UNC SCHOOL OF GOVERNMENT

ADMINISTRATION OF JUSTICE BULLETIN NO. 2025/06 | OCTOBER 2025

Capacity to Proceed in Criminal Cases in North Carolina

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CONTENTS

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This bulletin is adapted from chapters I wrote about capacity to proceed for the *North Carolina Defender Manual* and the *North Carolina Superior Court Judges' Benchbook*. Given that those chapters overlap significantly, it made more sense to issue a single bulletin updating the law and practice.

In keeping with the practical purpose of the earlier manual and benchbook chapters, the discussion of each topic is relatively brief, covering the basic law and identifying potential issues for consideration. Despite the overall length of this bulletin, more research and analysis can be done on many of the topics. For ease of use, the bulletin contains numerous headings and cross-references, with citations to authority in the text rather than in footnotes.

The original manual and benchbook versions contained practical advice for criminal defense attorneys and judges, respectively. This bulletin retains the advice where potentially helpful and identifies it as such.

The bulletin reflects my understanding of the law and its application. I welcome questions and comments. Please feel free to contact me at rubin@sog.unc.edu. You also may contact Jacquelyn Greene at greene@sog.unc.edu, who has worked in the area of juvenile capacity to proceed and intends to work in the area of criminal capacity in adult cases.

Shortly before publication of this bulletin, the General Assembly enacted S.L. 2025-93 (H. 307), which affects some of the procedures involving incapable defendants beginning as early as December 1, 2025. The impact of the bill is briefly discussed where applicable. The bill authorizes additional study. Readers should be alert to future legislative developments. [Shortly after publication of this bulletin, the General Assembly enacted S.L. 2025-97 (S. 449), which postponed some aspects of S.L. 2025-93 and is noted where applicable.]

I. Topics Covered in this Bulletin

A. Capacity and Commitment

Chapter 15A, sections 1001 through 1009 of the North Carolina General Statutes [hereinafter G.S.] contain the basic standards and procedures on the competency, or capacity to proceed, of a defendant. These provisions deal with the three main phases of the capacity to proceed process: a mental health examination; a hearing to determine capacity; and proceedings after a determination of incapacity—that is, involuntary commitment and disposition of the criminal case. This bulletin reviews these three phases in roughly chronological order, although the issues do not always arise in that order.

Making this area of law more complicated is the interrelationship between the criminal process for determining capacity under G.S. Chapter 15A and the involuntary commitment process under G.S. Chapter 122C. This bulletin reviews commitment law and procedure where pertinent to defendants found incapable to proceed, sometimes referred to as ITP commitments. For a more complete discussion of civil commitment law and procedure, see North Carolina Civil Commitment Manual (UNC School of Government, 2d ed. 2011).

Several Administrative Office of the Courts [hereinafter AOC] forms apply to the capacity and commitment process. Frequently used forms include the following:

- AOC-CR-207B, Motion and Order Appointing Local Certified Forensic Evaluator (for Offenses Committed on or after Dec. 1, 2013) (Jan. 2023).
- AOC-CR-208B, Motion and Order Committing Defendant to Central Regional Hospital – Butner Campus for Examination on Capacity to Proceed (for Offenses Committed on or after Dec. 1, 2013) (Jan. 2023).
- AOC-SP-304B, Involuntary Commitment Custody Order Defendant Found Incapable to Proceed (for Offenses Committed on or after Dec. 1, 2013) (July 2024).

To access AOC forms referenced in this bulletin, visit the AOC Forms page. To access North Carolina State Bar ethics opinions and rules of professional conduct that may apply, visit the organization's Ethics/Rules of Professional Conduct page.

Where pertinent, the bulletin includes a discussion of significant statutory changes to the capacity and commitment process. For example, during the 2013 legislative session the General Assembly made several statutory changes. *See* S.L. 2013-18 (S. 45). These changes apply to offenses committed on or after December 1, 2013. The bulletin concentrates on the procedures that apply to those offenses but, where significant, compares the procedures in effect for cases involving offenses committed before December 1, 2013, some of which may still be pending in the courts. For an overview of the major changes made to the capacity statutes since they were first enacted in 1973, see *infra* VIII.C, Legislative Response in North Carolina.

B. Capacity Restoration

North Carolina's statutes provide for the involuntary commitment of a defendant who is found incapable to proceed and who meets the criteria for commitment. Because of interest among both criminal justice and mental health personnel in redressing criminal incapacity, treatment protocols have been developed to include restoration of capacity following involuntary commitment. With the greater emphasis on capacity restoration, defendants who have been involuntarily committed may be more likely to remain in a hospital until their capacity is

restored or they are considered unrestorable. But North Carolina's statutes do not authorize initial or continued commitment solely to restore capacity; a defendant may be involuntarily committed only if he or she meets the criteria for commitment. *See infra* VIII.D, Capacity-Restoration Programs (describing capacity restoration and its place in current statutory scheme); *infra* IX, Commitment Proceedings after Incapacity Determination (discussing commitment procedures and requirements).

C. Delays

Delays have become an increased concern in the capacity process. Some delay may occur in obtaining a capacity evaluation at Central Regional Hospital, one of the three state hospitals in North Carolina; longer delays may occur in obtaining treatment, including capacity restoration, at one of the state hospitals after a determination of incapacity to proceed. In some instances, treatment options may be limited or unavailable altogether for incapable defendants charged with lower-level offenses.

Delays in treatment for incapable defendants detained in jail before trial have received considerable attention. They have been the subject of a documentary, *Fractured*, PBS: Frontline (Mar. 5, 2024) (following cases in North Carolina), as well as a civil suit in federal court. *See* Complaint, Disability Rights N.C. v. N.C. Dep't of Health & Hum. Servs. (No. 1:24CV335) (M.D.N.C. Apr. 19, 2024) (alleging due process violations); Memorandum Opinion and Recommendation of U.S. Magistrate Judge, *Disability Rights N.C.* (No. 1:24CV335), 2025 WL 1665327 (M.D.N.C. June 12, 2025) (recommending to federal district court judge who will decide case at trial level that State's motion to dismiss due process claims and plaintiff's request for preliminary injunction be denied; also recommending that State's motion to dismiss federal statutory claims be granted). Further proceedings are expected in the case.

This bulletin discusses delays and potential measures for addressing them where they arise in the process as well as in the section of this bulletin on problematic cases. *See infra* XI.C, Treatment Delays and Limitations.

D. Juvenile Capacity

This bulletin addresses cases in which a defendant is being tried as an adult. Juveniles may be tried as adults in cases that are excluded from juvenile jurisdiction or that begin under juvenile jurisdiction and are transferred to superior court for trial as an adult. *See* G.S. 7B-1501(7), -1604, -2200, -2200.5. The criminal capacity laws discussed in this bulletin include cases in which a juvenile is tried as an adult.

Effective for offenses committed on or after January 1, 2025, the General Assembly enacted a series of statutes addressing the capacity of juveniles to proceed in delinquency proceedings. S.L. 2023-114 (H. 186); *see also* S.L. 2024-17 (H. 834) (making additional changes). The juvenile capacity law applies only to cases under juvenile jurisdiction. For a discussion of those provisions, which are beyond the scope of this bulletin, see the following:

- Jacquelyn Greene, *New Law on Juvenile Capacity to Proceed*, N.C. Crim. L.: A UNC Sch. of Gov't Blog (Sept. 24, 2024).
- Jacquelyn Greene, *Juvenile Remediation to Attain Capacity to Proceed: New NC Law*, N.C. Crim. L., UNC Sch. of Gov't Blog (Oct. 22, 2024).
- N.C. Dep't Health & Hum. Servs., *Juvenile Capacity Evaluations and Restoration*, *in* Forensic Services (last visited July 2025).

See also North Carolina Juvenile Defender Manual ch. 7, *Capacity to Proceed* (UNC School of Government, 2017 ed.); Jacquelyn Greene, *Including Young Children in Delinquency Jurisdiction: Issues of Infancy and Capacity*, Juv. L. Bull. No. 2021/01 (UNC School of Government, Feb. 2021).

E. Other Resources

This bulletin touches on various aspects of criminal procedure beyond capacity to proceed, which are considered in other manuals produced by the School of Government for different court personnel. Readers may be interested in the following:

- NC Superior Court Judges' Benchbook
- Indigent Defense Manual Series
- NC PRO: NC Prosecutors' Resource Online

II. Requirement of Capacity to Proceed

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). The court has an obligation to ensure that criminal defendants have the capacity to proceed. *See, e.g., infra* VII.B, Court's Obligation to Hold Hearing.

For the most part, once a defendant is found incapable, the criminal prosecution may not proceed. Some actions in the criminal case may still be appropriate or necessary, however. *See infra* X, Criminal Proceedings after Incapacity Determination.

B. Test of Capacity

The North Carolina appellate courts have considered the test for capacity in two main instances. In most cases, the issue before the appellate court is whether the evidence was sufficient to warrant a hearing on the defendant's capacity. In some cases, the appellate courts have considered whether the trial judge erred in finding that the defendant was capable to proceed. In both contexts, the appellate courts have considered the test for capacity and applied it to the evidence about the defendant.

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. Newson, 239 N.C. App. 183 (2015) (being disruptive and "obstreperous" during trial did not raise bona fide doubt about the defendant's capacity; most of the doctors who evaluated him believed his behavior was volitional, and there was not meaningful evidence to suggest that the defendant was experiencing a mental illness during trial); 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 defendant still was capable of proceeding); 3 Michael L. Perlin, Mental Disability Law: Civil and Criminal § 13-1.8.4 (3d ed. 2023) (physical disorders may impinge on brain functioning to degree affecting defendant's mental capacity to stand trial).

Capabilities. Under the second part of the test for capacity, 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. Bethea, 291 N.C. App. 591 (2023) (relying on *Willard* and holding that the defendant's lack of memory about the crime as a result of traumatic brain injury, which occurred when he was shot by an officer as he was attempting to flee the crime scene, did not per se render him unable to assist in his defense; the defendant could remember events before and after the crime and conceded that he met the other two standards for capacity); 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 is disjunctive. The defendant's inability to meet any one of the three statutory conditions—ability to understand proceedings, comprehend situation, or assist counsel—bars further prosecution. *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 state 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 (*McRae II*), 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 appellate courts have not specifically addressed the use of forcible medication to make a defendant capable of proceeding. *See* State v. Gregory, 291 N.C. App. 617 (2023) (prosecutor moved for defendant to be forcibly medicated to restore his capacity, but before conclusion of hearing defendant began to take medication voluntarily and trial court did not rule on motion), *aff'd per curiam*, 387 N.C. 339 (2025); State v. McRae (*McRae I*), 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). [The last-cited case, *Monk*, was decided before *Sell v. United States*, 539 U.S. 166 (2003), discussed below, which may raise questions about the rationale for the denial of relief in *Monk*.]

One possible explanation for the absence of case law on this issue is North Carolina's approach to capacity matters, which first involves an evaluation of a defendant's capacity to proceed and thereafter involuntary commitment and treatment. *See infra* IX, Commitment Proceedings after Incapacity Determination. At one time, defendants evaluated for capacity at a state facility may have received treatment as part of the capacity evaluation. *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" as part of capacity evaluation). Now, treatment is no longer a component of the capacity evaluation. If a 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); Sell v. United States, 539 U.S. 166 (2003) (observing that courts typically address involuntary medical treatment as a civil matter). Medication has also become a part of the protocols for restoring a person's capacity while committed, although they do not appear to authorize forcible medication for that purpose. *See* N.C. Dept. Health & Hum. Servs., Div. Mental Health, Developmental Disabilities & Substance Abuse Servs., Communication Bulletin # 140: Forensic Evaluator Guidelines (Dec. 3, 2013) (for people who have been involuntarily committed after being found incapable to proceed, adopting guidelines that treatment plans utilize multi-modal interventions, which may include prescription of psychotropic medication; bulletin was issued in response to uncodified section

of S.L. 2013-18 (S. 45), which directed the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to develop guidelines for treatment plans to include restoration of capacity to proceed). For a further discussion of capacity restoration during commitment, see *infra* VIII.D, Capacity-Restoration Programs.

North Carolina criminal courts may have the inherent authority to order forcible medication to restore capacity; given their impact, however, such orders may require specific statutory authorization. If the North Carolina courts have this authority, they must balance the State's interest in prosecution and the defendant's constitutional right to refuse treatment. The U.S. Supreme Court has "recognized that an individual has a 'significant' constitutionally protected 'liberty interest' [under the Due Process Clause of the U.S. Constitution] in avoiding the unwanted administration of antipsychotic drugs." *Sell*, 539 U.S. at 178 (quoting Washington v. Harper, 494 U.S. 210, 221 (1990)). For the court to order forcible medication to restore capacity, it must conduct a *Sell* hearing, at which it considers whether the following interests justify the action: (1) important government interests are at stake, such as bringing to trial a person accused of a serious crime, and special circumstances do not mitigate those interests; (2) the medication will significantly further those interests, making it substantially likely that the drugs will render the defendant capable while being substantially unlikely to have side effects that would significantly interfere with the defendant's ability to assist counsel and thereby render the trial unfair; (3) the medication is necessary to further those interests and less-intrusive treatments are unlikely to achieve substantially the same results; and (4) the drugs are medically appropriate—that is, in the patient's best medical interests in light of his or her medical condition. In the case before it, the *Sell* court vacated the orders for forcible medication for the lower courts' failure to consider these interests, observing that involuntary administration of drugs solely for trial competence purposes should be "rare." *Id.* at 180; *see also* Riggins v. Nevada, 504 U.S. 127 (1992) (discussing circumstances that would support forced administration of antipsychotic drugs and reversing conviction following trial in which defendant was forcibly medicated; medication could well have denied defendant's constitutionally protected rights under the Fourteenth and Sixth amendments). *Sell* recognized that a defendant required to submit to medication to restore capacity may immediately appeal, as waiting until after trial would subject the defendant to "the very harm" that he or she seeks to avoid. 539 U.S. at 177.

Numerous cases in the Fourth Circuit have considered *Sell* motions for forcible medication. The following are published Fourth Circuit decisions: United States v. Tucker, 60 F.4th 879 (4th Cir. 2023) (upholding order for forcible medication); United States v. Watson, 793 F.3d 416 (4th Cir. 2015) (finding that government failed to meet burden on second *Sell* factor); United States v. Chatmon, 718 F.3d 369 (4th Cir. 2013) (remanding to district court for consideration of less-intrusive means than forcible medication); 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 government's interest); United States v. Bush, 585 F.3d 806 (4th Cir. 2009) (holding that significance of defendant's liberty interests requires that government establish *Sell* factors by clear and convincing evidence and remanding case for consideration of second and fourth *Sell* factors); United States v. Baldovinos, 434 F.3d 233 (4th Cir. 2006) (holding that *Sell* applies to sentencing and that district court erred in ordering involuntary medication to make defendant capable for sentencing but that error did not seriously affect fairness, integrity, or public reputation of judicial proceedings); United States v. Evans, 404 F.3d 227 (4th Cir. 2005) (reversing

order for forcible medication where government did not identify medication or dosage range of proposed treatment and did not show that medication would be effective treatment for this defendant). For numerous additional cases applying *Sell*, see 2 Michael L. Perlin, Mental Disability Law: Civil and Criminal § 8-7.3.2.1 (3d ed. 2023).

D. Relevant Time

A defendant's capacity to proceed is evaluated as of the time of trial or other proceeding, and 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, multiple evaluations and hearings may need to be conducted over the life of the case, including immediately before or during trial. More recent examinations or observations of the defendant tend to carry more weight. Some cases have found older evaluations insufficient to allow the case to proceed. *See Silvers*, 323 N.C. 646 (conviction vacated where trial court based finding of capacity entirely on psychiatric examinations three to five months before trial and excluded more recent observations by lay witnesses); State v. Robinson, 221 N.C. App. 509 (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). *But see* State v. Allen, 377 N.C. 169 (2021) (substantial evidence did not exist to require trial judge sua sponte to hold capacity hearing at trial; capacity evaluation six months earlier concluded that defendant was capable, and defendant did not question capacity at trial), *rev'g* 269 N.C. App. 24 (2019) (finding that earlier capacity evaluation may not have accurately reflected defendant's mental state at trial).

Constitutional concerns also may arise from delays in evaluating and determining capacity. *See infra* X.B, Dismissal of Charges.

E. Comparison to Other Standards

Insanity and other mental health defenses. Incapacity to proceed refers to a defendant's ability to understand and participate in the trial and other proceedings. In contrast, the insanity defense turns on a 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 against the defendant, 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*, Admin. of Just. Memorandum No. 92/01 (Institute of Government, Sept. 1992); Jeff Welty, *Diminished Capacity*, N.C. Crim. L.: A UNC Sch. of Gov't Blog (Jan. 15, 2013).

Capacity to proceed may still be at issue in cases involving mental health defenses. It is improper for the court to accept a plea of not guilty by reason of insanity if the defendant is incapable to proceed. State v. Myrick, 277 N.C. App. 112 (2021); *cf.* State v. Payne, 256 N.C. App. 572 (2017) (capable defendant has constitutional right to decide whether to enter plea of not guilty by reason of insanity; court may not accept defense counsel's decision to enter plea without defendant's consent). Findings of a defendant's previous incapacity to proceed are generally admissible when a defendant who is capable to proceed asserts an insanity defense at trial. State v. Bundridge, 294 N.C. 45 (1978); State v. Gregory, 291 N.C. App. 617 (2023), *aff'd per curiam*, 387 N.C. 339 (2025). The same reasoning would apply to other mental health defenses.

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 IX, Commitment Proceedings after Incapacity Determination) and are beyond the scope of this bulletin, *See* North Carolina Civil Commitment Manual ch. 7, *Automatic Commitment—Not Guilty by Reason of Insanity* (UNC School of Government, 2d ed. 2011); *see also* Shea Denning, *Not Guilty by Reason of Insanity*, N.C. Crim. L.: A UNC Sch. of Gov't Blog (Nov. 2, 2015).

Guilty pleas. The standard of capacity to proceed for pleading guilty is the same as the standard for capacity to stand trial. A defendant need not have a higher level of mental functioning. To plead guilty, the defendant still 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. A 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 (referred to as "gray-area" defendants by the Court). Thus, despite a waiver of counsel, a trial court may require a defendant to be represented by counsel at trial. For a further discussion of this issue, see North Carolina Defender Manual, Vol. 1 Pretrial § 12.6C, "Capacity to Waive Counsel" (UNC School of Government, 2d ed. 2013) (discussing North Carolina cases interpreting *Edwards*); *see also* State v. Newson, 239 N.C. App. 183 (2015) (decided after 2013 edition of manual); State v. Joiner, 237 N.C. App. 513 (2014) (same).

***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(b) (4th ed. Nov. 2024) [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) (citing factors relevant to voluntariness of confession), § 3.10(b) (factors relevant to voluntariness of consent).

Capacity to be executed. *See, e.g.,* Madison v. Alabama, 586 U.S. 265 (2019) (Eighth Amendment's ban on cruel and unusual punishment prohibits execution of person whose mental condition prevents them from rationally understanding why the State seeks to impose that punishment); *cf.* Jeff Welty, *Incompetent to Serve a Sentence?*, N.C. Crim. L.: A UNC Sch. of Gov't Blog (Mar. 9, 2010) (musing about whether rationale from capital cases could bear on the service of a sentence by an incapable defendant).

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," as 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 bulletin 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). *See also* Timothy Heinle, *Incapacity to Proceed (G.S. Chapter 15A) and Incompetency (G.S. Chapter 35A): Apples and Oranges?*, N.C. Crim. L.: A UNC Sch. of Gov't Blog (Dec. 13, 2022).

Involuntary commitment. For a discussion of the criteria for involuntary commitment compared to incapacity to proceed to trial in a criminal case, see *infra* IX.A, Initial Determination of Grounds for Involuntary Commitment.

F. Capacity to Waive Presence during Trial

Several cases have considered the intersection of capacity to proceed and a defendant's right to presence. The cases typically involve a defendant who, after the trial commences, takes some action that results in his or her absence from trial, such as overdosing on drugs. The question is whether the trial may proceed after the defendant takes such an action. In *State v. Sides*, 376 N.C. 449 (2020), the N.C. Supreme Court held that while defendants may voluntarily waive their constitutional right to be present at trial, they may only waive the right if they have the capacity to do so. If there is substantial evidence of incapacity when the defendant absents himself or herself from trial, the trial judge must conduct a hearing on the defendant's capacity. Only if the defendant is capable may his or her actions constitute a waiver of the right to be present at trial. The court in *Sides* overruled previous caselaw to the extent inconsistent with its decision. *Id.* at 465 n.3.

If there is not substantial evidence that a defendant is incapable, a trial judge is not required to conduct a capacity hearing and may find that the defendant waived the right to be present and proceed with the trial. In *Sides*, the defendant attempted suicide and was involuntarily committed after the trial recessed for the day. The court held that the trial judge erred by finding that the defendant waived the right to presence and by failing to hold a hearing on the defendant's capacity. *Compare* State v. Flow, 384 N.C. 528 (2023) (defendant jumped from balcony in apparent suicide attempt on morning of sixth day of trial; trial judge made statutorily sufficient inquiry into capacity, and there was not substantial evidence of incapacity to require further inquiry as matter of due process before trial judge found that defendant had voluntarily absented himself from trial); State v. Minyard, 289 N.C. App. 436 (2023) (defendant voluntarily overdosed on alcohol and drugs and fell into stupor during jury deliberations; insufficient evidence to require trial judge to inquire sua sponte into defendant's capacity to proceed but, if

error occurred under *Sides*, it was harmless beyond reasonable doubt); *see also* State v. Mobley, 251 N.C. App. 665 (2017) (in case decided before *Sides*, court found that trial judge erred in failing to order capacity examination of defendant where defendant had serious physical and mental conditions, was taking twenty-five medications twice a day, and was unable to stay awake during trial).

G. Waiver of Right to Capacity Determination

Defendants have both a statutory and a constitutional right to a capacity determination. Although defendants may waive their statutory right, they may not waive their due process right not to be tried while incapable. State v. Wilkins, 386 N.C. 923 (2024); State v. Ashe, 230 N.C. App. 38 (2013); State v. McRae (*McRae I*), 139 N.C. App. 387 (2000). An attorney's failure to raise the issue is not a waiver of due process protections. *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); Meeks v. Smith, 512 F. Supp. 335 (W.D.N.C. 1981) (setting aside state court conviction on ground that incapable defendant and his attorney may not waive right to capacity determination).

H. 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*).

I. 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, to be held if the defendant currently has the capacity to proceed. *See* State v. Robinson, 221 N.C. App. 509, 516–17 (2012) (finding that "proper remedy" where trial court proceeds to trial notwithstanding evidence that defendant was incapable of proceeding is to vacate judgment and remand for new trial, to occur if and when defendant is capable of proceeding; finding, however, that defendant's expert testified during trial that defendant was capable of proceeding and that, 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, to determine whether the defendant was capable to proceed during the previous proceedings. This remedy is disfavored. *See* State v. McRae (*McRae I*), 139 N.C. App. 387, 392 (2000) (in the first North Carolina case on this issue, the court authorized such a hearing and stated 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").

Decisions finding that a retrospective hearing was not possible include *State v. Sides*, 376 N.C. 449 (2020) (holding that retrospective capacity determination after three years would not be feasible and ordering new trial if defendant is capable to proceed), and *State v. Ashe*, 230 N.C. App. 38 (2013) (holding that retrospective capacity hearing was not possible where defendant's capacity had never been assessed, let alone at a relevant time).

Decisions remanding for a retrospective hearing include *State v. Hollars*, 376 N.C. 432 (2020), and *State v. Whitted*, 209 N.C. App. 522 (2011).

Decisions upholding a retrospective finding of capacity include *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), and *State v. Blancher*, 170 N.C. App. 171 (2005) (upholding retrospective capacity determination).

III. Role of Defense Counsel

Because capacity to proceed relates specifically to the defendant, it is useful to consider defense counsel's role and relationship to their clients. This part includes some practical considerations for defense counsel. The role of the prosecutor is discussed where pertinent in this bulletin.

A. Duty to Investigate

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. In some cases, a client's incapacity may be apparent; in others, counsel may need to do more investigation. 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).

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. Various behaviors may be signs of incapacity (delusions, memory problems, puzzling medical complaints, peculiar speech patterns, difficulties in maintaining attention, etc.). *See generally* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed., Text Revision 2022).

Several sources of information may be useful to consider. Counsel should ask clients for their medical history, including any history of mental health treatment. Because clients may not want to admit to mental health problems or may not be accustomed to thinking in those terms, counsel may need to find different ways to phrase their questions. To obtain medical and other records, counsel can have clients sign several original release forms. Some hospitals or other facilities may have their own release forms, which if used may avoid potential objections by a given facility to the adequacy of the release.

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). For medical records not in the court file, counsel may 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). For these and other records concerning the defendant, counsel also may make a motion to the court in which the current criminal case is pending to require production. *See* Sonya Pfeiffer, *Competency to Stand Trial, in* Klinkosum on Criminal Defense Motions 492–93 (C. Melissa Owen ed., 4th ed. 2018) (suggesting that when a client is unable or unwilling to execute releases for their medical records, defense counsel should seek an ex parte order from the court); *see generally* North Carolina Defender Manual, Vol. 1 Pretrial § 4.6A, "Evidence in Possession of Third Parties" (UNC School of Government, Apr. 2021) (discussing process and circumstances in which motion may be made ex parte).

Several other types of records may contain relevant information, including school, work, military, and juvenile records. In addition to these records, the affidavit of indigency may indicate whether a client is receiving supplemental security income (SSI), which may be for a mental disability. The local social security office may have pertinent records.

The defendant's family and friends also may have information about the client's condition. Jailers, law enforcement officers, and court personnel may have had an opportunity to observe the defendant as well. *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).

B. 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 on the quantum of doubt that counsel must entertain. *See* Criminal Justice Standards on Mental Health Standard 7-4.3(c) (A.B.A. 2016) (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); 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 "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 30–47 (Rodney J. Uphoff ed., 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* N.C. State Bar, Ethics Op. CPR 314 (1982) (opinion under former ethics code states that lawyer may not prepare will for client whom lawyer knows to be incompetent to make a will; however, if reasonable people could differ about client's competency, lawyer does not necessarily act unethically by doing so).

Most decisions in North Carolina about the obligation to inquire into capacity concern the statutory and constitutional obligation of a court not to allow a case to go forward if a defendant lacks capacity. North Carolina law on counsel's obligations is not as extensive but is consistent with those principles. *See* State v. Myrick, 277 N.C. App. 112 (2021) (finding that counsel lacked authority to enter plea on behalf of defendant who was incapable to proceed). G.S. 15A-1002(b1) allows the parties to stipulate that a defendant is capable to proceed, but presumably defense counsel may not stipulate if counsel doubts the client's capacity. The failure to request a hearing when a client's capacity is in doubt could amount to ineffective assistance of counsel. *See* Meeks v. Smith, 512 F. Supp. 335 (W.D.N.C. 1981) (so noting).

Impact of client wishes. As in other matters, counsel should first try to discuss with a client the issue of raising capacity and its consequences and, if possible, determine the client's wishes. Rev. Rules of Pro. Conduct r. 1.14(a) (N.C. State Bar, amended 2003) ("When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.").

In some instances, a 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 id.* 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"); N.C. State Bar, Representing a Client of Questionable Competence, 1993 Formal Ethics Op. 157 (Apr. 16, 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 suggests that if defendant elects to defend capacity, defendant may be entitled to assistance of new counsel to present his or her position).

Continued representation. 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). 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's interests, counsel may request that the court allow withdrawal and appoint new counsel. *See generally* Rev. Rules of Pro. Conduct r. 1.16(b) (N.C. State Bar, amended 2003) (grounds for requesting withdrawal). Before a client obtains treatment, however, it may be premature for counsel to request withdrawal on the basis that the relationship has broken down. Until then, it may be unclear whether counsel and client will be able to work together. Appointment of new counsel also may delay a determination of capacity and the provision of treatment for the client.

Consequences of questioning capacity. Although some actions necessarily follow when counsel believes a client is incapable, various decision points may arise that require counsel to consider different courses of action. Counsel should be aware of the potential consequences, favorable and unfavorable for the client, involved in different aspects of the capacity process.

On the one hand, the process may lead to needed treatment. It may provide favorable information, such as evidence in support of a mental health defense, mitigating factors pertinent to plea negotiations or sentencing, or information bearing on the voluntariness of a confession

or waiver of rights. *See, e.g.,* State v. Bundridge, 294 N.C. 45 (1978) (evidence of earlier incapacity to stand trial admissible to support insanity defense). A finding of incapacity could lead to dismissal. *See infra* X.B, Dismissal of Charges. On the other hand, the process could disclose damaging information, which could hurt plea negotiations, lead to other unfavorable evidence, and in some instances be admissible at trial. *See infra* XII, Admissibility at Trial of Results of Capacity Evaluation. During the process, the client could be confined in jail or a hospital, which could be for longer than the sentence the client could have received. A finding of incapacity and involuntary commitment could stigmatize the client and affect other rights. *See* North Carolina Civil Commitment Manual ch. 12, *Advising Clients on Collateral Matters and Consequences of Commitment* (UNC School of Government, 2d ed. 2011).

IV. Options for Expert Evaluation

There are three main ways that an expert may be involved in evaluating capacity.

A. Funds for Mental Health Expert for Defense

A 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 North Carolina Office of Indigent Defense Services (IDS). *See* North Carolina Defender Manual, Vol. 1 Pretrial § 5.5, "Obtaining an Expert Ex Parte in Noncapital Cases" (UNC School of Government, June 2020). 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. An expert's work in noncapital and capital cases is funded by IDS. Defense counsel may prefer this route based on factors such as the seriousness of the charges, the presence of mental health defenses and other mental health issues, the need for a comprehensive evaluation, the importance of confidentiality, 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. *See* Sonya Pfeiffer, *Competency to Stand Trial, in* Klinkosum on Criminal Defense Motions 503 (C. Melissa Owen ed., 4th ed. 2018) (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"); Welsh S. White, *Government Psychiatric Examinations and the Death Penalty*, 37 Ariz. L. Rev. 869 (1995) (analyzing reasons for defense opposition to government examinations); *see also* North Carolina Defender Manual, Vol. 1 Pretrial § 4.8C, "Results of Examinations and Tests" (UNC School of Government, Apr. 2021) (noting that if the defense utilizes a nontestifying expert—that is, does not call the expert as witness—the prosecution ordinarily does not have a right to discovery of the expert's work).

A defendant may later raise the question of capacity in reliance on the expert's evaluation. *See* Klinkosum on Criminal Defense Motions at 505–06 (recommending in that instance that defense counsel draft a motion questioning capacity rather than using the AOC form, which by its terms seeks a local or state capacity examination). If the prosecutor disputes the expert's opinion or the court finds it necessary, the court may order a further examination of the defendant before determining capacity. *See infra* V, Examination by State Facility or Local Examiner.

B. Appointment of Particular Expert by Court

Theoretically, a court may appoint a particular expert to examine a defendant if capacity is questioned. *See* G.S. 15A-1002(b)(1a) (court may appoint one or more impartial medical experts); *see also* G.S. 15A-1002(b2)(3) (setting deadline for report of independent examination in cases in which defense counsel challenges the results of a local or state capacity report). The expert's work would be funded by the AOC. *See* G.S. 7A-314(d) (expert witness acting on behalf of court shall be paid in accordance with rules established by AOC). This procedure rarely occurs.

C. Examination by State Facility or Local Examiner

The assessment of capacity to proceed often begins with an examination of a defendant by a state or local mental health examiner. State exams occur at Central Regional Hospital (often referred to as CRH) in Butner, North Carolina, operated by the North Carolina Department of Health and Human Services (NCDHHS). Local exams are conducted by forensic evaluators who are registered with and paid by the Division of Mental Health, Developmental Disabilities and Substance Abuse Services within NCDHHS. *See* Title 10A, Chapter 27A, Subchapter H, Rules .0201 through .0207 of the N.C. Administrative Code [hereinafter N.C.A.C.]. These examinations are discussed in detail in the next section.

V. Examination by State Facility or Local Examiner

A. Motion for Examination

By defendant. Defense counsel is often the person who begins the process for determining capacity to proceed by moving for an examination of the defendant. The evaluations are sometimes referred to as *forensic* (that is, relating to criminal investigations) evaluations or examinations. Two different form motions are available to request an examination, one for a state evaluation by Central Regional Hospital (AOC-CR-208B, Motion and Order Committing Defendant to Central Regional Hospital – Butner Campus for Examination on Capacity to Proceed (for Offenses Committed on or after Dec. 1, 2013) (Jan. 2023)) and one for an evaluation by a local examiner (AOC-CR-207B, Motion and Order Appointing Local Certified Forensic Evaluator (for Offenses Committed on or after Dec. 1, 2013) (Jan. 2023)). For offenses committed before December 1, 2013, use the "A" version of these forms, available on the AOC's website. Whether the examination is done at a state or local level depends on the charge and the court's order, discussed below.

The moving party must provide sufficient information to the court in support of the request for an examination. *See* G.S. 15A-1002(a) (requiring moving party to detail conduct in support of motion); State v. Grooms, 353 N.C. 50 (2000) (where the defendant demonstrates or matters indicate that there is a significant possibility that the defendant is incapable of proceeding, the trial court must appoint an expert to inquire into the defendant's mental health; an evaluation was not required on the evidence 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,

409–10 (1979) (motion must contain sufficient detail to cause "prudent judge" to call for psychiatric examination before determining capacity); State v. Robinson, 221 N.C. App. 509 (2012) (trial judge erred in denying motion for capacity examination).

If the motion requesting an evaluation is uncontested, defense counsel typically submits it directly to a judge, who may grant it without a hearing and without the defendant being present. *See* John Rubin, *Capacity, Commitment, and COVID-19*, N.C. Crim. L.: A UNC Sch. of Gov't Blog (Apr. 13, 2020) (discussing issues); State v. Leyshon, 211 N.C. App. 511 (2011) (G.S. 15A-1002 does not require court to hold hearing before ordering capacity examination). If the showing supporting the motion contains confidential information, such as information obtained in the course of privileged attorney-client communications, defense counsel may ask the court to review the information in camera. *See generally* State v. Ballard, 333 N.C. 515 (1993) (recognizing constitutional grounds for ex parte motion by defense for funds for expert).

By prosecutor. The prosecution may raise the question of capacity. As with a request 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* XII.C, Fifth and Sixth Amendment Protections. *But 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 different Dix examiner to do examination than one initially designated; court found that hospital, not prosecutor, requested modification, that defendant was represented by counsel at hearing at which court first ordered capacity evaluation, and that in these circumstances modification of order did not violate defendant's right to fair trial). The court may order that the scope and use of the examination be limited. *See infra* V.J, Conduct of Examination (court order limiting scope and use of examination).

By judge sua sponte. Trial judges have the power on their own motion to order an evaluation of a defendant's capacity to proceed. *See* State v. Grooms, 353 N.C. 50, 78 (2000) (so holding). The court is obligated to inquire into and hold a hearing on the defendant's capacity to proceed, even in the absence of a request by the defense, if a bona fide doubt exists about the defendant's capacity. *See infra* VII.B, Court's Obligation to Hold Hearing. Such an inquiry may necessitate an order for an examination before the hearing. State v. Rich, 346 N.C. 50, 61 (1997) (holding that trial judge may have constitutional duty to order capacity examination when capacity is at issue).

B. Hearing without Examination

Before trial, the court ordinarily will order an examination before holding a hearing to determine a defendant's capacity. However, a trial judge may hold a hearing to determine a defendant's capacity without an examination. *See* G.S. 15A-1002(b)(1); *see also* State v. Flow, 384 N.C. 528 (2023) (finding inquiry during trial sufficient without exam). For a further discussion of capacity hearings, see *infra* VII, Hearings on Capacity to Proceed.

C. Timing of Motion for Examination

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 to a last-minute motion for an initial examination, but the determinative

question remains whether the evidence is sufficient to raise a question about capacity. *See* State v. Washington, 283 N.C. 175 (1973) (finding that court did not abuse discretion in ruling that defendant failed to provide sufficient information to warrant capacity examination; court characterized as "belated" motion for initial examination two weeks before trial but did not reject motion for that reason).

D. Subsequent Examinations

A defendant may obtain subsequent capacity examinations if the report from the first examination has become stale or the defendant's condition has changed. For a discussion of cases recognizing the importance of having an up-to-date assessment of capacity, see *supra* II.D, Relevant Time.

E. Who Does Examination

Misdemeanors. For misdemeanors committed before December 1, 2013, former G.S. 15A-1002(b)(1) provided that a defendant first had to be evaluated by a local forensic examiner. State v. Leyshon, 211 N.C. App. 511, 521 (2011) (defendant correctly contended [under provision of G.S. 15A-1002 then in effect] that 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 examiner could find the defendant capable or incapable of proceeding or could recommend that the defendant be evaluated further at a state psychiatric facility. It is unlikely that any misdemeanors subject to these provisions are still pending.

Effective for offenses committed on or after December 1, 2013, state forensic examinations are not authorized for misdemeanors. G.S. 15A-1002(b)(1) was revised and recodified as G.S. 15A-1002(b)(1a), which authorizes local examinations for misdemeanors and felonies. G.S. 15A-1002(b)(2) goes on to authorize state examinations for felonies but does not refer to misdemeanors. Taken together, these statutes authorize capacity examinations for misdemeanors by local examiners only and do not authorize an examination at a state psychiatric facility for a misdemeanor alone following a local examination. Judges have sometimes ordered state examinations for misdemeanors alone, but their authority to do so is questionable.

An advantage of local examinations is speed. They occur more quickly, take less time to complete, and use fewer resources than state examinations. The capacity statutes do not set a deadline for conducting a local exam, but the applicable AOC form directs the local examiner to conduct the evaluation within seven days. *See* AOC-CR-207B, Motion and Order Appointing Local Certified Forensic Evaluator (for Offenses Committed on or after Dec. 1, 2013) (Jan. 2023). Busy mental health practitioners may have difficulty meeting this deadline and need additional time.

Concerns have sometimes been raised about the thoroughness of local examinations. If dissatisfied with an examiner's initial report, a judge may require the examiner to review additional records (item number 7 in the Order section of the AOC form provides that a local forensic evaluator may obtain confidential records such as school, mental health, and juvenile records); may direct the examiner to provide the court with additional information about the defendant; or may order another local exam. The AOC form (item number 3 in the Order section) also states that a local examiner may arrange for an additional evaluation by a local medical expert if needed—for example, for a neurological problem—but it is unclear how often this procedure is utilized.

An uncodified section of S.L. 2013-18 (S. 45), the 2013 act that revised the capacity statutes, directed the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to adopt rules addressing potential concerns about the quality of local forensic evaluations. *See* N.C. Dep't Health & Hum. Servs., Div. Mental Health, Developmental Disabilities & Substance Abuse Servs., Communication Bulletin # 140: Forensic Evaluator Guidelines (Dec. 3, 2013) (indicating that rules would take effect December 1, 2013, but initial rules were withdrawn). The completed rules took effect June 1, 2018, and establish, among other things, criteria for obtaining certification as a local forensic evaluator, training requirements, oversight of evaluators, and the components of evaluation reports, including an assessment of whether an incapable defendant is likely to gain capacity. 10A N.C.A.C. 27H, r. .0201 through .0207. The N.C. Department of Health and Human Services (NCDHHS) and Central Regional Hospital (CRH) provide training for local examiners, engage in quality control, and maintain a list of certified local examiners. *See* NCDHHS, *Examinations: Local Certified Forensic Evaluations*, *in* Forensic Services (last visited July 2025).

Felonies. If the underlying offense alleged is a felony, the court may order a local evaluation or may order a state exam at CRH without a local evaluation. For a local exam in felony cases, use the same AOC form as is used in misdemeanor cases, above. To order a defendant to CRH without a local evaluation first, by statute a court must find that a state facility examination would be "more appropriate" to determine the defendant's capacity. *See* G.S. 15A-1002(b)(2). For state exams, with or without a local exam first, use AOC-CR-208B, Motion and Order Committing Defendant to Central Regional Hospital – Butner Campus for Examination on Capacity to Proceed (for Offenses Committed on or after Dec. 1, 2013) (Jan. 2023). The statute does not specify the criteria for the court to consider in deciding whether to order a state or local exam.

An advantage of state examinations at CRH is that they are more in depth and are conducted by hospital personnel. They generally include a more exhaustive review of records and psychological testing, if necessary, as well as an examination of the defendant.

A disadvantage of state examinations is delay. As of this writing, a capacity examination at CRH can take some time, including for defendants who are in jail awaiting trial. During this time, treatment options are limited. For in-custody defendants with mental health needs, jails may be ill-equipped to provide adequate treatment.

Under G.S. 15A-1002(b)(2), the court may order a defendant to a state facility for up to 60 days for a capacity exam. This authority allows for a more thorough evaluation and, potentially, treatment. G.S. 15A-1002(b)(2) (stating that court may commit defendant for "observation and treatment"). As a practical matter, however, a state examination is typically far shorter and does not involve an inpatient stay or treatment, which generally occurs after a finding of incapacity and order of commitment. The North Carolina courts have held that neither the statute nor due process principles establish a minimum period of observation for capacity evaluations. State v. Robertson, 161 N.C. App. 288, 291–92 (2003) (capacity evaluation of one hour and forty minutes' duration on second day of trial was adequate; capacity statutes do not require minimum period of observation).

A jail or other interested person may be able to petition to have a defendant involuntarily committed, before a capacity examination, under the usual involuntary commitment procedures. *See* N.C. Civil Commitment Manual § 2.3. "Involuntary Commitment: Prehearing Procedures" (UNC School of Government, 2d ed. 2011). Assuming this option is available, the

commitment would be to a local hospital and would likely be for short-term, acute care only, after which the person would return to jail if unable to satisfy pretrial release conditions. Such care is not intended to restore a defendant's capacity, though it may have that effect in some cases. A jail also can request the criminal court to enter a "safekeeping order," transferring a defendant to a unit of the state prison system designated by the Division of Adult Correction (DAC). *See* G.S. 162-39(d); *cf.* G.S. 148-32.1(b3)(2) (authorizing court to enter order transferring to Division of Prisons person who is in local jail, has been convicted of misdemeanor, and is in need of mental health treatment). The availability, cost, and appropriateness of a safekeeping order is beyond the scope of this bulletin.

F. Location of Examination

Examinations generally occur on an outpatient basis. They may be in person or by telehealth. If a defendant is in jail, they may occur at the jail. In cases requiring more intensive evaluations, CRH may conduct examinations on an inpatient basis. *See* NCDHHS, *Examinations*, *in* Forensic Services (last visited July 2025).

G. Pretrial Release

For ease of use, the discussion below considers the various statutes bearing on pretrial release throughout the capacity process, whether before or after a capacity determination.

Pending a hearing on capacity, G.S. 15A-1002(c) provides that a court "may" but is not required to "make appropriate temporary orders for the confinement or security of the defendant." Thus, the court may order confinement of a defendant pending a capacity hearing but also may allow the defendant to be out of custody (subject to the provisions governing pretrial release generally) and include as a condition of pretrial release that the defendant present himself or herself when the examiner is ready to proceed. If a defendant is out of custody, the court also may order a sheriff to pick up and transport the defendant for an exam once scheduled. The AOC forms for local and state capacity exams, AOC-CR-207B and AOC-CR-208B, provide for the sheriff to transport the defendant to and from the exam. *See also* Jeff Welty, *What to Do When Dorothea Dix Lights the "No Vacancy" Sign*, N.C. Crim. L.: A UNC Sch. of Gov't Blog (Dec. 8, 2009) (observing that a sheriff is "on the hook" to transport out-of-custody defendants for a capacity evaluation); *cf.* G.S. 15A-1002(b)(2) (requiring sheriff to return defendant when notified that examination at state facility is completed).

The AOC form for local exams (item number 6 in the Order section of AOC-CR-207B), recognizes that a defendant need not be in custody pending an examination. The AOC form for state exams, AOC-CR-208B, does not refer to pretrial release, but the statutes do not preclude a court from setting pretrial release conditions and allowing a defendant to present himself or herself for a state examination.

The outer limit on confinement under G.S. 15A-1002(c)—that it be "appropriate" and "temporary"—may be at issue with the longer delays that now exist in the capacity process. Lengthy pretrial confinement also may raise due process concerns. A pending civil suit for injunctive relief in federal district court in North Carolina, *Disability Rights North Carolina v. North Carolina Department of Health & Human Services*, contends that the delays in the capacity process violate due process. *See* Complaint, Disability Rights N.C. v. N.C. Dep't of Health & Hum. Servs. (1:24CV335) (M.D.N.C. Apr. 19, 2024); Memorandum Opinion and Recommendation of U.S Magistrate Judge, *Disability Rights N.C.* (No. 1:24CV335), 2025 WL 1665327 (M.D.N.C. June 12, 2025) (recommending to federal district court judge who

decides case at trial level that State's motion to dismiss due process claims and plaintiff's request for preliminary injunction be denied; also recommending that State's motion to dismiss federal statutory claims be granted). The eventual disposition of the claims and requested remedies in that lawsuit does not necessarily determine the appropriate measures in criminal cases, but it raises questions that may need to be considered, which may come before a criminal court by motion or petition for habeas corpus. *See* G.S. 15A-547 (recognizing that statutes on pretrial release do not abridge the right of habeas corpus under G.S. Chapter 17).

After a finding of incapacity, G.S. 15A-1003(b) contains similar provisions about confinement. It provides that the court "may make appropriate orders for temporary detention of the defendant" pending commitment proceedings. The commitment form for a defendant found incapable to proceed, AOC-SP-304B, does not mention pretrial release, but the court's authority is similar to the authority under G.S. 15A-1002(c) pending a capacity hearing.

G.S. 15A-1004 provides that the court may set pretrial release conditions if the defendant is found to be incapable and is not placed in the custody of a hospital pursuant to involuntary commitment proceedings. G.S. 15A-1004(b). The statute requires the court to make appropriate orders to safeguard the defendant and to ensure his or her return for trial but, unlike the other pretrial provisions in the capacity statutes, does not authorize an order of confinement. G.S. 15A-1004(a). Constitutional concerns may provide additional grounds for pretrial release. In *Jackson v. Indiana*, 406 U.S. 715 (1972), the court held that a defendant must be released from custody if he or she is unlikely to gain capacity and is not committed. *See also infra* VIII.B, Constitutional Backdrop (discussing impact of *Jackson*). In setting a defendant's pretrial release conditions, a court may include any of the procedures, orders, and conditions under Article 26 of G.S. Chapter 15A, the article on bail, including placing the defendant in the custody of a designated person or organization agreeing to supervise the defendant. G.S. 15A-1004(b). A court may not order a custody release to a person or organization that does not consent. *See* State v. Gravette, 327 N.C. 114 (1990) (court could not require probation department, without its consent, to supervise defendant who was incapable of proceeding while on pretrial release). Presumably, a court also may order a custody release before a capacity hearing or commitment proceedings, discussed above, although not specifically mentioned in the statutes for those contexts.

If a defendant fails to comply with pretrial release conditions, a judge may modify the conditions. The pretrial release statutes provide that a judge may modify a pretrial release order "at any time" and may revoke pretrial release for "good cause," requiring the person to apply for new conditions. G.S. 15A-534(e), (f). A defendant's failure to appear for a required examination or treatment may give a judge reason to reconsider pretrial release conditions. A finding of a willful violation by the defendant, a requirement in other contexts, appears unnecessary (and may be unwarranted if the defendant is incapable).

Effective for determinations of pretrial release conditions on or after December 1, 2026, S.L. 2025-93 (H. 307), as amended by S.L. 2025-97, section 5.3 (S. 449), modifies G.S. 15A-533 to require a judicial official, upon the arrest of a defendant, to order an examination by a commitment examiner when a defendant is either (1) charged with a violent offense and has been subject to an involuntary commitment order within the previous three years or (2) charged with any offense and the judicial official has reasonable grounds to believe the defendant is a danger to self or others. *See also* G.S. 15A-501 (as revised by S.L. 2025-93, effective Dec. 1, 2025, requiring the arresting officer to inform the judicial official setting pretrial release conditions of any relevant behavior by the defendant observed by the officer); G.S. 122C-54(d) (as revised by S.L. 2025-93, effective Oct. 3, 2025, allowing judicial officials who set pretrial release conditions

under G.S. 15A-533 to have access to records of proceedings in which a defendant has been involuntarily committed within the previous three years). The bill does not modify the pretrial release provisions on incapacity to proceed, discussed above.

H. Information Available to Examiner

Generally. G.S. 15A-1002(b)(4) directs the court, as part of its order for a capacity examination of a defendant, to authorize 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 statute provides for defendants to receive notice and an opportunity to be heard before entry of the order for release of their records, which presumably occurs when the court considers a motion for a capacity examination.

G.S. 15A-1002(b)(4) states that a court may need to hold additional hearings and make additional findings to order the release of records subject to federal confidentiality laws. The order portions of the applicable AOC forms for capacity examinations by state and local examiners, AOC-CR-208B and AOC-CR-207B, respectively, implement this limitation by stating that the orders do not require record holders to release records in violation of federal law. Thus, if a record holder does not release federally-protected records and an examiner wants to review them, additional proceedings may be necessary.

Provided by defense counsel. The AOC form capacity orders direct defense counsel to provide information to examiners. According to the form for local exams, the moving party must provide the examiner with the order and charging documents. For state exams, the order directs the moving party to provide the examining hospital with a copy of the order and charging documents as well as any local forensic report on the defendant. The order for state exams also states that counsel for the defendant must give "such records and information in counsel's possession as the evaluator requests." The order recognizes, however, 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."

The authority for requiring defense counsel to produce records is not clear. G.S. 15A-1002(b)(4) requires a court to order the release of confidential information to examiners when ordering a capacity examination. The apparent intent of this provision was to permit custodians of records, such as mental health providers, schools, and law enforcement agencies, to release otherwise protected information. It seems unlikely that the General Assembly intended for this provision to require defense counsel to turn over information about their clients, which implicates the Sixth Amendment right to counsel and potentially other constitutional protections. *See, e.g.,* State v. Dunn, 154 N.C. App. 1 (2002) (analyzing relationship between work product and Sixth Amendment right to effective assistance of counsel). Resolution of the question may be unnecessary in light of the exception in the AOC form for attorney-client and work-product information, which broadly allows counsel to withhold information obtained or generated during the representation of their clients.

Counsel is not precluded from providing otherwise confidential information to the examiner. *See supra* III.B, Ethical Considerations (discussing authority of counsel to take action to protect interests of client with diminished capacity). Counsel may relate his or her observations of the defendant, identify people knowledgeable of the defendant's condition and the places where the

defendant has previously received services, transmit copies of relevant records, and provide other relevant information. This information may be particularly important to local examiners, who have less time to conduct evaluations.

I. Confidentiality

Subject to certain exceptions, an examination of a defendant 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 -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 V.L, Disclosure of Report.
- The results of the examination, including statements made by the defendant, may be admissible at subsequent court proceedings. *See infra* VII.F, Evidentiary Issues; *infra* XII, 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).

J. Conduct of Examination

A central part of any court-ordered examination, whether by Central Regional Hospital or a local examiner, is the interview of the defendant. The interview may cover the alleged offense, as the defendant's understanding of the allegations may bear on his or her capacity to proceed. Potential issues that may arise with the conduct of an examination are discussed below.

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 facts of alleged offense with examiner during capacity evaluation). The defendant's refusal may result in an incomplete report, however, and make it difficult for the examiner to determine capacity and for the defendant to meet the burden of showing incapacity. *See supra* II.H, Burden of Proof.

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 alleged offense. *See* State v. Huff, 325 N.C. 1 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990). The court of appeals has held that a trial court may order a psychiatric examination when a 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 court may have cause to impose remedial measures. *See* Criminal Justice Standards on Mental Health, Standard 7-6.4(b) (A.B.A. 2016) ("If the court determines that an adequate evaluation of defendant's mental health condition at the time of the alleged crime has been precluded because the defendant has refused to cooperate with the mental health professional, it should adopt remedial measures proportionate to the degree of prejudice to the prosecution and the extent to which the

non-cooperation was influenced by the defendant's mental disorder."); *see also* N.C. Defender Manual, Vol. 1 Pretrial § 4.8A, "Sanctions," in *Procedures for Reciprocal Discovery* (UNC School of Government, Apr. 2021) (discussing constitutional and statutory standards for sanctions against the defense for discovery violations).

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). The *Davis* decision does not foreclose defense counsel from being present, however. Examiners may be willing to 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. In appropriate cases, a trial judge may enter an order specifically limiting the scope and use of a capacity 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 underlying offense may not be divulged to the prosecution. *But cf. Davis*, 349 N.C. at 40–44 (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). For a discussion of the admissibility of the examination results, see *infra* VII.F, Evidentiary Issues (discussing capacity hearings); *infra* XII, Admissibility at Trial of Results of Capacity Evaluation.

Videotaping of examination. Standard 7-3.5(d) of the American Bar Association's Criminal Justice Standards on Mental Health (2016) states that a defendant may request that a court-ordered capacity evaluation be recorded. The ABA standards provide that the prosecution may only review the recording if the defendant calls the evaluator as an expert on the defendant's mental condition at the time of the underlying offense. *Id.* No North Carolina decisions have addressed the issue, and such a recording may be available to the prosecution in other instances. *See, e.g., infra* V.L, Disclosure of Report (discussing disclosure of underlying information); *infra* XII.D, Rebuttal of Mental Health Defense.

K. Report of Examination

Time of report. G.S. 15A-1002(b2) requires that examination reports be completed within specified time limits: for misdemeanors, no later than ten days after the examination for a defendant in custody and no later than twenty days after the examination for a defendant out of custody; for felonies, no later than thirty days after the examination. The statute allows the court to grant extensions of time for good cause for periods of thirty days, up to 120 days. If a defendant challenges a determination of a state or local examiner and the court orders an independent examination (discussed *supra* in IV.B, Appointment of Particular Expert by Court),

that examination and report must be completed within sixty days of the court's order. G.S. 15A-1002(b2)(3). The statute does not specify a remedy for the failure to submit an examination report within the statutory time limits.

The statute does not set deadlines for holding examinations, but the AOC form order for local exams, AOC-CR-207B, sets a seven-day deadline.

Restorability. If an examiner concludes that a defendant is incapable, G.S. 122C-54(b) requires that the report include a treatment recommendation, if any, and the examiner's opinion whether the defendant is likely to gain capacity—in other words, whether the defendant's capacity is restorable. Capacity restoration is discussed *infra* in VIII.D, Capacity Restoration Programs.

L. Disclosure of Report

To court, defense, and prosecution. The 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. G.S. 15A-1002(d) (so stating); G.S. 122C-54(b) (requiring disclosure as provided in G.S 15A-1002(d)). The current AOC forms for a capacity examination—AOC-CR-208B (Jan. 2023) for an examination at a state facility and AOC-CR-207B (Jan. 2023) for a local examination—appear to be consistent with this limitation, providing that the examination report is to be sent to the court and defense counsel only. The actual practice may vary, however, as some examiners may send the report to the court, defense counsel, and prosecutor automatically. In ordering a capacity examination, the court may include in its order that the report be submitted to the court and defense counsel and that it remain sealed until ordered disclosed by the court.

The statutes governing disclosure of re-examinations appear to be different. G.S. 15A-1004(c) and 122C-278 specify the circumstances in which the defendant's capacity must be re-examined following an incapacity determination. *See infra* IX.E, Reassessment of Capacity. They provide for disclosure of re-examination reports as provided in G.S. 15A-1002. Unless a court issues an order limiting disclosure, automatic disclosure to the court, defense counsel, and prosecutor appears to be permissible under G.S. 15A-1002 because the defendant's capacity will necessarily have been questioned when the court initially determined that the defendant was incapable to proceed.

To sheriff. G.S. 15A-1002(d) requires that the covering statement on the report, which indicates the examiner's conclusion as to whether the defendant is capable or incapable, be provided to the sheriff who has custody of the defendant. The sheriff must maintain the covering statement as a confidential record. The revised statute does not authorize disclosure of the report itself to the sheriff.

For capacity restoration. G.S. 15A-1002(d) provides that a capacity report and relevant confidential information previously ordered released under G.S. 15A-1002(b4)—for example, mental health records obtained for the capacity evaluation—are to be released to clinicians where the defendant is receiving capacity restoration. *See* S.L. 2017-147 (S. 388). The evident purpose of this provision is to ensure that the clinicians have the information they need for capacity restoration, discussed *infra* in VIII.D, Capacity-Restoration Programs.

Underlying information. If necessary to the proper administration of justice, a court may compel disclosure of information to the prosecution about the examination of a defendant in addition to the examination report itself. In *State v. Williams*, 350 N.C. 1, 16–23 (1999), the court held that the statute allowing disclosure of capacity reports did not preclude the trial court from compelling disclosure of additional information about the examination of the defendant, in this case the complete file of Dorothea Dix Hospital; it also was permissible for the 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 at the capital sentencing proceedings a mental health expert. *See infra* XII.D, Rebuttal of Mental Health Defense (discussing authority allowing prosecution to use capacity report for this purpose). 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.

VI. Procedure after Capacity Examination

A. After Examination Finding Defendant Capable to Proceed

G.S. 15A-1002(b)(1) states that a hearing "shall" be held after a court-ordered capacity examination of a defendant, but the cases indicate that the defendant may waive the statutory right to a hearing by not requesting one. The court is not required to initiate a hearing on its own motion unless the evidence suggests that the defendant is incapable of proceeding. *See, e.g.,* State v. Wilkins, 386 N.C. 923 (2024) (analyzing current statutes and recent caselaw and restating principle that defendant may waive statutory right to hearing by failing to assert it); State v. King, 353 N.C. 457, 465–67 (2001) (defendant waived statutory right to hearing by failing to question capacity; trial court nevertheless has constitutional duty to institute capacity hearing if there is substantial evidence that defendant is incapable of proceeding, but evidence in this case did not require trial court to act on its own motion); State v. Young, 291 N.C. 562 (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 capacity evaluation was ordered but not completed and, other than statement of defense counsel in earlier motion for evaluation, there was no evidence that defendant was unable to assist counsel); State v. Snipes, 168 N.C. App. 525 (2005) (finding that evidence did not require trial court to inquire sua sponte into defendant's capacity to proceed where defense counsel withdrew motion questioning defendant's capacity).

As a practical matter, because of the risk of constitutional error, judges may opt to hold a hearing following an examination. *See* Ripley Rand, *Guilty Pleas and Related Proceedings Involving Defendants with Mental Health Issues: Best Practices* 2 (N.C. Superior Court Judges Conference, Fall 2008) (suggesting to superior court judges that they "probably" should hold

a hearing following a capacity examination); *see also infra* VII.B, Court's Obligation to Hold Hearing (discussing cases); NC PRO, NC Prosecutors' Resource Online 130.3, Next Steps After Capacity Evaluation (Dec. 2023) (suggesting that if defense does not contest examiner's opinion that defendant is capable, prosecutor should schedule hearing and get court to make finding of capacity on record). G.S. 15A-1002(b1) allows the parties to stipulate to the defendant's capacity, limiting the potential scope of the hearing. *See also infra* VII.E, Findings and Stipulations.

B. After Examination Finding Defendant Incapable to Proceed

If an examination finds a defendant incapable to proceed, the court typically holds a hearing on capacity, but other alternatives are possible.

Dismissal by prosecutor. The prosecutor has the discretion to take a voluntary dismissal of the criminal case. Arrangements for treatment or other plans to address the defendant's condition may bear on the prosecutor's willingness to take a dismissal. *See infra* X.B, Dismissal of Charges.

Uncontested hearing on incapacity. G.S. 15A-1002(b1) prohibits the parties from stipulating that the defendant lacks the capacity to proceed, but they may choose not to offer evidence contesting a finding of incapacity, limiting the potential scope of the hearing. *See also infra* VII.E, Findings and Stipulations.

Involuntary commitment without capacity hearing. For offenses committed before December 1, 2013, G.S. 15A-1002(b1) allows involuntary commitment proceedings to be instituted against a defendant after an examination report concludes that the defendant is incapable to proceed and before a court finds the defendant incapable. For offenses committed on or after December 1, 2013, G.S. 15A-1002(b1) provides that involuntary commitment proceedings may be instituted after a court finds a defendant incapable, although involuntary commitment before a finding of incapacity may still be permissible under the usual involuntary commitment procedures in G.S. Chapter 122C. *See generally* North Carolina Civil Commitment Manual (UNC School of Government, 2d ed. 2011). It is unclear how often this option is used.

VII. Hearings on Capacity to Proceed

A. Request for Hearing

By defendant. A hearing on capacity to proceed may be calendared by the clerk of court after receipt of the examiner's report, but if a hearing is not calendared, defense counsel may move for one to avoid delays in the resolution of the case and in the provision of treatment. The absence of a request for a hearing does not remove a court's obligation to hold a hearing where appropriate, discussed in B, below; however, the absence of a request along with other circumstances may indicate that capacity is not genuinely at issue. *See* State v. Rouse, 339 N.C. 59 (1994) (counsel moved for examination during trial, but motion did not specifically request hearing and evidence before trial judge did not genuinely call defendant's capacity into question), *overruled on other grounds by* State v. Hurst, 360 N.C. 181 (2006).

By prosecutor. G.S. 15A-1007(a) requires a prosecutor to calendar a supplemental capacity hearing if a defendant has been found incapable and subsequently gains capacity. The prosecutor must calendar the matter at the next available term of court and not later than thirty days after receiving notice that the defendant has gained capacity. *See infra* IX.E, Reassessment of Capacity. There is not a comparable provision for calendaring the initial hearing following a capacity examination.

B. Court's Obligation to Hold Hearing

The main area in which trial courts are prone to reversal is for failure to order a hearing. North Carolina statutes and due process require a hearing on a defendant's capacity if the defendant's capacity is in question. G.S. 15A-1002(b)(1); Pate v. Robinson, 383 U.S. 375 (1966). Although a defendant may waive the statutory right to a hearing, a defendant may not waive the due process right not to be tried while incapable. *See supra* II.G, Waiver of Right to Capacity Determination.

Appellate decisions have used various language to convey when a court must hold a hearing on a defendant's capacity to proceed—for example, "substantial evidence" that the defendant may be incapable (State v. Heptinstall, 309 N.C. 231, 236 (1983); State v. George, 289 N.C. App. 660 (2023) or a "bona fide doubt" about capacity. State v. Williams, 267 N.C. App. 676, 681 (2019). Some have used a combination of different terms. *See* State v. Sander, 280 N.C. App. 115, 123 (2021) ("sufficient doubt" about capacity based on "substantial evidence"); State v. Hollars, 376 N.C. 432 (2020) (substantial evidence raising bona fide doubt); *see also* United States v. Mason, 52 F.3d 1286, 1293 (4th Cir. 1995) (in federal cases, party requesting hearing need not demonstrate incapacity conclusively and need only provide "reasonable cause" that defendant may be incapable of proceeding).

The decisions convey the same basic message: a court must hold a hearing when it has concerns about a defendant's capacity. The inquiry is fact dependent. "There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." State v. Chukwu, 230 N.C. App. 553, 562 (2013) (quoting State v. Staten, 172 N.C. App. 673, 679 (2005)).

A hearing on a defendant's capacity may be necessary even though an examiner has not reported that the defendant is incapable. *See, e.g.,* State v. Propst, 274 N.C. 62 (1968) (defendant found incapable, sent to state hospital for further observation and treatment, and found capable by hospital; conviction vacated for failure to hold hearing after defendant returned from hospital); State v. McRae (*McRae I*), 139 N.C. App. 387 (2000) (requiring capacity hearing following mistrial based on jury deadlock at which defendant had been found capable after several evaluations); State v. McGee, 56 N.C. App. 614 (1982) (defendant was twice sent to state hospital following capacity hearing; trial judge should have held hearing when defendant was returned to jail even though hospital only reported that it had completed its evaluation and defense counsel offered no evidence to support his contention that defendant was incapable).

The need for a hearing can arise at any time, including at trial, discussed in VII.H, Hearing at Trial, below. *See also* State v. George, 289 N.C. App. 660 (2023) (recognizing obligation of court to hold hearing before accepting guilty plea if substantial evidence of incapacity exists, but finding there was not such evidence).

C. Notice of Hearing

The parties are entitled to reasonable notice of a hearing on capacity. *See* G.S. 15A-1002(b)(1); 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 found that counsel could have obtained report earlier with minimal effort; court also found that counsel had opportunity to read report before hearing and offered no evidence).

D. Nature of Hearing

A hearing on capacity to proceed may vary in its formality. "[N]o particular procedure is mandated." State v. Flow, 384 N.C. 528, 547 (2023) (quoting State v. Gates, 65 N.C. App. 277 (1983)). At a minimum, the hearing must afford the defendant the opportunity to present any evidence relevant to capacity to proceed. *Id.*; *see also* State v. Whitted, 209 N.C. App. 522 (2011) (inquiry into effect of pain medication on defendant's ability to understand proceedings and decision to reject plea bargain was not sufficient).

Ordinarily, 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 submit the question of capacity to the trial jury. *See* State v. Propst, 274 N.C. 62 (1968).

The defendant ordinarily has the right to be present at the capacity hearing because of the significant interests at stake. *See* John Rubin, *Capacity, Commitment, and COVID-19*, NC Crim. L.: A UNC Sch of Gov't Blog (Apr. 13, 2020) (discussing issue); *see generally* North Carolina. Defender Manual, Vol. 2 Trial § 21.1B, "Pretrial Proceedings" (discussing defendant's right to presence) and § 21.1E, "Express and Inferred Waivers of Right" (discussing waiver of right to be present) (UNC School of Government, Jan. 2018).

E. Findings and Stipulations

G.S. 15A-1002(b1) requires a court to make findings of fact to support its determination of capacity or incapacity to proceed. For offenses committed before December 1, 2013, findings of fact were preferred but not required. *See* State v. O'Neal, 116 N.C. App. 390, 395– 96 (1994) ("better practice" is for judge to make findings); *see also* State v. Coley, 193 N.C. App. 458, 462–63 (2008) (while better practice is for trial court to make own findings of fact, not prejudicial for trial court to adopt examiner's findings), *aff'd per curiam*, 363 N.C. 622 (2009).

G.S. 15A-1002(b1) permits the parties to stipulate that the defendant is capable of proceeding but still requires the court to make findings of fact. *See* State v. Myrick, 277 N.C. App. 112 (2021) (finding that trial judge erred in failing to make findings that defendant was capable of proceeding). The statute prohibits the parties from stipulating that the defendant lacks the capacity to proceed, but the parties may choose not to offer evidence contesting an evaluation that the defendant lacks capacity.

F. Evidentiary Issues

Generally. North Carolina Rule of Evidence 1101(a) provides that the rules of evidence apply to all proceedings unless otherwise provided in Rule of Evidence 1101(b) or by statute. A hearing on capacity is not one of the proceedings identified as exempt from the rules of evidence. *See also* Kenneth S. Broun, Richard E. Myers II & Jonathan E. Broun, Brandis & Broun on North Carolina Evidence ch. 1, § 5, at 16–17 (8th ed. 2018) (noting pretrial proceedings at which rules of evidence do not apply; hearing on capacity is not listed as one of exempt proceedings).

Because a judge ordinarily decides capacity and is presumed to disregard incompetent evidence, the rules of evidence may not be followed as strictly at a hearing on capacity to proceed. *See* State v. Willard, 292 N.C. 567, 574–75 (1977) (court states that judge is presumed to have disregarded incompetent evidence but that "safer practice" is for court to adhere to rules of evidence at hearing on pretrial motion). Nevertheless, a judge may not base findings on inadmissible evidence. *See generally* Little v. Little, 226 N.C. App. 499 (2013) (holding that although appellate court generally presumes that trial court disregarded incompetent evidence, the only evidence supporting particular finding in action for domestic violence protective order was inadmissible hearsay; therefore, admission of inadmissible evidence was not harmless error). To ensure that evidentiary issues are preserved for appeal, the parties should object to inadmissible evidence.

Examination results. Either party may call the examiner who performed a court-ordered capacity examination, and the examiner's report is admissible on the question of capacity to proceed. *See* G.S. 15A-1002(b)(1a) (local report admissible); -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).

G.S. 15A-1002(b)(1a) states that a court may call a local examiner to testify with or without a request from the parties. G.S. 15A-1002(b)(2) does not contain similar language for state examinations, but presumably a court has the authority to call a state examiner to testify with or without the parties' request.

Expert opinion. In *State v. Smith*, 310 N.C. 108 (1984), the court upheld the trial judge's refusal to allow a lay witness to testify that the defendant was not competent to stand trial. The court stated that neither lay nor expert witnesses may testify that a defendant is or is not "competent" or does or does not have the "capacity to proceed" because those terms are considered improper legal conclusions. These witnesses may give their opinions on whether a 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 court's limitation on expert testimony was dicta and seems inconsistent with the statutory capacity scheme, which specifically directs that examiners determine the defendant's capacity. The court still makes the ultimate determination of capacity. *See also* Barbara A. Weiner, *Mental Disability and the Criminal Law, in* The Mentally Disabled and the Law 703 (3d ed. 1985) (indicating that courts follow experts' opinions on capacity in over 90 percent of cases). *Smith* may be better viewed as standing for the proposition that lay witnesses may not testify to a person's capacity or incapacity to proceed because they are not qualified to give such an opinion.

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. Smith, 310 N.C. 108 (1984) (so stating); *see also* 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. Willard, 292 N.C. 567 (1977) (upholding finding of capacity to proceed based in part on testimony of lay witnesses).

Defense 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. Robinson, 221 N.C. App. 509 (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); State v. McRae (*McRae II*), 163 N.C. App. 359, 369 (2004) (upholding trial judge's finding that defendant was capable to proceed; court observes "[b]ecause 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).

An unpublished court of appeals opinion suggests that a trial judge may preclude a 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). The decision is contrary to the above decisions. *See also* Rev. Rules of Pro. Conduct r. 1.14(c) (N.C. State Bar, amended 2003) (lawyer is impliedly authorized to reveal confidential information about client with diminished capacity to extent reasonably necessary to protect client's interest); *id.* 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).

Suggested questions by prosecution. For potential questions a prosecutor may want to ask a mental health expert at a capacity hearing, see NC PRO, NC Prosecutors' Resource Online, 130.4, Suggested Questions for Mental Health Expert (Dec. 2023).

G. 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 a hearing on the matter or objecting to capacity at the later adjudicatory hearing. It seems unlikely that this procedure would ordinarily be followed, 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* II.G, Waiver of Right to Capacity Determination. Nevertheless, to ensure that the issue is preserved for appeal, counsel may choose to object to a finding of capacity to proceed on entry of the order and again at the beginning of trial.

H. Hearing at Trial

A capacity hearing may become necessary during trial if a defendant's capacity is in doubt. Whether a trial judge erred in failing to hold a capacity hearing has been at issue in several cases. Decisions have considered, among other factors, the defendant's current behavior, including statements and actions in and out of court; cooperation with attorneys; past evaluations and conclusions; mental condition; risk of relapse; colloquy with court; need for medication to sustain capacity; and changes in the defendant's condition.

Evidence necessitated hearing. Below are brief summaries of decisions finding that the trial judge erred in not conducting a hearing.

> ***State v. Hollars,*** 376 N.C. 432 (2020). After the third day of trial, counsel raised concerns about the defendant's capacity and asked the judge to address the defendant. The following morning defense counsel told the judge that he no longer had concerns, and the judge said that the defendant's confusion was probably the result of a complicated discussion the previous day about the admissibility of evidence. The state supreme court affirmed the court of appeals in finding that, in light of the defendant's extensive history of mental illness, seven previous forensic evaluations with divergent findings on capacity, a five-month gap between the last capacity hearing and trial, and the potential for the defendant to deteriorate during trial, the trial judge erred in failing sua sponte to institute a capacity hearing.
>
> ***State v. Ashe,*** 230 N.C. App. 38 (2013). The trial judge erred in failing sua sponte to hold a hearing on capacity. The defendant had an extensive mental health treatment history; suffered from active psychosis, hallucinations, and extreme paranoia when not properly medicated; was disruptive before trial; and acted nonsensically and incoherently during his guilt-innocence trial and later habitual felon trial. Concerns were expressed by defense counsel and the trial judge about the need for arm and leg chains to restrain the defendant, and the defendant never had an extended colloquy with the trial judge or testified in a manner that demonstrated that he understood the nature of the proceedings and was able to assist counsel.
>
> ***State v. Whitted,*** 209 N.C. App. 522 (2011). The trial judge erred in failing to inquire sua sponte into the defendant's capacity to proceed in light of the defendant's history of mental illness, including paranoid schizophrenia and bipolar disorder; her remarks that her appointed counsel worked for the State and that the trial court wanted her to plead guilty; and her irrational behavior in the courtroom, including, on the third day of trial, refusing to return to the courtroom and, after forcibly being returned to the courtroom handcuffed to a rolling chair and being tasered, chanting loudly, singing prayers and religious imprecations, crying, screaming, and mumbling.

Evidence did not necessitate hearing. Below are brief summaries of decisions finding that the trial judge was not required to conduct a hearing.

> ***State v. Jones,*** 296 N.C. App. 512 (2024). The defendant only pointed to evidence of incapacity before trial, such as hearing voices after she started using methamphetamine at the time of the underlying offense. She was able to testify at

trial and interact with her attorneys and the court; when asked by the judge after the defendant testified, defense counsel stated that there was not any capacity issue and that soon after being assigned the defendant's case he decided that a capacity evaluation was not necessary.

State v. Sander, 280 N.C. App. 115 (2021). The trial judge was not required to hold a third capacity hearing at trial; previous evaluations concluded, among other things, that the defendant's unwillingness to work with his lawyer was the result of poor choices, not mental illness or a lack of capacity. Previous capacity hearings, at which the defendant was found capable, concerned behavior similar to his conduct at trial.

State v. Williams, 267 N.C. App. 676 (2019). The court reviewed the facts of several decisions and concluded that the evidence in this case did not require the trial judge to institute sua sponte a capacity hearing at trial.

State v. Newson, 239 N.C. App. 183 (2015). Being disruptive and "obstreperous" during trial did not raise bona fide doubt about the defendant's capacity. Most of the doctors who evaluated the defendant believed that his behavior was volitional, and there was not meaningful evidence to suggest that the defendant was experiencing a mental illness during trial.

Potential need for examination. In addition to determining whether to conduct a capacity hearing, a judge may need to determine whether an additional capacity evaluation is necessary. In some circumstances, a trial judge may have a constitutional obligation to order an evaluation. State v. Rich, 346 N.C. 50, 61 (1997). As with many matters involving capacity, the resolution is fact dependent. *See, e.g.,* State v. Flow, 384 N.C. 528 (2023) (defendant's apparent suicide attempt, along with other evidence, did not support conclusion that defendant may have lacked capacity at trial; trial judge did not order examination); State v. Mobley, 251 N.C. App. 665 (2017) (trial judge erred in not appointing expert to evaluate defendant where he suffered from serious physical and mental conditions, including bipolar schizophrenia; took twenty-five different medications daily with psychoactive side effects; was unable to remain awake; and was unable to consult with his attorney or participate in his defense); State v. Robinson, 221 N.C. App. 509 (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).

Ordering an examination during trial may present logistical challenges. It may be possible to get an examination quickly to avoid a delay requiring a mistrial. *See generally* State v. Robertson, 161 N.C. App. 288, 291–92 (2003) (capacity evaluation of one hour and forty minutes' duration on second day of trial was adequate; capacity statutes do not require minimum period of observation). Given limited resources, however, it may be difficult to schedule an examination on short notice.

Waiver of presence at trial. In some cases, capacity may be an issue when the defendant absents himself or herself after trial has started. The North Carolina courts have held that defendants may waive their right to presence by absenting themselves during trial. If there is substantial evidence of incapacity, however, the trial judge must first hold a hearing to determine whether the defendant is capable of waiving the right to presence. *See supra* II.F, Capacity to Waive Presence during Trial.

VIII. Procedure after Finding of Incapacity

A. Interplay of Criminal and Civil Commitment Proceedings

Once a court finds that a defendant is incapable to proceed, two separate but related proceedings may go on. The judge in the criminal case may initiate involuntary commitment proceedings—sometimes referred to as ITP (incapacity to proceed) commitments—which are subsequently handled in district court as a civil matter. The discussion uses the term *district court* or *commitment court* when discussing decisions made on the commitment side. During commitment, the defendant may receive capacity-restoration services. Although the services address the capacity of the defendant to proceed in the criminal case, they are part of the commitment phase of the case and must follow the procedures that govern that phase. Commitment procedures are discussed in detail *infra* in IX, Commitment Proceedings after Incapacity Determination.

Although the criminal proceedings largely come to a halt after a finding of incapacity, the criminal case remains pending (unless dismissed), and some actions may be appropriate and even necessary before the criminal court judge. This discussion uses the terms *criminal court* or *judge in the criminal case* when discussing decisions made on the criminal side. The procedures involving the criminal case following a finding of incapacity are discussed in detail *infra* in X, Criminal Proceedings after Incapacity Determination.

This scheme connects two different systems—criminal justice and mental health—each with its own rules, priorities, and limitations. The interplay can be complicated. Problems that have arisen over the years and efforts to address them are discussed *infra* in XI, Problematic Cases.

The remainder of this section provides an overview of the constitutional genesis of the connection between capacity and commitment proceedings, the legislative changes made over the years to manage that scheme, and the place of capacity restoration within it.

B. Constitutional Backdrop

The seminal case in this area is *Jackson v. Indiana*, 406 U.S. 715 (1972). There, the defendant was arrested for two robbery charges for taking a woman's purse with $4 in it and taking $5 from another person. The evidence showed that the defendant was at the mental level of a preschool child; that he could not read, write, speak, or hear; and that he could only communicate through simple sign language. One doctor reported that he doubted that the defendant would ever develop the communication skills needed to stand trial. Another said that there was nothing that the state of Indiana could do to help develop those skills. The trial court found that the defendant was incapable to proceed because of his almost nonexistent communication skills and committed him to the Indiana Department of Mental Health until he was certified as "sane." *Id.* at 719.

The U.S. Supreme Court found that the indefinite commitment of the defendant, with no real chance of getting to trial, violated due process and equal protection. The Court held that, unless a defendant is civilly committed, the State may hold the defendant no longer than a "reasonable period of time" to determine whether he or she will gain capacity to stand trial. *Id.* at 738. If the defendant is neither likely to gain capacity nor subject to civil commitment, he or she must be released. *See also* North Carolina Civil Commitment Manual § 8.5B, "Criminal Court Procedure" (UNC School of Government, 2d ed. 2011) (discussing *Jackson* holding).

C. Legislative Response in North Carolina

Response to *Jackson*. In 1973, shortly after the decision in *Jackson v. Indiana*, North Carolina adopted a new chapter of the General Statutes, Chapter 15A, which overhauled North Carolina criminal procedure. In response to *Jackson*, it included procedures for the civil commitment of a defendant found incapable to proceed. *See* G.S. Ch. 15A, art. 56 Official Commentary. The statutory provisions establish the procedures to follow but, as with other aspects of the law on incapacity to proceed, constitutional protections remain present.

In the years since linking criminal capacity determinations and civil commitment proceedings, the General Assembly has made several changes to the laws that apply in these cases. The significant ones are briefly described below.

House Bill 95 and violent offenses. In 1981, the General Assembly enacted House Bill 95, which revised parts of G.S. Chapter 122C, the chapter on involuntary commitment. S.L. 1981-537 (H. 95). The bill created special procedures for the commitment of defendants charged with a "violent offense" and found incapable to proceed. In 1983, the General Assembly revised G.S. Chapter 15A (as well as Chapter 122C) to reflect those and other requirements. S.L. 1983-380 (S. 75). A defendant subject to these procedures is still sometimes referred to as a "House Bill 95."

A principal goal of these procedures was to keep defendants charged with violent offenses in continuous custody. For example, they require that a defendant found incapable to proceed be taken directly to a state hospital for a commitment examination, bypassing the local examination undertaken for nonviolent offenses and in ordinary commitment cases. They also require court approval before an examining hospital can release a defendant, overriding the hospital's usual authority to release patients when they no longer meet commitment criteria.

Over time, the requirement that a defendant be taken directly to a state hospital became a tool for criminal courts to expedite treatment for defendants. Because of limits on state hospital capacity, however, the waiting time for admission to a state hospital has drastically increased and made the "violent offense" designation less effective in obtaining treatment. For further discussion of the procedure for violent offenses, see *infra* IX.D, Commitment for Violent Offenses: Statutory Procedures and Current Practices.

Limits on capacity examinations before commitment. In 1989 and 1995, the General Assembly limited state hospital examinations of a defendant's capacity to proceed. Although these acts apply to the criminal capacity determination, not to decisions on commitment, they represent an effort to manage the resources of state hospitals, which conduct criminal capacity examinations and house defendants following commitment.

The 1989 act permitted a state hospital capacity examination in a misdemeanor case only after the defendant received a local examination. S.L. 1989-486 (S. 517). The 1995 act permitted a state hospital capacity examination in a felony case, without a local examination first, only if the criminal court found that a state hospital examination was more appropriate. S.L. 1995-299 (H. 386). In 2013, the General Assembly enacted the current restriction on capacity examinations for misdemeanors, authorizing a local examination only. S.L. 2013-18 (S. 45). For a discussion of capacity examinations, see *supra* V, Examination by State Facility or Local Examiner.

Capacity considerations after commitment. In 2013, the General Assembly made several statutory changes to improve coordination between criminal capacity and commitment proceedings. S.L. 2013-18 (S. 45). The General Assembly made these changes applicable to offenses committed on or after December 1, 2013, not to all cases pending on or after that date.

For a defendant found incapable to proceed and involuntarily committed, the revised statutes direct that a state hospital reexamine the defendant's capacity before release and provide written notice to the criminal court if the defendant gains the capacity to proceed; that proceedings in criminal court be expedited after the defendant's release from the hospital if the defendant gains capacity; and, if the defendant is unlikely to gain capacity, that the criminal court dismiss the criminal charges. *See infra* IX.E, Reassessment of Capacity (discussing requirements after finding of incapacity); *infra* X.B, Dismissal of Charges (discussing grounds for dismissal).

The 2013 act and subsequent legislation also bear on capacity-restoration programs, discussed next.

D. Capacity-Restoration Programs

Statutory and other provisions. North Carolina's capacity and commitment statutes contain limited provisions on capacity restoration. The 2013 act, discussed above, revised several statutes to require court and hospital personnel to monitor capacity more closely after a defendant is found incapable and committed. The revised statutes do not specifically provide for capacity restoration, however. Rather, in an uncodified section of the 2013 act (section 10), the General Assembly directed the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to develop guidelines for treatment plans to include restoration of capacity after commitment for any person found incapable to proceed. In response to the legislature's directive, the Commission issued guidelines including capacity restoration as part of treatment in such cases. *See* N.C. Dept. Health & Human Services, Div. Mental Health, Developmental Disabilities & Substance Abuse Servs., Communication Bulletin # 140: Forensic Evaluator Guidelines (Dec. 3, 2013). These provisions do not authorize capacity restoration for defendants apart from commitment and do not allow commitment to remain in effect solely because a defendant has not regained capacity. Defendants still must meet commitment criteria.

Reinforcing the emphasis on capacity restoration, a 2017 act requires that capacity evaluations and confidential information obtained as part of those evaluations be provided to clinicians providing capacity restoration. S.L. 2017-147 (S. 388), *revising* G.S. 15A-1002(d). As with the 2013 legislation, the 2017 legislation did not alter the statutes to authorize commitment solely to restore capacity.

This year, in S.L. 2025-27, section 6 (H. 576), the General Assembly added G.S. 122C-256 to authorize jail- and community-based pilot programs for capacity restoration, providing legislative approval for the pilot programs currently underway. The statute does not specify particular criteria for the programs other than that they may be county- or regionally based. The act directs the N.C. Department of Health and Human Services (NCDHHS) and the Administrative Office of the Courts, in collaboration with other stakeholders, to propose legislative changes to create a permanent procedure for capacity restoration that does not require involuntary commitment. The report is due January 1, 2026.

Programs at state hospitals. Capacity restoration primarily takes place at one of North Carolina's three state hospitals—Central Regional, Broughton, and Cherry. The site selected depends on the location of the offense with which the defendant has been charged. The program consists of a combination of treatment and education. *See* N.C. Dep't Health & Human Servs., *Incapable to Proceed (ITP) and Capacity Restoration (CR)*, in Forensic Services (last visited July 2025) (describing programming). A defendant's participation in one of these programs is triggered

by a criminal court's finding that the defendant is incapable to proceed and meets the criteria for involuntary commitment. As a practical matter, participation also depends largely on the additional determination, by the criminal court, that the charged offense is violent. If a defendant is alleged to have committed a nonviolent offense, the defendant is less likely to get to the state hospital for capacity restoration for the reasons explained *infra* in IX.C, Current Practices for Nonviolent Offenses. If a court finds that a defendant is alleged to have committed a violent offense, the law provides for the defendant to be taken directly to a state hospital. Currently, however, the wait time for services can be several months, during which time the defendant would remain in jail unless on pretrial release. *See infra* in IX.D, Commitment for Violent Offenses: Statutory Procedures and Current Practices.

Pilot programs. The NCDHHS has launched six pilot capacity-restoration programs. Three pilots are detention-based (i.e., offered in the jail) in Mecklenburg, Wake, and Pitt counties. They are regional programs serving the western, central, and eastern parts of the state, respectively. Three pilots are community-based (i.e., outpatient) in Mecklenburg, Wake, and Cumberland counties but may be able to take defendants from other counties, space permitting.

Participation in these pilot programs effectively depends on a defendant's consent. According to the NCDHHS website, a defendant may participate in a detention-based capacity-restoration program if he or she voluntarily accepts treatment and otherwise meets the program's eligibility criteria. The NCDHHS website states that community-based capacity-restoration programs are intended for nonviolent offenses and that the criminal courts may make participation a condition of pretrial release for defendants who are agreeable to treatment and meet the program's eligibility criteria. (For a discussion of pretrial release provisions, see *supra* V.G, Pretrial Release.) These programs raise a range of evolving issues beyond the scope of this bulletin, including evaluation of consent by a defendant who is incapable to proceed, extent of the court's authority, role of defense counsel, consequences of noncompliance with the program, and relationship to the commitment process. For more information about these programs, see NCDHHS, *Incapable to Proceed (ITP) and Capacity Restoration (CR), in* Forensic Services (last visited July 2025).

IX. Commitment Proceedings after Incapacity Determination

A. Initial Determination of Grounds for Involuntary Commitment

G.S. 15A-1003 provides that if a criminal court judge finds a defendant incapable of proceeding, the judge must decide whether there are reasonable grounds to believe that the defendant meets the criteria for inpatient or outpatient involuntary commitment under Article 5, Part 7 in G.S. Chapter 122C. For inpatient commitment (confinement at a twenty-four-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); *see also* G.S. 122C-3(11) (defining dangerousness). Constitutional requirements underpin the statutory criteria for involuntary commitment. *See, e.g.,* O'Connor v. Donaldson, 422 U.S. 563 (1975) (recognizing constitutional limits on commitment); Cong. Rsch. Serv., Involuntary Civil Commitment: Fourteenth Amendment Due Process Protections (May 24, 2023) (discussing cases and principles).

A criminal court may hold an additional hearing if necessary to determine whether commitment of a defendant is appropriate. G.S. 15A-1003(a). Evidence from the capacity hearing is admissible (G.S. 15A-1003(c)); however, the criteria for commitment differ from the standard for capacity to proceed. Incapacity to proceed can be the result of a "mental illness or defect," which can include intellectual disabilities, brain injuries, and other conditions that do not necessarily warrant commitment. *See supra* II.B, Test of Capacity. Also for commitment, an incapable defendant must be dangerous to self or others. *Compare In re* K.V., 279 N.C. App. 368 (2021) (holding that defendant found incapable to proceed was not dangerous to self or others and reversing involuntary commitment order), *with In re* L.L., 284 N.C. App. 356 (2022) (unpublished) (holding that defendant found incapable to proceed met dangerousness standard and upholding commitment order).

If a criminal court judge finds grounds for a defendant's involuntary commitment, the judge may issue 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.

After issuance of a custody order, the commitment proceedings go down one of two tracks, depending on whether the underlying offense is designated as violent or nonviolent. This designation, made by the judge in the criminal case, significantly affects the ensuing process.

The statutory requirement to determine whether a defendant is subject to commitment appears to be mandatory and applies whether the offense alleged is designated as violent or nonviolent. As a practical matter, however, criminal courts may forego determining whether the defendant is subject to commitment if the offense is nonviolent. The reason is that mental health treatment is limited if the offense is not designated as violent. Criminal courts sometimes dismiss criminal charges under G.S. 15A-1008, which requires dismissal when, among other grounds, a defendant is unlikely to gain capacity to proceed or has met the limit on confinement. Effective for dismissals and proceedings on or after December 1, 2025, S.L. 2025-93 (H. 307) requires a criminal court, on motion of a district attorney, to determine whether a defendant is subject to commitment as provided in G.S. 15A-1003 before dismissing criminal charges under G.S. 15A-1008.

The next section reviews the statutory scheme for commitment for nonviolent offenses, and the succeeding section reviews information learned by the author about actual practices, which do not necessarily follow the statutory scheme.

B. Statutory Commitment Procedure for Nonviolent Offenses

The statutes lay out the following steps if a criminal court finds grounds for a defendant's commitment.

First examination. In cases involving nonviolent offenses, the law provides for a defendant to be examined locally within a day or two after issuance of a custody order by a criminal court. *See* G.S. 122C-261(e) (requiring law enforcement officer or other authorized person to take defendant into custody within twenty-four hours after issuance of custody order by court); 122C-263(c)

(requiring examination within twenty-four hours after law enforcement presents person for examination). This initial examination may take place in the physical presence of the examiner or through the use of telehealth procedures. *See* G.S. 122C-263(c). The examiner may find

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

If grounds for inpatient commitment of a defendant exist, the statutes provide for the defendant to receive a second examination at a twenty-four-hour facility, discussed below. If the examiner does not find grounds for commitment and the defendant has pending criminal charges and has not obtained pretrial release, the defendant is returned to jail to await further action in the criminal case. 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 (back to jail if criminal charges are still pending and the defendant has not obtained pretrial release). *See also* North Carolina Civil Commitment Manual § 2.3L, "Outpatient Commitment: Examination and Treatment Pending Hearing" (UNC School of Government, 2d ed. 2011) (discussing conditions of outpatient commitment).

Second examination. If a local examiner finds grounds for inpatient commitment of a defendant, the statutes provide for the defendant to be taken to a twenty-four-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* 122C-263(d)(2) (person may be detained at local facility for up to seven days after issuance of custody order if twenty-four-hour facility is unavailable, renewable for additional seven-day periods by filing of new commitment petition).

The second examiner has the same options as the local examiner, discussed above. If the second 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 twenty-four-hour facility is located. *See* North Carolina Civil Commitment Manual § 2.6, "Initial Hearing" (UNC School of Government, 2d ed. 2011).

Typically, a defendant goes for a second exam to one of the three regional state hospitals (Broughton in Morganton, Cherry in Goldsboro, or Central Regional Hospital in Butner), although the statutes provide that the second examination may occur at any twenty-four-hour facility described in G.S. 122C-252 (including university and veterans hospitals). 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 Office of Indigent Defense Services website.

Pretrial release. G.S. 15A-1003(b) provides that a court "may" but is not required to issue a temporary detention order pending the outcome of commitment proceedings. For a discussion of this provision and others on pretrial release, see *supra* V.G, Pretrial Release.

Hearing on inpatient commitment. At the district court hearing on a defendant's 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 90 days and inpatient commitment for 6-month and 1-year periods thereafter. *See* G.S. 122C-271(b)(2); 122C-276(e), (f).

Termination of inpatient commitment. When a defendant who has been charged with a nonviolent offense no longer meets the criteria for inpatient commitment, the hospital holding the defendant 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 a defendant has been committed to a hospital 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.

Capacity considerations during commitment. Several provisions address capacity issues following commitment, including examinations, reporting to the criminal court, hearings, and other matters. Although these provisions apply to both nonviolent and violent offenses, most apply only if a defendant is subject to inpatient hospital commitment, which may not happen as often for nonviolent offenses. For a discussion of these provisions, see *infra* IX.E, Reassessment of Capacity.

C. Current Practices for Nonviolent Offenses

The actual practice for cases involving nonviolent offenses may differ markedly from the statutory scheme for these offenses. Even when followed, limited options may be available to address a defendant's incapacity. Readers should determine the practices in their area in considering how to proceed.

The statutes discussed in B, immediately above, provide for a first examination to be conducted at a local hospital if a court finds that an incapable defendant meets the criteria for commitment, but some local hospitals reportedly do not accept defendants for examination.

If a local hospital conducts an examination in accordance with the statutory scheme, the ensuing process often does not address the defendant's incapacity for various reasons. A defendant may receive short-term treatment locally, which may ameliorate the defendant's acute mental health needs and, as a result, address the defendant's incapacity; but, once a defendant no longer meets the criteria for commitment, the defendant is released (back to jail if not on pretrial release) whether or not he or she has the capacity to proceed.

If a defendant continues to meet commitment criteria, the defendant may not receive a second examination at a twenty-four-hour facility as envisioned in the statutes. Although any twenty-four-hour facility described in G.S. 122C-252 is appropriate for a second examination, hospitals other than the three state hospitals do not have capacity-restoration programs and may take the position that they are not the right setting for defendants found incapable to proceed. The three state hospitals accept defendants charged with nonviolent offenses, but they have limited availability. As a result, defendants may remain at a local hospital until they no longer meet commitment criteria, then be released (back to jail if not on pretrial release). *See* G.S. 122C-263(d)(2) (person may be detained at site of first examination for up to seven days if a twenty-four-hour facility is not available, renewable for additional seven-day periods by filing of new commitment petition).

In an effort to provide more services to defendants who are incapable to proceed, the North Carolina Department of Health and Human Services has launched pilot capacity-restoration programs, which may be able to serve defendants charged with nonviolent offenses. These programs provide capacity restoration in jails and in the community beyond the statutory commitment process. For a further discussion of these programs, see *supra* VIII.D, Capacity-Restoration Programs.

If services are not available to address a defendant's incapacity—through the commitment process, pilot programs, or other mental health treatment—dismissal of the criminal case may be an appropriate remedy for the reason that the defendant is unlikely to gain capacity. *See infra* X.B, Dismissal of Charges.

D. Commitment for Violent Offenses: Statutory Procedures and Current Practices

Purposes. The commitment procedures for defendants charged with violent offenses are similar to those for defendants charged with nonviolent crimes, discussed in B, above, but special rules apply to keep defendants charged with violent offenses in continuous custody unless a court allows release. 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. Chapter 122C, discussed in A, above. The procedures have been upheld against equal protection and due process challenges. *See In re* Rogers, 63 N.C. App. 705 (1983).

Because the statutes require that a defendant charged with a "violent" offense be taken directly to a twenty-four-hour hospital if he or she is found incapable and meets commitment criteria, the designation effectively gives the defendant priority in obtaining treatment at North Carolina's state hospitals, where capacity restoration largely takes place. As a result, some criminal judges and parties have used arguably broader definitions of the term *violent offense*. The designation has become less effective over time as the number of cases has outpaced state hospital resources, resulting in potentially long wait times for admission.

Meaning of violent offense. A 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 if a defendant is "charged with a violent crime, including a crime involving assault with a deadly weapon." *See, e.g.*, G.S. 15A-1003(a). Reviewing this language, the court in *In re Murdock*, 222 N.C. App. 45 (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 charged. 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.* at 48 (quoting *Violent Crime*, Black's Law Dictionary (7th ed. 1999)). *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 thus the trial court did not err by designating the offense as a "violent crime."

Other North Carolina statutes refer to offenses as "violent" for different purposes. For example, for violent habitual felon status, G.S. 14-7.7 defines a "violent felony" as any Class A through E felony. Under sex offender registration requirements, G.S. 14-208.6(5) defines a "sexually violent offense" as any of the offenses listed in that statute. *See also* S.L. 2025-93 (H. 307) (effective for determinations of pretrial release conditions on or after December 1, 2025, revising G.S. 15A-531 to add a definition of "violent offense" for purposes of pretrial release and, effective for custody orders issued on or after December 1, 2027, in commitment cases generally, revising G.S. 122C-266(b1) to create new restrictions on release of a patient from a twenty-four-hour facility if the patient was previously convicted of a violent offense within the meaning of revised G.S. 15A-531). The offenses listed in these statutes do not necessarily include violence as an element and factually may not involve assault with a deadly weapon, as required by G.S. 15A-1003 and *Murdock*.

Because the judge in a criminal case makes the initial commitment determination after finding a defendant incapable to proceed, the prosecutor and defense attorney will be present and may make arguments about whether the offense should be designated as violent or nonviolent. There may be limited opportunities to address this 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 review of the criminal court's designation of the offense as violent by filing a petition for certiorari in the appellate division.) Whether dismissal of the criminal charges affects the designation is discussed under "Effect of dismissal of criminal charges," below.

No local examination. If a court finds that a defendant is incapable to proceed, that grounds exist for involuntary commitment, and that the underlying offense is a "violent crime," a law enforcement officer must take the defendant directly to a twenty-four-hour facility. *See* G.S. 15A-1003(a). No local examination occurs, unlike under the procedure for nonviolent offenses.

Pretrial release. G.S. 15A-1003(b) provides that a court "may" but is not required to issue a temporary detention order pending the outcome of commitment proceedings. For a discussion of this provision and others on pretrial release, see *supra* V.G, Pretrial Release.

Result if state hospital unavailable. Although the statutes provide that any twenty-four-hour facility described in G.S. 122C-252 is appropriate, hospitals other than the three state hospitals are reportedly unwilling to accept patients with pending criminal charges designated as violent. They also do not have programs specifically aimed at restoring a criminal defendant's capacity. As a result, defendants go to one of the three state hospitals based on the county in which the offense was allegedly committed. *See* 10 N.C.A.C. 28F, r. .0101 (identifying counties served by each hospital and providing for admission to hospital serving that region except in certain circumstances). The wait times can be long and can vary by hospital. If space is not available, a defendant must wait in jail unless on pretrial release.

No release by hospital pending hearing. Once a defendant arrives at a state hospital for a commitment examination, the hospital 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 it can for an incapable defendant charged with a nonviolent offense.

Termination of commitment. Typically, the State is represented at the district court commitment hearing by a staff attorney assigned to the facility holding the defendant by the Attorney General's Office. G.S. 122C-268(b). In cases in which the underlying 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), -276(b), -277(b).

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 to proceed. *See* G.S. 122C-269(c). The motion to move venue is heard by the commitment court; there is not statutory authority for the criminal court to issue an order "retaining venue" of the commitment proceedings.

Effective for commitment proceedings initiated on or after December 1, 2025, S.L. 2025-93 (H. 307) amends selected commitment statutes to ensure that a district attorney receives notice of hearings on the continued commitment or release of a defendant and, if the district attorney elects to represent the State's interest and so moves, require that such hearings be in the county in which the defendant was found incapable to proceed. *See* G.S. 122C-277(b); G.S. 122C-268(c) (also requiring notice to chief district judge in county where defendant was found incapable to proceed).

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).

Capacity considerations during commitment. Several provisions address capacity issues following commitment, including examinations, reporting to the criminal court, hearings, and other matters. For a discussion of these provisions, see *infra* IX.E, Reassessment of Capacity.

Effect of dismissal of criminal charges. Only one North Carolina appellate decision has addressed the effect of dismissal of the criminal charges after an incapable defendant has been committed for a violent offense. In *In re* Rogers, 78 N.C. App. 202 (1985), the trial judge found that the defendant was incapable to proceed, met the criteria for commitment, and was subject to the House Bill 95 procedures for a violent offense, discussed above. (The defendant was charged with murder, among other offenses.) The judge subsequently found that the defendant was unlikely to gain capacity and dismissed the criminal charges. On motion of the defendant, the judge removed the House Bill 95 designation and the special provisions restricting his release from the hospital. The court of appeals reversed, holding that dismissal of the criminal charges did not remove the procedures applicable to offenses that have been designated as violent.

Because of limited hospital resources, counsel for defendants (at the state hospital, special counsel attorneys) and the State (the Attorney General's office) sometimes request that the district court in a defendant's commitment proceedings remove the violent offense designation and the accompanying restrictions on release if the criminal charges are dismissed. The hospital then has greater flexibility to release the defendant when he or she no longer meets the criteria for commitment. In *Rogers*, the State contested the defendant's request. If uncontested, commitment courts reportedly have been willing to grant the request and remove the designation.

E. Reassessment of Capacity

Generally. Capacity considerations arise in two main ways after a commitment determination. First, several statutes direct the courts and state hospitals to keep track of defendants' capacity, discussed below. They include provisions to reassess a defendant's capacity after commitment, keep the criminal court apprised of the defendant's status, and expedite proceedings should the defendant gain capacity or be considered unrestorable. Most of these requirements apply to cases in which the defendant has been committed to a state hospital, but some apply regardless of whether the defendant is committed.

Second, the General Assembly has pressed for capacity restoration to be part of the commitment process—indirectly by requiring courts and hospitals to take the steps discussed in this section and directly through express, uncodified instructions in legislation. Capacity-restoration programs are discussed *supra* in VIII.D, Capacity-Restoration Programs.

Reporting to court. If a criminal court finds a defendant incapable to proceed and subject to commitment, the court's orders must require the treating hospital to report to the clerk of court regarding the condition of the defendant. G.S. 15A-1004(d). The report must state the likelihood of the defendant gaining capacity—in other words, whether the defendant is restorable. *Id.* The hospital must report immediately to the court if the defendant gains the capacity to proceed. *Id.* The notice must be in writing to the clerk, who must provide written notice to the district attorney, the defendant's attorney, and the sheriff. G.S. 15A-1006. Typically, reporting occurs when the hospital concludes that the person is capable, is nonrestorable, or no longer meets the criteria for involuntary commitment.

Reexaminations. G.S. 122C-278 requires a capacity examination before a defendant is discharged from a hospital (or outpatient commitment is terminated) if the defendant was found incapable to proceed, was referred by the court for civil commitment proceedings, and was committed for either inpatient or outpatient treatment. *See also* G.S. 15A-1004(c) (requiring capacity examination before release from hospital custody).

Hearings. G.S. 15A-1007(a) requires the district attorney to calendar a supplemental hearing no later than thirty days after receiving notice that a defendant has gained the capacity to proceed. (For offenses committed before December 1, 2013, G.S. 15A-1007(a) authorizes but does not require a court to hold a supplemental hearing when it receives a report that a defendant has gained capacity.) A court may hold a supplemental hearing on capacity at any time it determines a hearing is appropriate or necessary. G.S. 15A-1007(b).

Records of forensic capacity evaluators and the team that treated a defendant after commitment, which involve different personnel, may be pertinent at the supplemental hearing. In addition to including opinions about capacity, capacity evaluations may include recommendations for accommodations during trial (such as shorter days and more recesses) should the court find the defendant capable to proceed.

If it appears that the conditions for dismissal of the charges against a defendant have been met, discussed *infra* in X.B, Dismissal of Charges, the court must hold a supplemental hearing. G.S. 15A-1007(c).

Trial. G.S. 15A-1007(d) provides that if a court determines in a supplemental hearing that a 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.

Docket of cases. G.S. 15A-1005 requires the clerk of court to maintain a docket of defendants who have been found incapable and to submit it at least semi-annually to the senior resident superior court judge. This requirement applies whether or not a defendant has been committed.

X. Criminal Proceedings after Incapacity Determination

Although a criminal prosecution may not proceed against a defendant who lacks capacity, the case is not completely held in abeyance. Some actions may be appropriate or required.

A. Representation by Counsel

Criminal counsel who represents the defendant in a criminal case is obligated to continue that representation after a finding of incapacity if the criminal proceedings are still pending. In some instances, criminal attorneys have withdrawn after a finding of incapacity without new counsel being appointed. This practice is questionable because the case is still pending. *See* G.S. 15A-143 (describing obligation to handle case through final judgment at trial level). To address this problem when it arises, a specific AOC form was created to ensure that a defendant has counsel in the criminal case to protect his or her rights. The form, AOC-SP-210B, Petition for Appointment of Defense Counsel for Committed Respondent Charged with Violent Crime (for Offenses Committed on or after Dec. 2013) (Dec. 2013), 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 criminal counsel.

B. Dismissal of Charges

Dismissal by court under G.S. 15A-1008. Effective for offenses committed on or after December 1, 2013, G.S. 15A-1008 provides that a criminal court "shall" dismiss the criminal charges against a defendant who is incapable to proceed 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.

The biggest overall difference between the current statute and the previous version of the statute, discussed below, is that if a defendant meets one of the listed grounds, dismissal is mandatory, not discretionary.

Ground 1 adds a statutory requirement of dismissal to the constitutional requirements of *Jackson v. Indiana*, 406 U.S. 715 (1972), that a defendant unlikely to gain capacity must be released if he or she does not meet civil commitment standards. *See supra* VIII.B, Constitutional Backdrop. The Court in *Jackson* did not decide whether the criminal charges also must be dismissed, but it suggested that leaving charges open indefinitely may violate speedy trial and due process rights.

Ground 1 would be at issue if the capacity examiner or commitment hospital in the defendant's case concludes that the defendant is unlikely to gain the capacity to proceed. Defense counsel also have made motions to dismiss on this ground where services are not available to address a defendant's incapacity. The argument is essentially that the defendant is unlikely to gain the capacity to proceed without appropriate services and, should services become available, the State ordinarily would be able to refile the charges (see discussion below on whether dismissal is with or without prejudice).

Ground 2 sets an outer time limit for confinement. The limit differs from the usual rules for sentencing under North Carolina's Structured Sentencing statutes. First, if a person is charged with multiple offenses, the maximum period of confinement is for "the most serious offense charged" only; consecutive periods of confinement are not authorized. Second, the maximum period of confinement is based on the highest prior record level for the offense even if the defendant's prior record level is lower. The North Carolina appellate courts have not addressed whether confinement based on the highest prior record level for an incapable defendant, compared to the actual prior record level for a defendant capable of entering a plea or going to trial, is permissible as a matter of due process and equal protection. *Cf.* State v. Myrick, 277 N.C. App. 112 (2021) (holding without discussion that defendant was entitled to dismissal after being confined for maximum aggravated sentence at prior record level IV, his actual prior record level). Commentators have questioned whether holding an incapable defendant in custody based on the sentence he or she would receive if convicted can be squared with the requirement in *Jackson*, 406 U.S. at 378, that a defendant cannot be held more than a reasonable period of time to determine whether he or she will attain capacity. *See* 3 Michael L. Perlin, Mental Disability Law: Civil and Criminal § 13-1.6.3 (3d ed. 2023).

Ground 3 sets a maximum period that a case may remain pending after a determination of incapacity, regardless of the defendant's likelihood of gaining capacity, length of confinement, or potential sentence. Constitutional considerations may require disposition of the case before the statutory maximums.

If the ground for dismissal is Ground 2, the dismissal is "without leave." This phrasing means that the case is dismissed with prejudice and cannot be refiled. If the ground for dismissal is Ground 1 or 3, the dismissal is "without prejudice to the refiling of the charges." The "without prejudice" phrasing appears to distinguish a dismissal under Ground 1 or 3 from a dismissal with leave, a practice no longer permitted by the statutes (discussed below under "Dismissal of charges by prosecutor"). When a case has been dismissed with leave, the case could be viewed as still pending, which makes it more difficult for a defendant to obtain treatment and 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. If defense counsel or the prosecutor are trying to arrange for treatment and other services, they may need to educate involved agencies and programs about the impact of a dismissal without prejudice. They 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.

If the State wants to refile a case dismissed without prejudice, G.S. 15A-1008(c) provides that the prosecutor may reinstitute the proceedings by filing written notice with the clerk, the defendant, and the defendant's attorney of record. Since no case remains pending after a dismissal, including a dismissal without prejudice, a prosecutor may want to reissue the charges or in a felony case reindict the defendant, in addition to giving written notice, to ensure that the court has jurisdiction to proceed. Effective for dismissals and proceedings on or after December 1, 2025, S.L. 2025-93 (H. 307) amends G.S. 15A-1008(c) to delete the provision allowing a prosecutor to reinstitute charges by the mere filing of a written notice. The bill also amends G.S. 15A-1008 to provide that a dismissal on any of the grounds in the statute is not eligible for an expunction under G.S. 15A-146, the principal statute governing expunctions of dismissals.

For offenses committed before December 1, 2013, G.S. 15A-1008 provides that a criminal court "may" dismiss the criminal charges against an incapable defendant 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.

Although dismissal is discretionary under this earlier version of the statute, constitutional grounds still may require dismissal under *Jackson v. Indiana* when a defendant is unlikely to gain capacity.

Whether an offense is committed before or after December 1, 2013, the court must hold a hearing "if it appears that any of the conditions for dismissal of the charges have been met." G.S. 15A-1007(c) (setting forth this requirement under the current and former versions of this statute).

Other issues involving delays. Delays in the capacity process may raise additional issues.

Speedy trial protections may be implicated. *See* State v. Lee, 218 N.C. App. 42 (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 found no speedy trial violation where record was unclear as to reasons for delay; court stated 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).

A pending civil suit for injunctive relief in federal district court in North Carolina, *Disability Rights North Carolina v. North Carolina Department of Health & Human Services*, contends that delays in the capacity process violate due process. *See* Complaint, Disability Rights N.C. v. N.C. Dep't of Health & Hum. Servs. (1:24CV335) (M.D.N.C. Apr. 19, 2024); Memorandum Opinion and Recommendation of U.S. Magistrate Judge, *Disability Rights N.C.* (No. 1:24CV335), 2025 WL 1665327 (M.D.N.C. June 12, 2025) (recommending to federal district court judge who decides case at trial level that State's motion to dismiss due process claims and plaintiff's request for preliminary injunction be denied; also recommending that State's motion to dismiss federal statutory claims be granted). The eventual disposition of the claims and requested remedies in that lawsuit does not necessarily determine the appropriate measures in criminal cases, but it raises questions that may need to be considered, which may come before a court by motion

or by petition for writ of habeas corpus under G.S. Chapter 17. *See also In re* Tate, 239 N.C. 94 (1953) (allowing writ of habeas corpus to proceed in criminal superior court for defendant found incapable to proceed and committed to state hospital).

In *In re W.C.F.*, 286 N.C. App. 380 (2022) (unpublished), the defendant challenged the validity of involuntary commitment proceedings on statutory grounds because of delays in the process. There, after being found incapable to proceed in the criminal case, the defendant was detained in jail for four months while awaiting transfer to a state hospital. The court rejected the argument that the delay violated the commitment statutes and that termination of the commitment proceedings was required. The court based its ruling, in part, on the principle that one judge (the judge who presided over the commitment proceedings after the defendant was transferred to the state hospital) could not overrule another judge (the criminal judge who found the defendant incapable to proceed and entered the initial commitment order). The opinion did not discuss case law holding that one judge may modify an interlocutory order of another judge when the order involves the exercise of discretion and circumstances have changed. *See* State v. Turner, 34 N.C. App. 78 (1977) (stating general principle).

Dismissal of charges by prosecutor. As in other criminal cases, a prosecutor may take a voluntary dismissal when a defendant lacks the capacity to proceed. A prosecutor may refile the charges if the defendant later gains capacity, subject to due process and speedy trial protections and, in misdemeanor cases, the statute of limitations. *See* North Carolina Defender Manual, Vol. 1 Pretrial ch. 7, *Speedy Trial and Related Issues* (UNC School of Government, Mar. 2019).

For offenses committed before December 1, 2013, a prosecutor may dismiss charges with leave under former G.S. 15A-1009 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, the defendant's counsel, and the clerk of court.

Although called a dismissal, a dismissal with leave actually leaves the case pending. Some agencies and programs have been unwilling to provide services for a defendant, such as housing, treatment, and benefits, while criminal charges remain pending. As a result, a dismissal with leave makes it more difficult for providers such as state hospitals to arrange placements. *See* Sonya Pfeiffer, *Competency to Stand Trial, in* Klinkosum on Criminal Defense Motions 525–26 (C. Melissa Owen ed., 4th ed. 2018) (explaining problems associated with a dismissal with leave).

G.S. 15A-1009 has been repealed, and a prosecutor may not take a dismissal with leave based on a defendant's incapacity for offenses committed on or after December 1, 2013. For offenses before then in which a prosecutor has taken a dismissal with leave rather than a voluntary dismissal, a defendant still may seek dismissal by a court under former G.S. 15A-1009(f) and *Jackson v. Indiana*. Under former G.S. 15A-1009(e), a dismissal by the court supersedes a dismissal with leave by the prosecutor.

C. Other Matters

Pretrial release. A court may set pretrial release conditions after a defendant is found incapable to proceed. For a discussion of pretrial release, see *supra* V.G, Pretrial Release.

Other motions. While a defendant is incapable to proceed, G.S. 15A-1001(b) permits the court to go forward with any motions that defense counsel can make without the assistance of the defendant. *See also* Jackson v. Indiana, 406 U.S. 715, 740–41 (1972) (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, 568 U.S. 57 (2013) (death row inmates were not entitled under federal statutes to stay of habeas proceedings when incapable to proceed; claims were resolvable on record whether or not defendants were capable of proceeding).

For cases dismissed by a prosecutor with leave for offenses committed before December 1, 2013, some prosecutors have opposed the hearing of motions (other than a motion to dismiss under former G.S. 15A-1009, which that statute specifically allows) until the prosecutor reinstates the charges. *See generally* State v. Diaz-Thomas, 382 N.C. 640 (2022) (discussing dismissal with leave for defendant's failure to appear). As a constitutional matter, the court may be obligated to hear other motions under *Jackson v. Indiana*, which protects a defendant from having a case remain pending indefinitely.

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.

XI. Problematic Cases

In many instances, the treatment a defendant receives 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, sometimes without treatment. Three recurring problems and possible approaches are discussed below.

A. Ping-Pong Cases

One problem involves what are sometimes called "ping-pong" cases. A ping-pong case typically plays out as follows. 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, he or she 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 other instances, the treatment a defendant receives while committed will address his or her mental health condition, resulting in release because the defendant no longer meets the criteria for commitment, but the treatment may not make him or her capable of proceeding according to the test applied 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 a defendant's detention and delays resolution of the criminal case; increases transaction costs because the defendant must be examined multiple times, with law enforcement transporting the defendant to and from the hospital; and most importantly may adversely affect the mental health of the defendant, whose condition improves and deteriorates again and again.

On the commitment side, the greater emphasis on capacity restoration while a defendant is committed may result in fewer defendants being released from the hospital and returned to jail while incapable to proceed. Although commitment criteria are periodically reconsidered at commitment hearings, defendants may decide not to contest continued commitment while still incapable. For a discussion of capacity-restoration programs, see *supra* VIII.D, Capacity-Restoration Programs.

Some criminal court judges have entered orders directing 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 do not appear to be statutorily permissible. A hospital may keep a person under inpatient involuntary commitment only if the person meets the criteria for commitment.

On the criminal side, deadlines now apply to the prosecution of cases in which a defendant has been committed and thereafter gains capacity. *See also* G.S. 15A-1005 (requiring clerk of court to maintain docket of defendants who are incapable and submit it at least semi-annually to senior resident superior court judge). These deadlines, discussed *supra* IX.E, Reassessment of Capacity, are intended to reduce delays during which a defendant may decompensate and no longer be capable to proceed. The statutes do not specify a remedy for noncompliance. *See generally In re* B.M., 168 N.C. App. 350 (2005) (holding in another context that statutory time periods are directory, not mandatory, and do not deprive court of jurisdiction if legislature has not expressed consequence for noncompliance).

B. Permanently Incapable or Unrestorable Defendants

A second problem involves defendants whose condition will not improve—for example, defendants with intellectual disabilities, 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 their criminal cases. These defendants also may not meet the criteria for commitment because they do not suffer from a mental illness.

The remedy provided by the law in these cases is dismissal of the criminal case or at least release of the defendant. *See supra* X.B, Dismissal of Charges. Notwithstanding these legal requirements, a criminal court 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.

To provide courts some assurance of continued treatment of defendants after release, state hospital personnel may be able to assist in locating suitable placements or resources. A hospital may find that a defendant 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); 122C-266(a)(2). An outpatient commitment order may direct the person to receive psychiatric treatment in the community. *See* North Carolina Civil Commitment Manual ch. 2, *Involuntary Commitment of Adults and Minors for Mental Health Treatment* (UNC School of Government, 2d ed. 2011) (discussing statutory provisions on outpatient commitment). If a guardian can be found, greater supervision may be possible through a guardianship, under which the guardian has authority to make treatment decisions for the defendant, including agreeing to voluntary admission of the defendant 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). Such an arrangement may help

resolve the criminal and commitment cases—but at the cost of infringement on the defendant's personal autonomy. For further discussion of guardianship proceedings and their impact, see North Carolina Guardianship Manual ch. 1, *Overview of Adult Guardianship* (UNC School of Government, 2008).

C. Treatment Delays and Limitations

A third problem involves delays in services, including delays in capacity examinations of defendants at Central Regional Hospital, the state hospital that conducts the examinations in felony cases (*see supra* V.E, Who Does Examination); and, for defendants who are found incapable to proceed, delays in admission to the state hospitals, where treatment and capacity restoration ordinarily take place. *See supra* VIII.D, Capacity-Restoration Programs. During these delays, defendants may remain in jail, unable to move ahead with their criminal cases and without treatment beyond what the jail can provide.

Possible measures to address delays, arranged in roughly chronological order, include those briefly described below. These measures do not necessarily eliminate delay; nor do they address the underlying need for more treatment services, a topic beyond the scope of this bulletin.

- If a defendant has acute mental health needs, the jail (if the defendant is in custody) or another person may petition for involuntary commitment to a local hospital under the usual involuntary commitment procedures set out in G.S. Chapter 122C. *See generally* North Carolina Civil Commitment Manual ch. 2, *Involuntary Commitment of Adults and Minors for Mental Health Treatment* (UNC School of Government, 2d ed. 2011). As a result of short-term treatment at a local hospital, a defendant may gain the capacity to proceed without a capacity examination, judicial determination of incapacity, involuntary commitment thereafter, and longer-term treatment and restoration of capacity.
- A court may be able to determine that a defendant is incapable without a capacity examination. *See* G.S. 15A-1002(b)(1). A court typically orders a capacity examination first, which includes an assessment of the defendant's restorability if incapable, but a determination of incapacity without an examination may be appropriate where the evidence conclusively establishes incapacity. The court still must make findings to support its determination. Although the parties may stipulate to capacity, they may not stipulate to incapacity. G.S. 15A-1002(b1).
- A court may order a local examination of capacity in felony cases, which can be scheduled more quickly than an examination at a state hospital. A capacity examination at a state hospital is not required for felony cases (and is not permissible in cases involving misdemeanors only). *See supra* V.E, Who Does Examination. Although the statutes do not set a deadline for capacity examinations to be conducted, the applicable AOC form order directs local examiners to conduct evaluations within seven days of receiving the order. *See* AOC-CR-207B, Motion and Order Appointing Local Certified Forensic Evaluator (for Offenses Committed on or after Dec. 1, 2013) (Jan. 2023).
- The statutes place deadlines on the submission of capacity reports following a capacity examination. *See supra* V.K, Report of Examination.
- For defendants who have been found incapable and require treatment to restore their capacity, the North Carolina Department of Health and Human Services (NCDHHS) has started pilot programs to provide restoration services outside state hospitals. *See*

NCDHHS, *Capacity Restoration Pilot Programs, in* Forensic Services (last visited July 2025). Some programs are in local jails, some are available in the community for defendants who are not in custody. If a defendant is eligible to participate in a program and consents, the defendant may receive treatment and other services more quickly than waiting for space to become available at one of the state hospitals. If the local program does not succeed in restoring the defendant's capacity, he or she may still be committed to a state hospital thereafter for restoration services (assuming the defendant meets the criteria for commitment).

- While awaiting a capacity examination or commitment, including capacity restoration, defendants may be eligible for pretrial release. In appropriate cases, a court may order a defendant to appear for required services once they are available. *See supra* V.G, Pretrial Release.
- Dismissal of the criminal charges against a defendant may be statutorily or constitutionally required. *See supra* X.B, Dismissal of Charges.

XII. Admissibility at Trial of Results of Capacity Evaluation

A. Generally

The admissibility at trial of the results of a court-ordered capacity examination, a complicated topic, is reviewed briefly below. Although there may be various grounds for excluding or limiting use of an examination, the contents and results of a court-ordered capacity examination, including the defendant's statements and the examiner's opinions, may be admitted at trial in some instances. *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 opinion, prosecutor also may have been able to use report, under authorities discussed in subsection D, below, to rebut defendant's claim that his mental infirmity rendered his confession involuntary]).

The results of the capacity evaluation may be used 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); State v. Gregory, 291 N.C. App. 617 (2023) (restating general rule but holding that trial judge did not abuse discretion in finding that probative value of testimony from hearing on appropriateness of forcible medication was outweighed by other factors under Evidence Rule 403; dissenting judge argued that evidence was relevant and should have been admitted), *aff'd per curiam*, 387 N.C. 339 (2025) (two judges dissenting).

For potential limits on the capacity examination itself, see *supra* V.J, Conduct of Examination.

B. Effect of Doctor-Patient Privilege

The doctor-patient privilege does not protect the results of a court-ordered evaluation of a defendant's 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 the rebuttal of a mental health defense (discussed in D, below), the Fifth Amendment privilege against self-incrimination applies to evaluations of capacity to proceed and precludes use of examination 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 announced in that decision should apply to noncapital cases as well. Also, although *Estelle* involved a capacity examination initiated by a court, it should make no difference whether a 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 a 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. at 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 D, below.

D. Rebuttal of Mental Health Defense

If a 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 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; court found that defendant presented defense strategy alleging learning disorder, adjustment disorder, and disturbances of emotion and conduct; defendant's mental health expert also relied on capacity report as basis for his opinion).

The Fifth Amendment likewise does not preclude the State's use of a court-ordered capacity examination if a defendant relies on expert testimony in support of a voluntary intoxication defense. Kansas v. Cheever, 571 U.S. 87 (2013).

The courts also have held that the Sixth Amendment does not bar the use of capacity examination results where counsel should anticipate and advise the client that the examination could be used to rebut a mental health defense. *See Davis*, 349 N.C. at 43–44 (reaching this conclusion notwithstanding that trial court apparently limited scope of capacity evaluation to 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*, cited above, the Fifth Amendment may still protect capacity examination results if a defendant relies on a mental health defense but does not introduce expert testimony. *See* State v. Williams, 350 N.C. 1 (1999) [discussed in E, below].

Use of evidence from a capacity evaluation may be limited to rebuttal of the mental condition raised by a defendant; the evidence may not be admissible on the issue of guilt. *See* Criminal Justice Standards on Mental Health, Standard 7-3.2 (A.B.A. 2016); *see also* 5 LaFave, Criminal Procedure § 20.5(c) (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. at 21–23, counsel for the defendant announced that they did not intend to put on expert mental health testimony during either the guilt-innocence or sentencing phase of a capital trial, and the trial judge granted the defendant's request to preclude the prosecution from using evidence of the capacity evaluation of the defendant. The North Carolina Supreme 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 v. Smith, 451 U.S. 454 (1981), 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 receiving proper *Miranda*-style warnings. In none of those cases, however, did the Supreme Court actually allow admission of capacity 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 raised by the defendant. *See* Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 Cal. L. Rev. 1567, 1615 n.159 (1986) (suggesting that more reasonable reading of *Estelle* is that prosecution's use of psychiatric examination is limited to responding to mental health defense raised by defendant).

Several arguments exist against such a waiver theory:

- By ordering a defendant to submit to a capacity evaluation, a court effectively has compelled the defendant to cooperate with 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 would 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* II.A, Requirement of Capacity, and *supra* III.B, 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; justice 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 giving of *Miranda* warning made defendant's statements admissible, defendant would be placed in situation where he must sacrifice one constitutional right to claim another), *vacated 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 may 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 (Catherine A. Messina ed., 5th ed. 1995) (some jurisdictions, by statute or court decision, limit admissibility of capacity evaluations).
- Facilities ordinarily do not advise defendants of their right to remain silent, so defendants' cooperation with examiners does not constitute a waiver of their right to remain silent. *See generally* State v. Huff, 325 N.C. 1 (1989) (facility made inconsistent statements to defendant about confidentiality of capacity examination; court did not address whether warnings were sufficient or whether defendant waived rights), *vacated on other grounds*, 497 U.S. 1021 (1990). In practice, evaluators may advise defendants that the evaluation, including the defendants' statements, may be shared with the court and attorneys, but this advisement is not intended to and would not meet the requirements for a waiver of the right against self-incrimination.
- When a court orders a capacity examination, it necessarily finds that a defendant's mental condition is in question, which is inconsistent with a finding of a knowing and voluntary waiver of rights. *See, e.g.,* State v. Thorpe, 274 N.C. 457 (1968); 2 LaFave, Criminal Procedure § 6.9(b).