

Capacity to Proceed [Public Defender's Conference May 13, 2021]

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In order for a person to be tried for a criminal offense, they must be capable to proceed. The test for capacity was established in [Dusky v US 362 US 402 \(1960\)](#) where the District Court Judge found the defendant capable to proceed because "...the defendant [is] oriented to time and place and [has] some recollection of events." [Dusky](#) stated that was not the test and the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him."

This standard was codified in North Carolina in [NCGS 15A-1001](#) which states that "No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."" A person must have a mental illness or defect for capacity to be at issue and it must be the mental illness or defect that causes the incapacity. If there is no mental illness or defect, the person cannot be incapable to proceed. See State v. Brown, 339 N.C. 426 (1994) (finding the defendant's attitude, not a mental illness or defect, prevented him from assisting in his own defense) The person must: 1. Understand the nature and purpose of the criminal prosecution; and 2. Understand their own situation in the criminal prosecution; and 3. Assist their attorney in a rational or reasonable manner to be capable to proceed. If any of these is not satisfied because of the person's mental illness or defect, the person is incapable to proceed to trial and cannot be convicted, sentenced or punished until they have regained capacity to proceed. However, 15A-1001(b) does allow motions in a case to proceed where the assistance of the client is unnecessary.

Capacity to proceed may be raised at any time by any party including the Judge and it is fluid, meaning one could be capable at one point during the criminal prosecution, but not another. The defense attorney has three options when he or she believes capacity is at issue for his or her client: 1. Retain a private evaluator, psychologist or psychiatrist using [AOC-G-309 Application for Funding for Defense Expert Non-capital case](#) with an ex parte motion explaining the need for one's own expert; 2. Request a local forensic evaluator using [AOC-CR-207B Appointment Local Forensic Evaluator](#); or 3. Request an evaluation for capacity at Central Regional Hospital using [AOC-CR-208B Central Regional Evaluation on Capacity](#) [only for felony charges]. [If the offense date is on 11/30/13 or before, you would use AOC-CR-207A or AOC-CR-208A] [15A-1002\(b2\)](#) lists the time deadlines for the completion of the capacity to proceed reports after the evaluation has occurred [10 days after evaluation for in custody misdemeanor person; 20 days after evaluation for out of custody misdemeanor person; 30 days for felony person]. The Court, for good cause shown, has the power to extend these deadlines. The reports of the local forensic evaluator and the Central Regional Hospital evaluator are sent to the Judge [through the clerk's office], prosecutor and defense counsel. If an evaluation is ordered and the evaluator opines the person incapable to proceed, the evaluator's report must include a treatment recommendation and an opinion on the likelihood the person will regain capacity to proceed. [122C-54\(b\)](#) (for offenses on or after 12/1/13)

If the evaluation concludes the person is incapable to proceed, many times one side will want a second opinion which could come in the form of a Central Regional Hospital evaluation or the retention of a private evaluator by the defense or an impartial evaluator appointed by the court under [15A-1002\(b\)\(1a\)](#).

After the evaluations are complete, the Court must hold a hearing pursuant to [15A-1002\(b\)\(1\)](#). The parties may stipulate the person is capable to proceed, but cannot stipulate the person is incapable to proceed. Any reports created during this process are admissible during the hearing and witnesses may also be called.

If the Court finds the person incapable to proceed, involuntary commitment proceeding may commence under [15A-1003\(a\)](#) if the person meets commitment criteria using [AOC-SP-304 Involuntary commitment custody order defendant found incapable to proceed](#). In order to meet commitment criteria, the person because of a *mental illness*, is either a danger to himself or others or is “in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness.” [122C-261\(a\)](#). Therefore, if someone is found incapable because of a mental defect [e.g. intellectual disability], they would not meet commitment criteria.

If the Court finds the person meets commitment criteria and is charged with a violent crime, they are committed to one of three state mental hospitals: Broughton, Cherry or Central Regional and will remain there until they no longer meet commitment criteria. While there, the person will also participate in restoration classes. Currently, these three state hospitals are the only place in North Carolina with capacity restoration classes. As a result, if your client is found incapable to proceed and is either 1. charged with a non-violent crime and meets commitment criteria or 2. does not meet commitment criteria, there is no current system in place for the person’s capacity to be restored.

If the person meets commitment criteria, but is not charged with a violent crime, the person may be ordered for a local evaluation to determine if they may be involuntarily committed.

The Court must dismiss the charges against a person found incapable at the earliest point that one of three conditions have been met under [15A-1008](#). First, if there is evidence the person is non-restorable. This finding of non-restorability could be in the form of an opinion by a forensic evaluator. There is also an argument that since restoration is not available to a particular client because they cannot be committed to a state hospital, the client is also non-restorable. Second, the person has been in some court confinement [either hospital or detention facility] for the sentence of the most serious felony as a prior record level VI or the most serious misdemeanor as a prior record Level 3. Third, 5 years has passed since the finding of incapacity for a misdemeanor or 10 years for a felony. If the client’s capacity is restored and the charges were dismissed because of non-restorability or the passing of 5 or 10 years, the State can reinstate the charge(s). The State cannot reinstate charges dismissed by the Court where the sentence of the most serious felony or misdemeanor was served by the client in either a hospital or detention facility. It is very important to not let the State dismiss charges with leave where your client is incapable to proceed as this directly affects a client’s ability to obtain benefits. In fact, the dismissal form was changed to not allow a dismissal with leave under this situation as of December 1, 2013. [AOC-CR-307\(b\)](#) [Note: if the charges were from November 30, 2013 or earlier, the State may dismiss these charges with leave]

If the person is opined to be capable to proceed and returned for trial, the District Attorney’s Office, after receiving notice from the Clerk of Superior Court, must schedule the case for a capacity hearing during the next term of court but no later than 30 days after notice.

15A-1007(a) Once any of the conditions of dismissal have been met, the court must hold another hearing to determine whether the charges should be dismissed. **15A-1007(c)** “If the court determines in a supplemental hearing that a defendant has gained the capacity to proceed, the case shall be calendared for trial at the earliest practicable time. Continuances that extend beyond 60 days after initial calendaring of the trial shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance.” **15A-1007(d)**

CAPACITY TIPS

1. If you are unsure, request an evaluation. In particular, it can be really difficult for attorneys to see an intellectual disability which may rise to incapacity to proceed. Also, as these evaluations can happen out of custody [particularly now that Central Regional is doing their evaluations by video because of COVID-19], it should not automatically mean your client must remain in custody waiting for the evaluation.
2. Continue to raise capacity as is warranted as capacity is fluid.
3. Obtain your client's records [school, medical, mental health] through release or ex parte court order. School records may have IQ tests suggesting an intellectual disability.
4. If you can obtain your own expert to do a capacity evaluation, do so [especially if you think your client is incapable to proceed and the local evaluator or Central Regional evaluator has found your client capable to proceed]. Your expert's conclusions are not shared with the prosecutor unless you decide to share it.
5. Speak with the evaluators if asked and explain why you think the client is incapable to proceed. If you do not share this information, the evaluator may make the decision without input from you.
6. If you have a contested capacity hearing, always have your expert see the client close to the hearing date. In some cases, the other evaluation may be weeks or months before.
7. If you have your own expert, continue to share with them how the visits with your client are going and your assessment of the client's abilities based on these visits.
8. If your client is committed to a state hospital, reach out to the client's social worker as they may be able create a plan for your client about what will happen in terms of continuing mental health treatment and social services that can be used in plea negotiations. Also, reach out to the Special Counsel's Office as they are representing your client on the involuntary commitment.
9. If your client is restored and is now capable to proceed, if it is in your client's best interest, try to resolve the case quickly as capacity is fluid.
10. If it is in your client's interest, hold the State to requirement to have the client's case calendared at the earliest practicable time and that continuances beyond 60 days from the initial calendar will only happen in extraordinary cases. 15A-1007
11. If your client meets any criteria in 15A-1008 for dismissal, file a motion to dismiss and schedule a hearing.

Capacity to Proceed Links

Forms

[AOC-CR-207B Appointment Local Forensic Evaluator](#) [Offense on/after 12/1/13]

[AOC-CR-208B Central Regional Evaluation on Capacity](#)

[AOC-SP-304 Involuntary commitment custody order defendant found incapable to proceed](#)

[AOC-G-309 Application for Funding for Defense Expert Non-capital case](#)

Statutes

[15A-1001](#) No proceedings when defendant mentally incapacitated; exception

[15A-1002](#) Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

[15A-1003](#) Referral of incapable defendant for civil commitment proceedings

[15A-1004](#) Orders for safeguarding of defendant and return for trial

[15A-1005](#) Reporting to court with regard to defendants incapable of proceeding

[15A-1006](#) Return of defendant for trial upon gaining capacity

[15A-1007](#) Supplemental hearings

[15A-1008](#) Dismissal of charges

[122C-261](#) Involuntary Commitment of the Mentally Ill

[122C-262](#) Involuntary Commitment of the Mentally Ill

[122C-263](#) Involuntary Commitment of the Mentally Ill

Resources on Capacity to Proceed

[Defender Manuel Chapter 2: Capacity to Proceed \(unc.edu\)](#)

[Commitment Manuel Chapter 8: Commitment of Defendants Found Incapable of Proceeding](#)

[NC Superior Court Bench Book Capacity to Proceed - Spring 2015.pdf](#)

Smith's Criminal Case Compendium Capacity to Proceed Cases | UNC School of Government