

Guilty Pleas and Related Proceedings
Involving Defendants with Mental Health Issues: Best Practices

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Before a defendant may plead guilty, due process requires that the trial court determine (1) that the defendant is competent to plead guilty, and (2) that the defendant is entering the guilty plea knowingly, voluntarily, and understandingly. See *Godinez v. Moran*, 509 U.S. 389, 400-01, 125 L. Ed. 2d 321, 333-34 (1993).

The focus of the competency inquiry is to determine whether the defendant has the ability to understand the proceedings; the focus of the "knowing, voluntary, and intelligent" inquiry is to determine whether the defendant in fact understands the significance and consequences of the decision and whether that decision has in any way been coerced. See *Godinez*, 509 U.S. at 401, 125 L. Ed. 2d at 333 n.12. In accepting a guilty plea, the Court must make an explicit finding that the defendant is competent. See *Godinez*, 509 U.S. at 400, 125 L. Ed. 2d at 333.

To accept a guilty plea in the context of a competency issue, the Court must find under North Carolina law that a defendant:

- A. is able to understand the nature and the object of the proceedings against him; and
- B. is able to comprehend his own situation in reference to the proceedings; and
- C. is able to assist in his defense in a rational and reasonable manner.

If the defendant fails any one of these three tests, the defendant is incapable of proceeding under state law. See N.C. Gen. Stat. § 15A-1001; *State v. Jenkins*, 300 N.C. 578, 581-83 (1980).

The Court must also find under federal constitutional law that the defendant

- D. is able to consult with his lawyer with a reasonable degree of rational understanding (*if the defendant has an attorney*); and
- E. has a rational and factual understanding of the proceedings against him.

See *Godinez*, 509 U.S. at 396, 125 L. Ed. 2d at 330.

NOTE: The competency standard for pleading guilty is the same as that for standing trial, or for waiving one's right to a lawyer. See *Godinez*, 509 U.S. at 396, 125 L. Ed. 2d at 330.

ISSUES

1. At what point am I required to have a hearing on whether a defendant is competent?

The trial court has the constitutional duty to institute a competency hearing *sua sponte* if there is substantial evidence before the court that defendant may be incompetent. *Pate v. Robinson*, 383 U.S. 375, 15 L. Ed. 2d 815 (1966); *State v. Heptinstall*, 309 N.C. 231, 235-36 (1983). See also *State v. Badgett*, 361 N.C. 234, 258 (2007) (referring to the trial judge having a "bona fide doubt" as to competency), *cert. denied*, ___ U.S. ___, 169 L. Ed. 2d 351 (2007).

- "When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1002(b).
 - Does the filing of forensic evaluation report or order for evaluation raise duty to have hearing for purposes of N.C. Gen. Stat. § 15A-1001? Probably – one old case says that defendant can waive it, but more recent cases have required a hearing notwithstanding a defendant's failure to raise the issue.
 - "He waived it" case – where defendant had been evaluated as to competency but defendant did not raise issue or otherwise seek to have hearing prior to trial and where all the evidence indicated that defendant was competent at the time of trial, defendant waived the issue and a hearing was not required. *State v. Young*, 291 N.C. 562, 566-69 (1977).
 - "Have the hearing" cases – (1) Where there have been a number of evaluations and defendant has gone back and forth between being competent and not competent (and where reports noted "temporal nature" of defendant's competency in context of medication), "bona fide doubt" as to competency existed and trial court was required to have a hearing even when defendant did not request a hearing or object to the failure to have a hearing. *State v. McRae (McRae (I))*, 139 N.C. App. 387, 389-92 (2000); (2) While the court had previously held a hearing and found the defendant competent to proceed, subsequent order committing defendant to Dix for observation establishes presumption that defendant is incompetent, and failure of court to have additional hearing pursuant to the second order was error. *State v. McGee*, 56 N.C. App. 614, 616 (1982).

- Determinations as to whether circumstances require formal inquiry as to competency are within discretion of the presiding judge and are reviewed for abuse of discretion. *State v. Carroll*, 317 N.C. 136 (1986); *McGee*, 56 N.C. App. at 616.
 - See *State v. Douglas*, 184 N.C. App. 758, 2007 N.C. App. Lexis 1618 (July 17, 2007) (unpublished) (concluding that, when there was "substantial evidence" defendant did not understand charges against him, was completely irrational and paranoid during court proceedings, and where trial court expressed doubts about defendant's competency, trial court erred in failing to conduct hearing on the issue).
 - NOTE: When the Court of Appeals found that the court erred in failing to have a hearing in *McRae (I)*, the remedy was not vacating the conviction, but only remanding for retrospective competency hearing. See also *State v. Staten*, 172 N.C. App. 673, 681 (2005) (concluding that defendant was competent, but noting that the most defendant could have gotten if relief had been ordered was a retrospective competency hearing), *disc. rev. denied*, 360 N.C. 180 (2005), *cert. denied*, 547 U.S. 1081, 164 L. Ed. 2d 537 (2006).
 - Note also that the appellate courts have also stated that retrospective competency hearings are "disfavored" and are appropriate only when there already existed a sufficient record to have a "meaningful" hearing. See *State v. McRae (McRae (II))*, 163 N.C. App. 359, 367 (2004), *disc. rev. denied*, 358 N.C. 548 (2004); *State v. Blanche*, 170 N.C. App. 171 (2005) (concluding that retrospective hearing was meaningful when hearing occurred before same judge nine months later and in between original trial on criminal charge and subsequent proceeding for related habitual felon indictment), *disc. rev. denied*, 360 N.C. 67 (2005).
- NOTE: the Supreme Court has approved "substantial compliance" with § 15A-1002. See *State v. Rouse*, 339 N.C. 59, 89 (1994) (concluding that trial court did not err when it had heard pre-trial testimony as to defendant's competency and then held hearing on defendant's suicide attempt during trial limited to calling witnesses as to suicide attempt and noting previous testimony), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995).

- See also *State v. Mitchell*, 184 N.C. App. 190, 2007 N.C. App. Lexis 1273 (June 19, 2007) (unpublished) (concluding that, when trial court found defendant competent and defendant did not object, defendant waived the right to contest the trial court's failure to hold a hearing that strictly complied with § 15A-1002).
- NOTE that the determination whether defendant is competent to proceed can be done either by judge, or by jury. *State v. Jackson*, 302 N.C. 101, 104 (1981).

a. If I believe I need to address the issue of competency, am I required to have the defendant evaluated?

General rule: the presiding judge must order evaluation where there is a "significant possibility" that defendant is incompetent. *State v. Grooms*, 353 N.C. 50, 78 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001). BUT: The duty to address the issue of competency does not automatically create a duty to order an evaluation – where judge can hold a meaningful hearing based on the record already established, evaluation is not necessary. See *Rouse*, 339 N.C. at 86-89.

- Determinations whether to have defendant evaluated are in discretion of the presiding judge and are reviewed for abuse of discretion. *State v. Woods*, 293 N.C. 58, 63 (1977); *Rouse*, 339 N.C. at 88.
- For evaluation purposes, the presiding judge "may" appoint "one or more impartial medical experts" (including but not limited to forensic evaluators approved under state mental health rules) to "examine the defendant and return a written report describing the present state of the defendant's mental health"; these reports are admissible at any competency hearing. N.C. Gen. Stat. § 15A-1002(b)(1).
 - While the parties may call witnesses as to the issue of defendant's competency, the court may also on its own call appointed expert witnesses to testify as to that issue. N.C. Gen. Stat. § 15A-1002(b)(1).
 - Note that these evaluation reports are not public records until introduced into evidence. N.C. Gen. Stat. § 15A-1002(d).

b. What do I need to consider in determining whether the defendant is competent to go forward?

The judge presiding over the hearing must consider pretty much everything that can be viewed as relevant to the inquiry whether the defendant is competent.

- Evidence that defendant suffers from mental illness is not dispositive as to incompetence. *State v. Pratt*, 152 N.C. App. 694, 697 (2002), *cert. denied*, 357 N.C. 168 (2003).
- The Court is to give "significant weight" to defense counsel's representation about competency, since defense counsel is usually in the best position to determine if defendant is able to understand proceedings/assist in defense. *See State v. McRae (McRae II)*, 163 N.C. App. 359, 369 (2004), *disc. rev. denied*, 358 N.C. 548 (2004); *State v. Matthews*, ___ N.C. App. ___, 2007 N.C. App. Lexis 2091 (2007) (unpublished) (concluding that trial court did not err in relying on defense counsel's representations as to defendant's competency where defendant was taking pain medication and was "almost asleep" during trial).
 - There is a difference in a defendant's inability to consult with lawyer/assist in defense (incompetent) and a defendant's refusal to consult with lawyer/assist in defense (competent) – a "bad attitude" is not the same as being not competent to proceed. *State v. Brown*, 339 N.C. 426, 431-34 (1994), *cert. denied*, 516 U.S. 825, 133 L. Ed. 2d 46 (1995). *See also Grooms*, 353 N.C. at 77-78 (concluding that defendant's refusal to work with lawyer and refusal to submit to psychiatric evaluation when accompanied by coherent reasoning of defendant and reasonable behavior of defendant were not sufficient to mandate evaluation or hearing on competency issue).
- The court's personal observations of the defendant and independent conclusions about competency based on those observations are appropriate factors to weigh in determination. *See Pratt*, 152 N.C. App. at 697.
 - The Court of Appeals has distinguished between a presiding judge offering "observations" for the record (OK) and a presiding judge offering "disputed and material testimony" that is challenged by the defendant (not OK). *See McRae (II)*, 163 N.C. App. at 363-64.

- See also *State v. Calhoun*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1203 (July 1, 2008) (unpublished) (concluding that trial court did not err in finding defendant to be competent where it "look[ed] at all the surrounding circumstances," including trial court's own observations about defendant's ability to communicate and be involved in the proceeding).

c. If the defendant has previously been evaluated as to competency, am I required to conduct a "formal inquiry" as to competency at the time of the plea?

Probably.

- Where there have been a number of evaluations and defendant has gone back and forth between being competent and not competent (and where reports noted "temporal nature" of defendant's competency in context of medication), "bona fide doubt" as to competency existed and trial court was required to have a hearing even when defendant did not request a hearing or object to the failure to have a hearing. *McRae (I)*, 139 N.C. App. at 389-92.
- The "look at the court file" case – where defendant had previously been found competent to proceed, entry of subsequent order committing defendant for further observation (and finding that defendant "may be incapable of proceeding") creates presumption that defendant is not competent – trial court's reliance on earlier finding that defendant was competent did not appropriately address issue of defendant's competency in light of subsequent commitment order and therefore mandated retrial. *McGee*, 56 N.C. App. at 614.
- When defendant has been returned to court and been found competent to proceed, or whenever the court finds that a hearing is "appropriate or necessary," the court "may" hold a supplemental hearing to determine whether defendant is competent at that time. N.C. Gen. Stat. § 15A-1007.

d. If the defendant is on medication at the time of the plea, am I required to have a "formal inquiry" as to competency at the time of the plea?

Not necessarily, but it does mean that you should ask a few questions. (See pages 12-27 of this outline for sample questions.)

- Appellate courts have historically been deferential to trial courts in issues surrounding competency, but increasingly issues revolving around medication (or the failure to take medication) are being examined more closely.

- See, e.g., *State v. Ager*, 152 N.C. App. 577, 585-88 (2002) (Biggs, J., dissenting) (dissenting judge concluded that defendant's history of mental instability paired with failure to take one of a number of prescribed mental health medications cast doubt on competency where one mental health examiner said that defendant's competency to proceed was dependent on defendant taking mental health medications as prescribed), *aff'd per curiam*, 357 N.C. 154 (2003).
- See also *McRae (I)*, 139 N.C. App. at 392 (concluding that, when numerous psychiatric evaluations had been completed and doctor had concerns about "temporal nature" of defendant's competency in context of defendant's failure to take medication, "bona fide" doubt raised as to competence even when defendant did not ask for hearing and did not object to failure to have hearing).
- See also *State v. Paige*, 180 N.C. App. 693, 2006 N.C. App. LEXIS 2472 (2006) (unpublished) (concluding that, where the trial court "thoroughly questioned" the defendant about medication defendant was taking during proceeding and effects medication had on defendant, trial court did not err in accepting defendant's guilty plea).

2. Who bears the burden in a competency hearing?

- State does not have the burden of showing competence - Defendant has the burden of showing incompetence. *State v. Baker*, 312 N.C. 34 (1984).
 - BUT in those instances (like guilty pleas) when no one is making a motion to have the defendant found incompetent and the court is addressing the competency issue on its own, the better practice is to find by a preponderance of the evidence that the defendant is competent. See, e.g., Transcript of Plea (requiring finding that the defendant is competent to stand trial in acceptance of guilty plea).
 - Defendant's burden is by a preponderance of the evidence. See *State v. Moss*, 178 N.C. App. 393, 2006 N.C. App. Lexis 1468 (July 5, 2006) (unpublished) (citing *Medina v. California*, 505 U.S. 437, 120 L. Ed. 2d 353 (1992), and *Cooper v. Oklahoma*, 517 U.S. 348, 134 L. Ed. 2d 498 (1996)), *disc. rev. denied*, 360 N.C. 52 (2006).
 - The defendant does not have to be at the "highest stage of mental alertness" to be competent. *State v. Shytle*, 323 N.C. 684, 689 (1989).

- Evidence that defendant suffers from mental illness is not dispositive as to incompetence. *Pratt*, 152 N.C. App. at 697.
- Once defendant has entered the plea and indicated that he does so knowingly and voluntarily and the court has accepted that plea, defendant is bound by that plea "absent clear and convincing evidence to the contrary." *Ager*, 152 N.C. App. at 584.
- Defendant can waive this issue by not raising it at the time of the hearing. See, e.g., *State v. King*, 353 N.C. 457, 466 (2001) (concluding that, when defendant had past treatment for depression but had not been ordered for competency evaluation, evidence of past depression standing alone is not enough to trigger court's duty to institute competency hearing – evidence must go specifically to defendant's capacity to proceed at the time of trial), *cert. denied*, 534 U.S. 1147, 151 L. Ed. 2d 1002 (2002).
 - See also *State v. Bowman*, ___ N.C. App. ___ (October 7, 2008) (concluding that unsworn statement of defendant's wife about defendant's brain injury and inability to make decisions was not "substantial evidence" requiring trial court to hold competency hearing *sua sponte*).
 - BUT note that appellate courts are likely to analyze the issue anyway, given that "a conviction cannot stand when the defendant lacks capacity to defend himself." See, e.g., *Bowman* (concluding that defendant waived his right to a competency hearing, but then moving forward to address competency issue on the merits).

3. Now that the defendant has been evaluated and a competency hearing has been held, what should be in the record before I finish the plea?

Once you have a hearing, you must make a ruling specific as to competency at the time of the hearing, **not** at the time that the report was written. *State v. Reid*, 38 N.C. App. 547, 549-50 (1978), *disc. rev. denied*, 296 N.C. 588 (1979). **(See sample competency order on page 29 of this outline.)**

- Where evaluation was done three months before the hearing but examiner did not have "current" opinion as to competency, the court cannot automatically assume that the defendant remains competent at the time of trial when presented with evidence indicating that defendant's mental health situation may have changed in the interim. *Reid*, 38 N.C. App. at 547-50. See also *State v. Silvers*, 323 N.C. 646, 650-55 (1989) (concluding that, when forensic reports were completed months before the proceeding at which judge determined competency, evidence of defendant's condition at the time of hearing was also relevant to determination of competency).
 - The Court of Appeals has also noted that schizophrenia is marked by "sporadic changes in condition" and that courts cannot "assume the stability of [a defendant's] mental condition over a two to three month period" after an evaluation may have been completed. *Reid*, 38 N.C. App. at 547-50.
 - Compare *Reid* with *State v. Jacobs*, 51 N.C. App. 324 (1981) – where defendant had previously been found competent to proceed and second examiner's report finding defendant to be competent (but subject to fluctuations in his condition) was completed six weeks before trial, trial court did not err in finding defendant competent on date of trial where there was no evidence that defendant's mental health condition had in fact fluctuated since the report was issued (including evidence of defendant's condition during the trial itself); see also *McRae (II)*, 163 N.C. App. at 367-69 (concluding that, when examiner found defendant to be competent as long as defendant was taking medication, and there was no evidence of defendant's mental health fluctuating or that defendant stopped taking medication, trial court's determination that defendant was competent was not error).
- As to issues of competency, if supported by "competent evidence," the trial court's findings of fact are conclusive on appeal. *State v. Cooper*, 286 N.C. 549 (1975).
 - While the better practice is to make specific findings of fact about competency when it is at issue, failure to make specific findings is not error when the evidence compels the ruling made. *State v. Aytche*, 98 N.C. App. 358, 363 (1990).

- Where there is evidence supporting trial court's conclusion that defendant was competent, the fact that there is also evidence in the record supporting defendant's contention that he was not competent will not result in reviewing court's finding an abuse of discretion. *State v. O'Neal*, 116 N.C. App. 390, 395-96 (1994), *disc. rev. denied*, 338 N.C. 522.
- NOTE: the defendant does not have the statutory right to appeal issues about competency when he subsequently pleads guilty. *State v. O'Neal*, 116 N.C. App. at 395; N.C. Gen. Stat. § 15A-1444(a1, a2).
 - The COA usually declines to address competency issues when a defendant pleads guilty. *See, e.g., State v. Edwin*, 169 N.C. App. 457, 2005 N.C. App. Lexis 646 (April 5, 2005) (unpublished) (ruling that defendant does not have statutory right to appeal competency determinations when he pleaded guilty); *State v. Terry*, 177 N.C. App. 814, 2006 N.C. App. Lexis 1207 (June 6, 2006) (unpublished) (same as *Edwin*, but concluding that, even if they did review it, defendant's argument that he was not competent was without merit); *State v. Buffaloe*, 182 N.C. App. 176, 2007 N.C. App. Lexis 447 (March 6, 2007) (unpublished) (noting that the COA is "without authority" to address the issue of competency when defendant pleaded guilty, and suggesting that defendant file a motion for appropriate relief with the trial court as to the issue instead).
 - BUT NOTE: COA reviews trial court's decision whether to accept guilty plea itself for abuse of discretion. *See, e.g., State v. Brown*, 101 N.C. App. 71, 79-80 (1990). *See also O'Neal*, 116 N.C. App. at 395-96 (treating "appeal" of competency determination when defendant pleaded guilty as petition for certiorari, then addressing the issue). *See also* N.C. Gen. Stat. § 15A-1442(5)a. ("The following constitute grounds for correction of errors by the appellate division - . . . (5) Constitutionally Invalid Procedure or Statute[. . .] – a. The conviction was obtained in violation of the Constitution of the United States or of the Constitution of the United States.").

Recent related issues related to competency

(A) Except in very limited circumstances, due process prohibits a court or other judicial entity from forcing a defendant to take mental health medication against his will:

See *Sell v. United States*, 539 U.S. 166, 156 L. Ed. 2d 197 (2003).

Involuntary medication is acceptable when: (1) defendant is mentally ill and as a result of illness is dangerous to himself or others, or (2) where defendant has medical condition requiring medication and defendant's refusal to take medication puts his health gravely at risk. If neither of these apply, then involuntary administration of medication to get defendant to remain competent for purposes of court proceedings is prohibited unless (1) there are "important governmental interests" at stake; (2) involuntary medication will "significantly further" those interests; and (3) involuntary medication is "necessary" to further those interests.

- So: If this issue comes up, you will almost certainly have to have a hearing on it.
- See also *McRae (I)*, 139 N.C. App. at 392 (concluding that evidence that defendant was forced to take medication against his will was "too speculative," and declining to address the issue).

(B) Even when a defendant wishes to waive his right to a lawyer and proceed *pro se*, state trial judges may order a defendant with mental health issues to proceed with counsel in a trial when the judge concludes that the defendant is not capable of conducting trial proceedings on his own.

See *Indiana v. Edwards*, ___ U.S. ___, 171 L. Ed. 2d 345 (2008).

**Sample Questions for Addressing Mental Health Concerns
Raised During Guilty Plea Colloquies**

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NOTE: This list of questions is not designed to be used in its entirety in every case, but merely to give direction when helpful in addressing specific issues that may be brought up in the course of a colloquy with the defendant or his/her lawyer.

Relationship between Lawyer and Client

GOAL: *To gain information about to what extent the lawyer believes the defendant is competent to go forward.* **These questions are to be asked of the defendant's lawyer.**

1. How long have you served as the defendant's lawyer?
2. During that period of time, how many meetings would you say you have had with the defendant?
3. In adding all those meetings together, how long a period of time would you say you have spent with the defendant?
4. During those meetings, do you believe that the defendant understood the things you talked about? Without violating any attorney-client privileges, tell me about that.
5. During those meetings, do you believe that the defendant has understood the nature and the object of the proceedings against him? Without violating any attorney-client privileges, tell me about that.
6. During those meetings, do you believe that the defendant has been able to comprehend his own situation in relation to the charges against him? Without violating any attorney-client privileges, tell me about that.
7. During those meetings, has the defendant been able to assist in his defense in a rational and reasonable manner? Without violating any attorney-client privileges, tell me about that.
8. Without violating any attorney-client privilege, has the defendant been able to consult with you during those meetings with a rational degree of understanding?
9. During those meetings, has the defendant displayed that he has had a rational and factual understanding of the proceedings against him? Without violating any attorney-client privileges, tell me about that.

10. During your meetings with the defendant, has he handled your conversations appropriately? (In other words, has the things he has said to you made sense?) Without violating any attorney-client privileges, tell me about that.
11. Have you had the opportunity to talk with any members of the defendant's family or friends about your representation of the defendant?
12. Without violating any attorney-client privilege, has anything that his family members or friends told you about the defendant made you concerned about the defendant's ability to understand the nature of these proceedings?
13. (*If applicable*) Are you aware that the defendant has been taking (or is supposed to be taking) medication?

Do you know what that medication is?

Do you know whether the defendant has in fact been taking the medication?

Have you noticed any change in the defendant's behavior or disposition since he started taking the medication? Without violating any attorney-client privilege, tell me about that.

Have you talked with the defendant about any side effects that the medication may be having on him? Without violating any attorney-client privilege, tell me about that.

Do you believe that the medication has helped the defendant in handling his current situation?

Do you believe that the medication has helped the defendant in deciding how he is going to deal with the criminal charges he is facing?

Do you believe that the defendant's taking the medication has made your relationship with the defendant a more effective one, or a less effective one? Without violating any attorney-client privilege, tell me about that.

14. (If applicable) Have you had the opportunity to review the report on the defendant's psychiatric evaluation?

Do you agree with the doctor's assessment of the defendant's ability to understand the nature of this proceeding?

Do you agree with the doctor's assessment about the defendant's ability to communicate his thoughts and feelings?

Do you agree with the doctor's assessment that the defendant is currently competent to stand trial?

Is there anything in the report that you do not agree with? If so, tell me about that.

15. Without violating any attorney-client privilege, is there anything else that you haven't told me about that has given you concern about whether the defendant was able to understand these proceedings?

16. Is there anything about your interaction with the defendant today that gives you pause about whether the defendant is competent today?

17. Based on your experiences with the defendant over the last _____ (period of time you have represented him), do you believe that, as we stand here today, the defendant is able to understand the nature and object of the proceedings against him?

18. Based on your experiences with the defendant over the last _____ (period of time you have represented him), do you believe that, as we stand here today, the defendant is able to comprehend his own situation in reference to the proceedings?

19. Based on your experiences with the defendant over the last _____ (period of time you have represented him), do you believe that, as we stand here today, the defendant is able to assist in his defense in a rational and reasonable manner?

20. Based on your experiences with the defendant over the last _____ (period of time you have represented him), do you believe that, as we stand here today, the defendant is able to consult with you with a reasonable degree of understanding?

21. Based on your experiences with the defendant over the last _____ (period of time you have represented him), do you believe that, as we stand here today, the defendant has a rational and factual understanding of the proceedings against him?

22. Based on your experiences with the defendant over the last _____ (period of time you have represented him), do you believe that, as we stand here today, the defendant is competent to enter a plea of guilty in this case?

Medication

(for more information as to specific medications, see "Red Flag Medications" on page 29).

GOAL: *To determine what kind of medication the defendant is taking and whether the defendant is taking it as prescribed.*

NOTE: *One way to preface these questions with the defendant is:*

"I am going ask you a few questions. The reason that I am asking you these questions is not to be nosy or get in your business, but I need to ask you these questions so that I can be sure that you understand why we are here and what we are doing today."

1. How do you feel today?
2. Are you currently taking any medication – any medicine or pills?¹

What are the names of the medications you are taking?

* *If the defendant says he is not taking any medication, but there are indications that he should be –*

Have you ever been given medicine or told to take medicine you are not taking now?

If so - Why are you not taking that medicine?

When were you first told to take the medication?

When did you stop taking it?

Does your doctor know that you have stopped taking that medicine?

Who is the doctor who told you to take the medicine?

3. Do you know why you are taking this medicine?
4. Do you think you need to take this medicine?
5. Do you think this medicine helps you?
6. Does the medicine help you to make decisions, or think about things?
7. When was the last time you took the medicine?
8. How many times are you supposed to take the medicine every day?

¹ If neither the defendant nor the lawyer knows what medication the defendant is taking, ask the jail to submit medical records for your review (under seal, etc.).

9. Do you know what the dosage of the medicine is?

Do you take a whole pill when you take the medicine, or only part of a pill?

What color is the pill?

What shape is the pill?

Does the pill have any numbers, letters, or any other marks on it?

** If it is needed for the hearing, this information can be cross-checked with the Physician's Desk Reference – www.pdr.net – to determine the dosage of the medicine.*

10. Have you been taking the medicine when were you supposed to take it?

** If the answer is "no" -*

When are you supposed to take the medicine?

Why did you not take it then?

When did this first happen – that you didn't take the medicine when you were supposed to?

Why have you taken the medicine differently from what the doctor said?

Are you taking more than the doctor told you to take, or less than the doctor told you to take?

Are you taking it more times a day, or fewer times a day, than you are supposed to take it?

When was the last time you were supposed to take the medicine?

Did you take it then?

If not – why not?

Do you need help remembering to take your medicine?

Who helps you remember to take it?

11. For how long have you been taking this medicine?

12. Has the doctor recently changed how you take the medicine?

Are you taking more or fewer pills (or bigger or smaller pills) than you took before?

Are you taking the medicine more times a day, or fewer times a day, than you took it before?

13. Are you taking those medicines because you want to take them, or did someone tell you that you had to take them?²

** If defendant says he was told to take them –*

Who told you to take them?

When were you told to take them?

Have you been taking them like (he) told you to take them?

If not – why not?

14. Have you recently used or taken any illegal drugs, like cocaine or marijuana?

What was it?

When did you take it?

Were you taking the medicine at the same time you took (the illegal drug)?

15. Are you taking any other medicine that we haven't already talked about?

NOTE: Make sure that the medication that defendant says he is taking is not different from the medication currently or recently prescribed by a doctor (whether noted in competency evaluation, or in the jail records). If it is, then ask more questions about where that medication came from, when the defendant started taking it, etc.

² For dealing with issues involving involuntary administration of medication, see *Sell v. United States*, 539 U.S. 166, 156 L. Ed. 2d 197 (2003).

Medication/Disorder Side Effects

GOAL: *To determine whether the medication (to the extent the defendant is taking any) or mental health disorder is affecting the defendant's ability to understand the proceeding.*

1. Does the medicine you are taking make you feel different from how you normally feel?
2. How does it make you feel?

Does the medicine normally make it hard for you to think, remember, or understand things? Tell me about that.

Is the way that you feel today like the way you usually feel when you take the medicine?

If not – how is it different?

Are you dizzy or light-headed today?

Do you feel sleepier than usual?

Do you feel excited or nervous today?

Are you nauseated/have upset stomach?

Do you feel funny, or weird?

Do you now have or have you recently had headaches?

When have you had headaches?

Have you taken any medicine for the headaches?

What was that medicine?

When was the last time you took it?

Have you been taking it like you are supposed to take it? (Like the doctor said/like the instructions say?)

3. Are you having any pain today?

If so, what hurts?

Have you talked to a doctor about the pain?

Did the doctor give you any medicine?

Did you take it? (Why not?)

Did the doctor tell you that you needed to do anything else for the pain?

Did you do it? Why not?

4. Do you feel like your mind is racing or speeding up today?

5. Do you feel like your mind is slowed down or muddy today?

6. Are you having trouble thinking about things or remembering things? Tell me about it.

How long have you been having this trouble?

Have you talked to a doctor about this trouble?

Did the doctor tell you about anything that could help you for this?

If so, what was it?

Did you do what the doctor said?

If not, why not?

If so, did it help?

Have there ever been any times when you could not remember who you were or where you lived, things like that?

7. Are you having trouble thinking today? Tell me about it.

8. Do you feel confused in any way today? Tell me about it.

9. Are you having any trouble understanding what I am saying to you today?

10. Have you had any trouble understanding the things that your lawyer has been saying to you today?

11. Are you having trouble talking today?

Can you control the things you say today – the words you use, things like that?

Do you feel like you cannot say the words you want to say for some reason?

12. Do you feel out-of-sorts today? Tell me about that.

13. Have you recently had any panic attacks? Tell me about that.

14. Have you recently tried to kill yourself, or thought about killing yourself?

When?

Have you talked to a doctor about that?

What did the doctor tell you to do?

Did you do what the doctor told you to do?

If not, why not?

If so, did it help?

Did the doctor give you any medicine or tell you take some medicine?

If so, what was the medicine?

Have you been taking the medicine like the doctor told you to take it?

How many times a day are you supposed to take it?

How many times a day are you taking it?

Has the medicine helped at all? Tell me about that.

(If not taking the medicine) Why didn't you take the medicine?

15. Have you been having trouble sleeping recently?

If so, for how long have you been having trouble sleeping?

How many hours a night do you usually sleep?

Are you sleeping any during the day?

Have you taken any medicine to help you sleep?

What was that medicine?

Has it helped?

How many hours did you sleep last night?

Did you take the medicine last night?

What time did you take the medicine?

16. Have you been hearing voices you weren't sure other people could hear, or seeing things you weren't sure were other people could see?

When did this happen?

Has it happened more than one time? How many times?

Where were you when this happened?

What were the things that you heard or saw?

What did you do about it once it happened?

Did you tell anyone about this at the time? Who?

Did you go see a doctor about it?

If not, why not?

If so, did it help?

17. Have you recently experienced any blurred vision? Tell me about that.

18. Have you recently experienced any slurred speech? Tell me about that.

19. Have you recently had any seizures? Tell me about that.

20. Have you recently had any blackouts – times when you woke up and you couldn't remember what happened or how you got to where you were? Tell me about that.

21. Have you recently had any other symptoms or conditions that you do not usually have? Tell me about that.

Mental Health/Medical Treatment

GOAL: *To determine whether the defendant is receiving treatment for any medical or mental health issues.*

1. Are you currently seeing a doctor?

Who is the doctor? (What kind of doctor is he/she?)

For what reason were you seeing that doctor?

For how long have you been seeing that doctor?

Have you gone to your appointments like you were supposed to?

If not - Why not?

** If defendant is in jail -*

Were you seeing a doctor before you got arrested?

For what reason were you seeing that doctor?

For how long have you been seeing that doctor?

Have you seen a doctor in the jail?

When was that?

For what reason?

What did the doctor tell you to do?

Did you do it?

If not - Why not?

2. When was the last time you went to the hospital?

Which hospital was it?

Why did you go there?

When was that?

How long did you stay?

Did you choose to go, or did someone make you go?

What did they do there to help you get better?

Did they tell you that you needed some treatment after you left the hospital?

What did they tell you that you needed to do?

Did you do what they told you to do?

If not – Why not?

3. Have you been to the hospital recently other than what you just told me about?

When? Tell me about that.

4. Have you ever been to Dorothea Dix, Broughton, Cherry Hospital, Holly Hill, Butner, John Umstead, or any of the other hospitals where they primarily deal with mental illnesses?

When? Tell me about that.

5. Do you have any serious health problems right now?

If so, what are they?

Are you seeing a doctor for that?

Are you taking medicine for that? Tell me about that.

Comprehension of Plea Agreement

GOAL: *To make sure that the defendant understands the plea agreement.*

After describing plea agreement to the defendant -

1. Have you and your lawyer talked about this plea agreement?
2. Has he/she answered any questions you have about the plea agreement?
3. Do you have any questions for me about the plea agreement?
4. Can you tell me in your own words what you did that brings you here to court to plead guilty today?

**If it is an Alford plea – "Can you tell me in your own words what it is that the DA says that you did that brings you to court to plead guilty today?"*

5. In your own words, can you explain to me what you believe the basic plea agreement to be?

** To the extent that the defendant's general recitation of the plea agreement is different from the actual agreement, explain the agreement in more detail, then ask the defendant to repeat his understanding of what the agreement is.*

6. Do you want to accept this plea agreement today?
7. Is this agreement something that you want to do?

** If the defendant's understanding of the plea agreement is an issue, it may also help to change the wording of the questions on the plea transcript so that the expected answer is not always "Yes."*

Summary Questions

1. Is there anything going on with you today that is making it hard for you to think, remember, or understand what is happening here in the courtroom?

Is there anything about the medicine you are taking that is making it hard for you to think, remember, or understand what is going on?

2. Is your thought process clear today?

3. Do you feel like you are in your right mind to be in court today?

4. Do you understand why we are here and what we are doing today? Tell me why you think we are here and what we are doing today.

5. Do you have any questions about why we are here or what we are doing today?

SAMPLE COMPETENCY ORDER

"This matter comes on for hearing on (*the court's own motion, the defendant's motion, etc.*) for a determination whether the defendant is competent to proceed in this matter. Let the record reflect that this matter took place outside the presence of the jury, (*if applicable*) that the defendant was present in the courtroom during the hearing, and (*if applicable*) that the court has had the opportunity to see and observe each witness and to determine what weight and credibility, if any, to give to each witness's testimony.

Based on consideration of the record proper, including:

- the defendant's answers to the questions asked here in the courtroom;
- the Court's review of the matters contained in the court file (*including the written report dated _____ summarizing findings about the defendant's mental condition contained in the evaluation by Doctor _____ of _____ Hospital*);
- the totality of the information received by the Court during this hearing;
- the demonstrated ability of the defendant to understand the nature of the proceedings and to communicate his positions and desires to the Court in this matter;
- the Court's personal observation of the defendant during the ____ minutes involved in this hearing;
- the testimony of (*name witnesses relevant to finding*);
- and (*include any other relevant information here*);

the Court concludes based on the totality of the circumstances presented in this case that:

- (1) The defendant is able to understand the nature and the object of the proceedings against him;
- (2) The defendant is able to comprehend his own situation in reference to the proceedings;
- (3) The defendant is able to assist in his defense in a rational and reasonable manner;
- (4) The defendant has a rational and factual understanding of the proceedings against him.
- (5) (*if applicable*) The defendant is able to consult with his lawyer with a reasonable degree of rational understanding.

Based on the foregoing, the Court concludes by a preponderance of the evidence that the defendant is competent today to proceed in this matter."³

NOTE: The better practice is to set forth detailed Findings of Fact and Conclusions of Law when competency is at issue. *State v. Aytche*, 98 N.C. App. 358, 363 (1990).

³ When the defendant is arguing that he is not competent, you may also want to note the following: "The Court further concludes that the defendant has failed to carry his burden of showing by a preponderance of the evidence that he is not competent to stand trial."

Red Flag Medications

Research on mental health issues indicates that people who have been diagnosed with schizophrenia are more impaired than people with other mental disorders with respect to their ability to make decisions (their "adjudicative competence").* The following medications are commonly used to treat psychotic disorders - schizophrenia, delusional disorders, and bipolar (or manic-depressive) disorders. In addition to the concerns caused by the disorders themselves, these medications have side effects that can also include dizziness, drowsiness, increased risk of seizures, tremors, nausea, confusion, and slurred speech. (*The trade name is first, followed by the chemical name.*)

Lithobid, Escalith (Lithium)	Navane (Thiothixene)
Depakote (Valproate, Valproic Acid)	Clopixol/Acuphase (Zuclopenthixol)
Tegretol (Carbamazepine)	Clozaril (Clozapine)
Haldol (Haloperidol)	Zyprexa (Olanzapine)
Thorazine (Chlorpromazine)	Risperdal (Risperidone)
Prolixin (Fluphenazine)	Seroquel (Quetiapine)
Trilafon (Perphenazine)	Geodon (Ziprasidone)
Compazine (Prochlorperazine)	Invega (Paliperidone)
Mellaril (Thioridazine)	Abilify (Aripiprazole)
Stelazine (Trifluoperazine)	Lidone/Moban (Molindone)
Vesprin (Triflupromazine)	Loxitane (Loxapine)
Nozinan (Levomepromazine)	Lamictal (Lamotrigine)
Phenergan (Promethazine)	Neurontin (Gabapentin)
Depixol/Fluanxol (Flupenthixol)	Topamax (Topiramate)

* Source: *Voluntary, but Knowing and Intelligent? Comprehension in Mental Health Courts*, Allison D. Redich, 11 Psych. Pub. Pol. and L. 605, 611 (2005). See also, e.g., *State v. Reid*, 38 N.C. App. 547 (1978) (noting that schizophrenia is marked by "sporadic changes in condition" and that courts cannot "assume the stability of [a defendant's] mental condition over a two to three month period" after an evaluation may have been completed).

Medication List Sources: National Institute of Mental Health website (www.nimh.nih.gov); www.psychologyinfo.com; Wikipedia (entry of "antipsychotic")

For more information about particular medications and/or side effects, see www.medlineplus.gov (National Library of Medicine on-line) or www.pdr.net (Physician's Desk Reference on-line)

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