

Chapter 7:

Capacity to Proceed

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7.1

Overview

A juvenile who lacks the mental capacity to proceed may not be subjected to an adjudicatory or dispositional proceeding in juvenile court. Several provisions of the Criminal Procedure Act, “Incapacity to Proceed,” apply to the court’s determination of whether a juvenile is capable of proceeding. G.S. 7B-2401. These statutes are G.S. 15A-1001, providing that proceedings cannot go forward when the juvenile is incapacitated; G.S. 15A-1002, setting forth procedures for determination of incapacity; and 15A-1003, containing procedures for the court to determine whether civil commitment proceedings should be instituted if the juvenile is found incapable of proceeding.

In practice, evaluation of a juvenile’s capacity to proceed may be quite different from that of an adult client. A juvenile may be functioning at a lower level than an adult simply by virtue of age or immaturity. It can be difficult to determine if the juvenile is simply immature or lacks the capacity to proceed, although extreme immaturity could be grounds for a finding of lack of capacity. *See infra* 7.5B (Test of Capacity).

This chapter will review the standard for capacity to proceed, the test for capacity, judicial procedures for a hearing on capacity, and considerations for counsel in representing a juvenile whose capacity may be in question.

7.2

North Carolina Defender Manual

The North Carolina Defender Manual, published by the School of Government, explores in detail the issue of capacity to proceed in criminal cases. *See* Vol. 1, Ch. 2 of the North Carolina Defender Manual, hereinafter “Defender Manual,” at www.ncids.org. The issues and case law discussed there generally apply to juvenile proceedings, as capacity to proceed

in delinquency cases is determined pursuant to the designated statutes in the Criminal Procedure Act, G.S. 15A-1001, 15A-1002, and 15A-1003, and constitutional requirements.

This chapter is largely based on Chapter 2 of the Defender Manual, “Capacity to Proceed,” which has been adapted to take into account the juvenile court context and vocabulary. Most of the citations from the Defender Manual are to criminal cases and thus use the terms employed in criminal proceedings. These cases are applicable to juvenile cases to the extent that they involve the three relevant provisions of Chapter 15A and applicable constitutional considerations.

7.3 Terminology Used in This Chapter

Incapacity to Proceed is defined under North Carolina’s statutes to mean a juvenile who “by reason of mental illness or defect . . . is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.” G.S. 15A-1001(a). The term “incapable of proceeding” is used interchangeably. The term “incompetent” (see definition below) has a separate and distinct legal definition under current North Carolina law and is not interchangeable with “capacity,” but is sometimes used as such. Older North Carolina cases, as well as opinions from federal court and courts of other states, may also use the terms interchangeably.

Incompetent refers to an individual who has been adjudicated incompetent to make or communicate important decisions concerning one’s person, family, or property pursuant to the procedures of Chapter 35A, “Incompetency and Guardianship,” and who has been appointed a guardian pursuant to that chapter. *See* G.S. 35A-1101(7), (8).

Individualized Education Program (IEP) is the unique plan developed for each public school child with a disability who needs special education and related services. The IEP is developed by a team of qualified professionals and the child’s parents to address the specific needs of the child within the school setting. The IEP must be designed to meet the requirements of the Individuals with Disabilities Education Act (IDEA), Part B. *See A Guide to the Individualized Education Program*, U.S. Department of Education, at www.ed.gov/parents/needs/speced/iepguide/index.html.

7.4 Motions Pending Capacity Proceedings

G.S. 15A-1001(b) permits the court to go forward with any motions that the juvenile’s counsel can handle without the assistance of the juvenile pending determination of capacity to proceed. *See also Jackson v. Indiana*, 406 U.S. 715, 740–41 (1972) (indicating that counsel may proceed even with dispositive motions that do not require the defendant’s assistance, such as a motion challenging the sufficiency of the indictment).

7.5

Standard for Capacity to Proceed to Adjudication

A. Requirement of Capacity

Due process and North Carolina law prohibit the trial or punishment of a person who is legally incapable of proceeding. *See Drope v. Missouri*, 420 U.S. 162 (1975); Ch. 15A, Art. 56 commentary (North Carolina statutes on capacity to proceed codify the principle of law that a defendant may not be tried or punished if lacking mental capacity to proceed).

The requirement of capacity to proceed applies to all phases of a juvenile proceeding. A juvenile may not be “tried, convicted, sentenced, or punished” if mentally incapacitated as defined by statute. G.S. 15A-1001(a); G.S. 7B-2401.

B. Test of Capacity

Generally. G.S. 15A-1001(a) sets forth the general standard of capacity to proceed. Under the statute, a juvenile lacks capacity to proceed if, by reason of mental illness or defect, the juvenile is unable to:

- understand the nature and object of the proceedings,
- comprehend his or her situation in reference to the proceedings, or
- assist in the defense in a rational or reasonable manner.

Mental illness or defect. The above test has two parts. First, the juvenile must have a mental illness or defect. *See State v. Aytche*, 98 N.C. App. 358 (1990) (statute does not authorize general physical examination to see if physical problems exist); *but see Timothy J. v. Superior Court*, 150 Cal. App. 4th 847 (2007) (under former California Rule of Court 1498(d), minor not required to have mental disorder or developmental disability to invoke right to hearing on competency); 4 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 8A-6.4, at 89–90 (Michie Co., 2d ed. 2001) (physical disorders may impinge on brain functioning to degree affecting defendant’s mental capacity to stand trial). The California Court in *Timothy J.* found that in determining whether the juvenile was capable “of understanding the proceedings and of cooperating with counsel,” the developmental immaturity of the juvenile could be considered without proof of a mental disorder or developmental disability. 150 Cal. App. 4th at 862. The Court discussed at length testimony presented concerning the developmental stage of the juvenile’s brain and thinking processes. *Id.* at 853–54.

The North Carolina statute states that lack of capacity must be based on “mental illness or defect.” G.S. 15A-1001(a). The statute was drafted with adult cases in mind. Although immaturity in an adult, without evidence that it amounts to a mental defect such as mental retardation, might not be sufficient for an adult to be found incapable of proceeding, extreme immaturity in a juvenile could be viewed as the equivalent of a mental defect. Counsel might argue that the factors stressed by the California court—lack of physical maturity of the juvenile brain and the concurrent inability to maintain executive brain functions necessary to understand and make decisions concerning a court proceeding—are essentially a “mental

defect” for the purpose of determining capacity to proceed. Further, the gravamen of the constitutional requirement of capacity is the capacity to understand the proceedings and assist counsel, regardless of the cause. *See Timothy J., supra* (discussing constitutional test for capacity established in *Dusky v. United States*, 362 U.S. 402 (1960)).

Capabilities. Second, the mental condition must render the juvenile unable to perform at least one of the functions specified in G.S. 15A-1001(a). The existence of a mental condition alone does not necessarily mean that the juvenile lacks the capacity to proceed. *See State v. Willard*, 292 N.C. 567, 576–77 (1977) (amnesia does not per se render defendant incompetent, although temporary amnesia may warrant continuance of trial); *In re I.R.T.*, 184 N.C. App. 579 (2007) (although one evaluation noted “progressive decline in intellectual abilities,” both reports indicated juvenile could understand legal terms and procedures if explained in concrete terms); *In re Robinson*, 151 N.C. App. 733 (2002) (evidence sufficient to support court’s finding of capacity to proceed although private psychologist found moderate mental retardation and schizophreniform disorder).

This second part of the test for capacity is in the alternative. A juvenile’s inability to meet any one of the statutory conditions—ability to understand proceedings, comprehend situation, or assist counsel—bars further proceedings. *See State v. Shytle*, 323 N.C. 684 (1989); *State v. Jenkins*, 300 N.C. 578 (1980).

The cases sometimes refer to a fourth condition of capacity: the ability to cooperate with counsel to the end that any available defense may be interposed. *See, e.g., State v. Jackson*, 302 N.C. 101 (1981); *State v. O’Neal*, 116 N.C. App. 390 (1994). The North Carolina Supreme Court has held that trial courts need not make a specific finding on this fourth condition. *See Jenkins*, 300 N.C. 578 (1980). Nevertheless, the courts still appear to consider the condition to be a requirement of capacity, treating it as a subset of the statutory test. *See, e.g., Shytle*, 323 N.C. 684 (1989).

C. Medication

A juvenile may have capacity to proceed even though capacity to proceed was achieved through medication. *See State v. Cooper*, 286 N.C. 549 (1975) (medication was necessary to prevent exacerbation of mental illness and did not dull defendant’s mind). The North Carolina courts have not specifically addressed the use of medication or forced medications to achieve capacity to proceed in a juvenile delinquency proceeding. *See generally Sell v. United States*, 539 U.S. 166 (2003) (constitution allows the government to force a mentally ill defendant facing serious criminal charges to take antipsychotic drugs to render the defendant competent to stand trial if the treatment is medically appropriate, substantially unlikely to have side effects that would undermine fairness at trial, and the least intrusive way to further important governmental interests).

D. Time of Determination

The juvenile’s capacity to proceed is evaluated as of the time of the adjudicatory hearing or other proceeding. The question of capacity may be raised at any time by the juvenile, the court, or the prosecutor. *See G.S. 15A-1002(a); Drope v. Missouri*, 420 U.S. 162 (1975)

(competency issues may arise during trial). When the question of capacity arises before the adjudicatory hearing, the court should determine the question before proceeding with the hearing. *See State v. Silvers*, 323 N.C. 646, 653 (1989); *State v. Propst*, 274 N.C. 62, 69 (1968).

Because capacity to proceed is measured as of the time of the proceeding, more recent examinations or observations of the juvenile tend to carry more weight. *See State v. Silvers*, 323 N.C. 646 (1989) (conviction vacated where trial court based finding of competency entirely on psychiatric examinations conducted three to five months before trial and excluded more recent observations by lay witnesses); *State v. Reid*, 38 N.C. App. 547 (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

Incapacity to proceed distinguished from insanity defense. Incapacity to proceed is determined after a juvenile has been alleged to have committed a delinquent act and prior to or during the adjudicatory hearing on the allegations. The incapacity refers to the juvenile's ability to understand and participate in the adjudicatory hearing and other proceedings. An insanity defense relates to the juvenile's state of mind at the time the alleged delinquent act occurred. A juvenile who is "insane" at the time of hearing might be found incapable of proceeding. An insanity defense cannot be raised, however, unless the juvenile is capable of proceeding to the adjudicatory hearing. *See State v. Propst*, 274 N.C. 62 (1968) (comparing capacity to proceed with insanity).

Capacity to proceed and capacity to admit. The standard of capacity for admitting the allegations at the adjudicatory hearing is the same as the standard of capacity to proceed with the added proviso that the juvenile also must act knowingly and voluntarily in making any admission. *See G.S. 7B-2407* (When admissions by juvenile may be accepted).

F. Burden of Proof

The juvenile has the burden of proof to show incapacity to proceed. *See In re H.D.*, 645 S.E.2d 901 (2007) (unpublished), *citing State v. O'Neal*, 116 N.C. App. 390 (1994); *see also Medina v. California*, 505 U.S. 437 (1992) (burden of proof to show incompetence may be placed on defendant). The burden may not be higher than by the preponderance of the evidence. *See Cooper v. Oklahoma*, 517 U.S. 348 (1996).

7.6 Investigating Capacity to Proceed

A. Duty to Investigate

Counsel has a duty to make a “reasonable investigation” into the juvenile’s capacity to proceed to an adjudicatory hearing. *See Becton v. Barnett*, 920 F.2d 1190, 1192–93 (4th Cir. 1990) (counsel must make reasonable investigation into defendant’s capacity to proceed and must use reasonable diligence in investigating capacity; counsel may not rely on own belief that defendant was incapable of proceeding). Counsel should first try to discuss with the juvenile the issue of raising capacity and its consequences. As an officer of the court, however, counsel has a duty to raise the issue if there is a “good faith doubt” as to capacity to proceed. *See* ABA Criminal Justice Standards, Standard 7-4.2(c) (Responsibility for raising the issue of incompetence to stand trial) and Commentary; *see also infra* Appendix 7-1 (Practical Tips for Attorneys on Using Capacity, by Valerie Pearce); *see generally* 1 NORTH CAROLINA DEFENDER MANUAL § 2.3A (Ethical Considerations).

B. Guides for Assessment

Counsel must assess the juvenile’s behavior or symptoms in terms of the legal test for capacity. A primary source of information is Thomas Grisso, *Clinical Evaluations for Juveniles’ Competence to Stand Trial: A Guide for Legal Professionals* (Professional Resource Press, 2005).

C. Sources of Information

Personal interview. A face-to-face meeting—at which counsel can observe the juvenile’s speech, thinking, appearance, mannerisms, and other behavior—provides the best opportunity to assess the juvenile’s condition and its potential effect on capacity to proceed. Counsel may observe unusual or inappropriate behavior while interacting with the juvenile. The juvenile’s inability to understand a simple explanation of the proceedings, repeatedly asking the same questions, responding to internal stimuli, giddiness, or extreme sadness may be signs of an underlying condition affecting capacity to proceed.

Counsel should obtain permission from the juvenile during the meeting to talk with parents or other people who may have information about the juvenile’s condition.

Medical history. Counsel should obtain the juvenile’s medical history, including any history of mental health treatment, and ask that the juvenile and the parent, guardian, or custodian sign several original release forms for medical and other records. Parents and other caretakers may be able to provide more specific information concerning past treatment and diagnoses.

Witnesses. The juvenile’s family and friends may have helpful information about the juvenile’s condition. Other people who see the juvenile daily, including staff at the detention center if the juvenile is in secure custody, teachers, foster parents, group home staff, and social workers, may have observations relevant to the issue of capacity to proceed.

School records. School records that reflect poor academic performance, repeated suspensions, or an expulsion may be indicative of mental illness or other disability. Past or continuing

concerns about the juvenile's level of functioning may be disclosed in school records. Counsel should review report cards, disciplinary records, and other school records that describe the juvenile's behavior.

Individualized Education Program. School records are a particularly good source of information if the juvenile has an Individualized Education Program (IEP), which is mandated by the federal government for each child in public school who has been identified as having a disability requiring a special education plan. The IEP must be tailored to the juvenile's needs as determined by evaluations and assessments by qualified professionals.

Commitment proceedings. The juvenile may have been voluntarily admitted or involuntarily committed in the past. To obtain court records from prior proceedings, counsel may make a motion to the district court that heard the case. *See* G.S. 122C-54(d). For medical records not in the court file, counsel must submit a release to the appropriate hospital or other facility. Counsel also may make a motion to the juvenile court to compel production of records from other court proceedings or medical records in the possession of a nonparty. *See generally* 1 NORTH CAROLINA DEFENDER MANUAL § 4.7A (Evidence in Possession of Third Parties).

Other records. Several other types of records may contain relevant information, including prior juvenile records. Counsel should also ask whether the juvenile's parent receives a monthly payment from the Social Security Administration as a result of the juvenile's disability.

7.7 Consequences of Questioning Capacity

While counsel has a good faith duty to ensure that the juvenile is legally capable of proceeding, counsel should be aware of the potential repercussions, positive and negative, of questioning capacity.

A. Potential Benefits

Some of the benefits of questioning capacity to proceed include the following:

- The petition may be dismissed by the prosecutor.
- The examination may lead to needed treatment.
- A juvenile found incapable of proceeding cannot be adjudicated delinquent, precluding both an adjudication and the subsequent dispositional order.
- Even if the juvenile is found capable to proceed, the examination and hearing may generate evidence in support of a mental health defense, a favorable disposition, or a motion to suppress a confession on the ground that the juvenile did not knowingly and voluntarily waive *Miranda* or statutory rights.
- Information about the juvenile's mental condition may have a positive impact on discussions with the prosecutor and the juvenile court counselor.

B. Potential Adverse Consequences

Some of the adverse consequences that result from questioning competency include the following:

- The evaluation may result in disclosure of information that is damaging to the juvenile at disposition and could potentially be admitted during the adjudicatory hearing. Counsel should seek to minimize this risk by moving for an *in camera* review of the evaluation and for an order limiting the use of the evaluation. *See infra* § 7.9E (Limiting Scope and Use of Examination).
- An evaluation on capacity to proceed prior to the juvenile's making of a motion for funds for an expert (*see infra* § 7.8A (Procedures to Obtain Expert Evaluation)) may hurt the juvenile's chance for success on a motion for an expert or may result in the appointment of the examiner who performed the capacity exam.
- If found incapable of proceeding and involuntarily committed, the juvenile will be confined for some period, even though there might have been no confinement if adjudicated delinquent, or the confinement might be for a longer period than under a dispositional order, particularly if the underlying offense is a misdemeanor or the juvenile does not have a significant history of delinquency.
- The juvenile may be confined while proceedings to determine capacity are pending. *See* G.S. 15A-1002(b)(2) (court may commit defendant to state hospital for up to 60 days for evaluation, although the stay is ordinarily shorter); G.S. 15A-1002(c) (court may order defendant confined after evaluation and pending hearing). It is not uncommon for a juvenile to be placed in a detention facility pending an evaluation. Counsel should request a hearing to review secure custody and argue for release if the juvenile does not meet the statutory criteria. *See infra* § 8.5C (Criteria for Secure Custody Pending Adjudication).
- A finding of incapacity to proceed and subsequent involuntary commitment may stigmatize the juvenile.

7.8

Obtaining an Expert Evaluation

A. Procedures to Obtain Expert Evaluation

There are three ways that counsel may obtain expert assistance to evaluate capacity.

Ex parte motion. Counsel may obtain the assistance of a mental health expert for the juvenile by filing an *ex parte* motion with the court. *See* 1 NORTH CAROLINA DEFENDER MANUAL § 5.4 (Obtaining an Expert *Ex Parte*) (May 1998), at www.ncids.org. The motion does not ask the court to determine the defendant's capacity. Rather, it seeks funds for counsel to hire an expert of counsel's choosing to provide assistance on all applicable mental health issues. Once the expert has evaluated the juvenile, counsel will be in a better position to determine whether there are grounds for questioning capacity to proceed. Moving for funds for an expert affords counsel the best opportunity to obtain an expert who is well versed in

evaluating, diagnosing, and treating children and adolescents. Counsel should include in the *ex parte* motion the amount necessary to pay for expert's services. *See infra* Appendix 7-2 (Motion and Order for Funds to Hire an Expert).

One of the principal benefits of the above procedure is greater confidentiality. Because the motion is *ex parte*, it does not reveal to the prosecution that counsel has a question about the juvenile's mental condition. Also, if counsel decides not to raise lack of capacity or call the expert as a witness, the prosecution generally does not have a right to the results of the examination. *See* 1 NORTH CAROLINA DEFENDER MANUAL § 4.9C (discussing general prohibition in criminal cases on disclosure of nontestifying expert's report and circumstances in which disclosure may be allowed) (May 1998 & Supp. Sept. 1999), at www.ncids.org.

Motion requesting court to appoint a particular expert. Theoretically counsel could file a motion questioning the juvenile's capacity to proceed and asking the court to appoint a particular expert to examine the juvenile. *See* G.S. 15A-1002(b)(1) (court may appoint one or more impartial medical experts). Typically, however, the court uses the local mental health center to perform evaluations of capacity to proceed.

Motion for examination by local examiner or state facility. Counsel may begin the evaluation of capacity to proceed by obtaining an examination of the juvenile at a state or local mental health facility rather than moving for funds for an expert. *See infra* § 7.9 (Examination by Local Examiner or State Facility). Examination by a local examiner or state facility may be the only means of obtaining an expert's assistance in some cases. Counsel should ask if the local examiners use testing designed to evaluate children and adolescents and request that testing and techniques designed especially for children and adolescents be employed.

B. Choosing Which Motion to Make

In appropriate cases, counsel should consider obtaining an evaluation of the juvenile by moving *ex parte* for funds for an expert rather than moving initially for an examination at a state or local mental health facility. In determining whether to seek funds for the juvenile's own expert, counsel should consider factors such as the seriousness of the charges, the presence of other mental health issues, the importance of keeping the juvenile's statements confidential, the likelihood that the case will go to trial, and the opportunity to obtain an examiner who employs tools and techniques specifically tailored to evaluate children and adolescents.

C. Choosing an Expert

Most examiners have much more experience evaluating the capacity to proceed of adult defendants. Counsel should consider using an evaluator who employs tools and techniques specifically tailored to evaluate children and adolescents. *See* Thomas Grisso, *Clinical Evaluation for Juveniles' Competence to Stand Trial: A Guide for Legal Professionals* (Professional Resource Press, 2005) 15–16.

D. Contents of Motion

Counsel should detail the specific conduct or information that warrants funds for an expert or a capacity examination at a state or local facility, including observations of counsel. *See* Juvenile Defender/Motions & Forms/Motion And Order To Determine Competency at www.ncids.org (Juvenile Defender). If the showing contains confidential information, including information contained in the course of privileged attorney-client communications, counsel may ask the court to review the information *in camera*. If the motion is for funds for an expert, the motion and accompanying showing should always be made *ex parte*. *See infra* Appendix 7-3 (Motion and Order to Determine Competency).

7.9

Examination by Local Examiner or State Facility

Counsel may begin the evaluation of capacity to proceed by obtaining an examination of the juvenile at a state or local mental health facility (rather than moving for funds for an expert, discussed *supra* § 7.8). It is important that the examiner be someone who is trained in child development and evaluation.

A. Moving for Examination

Time limit. There is no formal time limit on a motion questioning the juvenile'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 (1973) (characterizing as "belated" a motion for initial examination two weeks before trial). A sample motion is included in Appendix 7-3 *infra*. *See also* Form AOC-CR-208 (Motion and Order Committing Defendant to Dorothea Dix for Examination on Capacity to Proceed) (March 2007), at www.nccourts.org/Forms/Documents/1023.pdf.

Second examination. The juvenile may be able to obtain a second examination if the report from the first examination has become stale or the juvenile's condition has changed. *See supra* § 7.5D (Time of Determination).

Motion for examination by prosecutor. The prosecution may request an evaluation of capacity to proceed. As with a motion by the juvenile for an examination, the prosecutor must detail the specific conduct warranting an examination. *See* G.S. 15A-1002(a). Counsel for the juvenile should be given notice of the motion. *See State v. Jackson*, 77 N.C. App. 491 (1985) (disapproving of entry of order for examination without notice to defendant); *see also infra* § 7.12B (discussing Sixth Amendment right to notice of examination). If the motion is granted, the juvenile may be able to limit the scope of the examination. *See infra* § 7.9E (Limiting Scope and Use of Examination).

B. Who Does Examination

Misdemeanors. If the underlying offense alleged is a misdemeanor, the juvenile must first be evaluated by a local forensic screener. *See* G.S. 15A-1002(b)(1), (2). The local screener may

find the juvenile capable or incapable of proceeding or may recommend that the juvenile be evaluated further at a State psychiatric facility. Local examinations tend to be short, consistent with the idea that they serve as a screening device. They may last less than a day, primarily involving an interview of the juvenile.

Felonies. If the underlying offense alleged is a felony, the court may order a local evaluation or may commit the juvenile to a State psychiatric facility. To commit the juvenile to a State facility without ordering a local evaluation first, the court must find that commitment is more appropriate. *See* G.S. 15A-1002(b)(2).

Courts do not generally use the option of commitment to a State facility, as there is no forensic unit for juveniles at any of the four State psychiatric hospitals. The juvenile statute specifically prohibits placement where the juvenile will come in contact with adults committed for any purpose. G.S. 7B-2401.

C. Providing Information to Examiner

Counsel should ensure that the examiner has access to relevant information concerning capacity to proceed, and may provide copies of records, if necessary. Observations of counsel concerning the juvenile's capacity that might be relevant may also be provided.

The National Juvenile Defender Center recommends that counsel submit a written request to the examiner outlining the specific areas to be addressed in the evaluation. *See* Juvenile Defender Delinquency Notebook at 51–55 (National Juvenile Defender Center, June 2006), at www.njdc.info/delinquency_notebook/interface.swf.

D. Confidentiality

Subject to certain exceptions, an examination at a state or local mental health facility is confidential. *See* G.S. 122C-52 (Right to confidentiality). Disclosure is allowed to a “client” (“an individual who is admitted to and receiving service from, or who in the past had been admitted to and received services from, a facility”) or pursuant to a written consent to release of information to a specific person, in certain court proceedings, and for treatment and research. *See* G.S. 122C-53 through 122C-56. For juvenile court 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 subsection F below. *See* G.S. 122C-54(b).
- The results of the examination, including statements by the juvenile, could be admissible at subsequent court proceedings. *See infra* §§ 7.11 (Hearing on Capacity to Proceed), 7.12 (Admissibility at Adjudication of Results of Capacity Evaluation); *see also* G.S. 122C-54(a1) (use in involuntary commitment proceedings).
- The facility may disclose otherwise confidential information if a court of competent jurisdiction orders disclosure. *See* G.S. 122C-54(a).

E. Limiting Scope and Use of Examination

A central part of any court-ordered examination is the interview of the juvenile. The interview likely will cover the alleged offense, as the juvenile's understanding of the allegations may bear on capacity to proceed. For suggestions on keeping confidential information from general disclosure, see Lourdes M. Rosado and Riya S. Shah, *Protecting Youth from Self-Incrimination when Undergoing Screening, Assessment and Treatment within the Juvenile Justice System* (2007), at www.jlc.org/files/publications/protectingyouth.pdf.

Discussed below are options for limiting the scope of an examination. For a discussion of the admissibility of the examination results, see *infra* § 7.12.

Refusal to discuss offense. The North Carolina courts have not addressed the question of whether the juvenile may refuse to discuss the alleged offense when the examination concerns only capacity to proceed. The juvenile's refusal may result in an incomplete report, however, and may make it difficult to show incapacity.

Presence of counsel. The North Carolina Supreme Court has held that there is no constitutional right to the presence of counsel during an examination concerning capacity to proceed. *State v. Davis*, 349 N.C. 1, 20 (1998). Counsel may request, however, that the examiner allow counsel to be present during the interview portion of the evaluation. If the examiner refuses, counsel may ask the court to exercise its discretion to order that counsel be permitted to attend the interview portion of the examination.

Court order. Counsel for the juvenile may request a court order limiting the scope and use of the evaluation. Such an order might provide that the examiner is to report to the court on the issue of capacity to proceed only and is not to inquire into any area not necessary to that determination, that the results are to be used for the determination of capacity only and for no other purpose, and that information obtained during the evaluation regarding the alleged offense may not be divulged to the prosecution. Additionally, counsel should request that the evaluation be submitted and remain under seal in the juvenile court file, to be disclosed only pursuant to further order of the court.

F. Report of Examination

A copy of the examination report is to be provided to the clerk of court in a sealed envelope addressed to the attention of the presiding judge. G.S. 15A-1002(d). Additionally, a copy of the report is to be provided to defense counsel or to the defendant if not represented by counsel. *Id.* G.S. 15A-1002(d) then states 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." This statutory scheme contemplates that the court and the defense are to get a copy of the report automatically after a capacity examination, but that the prosecutor is to get a copy of the report only if capacity is questioned after the examination and further court proceedings are necessary.

The above-quoted provision of G.S. 15A-1002(d) was intended by the General Assembly to limit the prosecution's access to capacity evaluations. Previously, the statute provided for reports to be sent automatically to the defense and the prosecution. See S.L. 1979-1313

(S 941). In 1985, however, the General Assembly added the current language of the statute as 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.” S.L. 1985-588 (S 696). Therefore, the prosecutor should receive a copy of the evaluation only if capacity continues to be an issue and a hearing is necessary.

In 2003, the General Assembly amended G.S. 122C-54(b) to require facilities to disclose a capacity examination as provided in G.S. 15A-1002(d). This change was part of a larger act dealing with mental health system reform. *See* S.L. 2003-313, sec. 2 (H 826), at www.ncga.state.nc.us/Sessions/2003/Bills/House/HTML/H826v4.html. Previously, G.S. 122C-54(b) stated that a facility “may” send the capacity report to the specified persons as provided in G.S. 15A-1002(d). Now, G.S. 122C-54(b) provides that the facility “shall” send the report as provided in G.S. 15A-1002(d). Thus, the disclosure provisions in G.S. 122C-54(b) continue to be linked to the requirements of G.S. 15A-1002(d), authorizing the facility to disclose a capacity examination report only to the extent provided in G.S. 15A-1002(d).

Note: It appears that some facilities have interpreted the 2003 change to G.S. 122C-54(b) as authorizing automatic disclosure of capacity evaluations to the prosecutor. Therefore, when requesting a capacity evaluation, defense counsel should ask the court to enter an order prohibiting the facility and examiners from disclosing the evaluation to the prosecutor except on further order of the court.

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.

7.10

Post-Examination Procedure

A. After Examination Finding Juvenile Capable of Proceeding

G.S. 15A-1002(b) states that a hearing “shall” be held after a court-ordered evaluation of capacity to proceed, but a hearing may not occur if the evaluation states that the juvenile is capable of proceeding and counsel does not request a hearing. The court must initiate a hearing on its own motion only when the evidence suggests that the juvenile lacks capacity to proceed. *See State v. Heptinstall*, 309 N.C. 231 (1983) (judge has constitutional duty to initiate competency hearing when evidence indicates that defendant may be incompetent); *State v. Young*, 291 N.C. 562 (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 Juvenile Incapable of Proceeding

The provisions of Chapter 15A-1004 through 15A-1009, which list the options available for resolution of a criminal case when the defendant is found incapable of proceeding, are not

incorporated into the Juvenile Code. *See* G.S. 7B-2401. Counsel may consider the following alternatives.

Dismissal. Counsel may advocate to the prosecutor that dismissal is the appropriate resolution of the case when the juvenile lacks capacity to proceed. Arrangement for treatment or other plans to address the juvenile's underlying problems will bolster this argument. Although there is no specific provision in the Juvenile Code for the prosecutor to dismiss the petition on a finding of lack of capacity, there is no bar to doing so and it would be within a prosecutor's authority. Dismissal is most appropriate if the juvenile's incapacitating condition is permanent or long-term, or if the juvenile is in ongoing or residential treatment. *See also* 1 NORTH CAROLINA DEFENDER MANUAL § 2.8A (May 1998) (discussing constitutional grounds for dismissal of charges against defendant who is unlikely to gain capacity to proceed), at www.ncids.org.

Hearing on capacity to proceed. If the prosecutor is unwilling to stipulate to lack of capacity, or the court is unwilling to accept a stipulation, counsel must request a formal hearing on the juvenile's capacity to proceed. G.S. 15A-1002(b).

7.11

Hearing on Capacity to Proceed

A. Request for Hearing

A hearing on capacity is typically calendared on receipt of the examiner's report, but if one has not been calendared, counsel should specifically request a hearing on capacity to proceed. Some criminal 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 (1994) (counsel moved for examination during trial, but motion did not specifically request hearing and did not genuinely call defendant's capacity into question).

B. Nature of Hearing

A hearing on capacity to proceed must, at a minimum, afford the juvenile the opportunity to present any evidence relevant to capacity to proceed. *See State v. Gates*, 65 N.C. App. 277 (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 (1994) ("better practice" is for judge to make findings).

C. Evidentiary Issues

Generally. The rules of evidence are more relaxed at a hearing on capacity to proceed than at an adjudicatory hearing. 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, 574-75 (1977) ("safer practice" for court to follow rules of evidence during hearing on pre-trial motion).

Examination results. Either party may call the examiner from a court-ordered examination, and the examiner's report is admissible on the question of capacity to proceed. *See* G.S. 15A-1002(b); *State v. Taylor*, 304 N.C. 249 (1981).

Expert opinion. An expert may give an opinion on whether the juvenile is able to perform the functions listed in G.S. 15A-1001(a): to understand the proceedings, comprehend the situation, and assist in the defense. The expert may specifically use those terms in testifying. The expert may not testify, however, that the juvenile is or is not "competent" or does or does not have the "capacity to proceed," as those terms are considered improper legal conclusions. *See State v. Smith*, 310 N.C. 108, 114–15 (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 juvenile. Further, if they have a reasonable opportunity to form an opinion, lay witnesses may give their opinion about whether the juvenile is able to perform the functions listed in G.S. 15A-1001(a). *See State v. Silvers*, 323 N.C. 646 (1989) (vacating conviction and remanding case for failure to allow defendant to present testimony of lay witnesses); *State v. Smith*, 310 N.C. 108 (1984) (expert and lay witnesses may testify in terms of factual descriptions in statute); *State v. Willard*, 292 N.C. 567 (1977) (upholding finding of competency based in part on testimony of lay witnesses). If the court disallows the testimony of the lay witness, counsel must make an offer of proof to preserve the testimony of the witness in the event of an appeal. *In re H.D.*, 645 S.E.2d 901 (2007) (unpublished) (although proper foundation laid to ask opinion of lay witness, issue not preserved for appellate review because no offer of proof).

Counsel's observations and opinion. Defense attorneys may offer their own observations and opinions about the juvenile's capacity, but such statements without more may be unpersuasive and may not even be permitted. *See State v. Gates*, 65 N.C. App. 277 (1983) (upholding capacity finding where counsel offered own observations of defendant's behavior but presented no medical evidence); *In re H.D.*, 645 S.E.2d 901 (2007) (unpublished) (counsel's statement that he felt juvenile lacked capacity was not competent evidence and did not provide basis for reversing finding of capacity; Court also found no error in trial court's ruling that counsel could not testify about his juvenile client's capacity unless he withdrew from representation); *but see State v. McRae*, 163 N.C. App. 359 (2004) ("Because defense counsel is usually in the best position to determine that the defendant is able to understand the proceedings and assist in his defense, it is well established that significant weight is afforded to a defense counsel's representation that his client is competent"); N.C. Rules of Professional Conduct, Rule 3.7(a)(3) (lawyer may act as advocate at trial in which lawyer is likely to be necessary witness if disqualification of lawyer would work substantial hardship on client), Rule 1.14(c) (lawyer is impliedly authorized to reveal confidential information about client with diminished capacity to extent reasonably necessary to protect client's interest).

D. Objection to Finding of Capacity

To ensure that the issue is preserved for appeal, counsel should object to a finding of capacity to proceed on entry of the order at the conclusion of the capacity hearing and again at the beginning of the adjudicatory hearing. *In re Pope*, 151 N.C. App. 117 (2002). In *Pope*,

although the juvenile's attorney filed a motion alleging incapacity to proceed and an affidavit in support of the motion, which in most contexts would be sufficient to preserve the issue for appeal, the Court held that counsel had waived the issue by not objecting to the finding of capacity after the hearing or objecting to capacity at the adjudicatory hearing. This ruling appears to resurrect the requirement that counsel state an "exception" to the court's ruling, at least with respect to a finding of capacity. *Compare infra* § 11.2C (Renewal of Objection at Hearing) (counsel must object to evidence that was the subject of an unsuccessful suppression motion when the evidence is offered at the adjudicatory hearing).

E. Effect of Finding of Incapacity by Court

Currently, there is no authority that sets out the court's options when a juvenile is found incapable of proceeding. In most jurisdictions, the charges are dismissed without leave. In other jurisdictions, the charges are dismissed with leave.

While the court may hospitalize a juvenile after making findings that the juvenile requires commitment, there doesn't seem to be any procedure by which the juvenile is brought back to court after the juvenile becomes "capable." *See generally* NORTH CAROLINA CIVIL COMMITMENT MANUAL (2006).

7.12

Admissibility at Adjudication of Results of Capacity Evaluation

The admissibility at the adjudicatory hearing of the results of a court-ordered capacity 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 juvenile's statements to and the opinions formed by the examiners. Although evidence from the examination may be less likely to be offered or admitted in juvenile court for issues other than capacity, counsel should anticipate the possibility that the results of a court-ordered examination of capacity to proceed may be admitted. *See supra* § 7.9E (Limiting Scope and Use of Examination).

A. Doctor-Patient Privilege

The doctor-patient privilege does not protect the results of a court-ordered evaluation of capacity to proceed. *See State v. Williams*, 350 N.C. 1, 20-21 (1999); *State v. Taylor*, 304 N.C. 249, 271-72 (1981).

B. Fifth and Sixth Amendment Protections

Subject to certain key exceptions (discussed in C, below), the Fifth Amendment privilege against self-incrimination generally applies to evaluations of capacity to proceed and precludes use of the results at the guilt-innocence or sentencing phase of a criminal trial. *See Estelle v. Smith*, 451 U.S. 454 (1981).

The Sixth Amendment right to counsel also precludes a psychiatric examination of the juvenile without notice to the juvenile's counsel of the scope and nature of the examination. *Estelle*, 451 U.S. 454, 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.

C. Rebuttal of Mental Health Defense

If the juvenile relies on a mental health defense and presents expert testimony in support thereof, the results of a court-ordered examination on capacity to proceed are admissible to rebut the testimony. The courts have held that the Fifth Amendment does not apply in this instance. *See Buchanan v. Kentucky*, 483 U.S. 402, 422–23 (1987); *State v. Huff*, 325 N.C. 1, 44 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990); *see also State v. Atkins*, 349 N.C. 62, 107–08 (1998) (no violation of Fifth Amendment by prosecution's use of capacity examination to rebut mental health evidence offered by defendant at sentencing phase of capital trial). The courts have also held that the Sixth Amendment does not bar use of the examination results because counsel should have anticipated and advised the client that the examination could be used to rebut a mental health defense. *See State v. Davis*, 349 N.C. 1, 43–44 (1998).

Under the reasoning of *Buchanan* and *Huff*, the Fifth Amendment may protect the examination results if the juvenile relies on a mental health defense but does not introduce expert testimony. Courts have also held that the prosecution may only offer evidence from the evaluation of capacity to proceed 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).

D. Waiver

Estelle v. Smith and other Supreme Court decisions involving psychiatric examinations suggest in dicta that a defendant (or juvenile respondent) might be able to waive Fifth Amendment rights after proper *Miranda*-style warnings. 451 U.S. 454 (1981). In none of those cases, however, did the Court actually allow admission of the evaluation results based upon a waiver of rights, and this dicta is unlikely to be followed.

Counsel should argue against any suggestion that a juvenile could waive this important constitutional right in the context of a capacity evaluation. *See* 1 NORTH CAROLINA DEFENDER MANUAL § 2.9E (Waiver) (May 1998 and Supp. Sept. 1999) (discussing authorities and arguments against waiver).

Appendix 7-1

Practical Tips for Attorneys on Using Capacity

By Valerie Pearce

1. Meet with client as soon as possible after appointment to case.
2. Take time to get to know client, establish rapport and trust. (See interview tips and information about what information to look for in the interview)
3. Observe client and family members.
4. After talking with client, interview family and other interested parties and obtain as much detailed information as possible.
5. Get releases signed for records.
6. Obtain and review discovery, including written statements and audio/video recordings of statements.
7. Decide if there is competency to proceed, capacity to proceed, or capacity limited to suppression issue.
8. If so, file appropriate motions for evaluations.
 - Evaluations should be completed by a competent, experienced evaluator knowledgeable about juvenile capacity. The evaluator must be skilled at doing culturally sensitive assessments of adolescent development. Mental health professionals qualified to diagnose mental disorders in adults are not necessarily qualified to identify adolescent developmental disabilities or mental illness. Be particularly attentive to qualifications of mental health examiners and the quality of their evaluations. You may need to obtain an order for the court to pay for a specific examiner who is qualified to do these types of evaluations in children. An expert witness will be helpful in explaining the research and its implications in juvenile court.
9. Gather complete records from the Department of Social Services, Schools, Medical records, Mental Health and Developmental Disability records, Substance Abuse records, Department of Juvenile Justice records, any psychological or psychiatric testing, including IQ tests, Special education records and IEP's, any written or oral statements made by the juvenile, any audio or video recording of interviews, investigator notes of all officers involved in interviewing, investigating, or transporting the juvenile, detention records, case management records, and any other agency or program involved with the juvenile that may be relevant.
10. You may need court orders to obtain some records.
11. Provide records to the evaluator.

12. Go over the statements and any audio or video recordings with a fine tooth comb, paying close attention to the interrogation environment, tone of voice, verbal and non verbal communication between the juvenile and the officers, terms used, and observations of the juvenile's reactions.
13. File a written motion to suppress with an affidavit and request that a pre-trial hearing be set.
14. Consider putting together a memorandum of law to provide to the court, as well as copies of case law and research articles on this issue.
15. Be specific and detailed in laying out the circumstances for the judge that show that this was NOT a voluntary, knowing, or intelligent waiver.
16. Prepare for the hearing and subpoena witnesses. Use records and have copies for the court when helpful
17. Prepare your expert. The expert will need to be able to explain the research in simple layman terms and how it applies in this particular case.
18. Decide whether or not you will put the juvenile on the stand and if so, prepare him for what to expect in the courtroom.
19. Be prepared for adverse reactions from the Court and from court personnel. Be prepared to hear such comments as;
 - "If you do this, you will open up the floodgates."
 - "Are you going to raise capacity in every case?"
 - "This is just juvenile court, this court is about treatment and not punitive."
 - "The child needs to accept consequences for his actions and this is a door to services"
 - "Why are you trying to make this court like adult court?"
 - "This is just a delay tactic."
 - "This is a waste of court time and money."

Some suggested responses:

- "It is our job as juvenile defenders to ensure that the most vulnerable in our society are given every protection allowed under the Constitution."
- "Justice naturally requires that we assure accuracy. It would be unfair to the alleged victims and to the courts if this child made statements that were inaccurate and the real suspects went unpunished because we assumed that the statements were true."

Keep the court focused on this individual child and their individual circumstances.

20. Just because a child says they understand does not make it true.
21. The ability to read does not equal understanding.
22. The law presumes that children under the age of 18 are not capable of deciding about medical treatment, entering into binding legal contracts, or operating automobiles.

Why then do we assume that they are capable of understanding complicated legal concepts and waive their constitutional rights?

23. When involved in the suppression hearing, be sure to flesh out all of the details that add up to the totality of the circumstances. Most officers have not been trained on how to interview children. They are focused on obtaining a confession in order to prove their theory of the case and are trained in using adult tactics. Focus on what they did not pick up on and what they did not do as well as what they said and did in the interrogation of the child. Keep the focus on the fact that this was a “child” and not an adult.
24. If the juvenile client takes the witness stand, keep the child focused on how they felt and what their perception was of the interrogation. You want the judge to see through the eyes of the child.
25. If the judge denies the motion to suppress, continue to object for the record so that you do not waive the issue at trial and preserve the issue for appeal.

of money for an expert's assistance ex parte 470 U.S. at 82, 84 L.Ed. 2d at 66.

4) The North Carolina Supreme Court reiterated the rule of *Ake* in *State v. Ballard*, 333 N.C. 515 (1993), in which the court reversed the defendant's murder conviction for failure of the trial court to allow the defense to make an ex parte showing of the need for the assistance of an expert witness.

5) Privately employed counsel representing a non-indigent juvenile would not be required to reveal to the prosecution her employment of or consultation with an expert witnesses, except as required by the rules of discovery. Equal protection guarantees of the United States Constitution and of the North Carolina Constitution require that appointed counsel not be forced to reveal their thoughts, reasoning and strategy as to expert assistance to the State during a hearing on application to the court for funds for those experts.

6) Further, for the court to require an in-court showing of the need for expert assistance would pose a risk to the juvenile's privilege against self-incrimination and to confidential communications between attorney and client.

7) After speaking with the Juvenile and otherwise reviewing the case, counsel has reason to believe that an expert in the field of psychology, psychiatry and/or medical testing is crucial to the preparation of his defense. See *Williams v. Martin*, 618 F. 2d 1021 (4th Cir. 1980) (the obligation of the government to provide an indigent defendant

with the assistance of an expert is firmly based on the Equal Protection Clause).

8) The State has used and is expected further to utilize the services of numerous experts, including criminal investigators, medical experts, and others in the investigation, preparation and trial of this case.

9) Without the funds to hire experts to conduct investigations necessary for the preparation of a defense, the Juvenile's constitutional rights to a fair trial and to present a defense are rendered meaningless. *See, e.g., Westbrook v. Zant*, 704 F.2d 1487, 1496 (11th Cir. 1983) (permitting an indigent defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence is unavailable).

10) The Juvenile is entitled to expert assistance to assure him of his rights under the North Carolina Constitution, Article I, Sections 14, 23, and 27 as well as his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. These rights include that of effective assistance of counsel, to be confronted by the witnesses against him and to obtain witnesses in his favor, to present a defense, to due process, to equal protection, and to individual, reliable sentencing.

11) Because of the nature of the charges and the age and mental characteristics of the Juvenile, an expert in the areas of psychology or psychiatry with a specialization

in cognitive functioning is essential to the preparation of an adequate defense and to a fair trial and is a necessary expense of representation under N.C. Gen. Stat. § 7A-450.

12) The Juvenile requests that the Court authorize him to spend up to [AMOUNT] for the consultation with such an expert in this case.

Wherefore, the Juvenile, requests this Honorable Court enter an Order authorizing him to retain the services of a qualified expert for the preparation of his case and to expend no more than [AMOUNT] for this purpose.

This the [] day of [], [].

[ATTORNEY]
[ADDRESS]
[CITY, STATE, ZIP]
[TELEPHONE]

STATE OF NORTH CAROLINA
[] COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. []

IN THE MATTER OF)
[JS, A JUVENILE])

) ORDER EX PARTE

This motion came on to be heard upon motion of the attorney for the Juvenile and was heard by the undersigned District Court Judge and for good cause shown and detailed in the Juvenile's Motion, it is ORDERED, ADJUDGED and DECREED as follows:

1. Counsel for the Juvenile is authorized to retain [EXPERT] as investigator to assist him and that the State of North Carolina shall pay for such services and expenses in the amount of [AMOUNT] an hour, not to exceed [AMOUNT].

2. If counsel demonstrates need for further services of the investigator, he shall seek leave of this court.

3. The Order and accompanying Motion and Affidavit are to be sealed and placed in the record.

This the [] day of [], [].

[JUDGE]
District Court Judge

Appendix 7-3

Motion and Order to Determine Competency

STATE OF NORTH CAROLINA		IN THE GENERAL COURT OF JUSTICE
[] COUNTY		DISTRICT COURT DIVISION
		FILE NO. []
STATE OF NORTH CAROLINA)	
)	MOTION AND ORDER TO DETERMINE
v.)	COMPETENCY
)	
[JS, A JUVENILE])	

NOW COMES the Juvenile, by and through his attorney, and requests this Honorable Court to grant him a competency determination. In support of said motion the Juvenile states the following:

BACKGROUND

1. On [date], the Juvenile was charged with [CHARGE], in violation of N.C. Gen. Stat. § [STATUTE NUMBER].
2. Juvenile’s counsel, [name of counsel], was assigned to represent him on [date].
3. On [DATE] at approximately [TIME], Counsel visited JS at the home of his grandmother.
4. Throughout the interview, JS seemed very distracted and preoccupied and appeared unable to concentrate. While Counsel was interviewing JS and explaining the pending charges to him, JS was inattentive and at times appeared confused. When she asked JS to read the police

- report with her, JS refused and asked her to read it to him. While Counsel read the police report, JS did not pay attention but instead looked away and fidgeted with his hands and with nearby objects. *Id.*
5. There were several times during their meeting when Counsel had to insist that JS focus on her instead of watching television. During their conversations, when Counsel repeatedly asked JS to look into her eyes, he refused, responding, "I can't do it!" *Id.*
 6. After interviewing JS, Counsel had serious questions about his ability to comprehend and understand on a rational level, as JS had persistently exhibited an extreme lack of concern, motivation, and appreciation for the ramifications of his decisions and actions. *Id.*
 7. That same evening, Counsel spoke with JS's grandmother who told her that JS has an IQ of 68 and that he is considered borderline mentally-retarded. His grandmother also stated that JS has been diagnosed with attention-deficit hyperactivity disorder (ADHD) and is prescribed medication for the condition. *Id.*
 8. His grandmother told Counsel that JS attends school regularly but has been suspended several times for disrupting the class and "acting out" with his teachers. JS has told his grandmother that he often finds it impossible to control his actions and that he isn't always aware of what is going on around him. *Id.*

9. As a result of the foregoing, Counsel has grave concerns about JS's capacity to fully understand the charges pending against him. Counsel questions whether JS is capable of understanding these charges and assisting her in his defense. Counsel therefore requests an evaluation to determine her client's ability to proceed with this case.

ARGUMENT

10. As set out in G.S. § 15A-1001(a) and as noted in *State v. McCoy*, 303 N.C. 1 (1981), the test of a defendant's mental capacity to stand trial is whether "by reason of mental illness or defect, he is unable to understand the nature and object of the proceedings against him, to comprehend his situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. See also *State v. McRae*, 139 N.C. App. 387 (2000) (trial court erred in not conducting competency hearing).

11. Therefore, as a result of her observations of and interactions with JS, and supported by the information provided by his grandmother, counsel contends that a psychological assessment of JS is necessary to determine whether JS has the capacity to proceed.

WHEREFORE, the Juvenile prays that this Honorable Court:

A. Grant him an assessment before proceeding with the charges brought against him.

B. Grant him any other mental or psychological evaluations that are deemed just and proper for effective defense in this case.

This the [] day of [], [].

[Attorney]
 [Address]
 [City, State, Zip]
 [Telephone Number]

* * * * *

Certificate of Service

I hereby certify that a copy of the foregoing motion was served on the District Attorney for the [NUMBER], Judicial District by deposit of said copy with [NAME], Assistant District Attorney.

This the _____ day of _____ [YEAR].

[ATTORNEY]

STATE OF NORTH CAROLINA
[] COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. _____

STATE OF NORTH CAROLINA)
)
 v.)
)
 [JS, a Juvenile])

ORDER TO DETERMINE COMPETENCY

This matter coming before the undersigned district court judge for hearing on the Juvenile's Motion to Determine Competency, upon good cause shown, the Court finds as follows:

On [DATE], the Juvenile was charged with [CHARGES], in violation of N.C. Gen. Stat. § [STATUTE NUMBER].

1. The Juvenile is represented by [ATTORNEY].
2. For good cause shown, the Court has found that the Juvenile should be evaluated for competency before proceeding to adjudication.
3. Pursuant to the Motion to Determine Competency filed in this case on [DATE], the Court finds that the Juvenile is in need of a psychological assessment to determine whether he has the capacity to proceed to adjudication.

Therefore, it is ordered that the Juvenile be so evaluated.

This the [] day of [], [].

[JUDGE]
District Court Judge

