permitted a criminal defendant to proceed *pro se* only after the trial judge is satisfied that the defendant (1) has clearly been advised of his right to the assistance of counsel, including his right to court-appointed counsel; (2) understands and appreciates the consequences of the decision to proceed without counsel; and (3) comprehends the nature of the proceedings and the range of permissible punishments. N.C. Gen. Stat. § 15A-1242. A line of pre-*Edwards* decisions in North Carolina reversed convictions of defendants who had been allowed to proceed *pro se* in the absence of any record that the trial court complied with the statute. *See, e.g., State v. Dunlap*, 318 N.C. 384 (1986) (signed written waiver of counsel is no substitute for statutory inquiry); *State v. Callahan*, 83 N.C. App. 323 (1986), cert denied, 319 N.C. 225 (1987) (trial court's colloquy with defendant must be on the record to show compliance with the statute).

Following *Edwards*, North Carolina's courts have continued to scrutinize trial court decisions allowing defendants to proceed *pro se*. *See State v. Lane* (*Lane II*), 365 N.C. 7, 26 (2011) (holding that the trial court's inquiry into the defendant's mental capacity was sufficient to support findings that the defendant knowingly and voluntarily waived his right to assistance of counsel). Once the trial court has determined that a defendant has the capacity to proceed, the decision to allow the defendant to represent himself or herself is within the discretion of the court. *State v. Lane* (*Lane II*), 365 N.C. 7, 22 (2011).

The defendant in *State v. Reid*, 204 N.C. App. 122, 128 (2010) contended that the trial court erred by allowing him to represent himself despite his mental illness, under the misapprehension that it could not require him to be represented by counsel, as provided in *Edwards*. There was no evidence other than the defendant's claim of mental illness that he suffered from a mental disability. The Court of Appeals affirmed the trial court's decision to allow the defendant to proceed *pro se*, noting that the trial

court conducted the inquiry required by N.C. Gen. Stat. § 15A-1242 before allowing the defendant to proceed *pro se*. The court also noted that the defendant had formed a coherent theory of the case, which he followed through the trial and argued to the jury. 204 N.C. App. at 129.

Even if the trial court has determined that a defendant falls within the "gray area" and cannot waive the right to counsel in the view of the trial court, the defendant may forfeit his or her right to counsel by serious misconduct. *See State v. Cureton*, 734 S.E.2d. 572, 583-86 (2012) (defendant who verbally and physically threatened three court-appointed counsel, threatened to make a frivolous complaint to the state bar against one attorney, shouted at and insulted his attorneys, spat on one attorney and threatened to kill him forfeited his right to counsel). However, the trial court should be careful not to find forfeiture based upon less serious misconduct which simply reflected that the defendant was not capable of voluntarily and knowingly waiving the right to counsel. In *State v. Wray*, 206 N.C. App. 354 (2010), the appellate court concluded that the defendant's misconduct, which was the basis for doubt about his capacity to proceed, did not amount to serious misconduct meriting a finding of forfeiture. The court therefore held that the trial court erred by granting defense counsel's motion to withdraw and by ruling that the defendant had forfeited his right to counsel. *Id.* at 362 & 371.

Competency to Consent to Questioning or Search

Proceedings against defendants with mental disabilities also often require the trial court to determine whether the defendant's mental condition affected the constitutionality of law enforcement investigations including searches, interviews, and interrogations. Just as the United States Supreme Court and North Carolina's appellate courts have concluded that the standards for the capacity to proceed are not the same as the standards to determine whether a waiver of rights is voluntary and intelligent, courts also have held that defendants who were capable to proceed to trial nonetheless did not understand the rights they were waiving during an investigation. These issues are most often raised in motions to suppress statements or evidence gathered in a warrantless search.

As with other motions to suppress, if the court's findings are supported by competent evidence, they should be conclusive on appeal. *State v. Thompson*, 287 N.C. at 317. The court's conclusions of law, however, are reviewable *de novo. Id.*

Confessions

North Carolina's appellate courts have equated the competency to give a voluntary confession with the competency to testify. *See State v. Shytle*, 323 N.C. 684, 689 (1989); *State v. Whittemore*, 255 N.C. 583, 587 (1961). But the inquiry does not

end with a finding that the defendant was competent to testify. *Whittemore*, 255 N.C. at 588. Just as in cases involving clearly competent defendants, the court should decide whether a statement was taken in violation of the defendant's due process rights based on the totality of circumstances, including the context of the questioning and conduct by investigating officers.

It is significant that unlike a hearing to determine the defendant's capacity to proceed, where the burden is on the defendant to show that he lacks capacity, the burden is on the prosecution to prove that the defendant's confession was voluntary, knowing, and intelligent. *State v. Williams*, 276 N.C. 703, 709 (1970), *reversed on other grounds*, 403 U.S. 948 (1971).

The trial court's findings of fact after a hearing concerning the admissibility of a confession should be conclusive and binding on the appellate court if supported by competent evidence, even if the evidence is conflicting. *State v. Cureton*, 734 S.E.2d 572, 579 (2012); *State v. Simpson*, 314 N.C. 359, 368 (1985). However, the trial court's conclusions of law that the defendant's statements were knowingly, intelligently, and voluntarily made are reviewable *de novo*. *Id.*

A defendant's low intelligence, standing alone, is not enough for the trial court to determine that the defendant did not knowingly, intelligently, and voluntarily provide a statement to law enforcement officers. *Cureton*, 734 S.E.2d at 580; citing *State v. Simpson*, 314 N.C. 359, 368 (1985).

Custodial Interrogations vs. Consensual Statements

Courts have generally held that the initial determination of custody, for purposes of requiring a pre-interrogation advisement of rights, depends upon the objective circumstances surrounding the interrogation and not the subjective views of either the defendant or investigating officers. A statement is generally considered to be custodial where, under the circumstances of the questioning, a reasonable person in the defendant's position would have felt that he or she was not at liberty to terminate the interrogation and leave. *Yarborough v. Alvarado*, 541 U.S. 652, 158 L. Ed. 938, 942 (2004) (upholding police interrogation of 17-year-old and reversing 9th Circuit decision which held the trial court should have considered the defendant's age when determining whether questioning was custodial). The reason for the objective test is to give law enforcement officers clear guidance of when and how they could interrogate suspects, without requiring them to assess contingent psychological factors regarding each suspect. *Id.* at 945.

Notwithstanding the objective standard generally used by courts to determine whether a suspect must be advised of his or her *Miranda* rights, evidence of a defendant's mental condition is a factor to consider in determining whether a defendant

has made a knowingly, intelligent, and voluntary statement to law enforcement officers. *Cureton*, 734 N.C. at 582. Other factors to consider, including whether law enforcement deceived the defendant or made promises to obtain the confession, and the familiarity of the defendant with the criminal justice system, could also involve consideration of the defendant's cognitive abilities. *See id.*

If it is determined that the defendant was in custody when he or she provided a statement to a law enforcement officer, the defendant's mental condition must be considered in determining whether the defendant effectively waived all of his *Miranda* rights, including the right to counsel. *Blackburn v. Alabama*, 361 U.S. 199, 203-07 (1960) (technical compliance with *Miranda* does not foreclose consideration of all circumstances, including whether the defendant was incompetent at the time of his confession). *See also State v. Ross*, 297 N.C. 137, 143 (1979) (new trial ordered where the defendant's written statement revealed that his confession "was not logical and sensible" and that there was a "mere chance that it was made during a lucid interval"); *cf. State v. Allen*, 322 N.C. 176, 187 (1988) (logical and sensible statement by the defendant rebutted expert testimony that the defendant was incompetent when she gave the statement).

In *State v. Thompson*, 287 N.C. 303, 319-23 (1975), *death sentence vacated*, 428 U.S. 908 (1976), the North Carolina Supreme Court held that even where *Miranda* warnings have been given, the court must consider the defendant's youth and mental condition in assessing the voluntariness of his statements to law enforcement officers. The court affirmed the denial of the defendant's motion to suppress the statements, however, based upon the defendant's access to his parents during the interrogation, his experience with law enforcement officers, and the absence of any coercion. *But see State v. Thorpe*, 274 N.C. 457 (1968) (conviction overturned because the record did not reflect that the defendant, a cognitively disabled 22-year-old, had been advised of his right to counsel during a custodial interrogation).

Other decisions have held that the defendant's mental condition need not be considered by the court when the defendant moves to suppress non-custodial statements that were self-initiated, i.e. not in response to an investigating officer's questions. In *State v. Leonard*, 300 N.C. 223, 230 (1980), the defendant asked investigating officers, with no prompting, how many times she had shot her sister. The North Carolina Supreme Court held that the court was not required to consider the defendant's mental state in admitting the statement in evidence.

Consent to Search

The analysis of whether a suspect with a mental disability has voluntarily consented to a search is similar to the analysis applicable to confessions and other statements.

Under North Carolina statute, consent to search means a statement to a law enforcement officer, made voluntarily and giving the officer permission to make a search. N.C. Gen. Stat. § 15A-221.

In *State v. McDowell*, 329 N.C. 363, 376-77 (1991), the court determined that the person who consented to the search at issue, who was mentally retarded and tended to respond favorably to authority figures, had voluntarily consented to the search, based upon evidence in the record that she understood the nature and consequences of her actions, that she had never been declared legally incompetent, had legal custody of her child, and could write her name. *See also State v. James*, 118 N.C. App. 221, 227 (1995) (although the defendant had an IQ level of 70 and tended to defer to authority figures, he testified that he consented to a search of his "own free will" and that law enforcement officers treated him fairly).