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## Chapter 2: Capacity to Proceed

G.S. 15A-1001 through 15A-1009 contain the basic standards and procedures for challenging the competency, or capacity to proceed, of a defendant. These provisions deal with the three main phases of a competency challenge: a psychiatric examination; a hearing to determine competency; and proceedings after a determination of incompetency (involuntary commitment and disposition of the criminal case).

### 2.1 Standard for Capacity to Proceed to Trial

#### A. Requirement of Capacity

Due process and North Carolina law prohibit the trial or punishment of a person who is legally incompetent. *See Drope v. Missouri*, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); Ch. 15A, art. 56 commentary (North Carolina statutes on capacity to proceed codify rule that defendant may not be tried or punished when he or she lacks capacity to proceed).

The requirement of competency applies to all phases of a criminal case. No person may be “tried, convicted, sentenced, or punished” if he or she is incompetent. G.S. 15A-1001(a). The requirement also applies to juveniles alleged to be delinquent. *See* G.S. 7A-628.

#### B. Test of Capacity

**Generally.** G.S. 15A-1001(a) sets forth the general standard of capacity to proceed. A defendant is incompetent 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. *See State v. Aytche*, 98 N.C. App. 358, 391 S.E.2d 43 (1990) (statute does not authorize general physical examination to see if physical problems exist). *But see* 3 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL 242–43 (Michie Co., 1989) (physical disorders may impinge on brain functioning to degree affecting defendant’s mental capacity to stand trial).

**Capabilities.** Second, 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 incompetent. *See State v. Willard*, 292 N.C. 567, 234 S.E.2d 587 (1977) (amnesia does not per se render defendant incompetent, although temporary amnesia may warrant continuance of trial).

This second part of the test for competency is disjunctive. A defendant's inability to meet any one of the statutory conditions—ability to understand proceedings, comprehend situation, or assist counsel—bars further criminal proceedings. *See State v. Shytle*, 323 N.C. 684, 374 S.E.2d 573 (1989); *State v. Jenkins*, 300 N.C. 578, 268 S.E.2d 458 (1980).

The cases sometimes refer to a fourth condition of competency: 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, 273 S.E.2d 666 (1981); *State v. O'Neal*, 116 N.C. App. 390, 448 S.E.2d 306 (1994). The supreme court has held that trial courts need not make a specific finding on this fourth condition. *See Jenkins* (decided in 1980). Nevertheless, the courts still appear to consider the condition to be a requirement of competency, treating it as a subset of the statutory test. *See, e.g., Shytle* (decided in 1989).

### C. Medication

A defendant may be competent to proceed even though his or her competency depends on medication. *See State v. Cooper*, 286 N.C. 549, 213 S.E.2d 305 (1975) (medication was necessary to prevent exacerbation of mental illness and did not dull defendant's mind). The North Carolina courts have not addressed the question of *forcible medication* to make a defendant competent. *See generally Riggins v. Nevada*, 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992); 3 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL 233–38 (Michie Co., 1989).

### D. Time of Determination

The defendant's capacity to proceed is evaluated as of the time of trial or other proceeding. The question of capacity may be raised at any time by the defense, court, or prosecutor. *See G.S. 15A-1002(a); Drope v. Missouri*, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) (competency 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, 374 S.E.2d 858 (1989); *State v. Propst*, 274 N.C. 62, 161 S.E.2d 560 (1968).

Because competency is measured as of the time of the proceeding, more recent examinations or observations of the defendant tend to carry more weight. *See State v. Silvers*, 323 N.C. 646, 374 S.E.2d 858 (1989) (conviction vacated where trial court based finding of competency entirely on psychiatric examinations three to five months before trial and excluded more recent observations by lay witnesses); *State v. Reid*, 38 N.C. App. 547, 248 S.E.2d 390 (1978) (trial court's finding of competency *not* supported by

evidence where state's expert testified as follows: defendant was suffering from chronic paranoid schizophrenia; defendant was competent 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 competency at time of competency hearing).

### **E. Compared to Other Standards**

The *insanity defense* turns on the defendant's state of mind at the time of the offense, not at the time of the proceedings against the defendant. *See State v. Propst*, 274 N.C. 62, 161 S.E.2d 560 (1968) (comparing capacity to proceed with insanity).

The standard of competency for *pleading guilty* or *waiving the right to counsel at trial* is the same as the standard of competency to stand trial. The defendant need not have a higher level of mental functioning. To plead guilty or waive counsel, however, the defendant also must act knowingly and voluntarily. *See Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993); G.S. 7A-457 (describing requirements for valid waiver of counsel).

For a discussion of mental impairment and the standard for waiving *Miranda* rights, *see generally* 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 525–27 (West Pub. Co., 1984).

### **F. Burden of Proof**

The defendant has the burden of persuasion to show incapacity to proceed. *See State v. O'Neal*, 116 N.C. App. 390, 448 S.E.2d 306 (1994); *see also Medina v. California*, 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) (burden of persuasion to show incompetency may be placed on defendant). But the burden may be no higher than by the preponderance of the evidence. *See Cooper v. Oklahoma*, 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996).

## **2.2 Recognizing Signs of Impairment**

### **A. Sources of Information**

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. To understand a client's condition or develop evidence for challenging competency, counsel may need to consider several sources of information.

**Client Interview.** 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.

**Medical History.** Counsel should obtain the client’s medical history, including any history of mental health treatment, and have the client sign several original release forms for medical and other records. Because clients may not want to admit to mental health problems or may not be used to thinking in those terms, counsel may need to find alternative ways to phrase such questions.

**Witnesses.** The defendant’s family and friends may have helpful information about the defendant’s condition. Jailers, law-enforcement officers, and court personnel also may have had an opportunity to observe the defendant. *See, e.g., State v. Silvers*, 323 N.C. 646, 374 S.E.2d 858 (1989) (conviction vacated and case remanded for failure to allow defendant to present testimony of jail personnel who had observed him).

**Commitment Proceedings.** The client may have been voluntarily 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, submit a release to the appropriate hospital or other facility. *See* G.S. 122C-53(i) (facility “shall” disclose to client’s attorney information relating to client).

**Other Records.** Several other types of records may contain relevant information, including school, work, military, and juvenile records. In addition to these records, counsel should check the affidavit of indigency to see if the client is receiving supplemental security income (SSI), which may be for a mental disability. To obtain SSI records, start with the local social security office where the client lives.

## **B. Significant Behaviors**

Counsel should note unusual behaviors that may be signs of incapacity to proceed (delusions, memory problems, puzzling medical complaints, peculiar speech patterns, difficulties in maintaining attention, etc.). A good introduction to mental disorders is contained in Deana Dorman Logan, *Learning to Observe Signs of Mental Impairment*, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE: FORUM, Vol. 19, No. 5-6, 1992, at 40. Several charts from her article, describing common disorders in lay terms, are reprinted at the end of this chapter. For a comprehensive discussion of mental disorders, *see* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-IV (American Psychiatric Association, 4th ed. 1994).

## C. Guides for Assessment

Counsel also must assess the defendant's behavior or symptoms in terms of the statutory test for competency. A competency assessment instrument, which highlights potential areas of inquiry, appears at the end of this chapter (from LABORATORY OF COMMUNITY PSYCHIATRY, HARVARD MEDICAL SCHOOL, COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS 98 (National Institute of Mental Health, 1973)).

## 2.3 Deciding Whether to Question Capacity

Before deciding to question a client's capacity to proceed, counsel must consider several factors. The severity of the client's condition is certainly critical, but counsel also must anticipate the impact of the various proceedings that may follow (court-ordered evaluation, hearing on capacity, and involuntary commitment proceedings). Some considerations are discussed below.

### A. Ethical Considerations

**Client Wishes.** In competency as in other matters, counsel first should try to inform the client of the consequences of challenging or not challenging competency and, if possible, determine the client's wishes. Ordinarily, the client's wishes control.

**Need for Protective Action.** In some instances, the client's faculties may be so impaired that he or she cannot engage in a meaningful discussion with counsel. May counsel question competency without the client's assent or over the client's objection? Yes, on the rationale that counsel may take protective action on behalf of an incompetent client. *See generally* North Carolina Rules of Professional Conduct, Ethics Opinion 157 (1993).

**Declining to Question Competency.** In some instances, counsel may doubt a client's competency but may be able to obtain a favorable plea. Must counsel raise the client's competency with the court? North Carolina does not appear to have addressed the question directly, and commentators differ to some extent on counsel's obligations. *Compare* Norma Schrock, Note, *Defense Counsel's Role in Determining Competency to Stand Trial*, 9 GEORGETOWN J. OF LEGAL ETHICS 639 (1996) (writer argues that counsel has duty to alert court to competency issues, but acknowledges that duty arises only when counsel "reasonably doubts" competency, a somewhat elastic test) *with* Rodney J. Uphoff, *The Decision to Challenge the Competency of a Marginally Competent Client: Defense Counsel's Unavoidably Difficult Position*, in RODNEY J. UPHOFF, ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS 30–47 (American Bar Association, 1995) (writer argues that counsel may decline to raise competency if raising issue would not be in client's best interest, but writer hedges this advice by stating that client must be "marginally competent"). *See also* North Carolina Code of Professional Responsibility, Ethics Opinion 314 (1982) (opinion

under former ethics code states that lawyer may not execute will for client whom lawyer knows to be incompetent; however, if reasonable people could differ about client's competency, lawyer does not necessarily act unethically by preparing will).

### **B. Potential Benefits**

Some of the benefits of questioning competency include the following:

- The examination may lead to needed treatment. (Counsel should consider whether the defendant can obtain treatment without instituting competency proceedings, however.)
- A defendant found incompetent cannot be tried, avoiding both sentencing on the current charge and a conviction that could be used in future cases.
- Even if a competency challenge is unsuccessful, the examination and hearing may generate evidence in support of a mental health defense, mitigating factors at sentencing, or a motion to suppress a confession on the ground that the defendant did not knowingly and voluntarily waive *Miranda* rights. *See, e.g., State v. Bundridge*, 294 N.C. 45, 239 S.E.2d 811 (1978) (evidence of earlier incompetency to stand trial admissible to support insanity defense).
- Information about the defendant's mental condition may have a positive impact on plea discussions with the prosecutor.

### **C. Potential Harms**

Some of the harms that may result from questioning competency include the following:

- The proceedings may result in disclosure of damaging information, which may hurt plea negotiations, lead to further evidence, or be admissible at trial. *See infra* § 2.9, p. 22 on admissibility of competency evaluation at trial. In capital cases in particular, defense lawyers have voiced concern about the dangers of state-conducted competency evaluations. *See, e.g., Welsh S. White, Government Psychiatric Examinations and the Death Penalty*, 37 ARIZ. L. REV. 869 (1995) (analyzing reasons for defense opposition). In light of these risks, counsel should consider obtaining a psychiatric examination by a private expert before deciding whether to question competency. *See infra* § 2.4, p. 9.
- A competency evaluation may hurt a motion by the defendant to obtain an expert on a mental health defense or other mental health issues. In some instances, courts have denied motions for expert assistance in light of the results of a state-conducted competency evaluation. Sometimes they have appointed the state's competency examiner as the defendant's expert rather than provide the defendant with funds to hire his or her own expert. *See infra* § 5.5A, p. 12 (impact of competency evaluation on motion for funds for mental health expert).

- If found incompetent and involuntarily committed, the defendant could be confined for a longer period than if convicted, particularly in misdemeanor cases.
- The defendant may be confined while competency proceedings are pending. *See* G.S. 15A-1002(b)(2) (court may commit defendant to state hospital for up to 60 days for evaluation, although stay is ordinarily shorter); G.S. 15A-1002(c) (court may order defendant confined after evaluation and pending hearing).
- A finding of incompetency and subsequent involuntary commitment may stigmatize a defendant.

## 2.4 Examination by Own Expert

### A. Types of Cases Requiring Expert

Ordinarily, the process of determining competency begins with a psychiatric examination of the defendant. In some cases, counsel should consider obtaining an evaluation of the defendant by a private expert rather than moving for an examination at a state or local mental health facility. (Some of the risks of state-conducted examinations are discussed *supra* § 2.3C, p. 8.) Counsel should consider this option in capital cases; in cases involving a mental health defense; and in other cases in light of such factors as the seriousness of the charges, the presence of mental health issues, the importance of keeping the defendant's statements confidential, and the likelihood that the case will go to trial.

### B. Procedure to Obtain Expert

Counsel may obtain the services of a mental health expert for an indigent defendant by filing an *ex parte* motion with the court. The motion does not ask the court to determine the defendant's competency. Rather, it seeks funds for an expert's assistance on all applicable mental health issues (defenses, mitigating factors, etc.), including competency. *See infra* Chapter 5 on experts, which contains a sample motion for a mental health expert. Once the expert has evaluated the client, counsel will be in a better position to determine whether there are grounds for questioning competency.

Moving for funds for an expert affords counsel the best opportunity to obtain an expert of his or her choosing. Theoretically, counsel could file a motion questioning the defendant's capacity to proceed and asking the court to appoint a particular expert to examine the defendant. *See* G.S. 15A-1002(b)(1) (court may appoint one or more impartial medical experts). Typically, however, the court uses state and local mental health facilities to perform competency evaluations.

### C. Confidentiality

One of the principal benefits of the above procedure is greater confidentiality. Because the motion is *ex parte*, it does not alert the prosecution to counsel's concerns about the defendant's mental condition. Also, if counsel does not intend to call the expert at trial, the prosecution generally does not have a right to the results of the examination. *See infra* § 4.9C, p. 46 (discussing general prohibition on discovery of nontestifying expert's report and circumstances in which disclosure may be allowed).

## 2.5 Examination by State Facility or Local Examiner

In misdemeanor and less serious felony cases, counsel may want to begin the competency process by obtaining an examination of the defendant at a state or local mental health facility (rather than moving for funds for an expert, discussed in the previous section).

### A. Moving for Examination

**Requirements of Motion.** Counsel may obtain a state or local examination by filing a motion questioning the defendant's capacity to proceed and asking that the defendant be evaluated. Two different form motions appear at the end of this chapter, one for an evaluation by Dorothea Dix in Raleigh, the state hospital that performs competency evaluations, and the other for an evaluation by a local facility (a local forensic examiner or screener).

Conceivably, a trial court could find a defendant competent without a psychiatric examination, but the court likely will grant a motion for an examination if the motion describes the specific conduct that leads counsel to question the defendant's capacity. *See* G.S. 15A-1002(a) (requiring moving party to detail conduct in support of motion); *State v. Taylor*, 298 N.C. 405, 259 S.E.2d 502 (1979) (motion must contain sufficient detail to cause "prudent judge" to call for psychiatric examination before determining competency).

**Time Limit.** There is no formal time limit on a motion questioning the 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 unreceptive, however, to a last-minute motion. *See, e.g., State v. Washington*, 283 N.C. 175, 195 S.E.2d 534 (1973) (characterizing as "belated" a motion for initial examination two weeks before trial).

**Second Examination.** A defendant may be able to obtain a second examination if the report from the first examination has become stale or the defendant's condition has changed. *See supra* § 2.1D, p. 4 (discussing cases on importance of time of observation of defendant).

**Motion for Examination by Prosecutor.** The prosecution may raise the question of competency and request a competency examination. As with a motion 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 the motion. *See State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985) (disapproving of entry of order for examination without notice to defendant); *see also infra* § 2.9C, p. 22 (Sixth Amendment right to notice of examination). If the motion is granted, the defendant may be able to limit the scope of the examination. *See infra* § 2.5D, p. 12.

## B. Who Does Examination

**Misdemeanors.** If charged with a misdemeanor, the defendant first must be evaluated by a local forensic screener. *See* G.S. 15A-1002(b)(1). The local screener may find the defendant competent or incompetent or may recommend that the defendant be evaluated further at Dorothea Dix.

Local examinations tend to be short, consistent with the idea that they serve as a screening device. Local exams may last less than a day, primarily involving an interview of the defendant (in jail if the defendant is incarcerated).

**Felonies.** If the defendant is charged with a felony, the court may order a local evaluation or may commit the defendant to Dorothea Dix. To commit the defendant to Dorothea Dix without ordering a local evaluation first, the court must find that commitment is more appropriate. *See* G.S. 15A-1002(b)(2). In requesting an examination, counsel should consider whether a local or state examination best serves the defendant's interests. Considerations include the defendant's previous contacts with the facility, the attitudes and reliability of the examiners, etc.

State examinations generally last far longer than local exams. Under G.S. 15A-1002(b)(2), the court may commit the defendant to Dorothea Dix for up to 60 days, although the typical stay lasts about two weeks. (In less serious cases or for follow-up reports, Dorothea Dix might conduct the evaluation on an outpatient basis.) The evaluation at Dorothea Dix has several components, including an interview of the defendant, interviews of family members, review of mental health, school, and other records, and testing and observation of the defendant.

*Note:* Whether Dorothea Dix or a local mental health facility evaluates the defendant, counsel should contact the examiner and take the opportunity to relate his or her observations of the defendant, identify people knowledgeable of the defendant's condition, and provide other relevant information.

### C. Confidentiality

Subject to certain exceptions, an examination at a state or local mental health facility is supposed to be confidential. *See* G.S. 122C-52 (right to confidentiality). Disclosure is allowed to clients and their representatives, in certain court proceedings, and for treatment and research. *See* G.S. 122C-53 through 122C-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 in E. below. *See* G.S. 122C-54(b).
- The results of the examination, including statements by the defendant, could be admissible at subsequent court proceedings. *See infra* § 2.7C, p. 16 (use in competency hearing); § 2.9, p. 22 (use at trial). *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).

### D. Limiting Scope and Use of Examination

A central part of any court-ordered examination, whether by Dorothea Dix or a local mental health facility, is the interview of the defendant. The interview likely will cover the alleged crime, as the defendant's understanding of the allegations may bear on his or her capacity to proceed. Discussed below are options for limiting the scope of an examination. For a discussion of the admissibility of the examination results, *see infra* § 2.9, p. 22.

**Refusal to Discuss Offense.** May the defendant refuse to discuss the offense or other matters with the examiner? The North Carolina courts have not addressed this question when the examination has concerned competency only. The defendant's refusal may result in an incomplete report, however, and may make it difficult for the defendant to meet the burden of showing lack of capacity.

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 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 offense. *See State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *vacated on other grounds*, 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990). The court of appeals has held further that a trial court may order a psychiatric examination when the 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, 493 S.E.2d 770 (1997). If the court orders such an examination and the defendant refuses to cooperate, the prosecution may have grounds for moving to exclude the defendant's expert testimony (although probably not lay testimony) on the mental health defense. *See*

CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-6.4 (American Bar Association, 1989).

**Presence of Counsel.** The law is unsettled on whether counsel has the right to be present during a competency evaluation. *See* Timothy E. Travers, *Right of Accused in Criminal Prosecution to Presence of Counsel at Court-Appointed or -Approved Psychiatric Examination*, 3 A.L.R.4th 910 (1981) (possible right to be present if examination will be used either at guilt-innocence or sentencing phase of trial). Some facilities, such as Dorothea Dix, may allow counsel to be present during the interview portion of the evaluation.

**Court Order.** In some instances, defense counsel may want to seek a court order limiting the scope and use of a competency evaluation. For example, if the prosecution moves for a competency evaluation in a capital case, defense counsel may want to ask the court to include protective language in the order for examination. Such an order might provide that the state's experts are to report to the court on the issue of competency only and are not to inquire into any area not necessary to that determination; that the results are to be used for the determination of competency only and for no other purpose; and that information obtained during the evaluation regarding the offense may not be divulged to the prosecution.

**Videotaping of Examination.** Standard 7-3.6(d) of the CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (American Bar Association, 1989) would give the defendant the right to have a court-ordered competency evaluation initiated by the prosecution recorded on audiotape or videotape. Such a recording could assist counsel in cross-examining the state's expert. Before requesting or consenting to recording, however, counsel should consider the potential harm that could result if the prosecution gained access to the tape.

## **E. Report of Examination**

Upon completion of the evaluation, the examiner must submit to the clerk of court

- a report of the examination, and
- a cover letter indicating the fact of the examination and any conclusion about whether the defendant has or lacks the capacity to proceed.

Under G.S. 15A-1002(d), a copy of the examination report goes to the presiding judge and to defense counsel; at least initially, the report is not supposed to go to the prosecutor. *See also* ROBERT L. FARB, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK 31 (Institute of Government, 1996). The statute provides further that "if the question of the defendant's capacity to proceed is raised at any time, a copy of the full report must be forwarded to the district attorney." Thus, if defense counsel continues to question the defendant's capacity, the prosecutor receives a copy of the report.

May the prosecutor get a copy of the report simply by questioning the defendant's capacity after the evaluation? Disclosure would seem inappropriate unless a genuine issue exists about capacity. The above-quoted provision was intended to limit the prosecution's access to competency reports. Previously, G.S. 15A-1002(d) provided for reports to be sent automatically to the defense and prosecution. *See* 1979 N.C. Sess. Laws ch. 1313 (2d Sess. 1980). In 1985, however, the General Assembly added the above provision, which was part of a bill entitled: "An act to provide that an indigent defendant's competency evaluation report will not be forwarded to the district attorney." 1985 N.C. Sess. Laws ch. 588 (1st Sess. 1985).

*Note:* Beware of older AOC forms for a psychiatric evaluation, which still may be in circulation, directing examiners to send a copy of the report to the prosecutor.

## 2.6 Post-Examination Procedure

### A. After Examination Finding Defendant Competent

Studies indicate that courts follow the expert's opinion in over 90% of the cases. *See* SAMUEL JAN BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 703 (American Bar Foundation, 3d ed. 1985). Consequently, if the examination indicates that the defendant is capable of proceeding, counsel may not want to take further action. (The information from the competency evaluation still may be valuable for plea negotiations or other purposes.)

G.S. 15A-1002(b) states that a hearing "shall" be held after a court-ordered competency examination, but a hearing generally does not take place unless counsel requests one. The court must initiate a hearing on its own motion only when the evidence suggests that the defendant is incompetent. *See State v. Heptinstall*, 309 N.C. 231, 306 S.E.2d 109 (1983) (judge has constitutional duty to initiate competency hearing when evidence indicates that defendant may be incompetent); *State v. Young*, 291 N.C. 562, 231 S.E.2d 577 (1977) (defendant may waive hearing by failing to request one); *Meeks v. Smith*, 512 F. Supp. 335 (W.D.N.C. 1981) (setting aside state-court conviction on ground that incompetent defendant may not waive right to competency determination).

### B. After Examination Finding Defendant Incompetent

Counsel has a number of options after an examination finding the defendant incompetent.

**Dismissal.** The prosecutor may agree to take a voluntary dismissal of the criminal case.

**Stipulation.** The prosecutor may agree to the entry of an order finding the defendant incompetent to proceed, which triggers other procedures. For example, the court could issue a custody order requiring that the defendant be examined to determine whether involuntary commitment is appropriate. The court or prosecutor also may be willing to

dismiss the criminal charges in conjunction with an order of incompetency and a custody order. (AOC-SP-304, which appears at the end of this chapter, combines both an incompetency and a custody order.) For a discussion of procedures after the issuance of an order of incompetency, *see infra* § 2.8, p. 17.

If the prosecutor is unwilling to dismiss and the defendant is incarcerated, there is ordinarily no reason to delay obtaining an order of incompetency. Without it, the defendant may languish in jail, unable to stand trial or enter a plea because the examination indicates that he or she is incompetent to proceed.

**Competency Hearing.** If the prosecutor is unwilling to stipulate to incompetency, or the court is unwilling to accept a stipulation, counsel will need to request a formal hearing on the defendant's capacity to proceed. *See infra* § 2.7, p. 15. Once the court finds the defendant incompetent, whether based on a stipulation or after a hearing, the ensuing procedures are the same. *See infra* § 2.8, p. 17.

**Involuntary Commitment.** G.S. 15A-1002(b1) appears to allow involuntary commitment proceedings to be instituted without a prior court order of incompetency when the examination report indicates that the defendant is incompetent. This procedure appears to be rarely used, however, and the defendant would appear to benefit more by obtaining a judicial determination of incompetency first. *See infra* § 2.8E, p. 20 (some time limits on confinement run from date of determination of incompetency).

## 2.7 Competency Hearings

### A. Request for Hearing

Counsel who wants a hearing to determine competency should specifically request one. As with motions for a psychiatric examination (discussed *supra* § 2.5A, p. 10), the motion should detail the specific conduct that leads counsel to question the defendant's competency. Some cases have upheld the denial of a hearing for counsel's failure to make a specific request for one or failure to supply sufficient supporting detail. *See State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994) (counsel moved for examination during trial but motion did not specifically request hearing and did not genuinely call defendant's capacity into question).

Notwithstanding some adverse cases, counsel is on strong legal ground when requesting a hearing. The main area in which trial courts are prone to reversal is for failure to order a hearing. *See, e.g., Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966) (due process right to hearing on competency); *State v. Propst*, 274 N.C. 62, 161 S.E.2d 560 (1968) (conviction vacated for failure to hold hearing); *State v. McGee*, 56 N.C. App. 614, 289 S.E.2d 616 (1982) (conviction vacated for failure to hold hearing); *Meeks v. Smith*, 512 F. Supp. 335 (W.D.N.C. 1981) (hearing required by due process and North Carolina law); G.S. 15A-1002(b) (hearing mandatory when question of capacity arises).

*See also United States v. Mason*, 52 F.3d 1286 (4th Cir. 1995) (in federal cases, party requesting hearing need not demonstrate incompetency conclusively but need only provide “reasonable cause” that defendant may be incapable of proceeding).

## **B. Nature of Hearing**

A hearing on competency may vary in its formality. At a minimum, it must afford the defendant the opportunity to present any evidence relevant to capacity to proceed. *See State v. Gates*, 65 N.C. App. 277, 309 S.E.2d 498 (1983). Generally, the court holds an evidentiary hearing, at which the parties may call and cross-examine witnesses and the court makes findings of fact. *See State v. O’Neal*, 116 N.C. App. 390, 448 S.E.2d 306 (1994) (“better practice” is for judge to make findings).

Although unlikely to occur, a judge may impanel a special jury to determine capacity to proceed. *See State v. Jackson*, 302 N.C. 101, 273 S.E.2d 666 (1981). The judge may not, however, submit the question of capacity to the trial jury. *See State v. Propst*, 274 N.C. 62, 161 S.E.2d 560 (1968).

## **C. Evidentiary Issues**

**Generally.** The rules of evidence are more relaxed at a competency hearing because a judge, not a jury, ordinarily decides competency. The judge may not base findings on inadmissible evidence, however, so counsel should continue to object when appropriate. *See State v. Willard*, 292 N.C. 567, 234 S.E.2d 587 (1977).

**Examination Results.** Either party may call the examiner from a court-ordered examination, and the examiner’s report is admissible on the question of competency. *See G.S. 15A-1002(b)*; *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981).

**Expert Opinion.** An expert may give his or her opinion on whether the defendant is able to perform the functions listed in G.S. 15A-1001(a)—that is, understand proceedings, comprehend situation, and assist in defense. The expert may specifically use those terms in testifying. The expert may not testify, however, that the defendant is or is not “competent” or “capable of proceeding,” as those terms are considered improper legal conclusions. *See State v. Smith*, 310 N.C. 108, 310 S.E.2d 320 (1984).

**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. Silvers*, 323 N.C. 646, 374 S.E.2d 858 (1989) (vacating conviction and remanding case for failure to allow defendant to present testimony of lay witnesses); *State v. Smith*, 310 N.C. 108, 310 S.E.2d 320 (1984) (expert and lay witnesses may testify in terms of factual descriptions in statute); *State v. Willard*,

292 N.C. 567, 234 S.E.2d 587 (1977) (upholding finding of competency based in part on testimony of lay witnesses).

**Counsel's Observations.** Defense counsel may offer his or her own observations of the defendant, but such evidence by itself may be unpersuasive. *See, e.g., State v. Gates*, 65 N.C. App. 277, 309 S.E.2d 498 (1983) (upholding competency finding where counsel offered own observations of defendant's behavior but presented no medical evidence).

## 2.8 Procedure After Order of Incompetency

Once the court enters an order of incompetency, defense counsel must consider the interplay of two proceedings:

- involuntary commitment proceedings; and
- the pending criminal charges.

Involuntary commitment proceedings often follow an order of incompetency. Although counsel appointed in the criminal case ordinarily does not represent the defendant in commitment proceedings, those proceedings may bear on the criminal case. Defense counsel therefore should keep track of the commitment proceedings and coordinate with the defendant's commitment lawyer. (Pursuant to several statutes, the clerk, prosecutor, and others receive notice of the status of involuntary commitment proceedings, but the statutes do not mandate notice to the defendant's criminal lawyer.)

### A. Constitutional Backdrop

In *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972), the Court found equal protection and due process violations in the indefinite confinement of a defendant found incapable of standing trial. The court held that, absent civil commitment, the state may hold a defendant no longer than a "reasonable period of time" to determine whether he or she will gain capacity to stand trial. If the defendant is neither likely to gain capacity nor subject to civil commitment, he or she must be released.

In response to *Jackson*, North Carolina adopted elaborate procedures for the civil commitment of a defendant found incompetent to stand trial. *See* G.S. 15A, art. 56 commentary. These provisions, discussed below, ordinarily control the disposition of the case after a finding of incompetency. *Jackson* issues still may arise with "permanently incompetent" defendants, however, such as mentally retarded defendants (as in *Jackson*) and others with permanent mental disabilities.

## **B. Grounds for Involuntary Commitment**

G.S. 15A-1003 provides that if the court finds the defendant incapable of standing trial, it must decide whether there are reasonable grounds to believe that the defendant meets the criteria for inpatient or outpatient involuntary commitment under G.S. Ch. 122C, Art. 5, Part 7. These criteria differ from the standard of capacity to stand trial. For inpatient commitment (confinement at a 24-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).

If the court finds grounds for commitment, it issues an order to have the defendant taken into custody for examination, the first step in the involuntary commitment process. At several points in the ensuing process, the defendant may be returned to jail to await further action in the criminal case.

## **C. Commitment Procedure for Nonviolent Offenses**

The proceedings may go down one of two tracks after the issuance of a custody order, depending on whether the defendant is charged with a violent or nonviolent offense.

**First Examination.** In cases involving nonviolent offenses, the defendant is examined locally within a day or two after issuance of the custody order. The examiner may find

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

If the examiner does not find grounds for inpatient commitment, and criminal charges are no longer pending, the defendant is released. (If the examiner recommends outpatient commitment, the district court must hold a hearing within 10 working days of the day the defendant was taken into custody for the examination; the defendant does not necessarily have counsel at that hearing.) If the examiner does not find grounds for inpatient commitment, and the defendant has pending charges and has not obtained pretrial release, the defendant may be returned to jail to await further action in the criminal case.

**Second Examination.** If the local examiner finds grounds for inpatient commitment, the defendant is taken to a 24-hour facility, which must conduct a second examination within one day of the defendant's arrival. The second examiner has the same options as above. If the examiner finds no grounds for commitment or grounds for outpatient commitment only, the defendant is released (possibly back to jail). If the examiner finds grounds for commitment (inpatient or outpatient), the district court must hold a hearing within 10 working days of the day the defendant was taken into custody. If the facility has recommended inpatient commitment, it holds the defendant pending the hearing.

The second examination may occur at any 24-hour facility described in G.S. 122C-252 (including university and veterans hospitals). Usually, the defendant goes to one of the four regional state hospitals (Broughton in Morganton, Cherry in Goldsboro, John Umstead in Butner, or Dorothea Dix in Raleigh). Each facility has special counsel to represent defendants held there. They can be reached at:

Broughton Special Counsel	828-433-2275
Cherry Special Counsel	919-731-3437
Dorothea Dix Special Counsel	919-733-5544
John Umstead Special Counsel	919-575-7578 or 7592

**Hearing on Inpatient Commitment.** At the district court hearing on inpatient commitment, the judge has the same options as above—no commitment, outpatient commitment, or inpatient commitment. (The judge also may impose a combination of inpatient and outpatient commitment.) The first two options require the defendant’s release (possibly back to jail). The judge may order inpatient commitment for an initial period up to 90 days. The court may order inpatient commitment for six-month and one-year periods thereafter. *See* G.S. 122C-271, -276.

**Termination of Inpatient Commitment.** When a defendant charged with a nonviolent offense no longer meets the criteria for inpatient commitment, the hospital must release the defendant (possibly back to jail). *See* G.S. 122C-277. The hospital must notify the clerk of court if the defendant is to be released. *See* G.S. 15A-1004(c).

#### **D. Commitment Procedure for Violent Offenses**

The procedures are similar for defendants charged with violent crimes, including assault with a deadly weapon, but special rules apply to keep the defendant in continuous custody.

**Local Examination.** If the court finds that the defendant is incompetent and that grounds exist for involuntary commitment, a law-enforcement officer must take the defendant directly to a 24-hour facility. *See* G.S. 15A-1003(a). No local examination occurs, unlike the procedure for nonviolent offenses.

**Release Pending Hearing.** The 24-hour facility 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 the defendant upon finding that he or she does not meet inpatient-commitment criteria, as it can with nonviolent offenses.

**Termination of Commitment.** If the district court imposes inpatient commitment, a hearing must be held before the commitment is terminated; the prosecutor in the criminal case may represent the state’s interest at the hearing. *See* G.S. 122C-276(a), -277(b). If

the court 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).

### **E. Disposition of Criminal Case While Defendant Incompetent**

The criminal case is not completely held in abeyance while the defendant lacks capacity to proceed. Defense counsel may pursue several options, usually at the time an order of incompetency is entered or at the time involuntary commitment proceedings are terminated.

**Dismissal of Charges by Court.** Under G.S. 15A-1008, the court may dismiss the criminal charges against an incompetent defendant if

- it appears to the court's satisfaction that the defendant will not gain the capacity to proceed;
- 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
- in the case of a misdemeanor five years have expired from the date of the determination of incapacity to proceed, and in the case of a felony ten years have expired.

This statute appears to make dismissal discretionary with the judge. When the defendant is unlikely to gain capacity, however, *Jackson v. Indiana* may provide a constitutional ground for dismissal. *Jackson* held that a defendant unlikely to gain capacity must be released if he or she does not meet civil commitment standards. The court did not decide whether the criminal charges also must be dismissed, but suggested that leaving charges open indefinitely might violate speedy trial and due process rights.

**Dismissal of Charges by Prosecutor.** Under G.S. 15A-1009, the prosecutor may dismiss the charges with leave after the court enters an order of incompetency. This option may appeal to a prosecutor, particularly in misdemeanor cases. A dismissal with leave removes the case from the docket, but outstanding process retains its validity (thus, any statute of limitations is tolled). The prosecutor may reinstitute charges by filing written notice with the defendant, defendant's counsel, and clerk of court.

The defendant still may seek dismissal by the court if the conditions discussed above are met. A dismissal by the court supersedes a dismissal with leave by the prosecutor. *See* G.S. 15A-1009(e), (f).

**Pretrial Release.** If inpatient involuntary commitment is not imposed, the court may set conditions of pretrial release, including release of the defendant to the custody of a person or organization agreeing to supervise the defendant. *See* G.S. 15A-1004(b); *State v. Gravette*, 327 N.C. 114, 393 S.E.2d 865 (1990) (person or organization taking custody of defendant must consent; court could not require probation department to supervise

incompetent defendant on pretrial release). For example, if involuntary commitment proceedings lead to outpatient commitment and return of the defendant to jail, the court may set pretrial release conditions.

*Jackson v. Indiana* would appear to require release when the defendant is unlikely to gain capacity. Any conditions on release may be unenforceable since *Jackson* would not appear to allow reincarceration for violation of the conditions.

**Other Motions.** G.S. 15A-1001(b) permits the court to go forward with any motions that defense counsel can handle without the assistance of the defendant. *See also Jackson v. Indiana* (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).

## F. Redetermination of Capacity

The court may redetermine capacity at any time during the pendency of the criminal case. *See* G.S. 15A-1007(b). The court most likely will do so in the following instances.

**During Period of Commitment.** If the hospital determines that a defendant subject to inpatient commitment has gained the capacity to proceed, the hospital must notify the clerk of court, and the court may hold a supplemental hearing to determine capacity. *See* G.S. 15A-1006, -1007(a).

**At Termination of Commitment.** If the defendant no longer meets the criteria for inpatient commitment, the court may decide to order a further competency evaluation. This practice can lead to a vicious cycle, particularly in cases involving serious charges. A defendant may be found incompetent to proceed and involuntarily committed; then found not to meet the criteria for commitment and returned to jail; again found incompetent and involuntarily committed; 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. 1485 (1991) (criticizing repeated evaluations and extended detention of defendants).

This cycle can be broken if the defendant gains the capacity to enter a plea or stand trial; qualifies for release under the statutory pretrial release provisions; obtains dismissal of the charges; or shows that he or she is unlikely to gain capacity and is entitled to release under *Jackson v. Indiana*.

*Note:* A defendant who gains capacity to proceed and is convicted should receive credit for time served while involuntarily committed or otherwise confined. *See* G.S. 15-196.1.

## 2.9 Admissibility at Trial of Results of Competency Evaluation

The admissibility at trial of the results of a court-ordered competency examination is a complicated topic, reviewed only briefly here. Several arguments, legal and factual, exist for excluding or at least limiting the use of the examination, including the defendant's statements to and the opinions formed by the examiners. But, counsel should anticipate the possibility that the results of a court-ordered competency examination may be admitted. (For a discussion of potential ways to limit the examination, *see supra* § 2.5D, p. 12.)

### A. Doctor-Patient Privilege

The doctor-patient privilege does not protect the results of a court-ordered competency evaluation. *See State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981).

### B. Fifth Amendment

Subject to some exceptions (discussed further below), the Fifth Amendment privilege against self-incrimination applies to competency evaluations and precludes use of the results at the guilt-innocence or sentencing phase of a trial. *See Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).

Although *Estelle* was a death penalty case, it should apply to noncapital cases as well. *See* 1 JOHN W. STRONG, MCCORMICK ON EVIDENCE 506 (West Pub. Co., 4th ed. 1992) (“no principled distinction between capital and other cases is possible”). Also, although *Estelle* involved a competency examination initiated by the court, it should make no difference whether the court, prosecutor, or defendant requests the examination. *See Witt v. Wainwright*, 714 F.2d 1069 (11th Cir. 1983), *rev'd on other grounds*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

### C. Sixth Amendment

The Sixth Amendment right to counsel precludes a psychiatric examination of the 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 competency examination were inadmissible at trial, reasoning that the defendant was denied the assistance of his attorney in deciding whether to submit to the examination. *See also Powell v. Texas*, 492 U.S. 680, 109 S. Ct. 3146, 106 L. Ed. 2d 551 (1989) (reversing conviction on Sixth Amendment grounds because defendant did not have notice that competency evaluation would inquire into future dangerousness for purposes of capital sentencing proceeding).

## D. Rebuttal of Mental Health Defense

If the defendant relies on a mental health defense at trial and presents expert testimony in support of the defense, the results of a court-ordered competency examination are admissible to rebut the testimony. The courts have held that the Fifth Amendment does not apply in that instance. *See Buchanan v. Kentucky*, 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987); *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *vacated on other grounds*, 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990).

These cases do not give the prosecution carte blanche, however, to introduce the results of a competency evaluation when the defendant raises a mental health defense. Under the reasoning of *Buchanan* and *Huff*, the Fifth Amendment may protect the examination results if the defendant relies on a mental health defense but does not introduce expert testimony.

The Sixth Amendment also may bar use of the examination results, even to rebut expert testimony in support of a mental health defense, if defense counsel did not have notice of the scope and nature of the competency evaluation. *Compare Delguidice v. Singletary*, 84 F.3d 1359 (11th Cir. 1996) (defense counsel did not have notice that competency evaluation would concern sanity) *with Huff* (defense counsel had adequate notice).

Courts also have held that the prosecution may only offer evidence from the competency evaluation with respect to the mental condition raised by the defendant; the evidence cannot be submitted on the issue of guilt. *See CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-3.2 commentary* (American Bar Association, 1989) (citing cases).

## E. Waiver

*Estelle* and other Supreme Court decisions involving psychiatric examinations suggest in dicta that a defendant might be able to waive his or her Fifth Amendment rights after proper *Miranda*-style warnings. In none of those cases, however, did the Court actually allow admission of the evaluation results on waiver grounds. Several arguments may be made against a waiver theory, including:

- By ordering the defendant to submit to a competency evaluation, the court effectively has compelled the defendant to cooperate with the 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, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972) (if state compels testimony, neither testimony nor its fruits may be used in criminal prosecution); *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) (involuntary statements are not admissible for any purpose).
- 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 incompetent). *See generally Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); *State v. White*, 340 N.C. 264, 457 S.E.2d 841 (1995) (citing *Simmons* with approval).

- North Carolina law should be interpreted as disallowing the use of a competency evaluation at trial except to rebut a mental health defense. *See* JOHN PARRY, MENTAL DISABILITY LAW: A PRIMER 67 (American Bar Association, 5th ed. 1995) (some jurisdictions, by statute or court decision, limit admissibility of competency evaluation).
- The facility did not adequately advise the defendant of the right to remain silent, and the defendant did not waive the right to remain silent by cooperating with the examiners. *See, e.g., Huff* (facility made inconsistent statements to defendant about confidentiality of examination; court did not address whether warnings were sufficient or whether defendant waived rights).
- The defendant's mental condition (which the court found to be in question when it ordered a competency examination) precluded a knowing and voluntary waiver of rights.