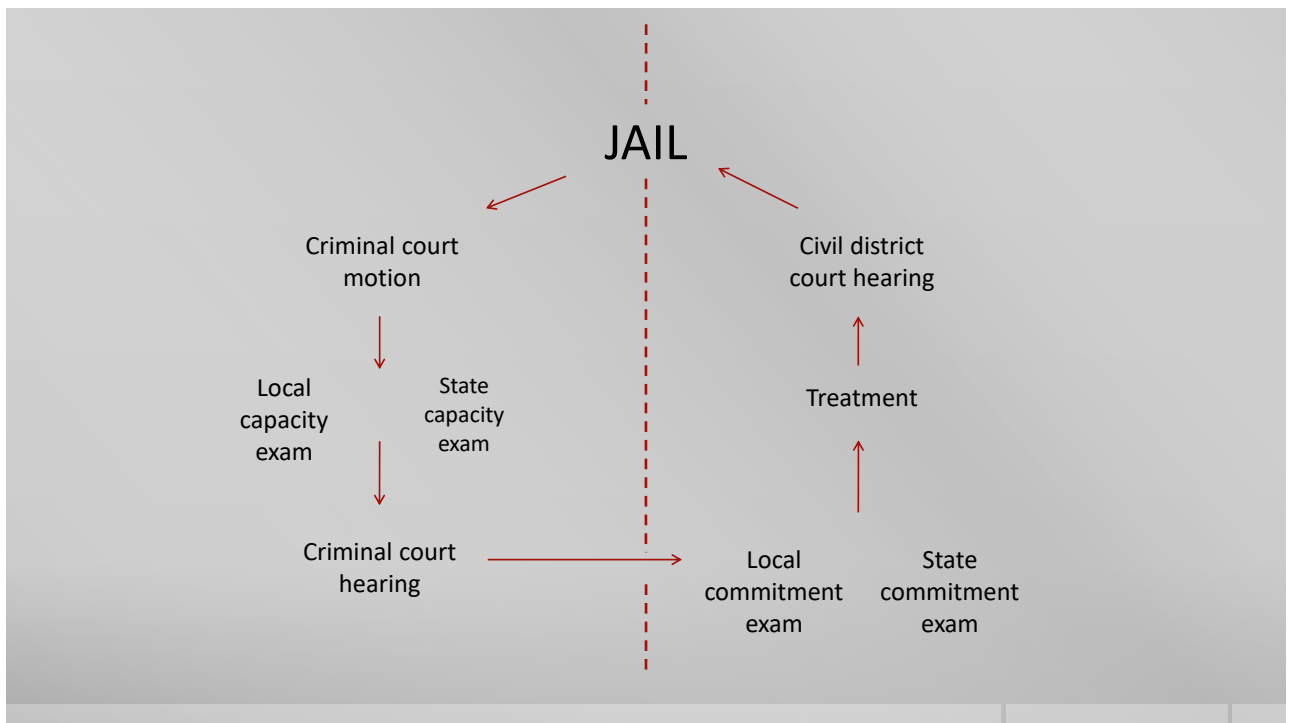


Capacity to Proceed

Issues for Superior Court Judges

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Capacity after Trial Starts: *State v. Hollars*, 376 N.C. 432 (2020)

- The defendant was arrested in 2012 for sexual offenses he allegedly committed against his stepdaughter in the 1970s and 1980s. The case went to trial in 2018. The defendant was 71 years old.
- At end of the third day of trial, defense counsel told the judge that he just had a conversation with his client and, based on that exchange, he asked the judge to inquire into his client's capacity.
- The next day, when the judge asked defense counsel if he had any more information or argument about his client's capacity, counsel said there were no existing concerns. He said that the previous day his client looked at him as if the client had no idea who he was, but this morning the client interacted with him as he had at other times.
- **Should the trial judge have held a hearing on the defendant's capacity?**

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The Court File in *Hollars*

- The defendant had been evaluated seven times for capacity from the time of his arrest in 2012 to his trial in 2018. He suffered from schizophrenia, bipolar disorder, and mild neurocognitive disorder, among other conditions. The defendant was initially found incapable to proceed.
- In 2015, the state hospital found that the defendant was capable but recommended that he stay at the hospital during trial and advised that the stress of the trial could cause him to become incapable. The court ordered an additional forensic evaluation, which found the defendant incapable to proceed.
- In August 2017, the state hospital reported that the defendant had become capable to proceed. Defense counsel agreed, and the trial judge set the case for trial.
- The trial began five months later in January 2018. Defense counsel's pretrial motions referenced his client's fluctuating mental states, but apparently did not question the defendant's capacity and no further inquiry was made about capacity before the trial began.

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Takeaways

- Trial judge has sua sponte obligation to address incapacity
- Standard is substantial evidence
- All the circumstances matter, not just current behavior; consider history, condition, other relevant information
- Defense counsel cannot waive hearing
- No particular hearing procedure is required
- Hearing and examination are different matters
- Findings appear to be required by 15A-1002(b1)
- Retrospective capacity hearing possible but disfavored

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Selected Decisions Requiring Hearing

- *State v. Ashe*, 230 N.C. App. 38 (2013)
 - Extensive mental health history for active psychosis and other conditions requiring medication; nonsensical and incoherent behavior during trial and habitual felon trial; refusal to wear clothes to court until mom interceded; request by counsel for arm and leg restraints; lack of extended colloquy by judge demonstrating defendant's understanding of proceedings
- *State v. Whitted*, 209 N.C. 522 (2011)
 - Diagnosed with paranoid schizophrenia and bipolar disorder; accused appointed counsel of working for State and trial court wanting her to take a plea; refusal to return to court on third day of trial; tasered and forcibly returned to court strapped to rolling chair and later gurney; singing, crying, praying, and refusing to remain quiet during court proceedings

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Selected Decisions Not Requiring Hearing

- *State v. Jones*, ___ N.C. App. ___, 909 S.E.2d 373 (2024), *petition for discretionary review pending*
 - Defendant testified at trial that she began hearing voices after she started using methamphetamine and went to her neighbor's house to get him to stop the "voice-to-skull technology"; following her testimony, the judge asked defense counsel whether there was a capacity issue; defense counsel said there wasn't and that early on in the case he had talked with the defendant and they agreed that a capacity evaluation was unnecessary; defendant appeared to be able to interact with the trial judge and counsel
- *State v. Newson*, 239 N.C. App. 183 (2015)
 - Being disruptive and obstreperous during trial did not raise bona fide doubt about defendant's capacity; most of doctors who did capacity evaluations believed his behavior was volitional; there was not meaningful evidence to suggest that the defendant was experiencing a mental illness during trial

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Another Capacity Example after Trial Starts

- The defendant was charged with four counts of felony embezzlement. She was present in the courtroom for the first three days of trial. After the third day of trial, she ingested 60 one-milligram tablets of Xanax, thirty times her dosage. She was found unresponsive and was taken to the hospital.
- Based on the exam of a hospital doctor, the defendant was involuntarily committed. A hospital psychiatrist subsequently found that she remained suicidal and required inpatient hospitalization. Her medical records showed that she had a mood disorder, managed with daily medications.
- The defendant took the pills intentionally, telling hospital staff that she was not going to jail. In response to questioning by the judge, defense counsel stated that until her suicide attempt the defendant had not exhibited any signs that she was incapable to proceed.
- **Can the trial proceed in the defendant's absence?**

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Takeaways

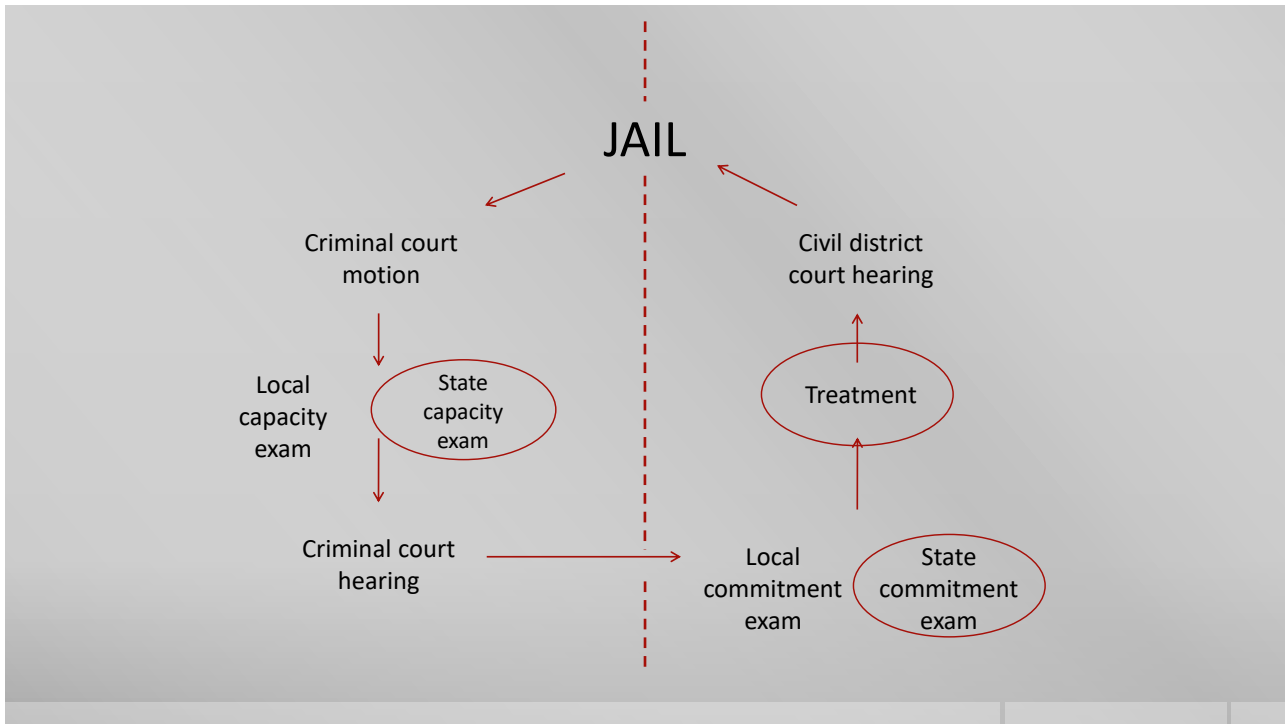
- A defendant has the right to be present at trial
- A defendant's voluntary absence after the start of trial constitutes a waiver of the right to be present
- A waiver of the right to presence is valid only if the defendant has capacity to waive
- If there is substantial evidence of incapacity, the trial judge must hold a hearing to determine the defendant's capacity to waive the right to presence before proceeding with the trial
- A suicide attempt shows mental instability but does not necessarily require a hearing on capacity
- *Compare State v. Sides*, 376 N.C. 449 (2020) (error not to hold hearing and determine capacity) *with State v. Flow*, 384 N.C. 528 (2023) (inquiry was adequate under statute and evidence did not require further hearing under constitution)

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Capacity to Waive Counsel

- Standard for capacity to waive counsel and represent self is same as standard for capacity to proceed
- A judge may but is not required to deny a request to proceed pro se if the defendant falls in the "gray area" of defendants who are not capable of self-representation
- If a defendant is capable to proceed, a judge either may:
 - grant the defendant's request to proceed pro se upon finding that the defendant knowingly and voluntarily waives the right to counsel, or
 - deny the request, thereby denying the constitutional right to self-representation, and make findings that the defendant is unable to carry out the basic tasks needed to present his own defense without counsel
- *State v. Lane*, 365 N.C. 7 (2011)

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U.S. Supreme Court's Ruling and General Assembly's Response

- *Jackson v. Indiana*, 406 U.S. 715 (1972)
 - If there is not a substantial probability that an incapable defendant will gain capacity in the foreseeable future, the State must either release the defendant or institute the customary civil commitment proceedings for committing any other person
- Commentary to 15A-1001 to 15A-1009 (part of 1973 Criminal Procedure Act)
 - "In order to accomplish these requirements [from *Jackson v. Indiana*], this draft provides that when the trial court determines that the defendant does not have capacity to proceed, it will turn him over . . . for civil commitment proceedings."

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Legislative Changes

- SL 1981-537 (House Bill 95)
 - For offenses considered “violent,” additional procedures apply that require transfer directly to state hospital, continuous custody, and court hearings before release
- SL 1989-486
 - Local capacity exam for misdemeanors required before state exam
- SL 1995-299
 - Local capacity exam for felonies preferred but not required
- SL 2013-18
 - Only a local capacity exam for misdemeanors
 - Reporting requirements about criminal capacity after commitment
 - Deadlines for action, including mandatory dismissal

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Capacity Proceedings

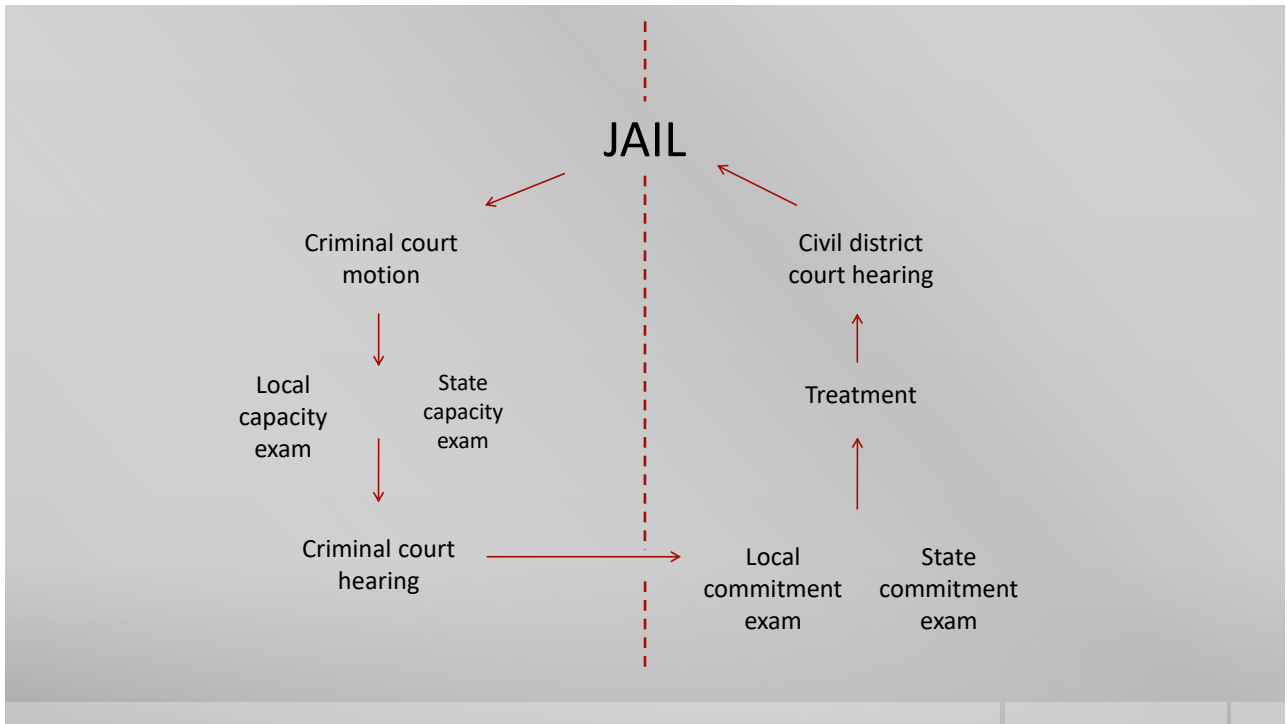
- Incapacity can be determined without capacity exam. 15A-1002(b)(1)
- State exam not required for felonies and not statutorily allowed for misdemeanors. 15A-1002(b)(1a)
- Deadline for submission of capacity report (but not for capacity exam or hearing). 15A-1002(b2)
- Pretrial release is permissible. 15A-1004(b)
- Dismissal is mandatory in three instances. 15A-1008

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G.S. 15A-1008

- When a defendant lacks capacity to proceed, the court shall dismiss the charge if
 1. it appears the defendant will not gain capacity
 2. the defendant has been confined for the maximum term for the most serious offense, or
 3. five years have elapsed in a misdemeanor case and ten years have elapsed in a felony case after a finding of incapacity

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Following Incapacity Determination

- Defendant must meet standard for commitment. 15A-1003(a)
- Offense is not “violent” unless it meets specific definition. 15A-1003(a); *In re Murdock*, 222 N.C. App. 45 (2012)

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Definition of Violent Offense

- “[A] violent crime, including a crime involving assault with a deadly weapon.” G.S. 15A-1003(a).
 - Whether a crime is “violent” depends on elements. *In re Murdock*, 222 N.C. App. 45 (2012).
 - Whether a crime “involves” assault with a deadly weapon depends on facts. *Id.*

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Following Incapacity Determination

- Defendant must meet standard for commitment. 15A-1003(a)
- Offense should not be designated as “violent” unless it meets the statutory definition in 15A-1003(a), as interpreted by *In re Murdock*, 222 N.C. App. 45 (2012)
- DA is supposed to calendar supplemental capacity hearing by deadline. 15A-1007(a)
- Trial is supposed to be earliest practicable time. 15A-1007(d)
- Pretrial release is permissible. 15A-1004(b)
- Dismissal is mandatory in three instances. 15A-1008
 - It appears the defendant will not gain capacity
 - The defendant has been confined for the maximum term for the most serious offense, or
 - Five years have elapsed in a misdemeanor case and ten years have elapsed in a felony case after a finding of incapacity

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Help Is on the Way?

- Pilot programs
- Capacity restoration legislative proposal
- Work group on conditional release of NGRI patients
- Lawsuit
- Revised benchbook chapter
 - Questions
 - Email: rubin@sog.unc.edu
 - Mobile: on the board

