

2.1 Standard for Capacity to Proceed to Trial

A. Requirement of Capacity

Due process and North Carolina law prohibit the trial and punishment of a person who is legally incapable of proceeding. *See Drope v. Missouri*, 420 U.S. 162 (1975); G.S. Ch. 15A, art. 56 Official Commentary (recognizing that North Carolina statutes on capacity to proceed codify the principle of law that a criminal defendant may not be tried or punished when he or she lacks the capacity to proceed).

The requirement of capacity to proceed applies to all phases of a criminal case. No person may be “tried, convicted, sentenced, or punished” if he or she is incapable of proceeding. G.S. 15A-1001(a).

B. Test of Capacity

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

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

Mental illness or defect. The above test has two parts. First, the defendant must have a mental illness or defect. Conditions that do not constitute a mental illness or defect have been found not to be a basis for an incapacity finding. *See State v. Brown*, 339 N.C. 426 (1994) (finding that trial court could conclude that defendant was capable of proceeding where capacity examination indicated that defendant’s attitude, not a mental illness or defect, prevented him from assisting in his own defense); *State v. Aytche*, 98 N.C. App. 358 (1990) (statute does not authorize general physical examination to see if physical problems exist). *But cf. State v. McCoy*, 303 N.C. 1, 18 (1981) (defendant was experiencing headaches as result of being wounded, suggesting that physical condition could be cause of incapacity, but evidence showed that the defendant still was capable of proceeding); 4 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 8A-6.4, at 89–90 (2d ed. 2002) (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 incapable of proceeding. *See State v. Willard*, 292 N.C. 567 (1977) (amnesia does not per se render defendant incapable of proceeding, although temporary amnesia may warrant continuance of trial); *State v. Coley*, 193 N.C. App. 458 (2008) (testimony that defendant suffered from dementia and an untreated mental illness not dispositive on issue of capacity in light of other evidence that defendant’s mental deficits did not negate his capacity to stand trial),

aff'd per curiam, 363 N.C. 622 (2009); *State v. McClain*, 169 N.C. App. 657, 663–65 (2005) (defendant's mental retardation did not necessarily render him incapable of proceeding).

This second part of the test for capacity 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 (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 supreme court has held that trial courts need not make a specific finding on this fourth condition. See *Jenkins*, 300 N.C. at 583 (decided in 1980). Nevertheless, the courts still appear to consider the condition to be a requirement of capacity, treating it as a subset of the statutory test. See, e.g., *Shytle*, 323 N.C. at 688–89.

C. Medication

A defendant may have the capacity to proceed even though his or her capacity depends on medication. See *State v. Buie*, 297 N.C. 159, 161 (1979) (upholding finding that defendant was capable of proceeding and stating that the “fact that defendant was competent only as a result of receiving medication does not require a different result”); *State v. Cooper*, 286 N.C. 549 (1975) (medication was necessary to prevent exacerbation of mental illness and did not dull defendant's mind), *disapproved on other grounds in State v. Leonard*, 300 N.C. 223 (1980); *State v. McRae*, 163 N.C. App. 359 (2004) (defendant capable throughout trial while taking antipsychotic medication); cf. *State v. Martin*, 126 N.C. App. 426 (1997) (defendant remained capable to proceed although he had stopped taking his medication for schizophrenia and his symptoms may have begun to return).

The North Carolina courts have not specifically addressed the use of forcible medication to make a defendant capable of proceeding. See *State v. McRae*, 139 N.C. App. 387 (2000) (rejecting claim that defendant was involuntarily medicated because evidence about how medicine was administered was too speculative); *State v. Monk*, 63 N.C. App. 512 (1983) (trial judge committed the defendant to Dorothea Dix Hospital for a capacity determination and ordered treating physician to administer medication needed to make defendant capable; defendant argued on appeal that forcible medication violated his constitutional rights, but court of appeals found it unnecessary to resolve question because medication had terminated three months before trial and defendant's right to appear before jury unimpaired by psychotropic drugs was not implicated).

One possible explanation for the absence of case law on this issue is North Carolina's approach to capacity determinations, which first involves an evaluation of the defendant's capacity to proceed and thereafter involuntary commitment and treatment. See *infra* § 2.8B, Initial Determination of Grounds for Involuntary Commitment. At one time,

defendants evaluated for capacity at a state facility may have received treatment as part of the process. *See generally* G.S. 15A-1002(b)(2) (authorizing court to commit defendant to state facility for up to 60 days for “observation and treatment”). Now, however, treatment is generally not a component of the capacity evaluation process. If the defendant is found incapable to proceed and is thereafter involuntarily committed, he or she receives treatment as part of the commitment, which may include administration of medication without the defendant’s consent. *See* G.S. 122C-57(e) (allowing forcible medication for involuntarily committed patient in circumstances specified). Although medication administered during an involuntary commitment may address the causes of the defendant’s incapacity to proceed, the statute does not explicitly authorize forcible medication for that purpose.

For cases addressing the constitutionality of forcible medication, see *Sell v. United States*, 539 U.S. 166 (2003) (U.S. Constitution allows the government to force a mentally ill defendant facing serious criminal charges to take antipsychotic drugs to render the defendant capable of standing 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 government interests; forcible medication was impermissible in this case in absence of consideration of these interests); *Riggins v. Nevada*, 504 U.S. 127 (1992) (discussing circumstances that would support forced administration of antipsychotic drugs); *United States v. White*, 620 F.3d 401 (4th Cir. 2010) (concluding that government’s interest in prosecuting defendant did not warrant forcible medication to make defendant capable to stand trial; special circumstances, including that defendant was nonviolent and had served a significant amount of her sentence, mitigated the government’s interest). *See also* 4 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 8A-4.2, at 51–59 (2d ed. 2002 & Supp. 2012) (discussing the use of medication to achieve capacity to proceed).

Legislative note: Effective for offenses committed on or after December 1, 2013, G.S. 122C-54(b) requires the report of a capacity evaluation to include a treatment recommendation as well as an opinion on whether a defendant found incapable to proceed is likely to gain capacity. The treatment recommendation may be helpful in addressing an incapable defendant’s condition during the ensuing commitment proceedings. The revised statute does not specifically authorize treatment or medication to restore capacity. An uncodified section of S.L. 2013-18 (S 45) directs the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to adopt guidelines for the treatment of people who are involuntarily committed after a determination of incapacity to proceed. For a further discussion of capacity evaluations, see *infra* § 2.5, Examination by State Facility or Local Examiner.

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 defendant, court, or prosecutor. *See* G.S. 15A-1002(a); *Drope v. Missouri*, 420 U.S. 162 (1975) (capacity issues may arise during trial). When the question of capacity arises before trial, the court

should determine the question before placing the defendant on trial. *See State v. Silvers*, 323 N.C. 646 (1989); *State v. Propst*, 274 N.C. 62 (1968).

Because capacity to proceed is measured as of the time of the proceeding, more recent examinations or observations of the defendant tend to carry more weight. *See State v. Silvers*, 323 N.C. 646 (1989) (conviction vacated where trial court based finding of capacity entirely on psychiatric examinations three to five months before trial and excluded more recent observations by lay witnesses); *State v. Robinson*, ___ N.C. App. ___, 729 S.E.2d 88 (2012) (trial judge erred in denying motion for capacity examination at beginning of trial; earlier evaluations finding defendant capable indicated that his condition could deteriorate, and defense counsel's evidence in support of current motion for examination indicated that defendant's mental condition had significantly declined); *State v. Reid*, 38 N.C. App. 547 (1978) (trial court's finding of capacity was *not* supported by evidence where State's expert testified as follows: defendant was suffering from chronic paranoid schizophrenia; defendant was capable of proceeding at time of examination two to three months earlier, but condition could worsen without medication; and State's expert had not reexamined defendant and had no opinion on defendant's capacity at time of capacity hearing).

Delays in evaluating and determining capacity may support a claim of a speedy trial violation. *See State v. Lee*, ___ N.C. App. ___, 720 S.E.2d 884 (2012) (twenty-two month delay, including ten-month delay in holding of capacity hearing after psychiatric evaluation of defendant, prompted consideration of speedy trial factors, but court finds no speedy trial violation where record was unclear as to reasons for delay; courts states that while troubled by delay in holding of capacity hearing, it could not conclude that delay was due to State's willfulness or negligence where, among other things, defendant repeatedly requested removal of trial counsel and victim was out of country for medical treatment for injuries). For a discussion of speedy trial requirements, see *infra* Chapter 7, Speed Trial and Related Issues.

E. Compared to Other Standards

Insanity and other mental health defenses. Incapacity to proceed refers to the defendant's ability to understand and participate in the trial and other proceedings. In contrast, the insanity defense turns on the defendant's state of mind at the time of the alleged offense. *See State v. Propst*, 274 N.C. 62 (1968) (comparing capacity to proceed with insanity). Likewise, other mental health defenses to the charges, such as diminished capacity, turn on the defendant's state of mind at the time of the alleged offense. *See* John Rubin, *The Diminished Capacity Defense*, ADMINISTRATION OF JUSTICE MEMORANDUM No. 92/01 (Institute of Government, Sept. 1992), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aojm9201.pdf.

Practice note: G.S. 15A-1321 provides for automatic commitment of a defendant found not guilty by reason of insanity (NGRI). The commitment procedures that apply following a NGRI plea or verdict differ in several respects from the procedures for defendants found incapable to proceed and involuntarily committed (discussed *infra* in §

2.8, Procedure After Order of Incapacity) and are beyond the scope of this manual, *See* NORTH CAROLINA CIVIL COMMITMENT MANUAL Ch. 7 (Automatic Commitment—Not Guilty by Reason of Insanity) (UNC School of Government, 2d ed. 2011).

Guilty pleas. The standard of capacity to proceed for *pleading guilty* is the same as the standard for capacity to stand trial. The defendant need not have a higher level of mental functioning. To plead guilty, however, the defendant also must act knowingly and voluntarily. *See Godinez v. Moran*, 509 U.S. 389 (1993).

Waiver of counsel at trial. In *Godinez*, the U.S. Supreme Court held that the standard for waiving counsel is the same as the standard for capacity to stand trial. The defendant need not have a higher level of mental functioning, although still must act knowingly and voluntarily. *See also* G.S. 7A-457 (describing requirements for valid waiver of counsel).

In *Indiana v. Edwards*, 554 U.S. 164 (2008), the Court qualified its holding in *Godinez*. The Court stated that the U.S. Constitution does not prohibit states from insisting on representation by counsel for those defendants who meet the standard for capacity to proceed but who suffer from a mental infirmity that impairs their ability to conduct trial proceedings themselves. Thus, despite a waiver of counsel, the trial court may require the defendant to be represented by counsel at trial. For a further discussion of this issue, see *infra* “Capacity to represent self” in § 12.6C., Capacity to Waive Counsel.

Waiver of *Miranda* rights during questioning and other rights during investigation. A defendant’s mental impairment may render ineffective a waiver of *Miranda* rights during custodial interrogation. *See, e.g., State v. Thorpe*, 274 N.C. 457 (1968); *see generally* 2 WAYNE R. LAFAYETTE ET AL., CRIMINAL PROCEDURE § 6.9(a), at 817–20 (3d ed. 2007) [hereinafter LAFAYETTE, CRIMINAL PROCEDURE].

A defendant’s mental impairment also may bear on the voluntariness of a confession (*see, e.g., State v. Ross*, 297 N.C. 137 (1979); *State v. Thompson*, 287 N.C. 303 (1975), *vacated on other grounds*, 428 U.S. 908 (1976)) or of a consent to search. *See, e.g., State v. McDowell*, 329 N.C. 363 (1991); *see generally* 2 LAFAYETTE, CRIMINAL PROCEDURE § 6.2(c), at 638–40 (citing factors relevant to voluntariness of confession), § 3.10(b), at 413 (factors relevant to voluntariness of consent).

Incompetency to manage affairs. The term *incompetent* is sometimes used interchangeably with *incapacity to proceed*, but the terms have distinct legal definitions. *Incompetent* refers to an individual who has been adjudicated, pursuant to the procedures in G.S. Chapter 35A, “Incompetency and Guardianship,” incompetent to make or communicate important decisions concerning one’s person, family, or property, and who has been appointed a guardian pursuant to that chapter. *See* G.S. 35A-1101(7), (8). For this reason, this manual uses the terms *capacity* or *incapacity* to describe a criminal defendant’s ability to proceed to trial, not *competency* or *incompetency*. For a further discussion of guardianship proceedings, see NORTH CAROLINA GUARDIANSHIP MANUAL (UNC School of Government, 2008), available at www.ncids.org (select “Training & Resources,” then “Reference Manuals”).

F. Burden of Proof

The defendant has the burden of persuasion to show incapacity to proceed. *See State v. Goode*, 197 N.C. App. 543 (2009); *State v. O’Neal*, 116 N.C. App. 390 (1994); *see also Medina v. California*, 505 U.S. 437 (1992) (burden of persuasion to show incapacity to proceed may be placed on defendant). The burden may be no higher than by the preponderance of the evidence. *See Cooper v. Oklahoma*, 517 U.S. 348 (1996); *State v. Moss*, 178 N.C. App. 393 (2006) (unpublished) (following *Cooper*).

G. Retrospective Capacity Determination

If an appellate court finds that the trial court erroneously failed to determine the defendant’s capacity to proceed, the appellate court has two main options.

The first option is to remand for a new trial. *See State v. Robinson*, ___ N.C. App. ___, 729 S.E.2d 88 (2012) (finding that “proper remedy” where trial court proceeds to trial notwithstanding evidence that the defendant was incapable of proceeding is to vacate the judgment and remand for a new trial if and when defendant is capable of proceeding; finding, however, that defendant’s expert testified during trial that defendant was capable of proceeding and therefore trial court’s error was not prejudicial and did not warrant vacating judgment).

The second option is to remand for the trial court to determine whether a retrospective capacity hearing is possible and, if so, determine whether the defendant was capable of proceeding to trial. This remedy is disfavored. *See State v. McRae (McRae I)*, 139 N.C. App. 387, 392 (2000) (first North Carolina case on issue authorizing such a hearing, but stating that such a hearing may be conducted “only if a meaningful hearing on the issue of the competency of the defendant at the prior proceedings is still possible”); *State v. McRae (McRae II)*, 163 N.C. App. 359, 367 (2004) (recognizing that “[t]his remedy is disfavored due to the inherent difficulty in making such *nunc pro tunc* evaluations[,]” but upholding trial court’s holding of retrospective capacity hearing, including procedures followed during hearing, and affirming determination that defendant was capable to proceed); *State v. Blancher*, 170 N.C. App. 171 (2005) (upholding retrospective capacity determination); *see also State v. Whitted*, 209 N.C. App. 522 (2011) (remanding to trial court to determine whether retrospective capacity hearing was possible).