2.5 Examination by State Facility or Local Examiner

Counsel may begin the process for determining capacity to proceed by seeking an examination of the defendant at a state or local mental health facility (rather than moving for funds for an expert, discussed *supra* in "Ex parte motion" in § 2.4A, Procedures to Obtain Expert Evaluation.

A trial court can hold a hearing to determine a defendant's capacity without a psychiatric examination. *See* G.S. 15A-1002(b) (so indicating). Generally, however, the court will order an examination first. *See also State v. Leyshon*, 211 N.C. App. 511 (2011) (court not required to hold hearing before ordering capacity examination).

A. Moving for Examination

No time limit. There is no formal time limit on a motion questioning a 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 less receptive, however, to a last-minute motion for an initial examination. *See, e.g.*, *State v. Washington*, 283 N.C. 175 (1973) (characterizing as "belated" a motion for initial examination two weeks before trial).

Contents 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 are available. One is for an evaluation by Central Regional Hospital in Butner, North Carolina, the state hospital that performs capacity Evaluations. *See* AOC Form AOC-CR-208, "Motion and Order Committing Defendant to Central Regional Hospital – Butner Campus for Examination on Capacity to Proceed" (Jan. 2011). The other is for an evaluation by a local facility (a local forensic examiner or screener). *See* AOC Form AOC-CR-207, "Motion and Order Appointing Local Certified Forensic Evaluator" (Jan. 2011).

Counsel should provide sufficient information to the court in support of the request for an examination, particularly if counsel anticipates resistance to the request. *See* G.S. 15A-1002(a) (requiring moving party to detail conduct in support of motion); *State v. Grooms*, 353 N.C. 50 (2000) (where defendant demonstrates or matters indicate that there is a significant possibility that defendant is incapable of proceeding, trial court must appoint expert to inquire into defendant's mental health; evaluation not required in this case); *State v. Rouse*, 339 N.C. 59 (1994) (during sentencing phase of capital case, defense counsel requested evaluation of client's capacity following suicide attempt or "gesture"; court upheld trial court's denial of request, finding that single incident without more did not require as matter of law expert evaluation of capacity), *overruled on other grounds by State v. Hurst*, 360 N.C. 181 (2006); *State v. Taylor*, 298 N.C. 405 (1979) (motion must contain sufficient detail to cause "prudent judge" to call for psychiatric examination before determining capacity); *State v. Robinson*, ___ N.C. App. ___, 729 S.E.2d 88 (2012) (trial judge erred in denying motion for capacity examination).

If the showing contains confidential information, such as information obtained in the course of privileged attorney-client communications, counsel should ask the court to review that information in camera.

Subsequent examinations. A defendant may be able to obtain subsequent examinations if the report from the first examination has become stale or the defendant's condition has changed. *See supra* § 2.1D, Time of Determination.

Motion for examination by prosecutor or court. The prosecution may raise the question of capacity and request a capacity 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 a motion by the prosecution for a capacity examination. *See State v. Jackson*, 77 N.C. App. 491 (1985) (disapproving of entry of order for examination without notice to defendant); *see also infra* § 2.9C, Fifth and Sixth Amendment Protections. *Cf. State v. Davis*, 349 N.C. 1 (1998) (court modified previous order for capacity examination, without notice to defendant, by directing that examination take place at Dorothea Dix Hospital rather than at Central Prison and by designating a different Dix examiner to do the examination than the one initially designated; court found that hospital, not prosecutor, requested modification, that defendant was represented by counsel at the hearing at which the court first ordered the capacity evaluation, and that in these circumstances modification of the order did not violate defendant's right to fair trial).

Practice note: If the court grants a motion by the prosecutor for a capacity examination, defense counsel should consider requesting that the scope of the examination be limited. *See infra* § 2.5E, Limits on Scope and Use of Examination.

The trial court has the power on its own motion to order an evaluation of the defendant's capacity to proceed. *See State v. Grooms*, 353 N.C. 50, 78 (2000). Further, the court is obligated to inquire into capacity, even in the absence of a request by the defense, if a bona fide doubt exists about the defendant's capacity to proceed. Such an inquiry may include an order for an examination. *See State v. Whitted*, 209 N.C. App. 522 (2011) (finding that trial court erred in failing to inquire); *State v. Snipes*, 168 N.C. App. 525 (2005) (stating principle but finding that evidence was insufficient to require trial court to inquire sua sponte into defendant's capacity to proceed).

B. Who Does Examination

Misdemeanors. If the underlying offense alleged is a misdemeanor, the defendant first must be evaluated by a local forensic screener. *See* G.S. 15A-1002(b)(1); *State v. Leyshon*, 211 N.C. App. 511, 521 (2011) (defendant correctly contends that a person charged with misdemeanor must have local examination before court may commit him or her to state facility for examination, but issue was moot). The local screener may find the defendant capable or incapable of proceeding or may recommend that the defendant be

evaluated further at a state psychiatric facility—that is, Central Regional Hospital in Butner, North Carolina. State examinations are discussed under "Felonies," below.

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 (which may take place at the jail if the defendant is incarcerated).

Legislative note: Effective for offenses committed on or after December 1, 2013, revised G.S. 15A-1002(b)(1) is recodified as G.S. 15A-1002(b)(1a) and, in conjunction with revised G.S. 15A-1002(b)(2), authorizes capacity examinations for misdemeanors by local examiners only. The statute no longer authorizes an examination at a state psychiatric facility for a misdemeanor following a local examination. This change may free up resources to meet the requirement under the legislation that capacity examinations be conducted during the commitment process. *See infra* "During period of commitment" (Legislative note) in § 2.8E, Redetermination of 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 rules requiring forensic evaluators appointed under G.S. 15A-1002(b) to meet specified requirements, such as training to be credentialed as a certified forensic evaluator and attendance at continuing education seminars.

Felonies. If the underlying offense alleged is a felony, the court may order a local evaluation or may order the defendant to a state psychiatric facility (Central Regional Hospital) without a local evaluation. To order the defendant to a state psychiatric facility without a local evaluation first, the court must find that a state facility examination is more appropriate. *See* G.S. 15A-1002(b)(2). In requesting an examination, counsel should consider whether a local or state examination best meets the needs of the case. Considerations include the defendant's previous contacts with the facility, the expertise of the examiners, etc.

State examinations may last longer than local exams. Under G.S. 15A-1002(b)(2), the court may commit the defendant to a state facility for up to sixty days. This authorization allows for a more thorough evaluation, including potentially an interview of the defendant, interviews of family members, review of mental health, school, and other records, and testing and observation of the defendant. In authorizing a longer evaluation period, the N.C. General Assembly also may have contemplated that defendants receive treatment at the state facility (G.S. 15A-1002(b)(2) states that the court may commit the person for "observation and treatment").

As a practical matter, however, the typical state facility examination is far shorter. Typically, an evaluation does not involve an inpatient stay or treatment and may last no more than a day. (If the defendant is found incapable to proceed and thereafter involuntarily committed, he or she may receive treatment as part of the commitment process. *See infra* § 2.8, Procedure After Order of Incapacity.) Court system actors have coined the term "drive-by evaluations" for these shorter capacity evaluations because law enforcement drives the defendant to and from the state facility on the same day. *See*

KLINKOSUM at 439; *cf. State v. Robertson*, 161 N.C. App. 288, 291–92 (2003) (capacity evaluation of 1 hour and forty minutes on second day of trial was not inadequate; capacity statutes do not require minimum period of observation). Typically, state facility examiners gather background information before evaluating the defendant. The AOC form order for a state facility examination authorizes the facility to obtain otherwise confidential information. *Compare* AOC-CR-208, "Motion and Order Committing Defendant to Central Regional Hospital - Butner Campus for Examination on Capacity to Proceed" (Jan. 2011) (so stating), *with* AOC-CR-207, "Motion and Order Appointing Local Certified Forensic Evaluator" (Jan. 2011) (no comparable language).

Delays may occur in scheduling a capacity examination at the state facility, during which time the defendant may not have adequate treatment. As a result, defendants in need of immediate treatment are sometimes involuntarily committed on petition of the jail or other interested person under the usual involuntary commitment procedures.

C. Providing Information to Examiner

Whether a state or a local mental health facility evaluates the defendant, counsel should contact the examiner and ensure that he or she has access to relevant information about the defendant. Counsel may relate his or her observations of the defendant, identify people knowledgeable of the defendant's condition, transmit copies of relevant records, and provide other relevant information.

The AOC form for examinations at Central Regional Hospital states that counsel for the defendant must give "such records and information in counsel's possession as the evaluator requests." *See* AOC-CR-208, "Motion and Order Committing Defendant to Central Regional Hospital – Butner Campus for Examination on Capacity to Proceed" (Jan. 2011). The form recognizes that this requirement does not "require counsel to divulge any information, documents, notes, or memoranda that are protected by attorney-client privilege or work-product doctrine."

Legislative note: Effective for offenses committed on or after December 1, 2013, revised G.S. 15A-1002(b)(4) authorizes the judge who orders a capacity examination to order the release of relevant confidential information to the examiner, including the warrant or indictment, the law enforcement incident report, and the defendant's medical and mental health records. The revised subsection includes a requirement that the defendant receive notice and an opportunity to be heard before release of the records. The subsection also states that it does not relieve the court of its duty to conduct hearings and make findings required under relevant federal law before ordering the release of any private medical or mental health information or records related to substance abuse or HIV status or treatment.

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 in

specified circumstances, including to a client as defined in the statutes, to others pursuant to a written release by the client or legally responsible person, in certain court proceedings, and for treatment and research. *See* G.S. 122C-53 through G.S. 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 *infra* in § 2.5F, Report of Examination. *See* G.S. 122C-54(b).
- The results of the examination, including statements made by the defendant, may be admissible at subsequent court proceedings. *See infra* § 2.7D, Evidentiary Issues; § 2.9, Admissibility at Trial 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. Limits on Scope and Use of Examination

A central part of any court-ordered examination, whether by Central Regional Hospital or a local mental health facility, is the interview of the defendant. The interview likely will cover the alleged offense, 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* § 2.7D, Evidentiary Issues; § 2.9, Admissibility at Trial of Results of Capacity Evaluation.

Refusal to discuss offense. The North Carolina courts have not specifically addressed the impact of a defendant's refusal to discuss the alleged offense when the examination concerns only capacity to proceed. *Cf. State v. Davis*, 349 N.C. 1, 43–44 (1998) (noting that defense counsel advised defendant not to discuss the facts of the alleged offense with the examiner during the capacity evaluation). The defendant's refusal may result in an incomplete report, however, and make it difficult to determine 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 an 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 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990). The court of appeals has also held 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 (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* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-6.4 (1989), *available at* www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html.

Presence of counsel. The North Carolina Supreme Court has held that there is no constitutional right to the presence of counsel at an examination concerning capacity to proceed. *See State v. Davis*, 349 N.C. 1 (1998) (trial court did not violate defendant's Sixth Amendment right to counsel by refusing to allow defense counsel to be present during capacity examination). *Cf.* 2 NORTH CAROLINA DEFENDER MANUAL § 21.1 (Right to Be Present) (UNC School of Government, 2d ed. 2012). The *Davis* decision does not foreclose counsel from being present, however. Examiners still may allow counsel to be present, at least during the interview portion of the evaluation. The trial court also appears to have the discretion to order that counsel be permitted to attend. *See* Timothy E. Travers, Annotation, *Right of Accused in Criminal Prosecution to Presence of Counsel at Court-Appointed or -Approved Psychiatric Examination*, 3 A.L.R.4th 910 (1981) (observing that some cases have held that although defendant did not have absolute right to presence of counsel, trial court had discretion to allow counsel to be present).

Court order limiting scope and use of examination. If counsel has concerns about the potential impact of a capacity examination beyond the proceedings to determine capacity**,** counsel may want to request a court order explicitly limiting the scope and use of the examination. For example, such an order might provide that the examiner is to report on the issue of capacity 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 offense may not be divulged to the prosecution. *But cf. State v. Davis*, 349 N.C. 1, 40–44 (1998) (trial court limited scope of capacity examination to issue of capacity, but at trial defense counsel presented mental health defenses and defense expert relied on capacity examination in forming opinion; permissible for prosecution to use information from capacity examination to cross-examine defense expert).

Additionally, in all cases in which counsel has concerns about disclosure of the examination report, counsel should consider requesting that the evaluation report be submitted to the defense and to the court only and that it remain sealed until ordered disclosed by the court. *See infra* § 2.5F, Report of Examination.

Videotaping of examination. Standard 7-3.6(d) of the ABA Criminal Justice Mental Health Standards (1989) states that the defendant should have the right to have a court-ordered capacity evaluation initiated by the prosecution recorded on audiotape or videotape. Such a recording could assist counsel in cross-examining the State's expert, but it also could result in disclosure of potentially damaging information.

F. Report of Examination

Time of report. Currently, there is no statutory deadline for the completion of an examination report.

Legislative note: Effective for offenses committed on or after December 1, 2013, new G.S. 15A-1002(b2) requires that examination reports be completed within specified time limits—for example, thirty days following the completion of a capacity examination in a

felony case. The statute allows the court to grant extensions of time for good cause up to a maximum limit. The statute does not set deadlines for the holding of the examinations. Nor does it specify a remedy for the failure to submit an examination report within the statutory time limit.

Potential need for motion limiting disclosure. The current practice on disclosure of capacity examination reports may not match the law on the issue. The applicable statutes appear to provide that the report of examination is supposed to go to the court and defense counsel first and, if capacity is still questioned and further proceedings are necessary, only then to the prosecutor.[1] In practice, however, it appears that Central Regional Hospital automatically sends its report of examination to the court, defense counsel, and prosecutor. Some local forensic examiners may have adopted the same practice.

[1]. G.S. 15A-1002(d) provides that after a capacity examination, a copy of the examination report is to be provided by the facility to the clerk of court in a sealed envelope addressed to the attention of the presiding judge, along with a covering statement indicating the fact of the examination and conclusion about the defendant's capacity to proceed. The statute also states that a copy of the report is to be provided to defense counsel or to the defendant if not represented by counsel. 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 appears to contemplate that the court and the defense are to get a copy of the report automatically after a capacity examination, but the prosecutor is to get a copy of the report only if capacity is questioned after the examination and further court proceedings are necessary. At that point, the prosecutor is entitled to otherwise confidential information in order to prepare and respond. The initial request for a capacity examination by a defendant does not appear to be the equivalent of raising the question of the defendant's capacity for purposes of triggering disclosure to the prosecutor. Otherwise, it would be unnecessary for the statute to establish separate procedures for disclosure of the report to the court and defendant, on the one hand, and to the prosecutor, on the other. *See also* JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK at 34 (UNC School of Government, 3d ed. 2013) (noting that statute may allow the State access to capacity report only if the defendant persists in questioning capacity after return of the report; also noting that the court may have discretion to order earlier disclosure).

The legislative history of G.S. 15A-1002(d) reinforces that the General Assembly intended to limit the prosecution's access to capacity evaluations. Previously, the statute provided for reports to be sent automatically to the defense and prosecution. *See* 1979 N.C. Sess. Laws Ch. 1313 (S 941) (title of act states that it is "[a]n act to require that copies of pretrial mental examinations be sent to the district attorney"). 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." 1985 N.C. Sess. Laws Ch. 588 (S 696).

A second statute, G.S. 122C-54(b), provides a limited exception to the obligations of facilities to maintain the confidentiality of capacity evaluations. G.S. 122C-54(b) authorizes disclosure of a capacity evaluation to the court, prosecutor, and defendant's attorney "as provided in G.S. 15A-1002(d)." In 2003, the General Assembly amended G.S. 122C-54(b) as part of a larger act dealing with mental health system reform. *See* 2003 N.C. Sess. Laws Ch. 313, sec. 2 (H 826). 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). As revised, G.S. 122C-54(b) provides that the facility "shall" send the report as provided in G.S. 15A-1002(d). Thus, revised G.S. 122C-54(b) requires, rather than merely permits, facilities to disclose capacity evaluations as provided in G.S. 15A-1002(d). Facilities appear to be relying on the change of "may" to "shall" to justify automatic disclosure of examination reports to the court, defense, and prosecution. The revised statute, however, continues to be keyed to the requirements and restrictions in G.S. 15A-1002(d) and does not appear to broaden the circumstances in which prosecutors are to receive capacity reports. Nor, unlike previous legislative changes, does the title of the 2003 act indicate that the revised language should be construed as making such a change.

The 2013 legislative changes revised G.S. 15A-1002(d) to refer to the requirements of G.S. 122C-54(b), but this change does not appear to be substantive.

Consequently, if defense counsel wants to limit disclosure of the examination report, counsel should ask, when requesting a capacity evaluation, that the court enter a specific order prohibiting the facility and its examiners from disclosing the evaluation to the prosecutor except on further order of the court. *Be sure the order is transmitted to the facility and examiners*. The current AOC forms for a capacity examination—AOC-CR-208 (Jan. 2011) for an examination at a state facility and AOC-CR-207 (Jan. 2011) for a local examination—provide that the examination report is to be sent to the court and defense counsel only. The AOC forms do not appear to have affected disclosure practices, however. Counsel must move for a specific order restricting disclosure.

Legislative note: Effective for offenses committed on or after December 1, 2013, G.S. 15A-1004(c) and G.S. 122C-278 expand the circumstances in which the defendant's capacity must be re-examined following an incapacity determination. (For a discussion of the re-examination requirement, see *infra* "During period of commitment" (Legislative note) in § 2.8E, Redetermination of Capacity.) The revised statutes provide for disclosure of re-examination reports as provided in G.S. 15A-1002. *See* G.S. 15A-1004(c) ("A report of the examination shall be provided pursuant to G.S. 15A-1002"); *see also* G.S. 122C-278 ("the respondent shall not be discharged . . . until the respondent has been examined for capacity to proceed and a report filed with the clerk of court pursuant to G.S. 15A-1002"). Unless defense counsel obtains an order limiting disclosure, re-examination reports likely will go to the court, defense counsel, and prosecutor. Automatic disclosure may be permissible under G.S. 15A-1002 because the defendant's capacity will necessarily have been questioned when the court initially determined that the defendant was incapable to proceed; also, as a practical matter, most re-examinations may take place at state facilities, which likely will follow the current practice of disclosing reports to the prosecutor unless the court has limited disclosure.

Effective for offenses committed on or after December 1, 2013, revised G.S. 15A-1002(d) also requires that the covering statement that accompanies the report be provided to the sheriff who has custody of the defendant. The revised statute does not authorize disclosure of the report itself to the sheriff.

G. Disclosure of Underlying Information

If necessary to the proper administration of justice, the court may compel disclosure of information concerning the examination in addition to the report itself. *See State v. Williams*, 350 N.C. 1, 19–23 (1999) (statute allowing disclosure of report does not preclude trial court from compelling disclosure of additional information concerning the examination, in this case the complete file of Dorothea Dix Hospital concerning the defendant; it also was permissible for trial court to require the Dix examiners to confer with the prosecutor to the same extent that they had conferred with defense counsel). In *Williams*, the circumstances justifying disclosure were narrow. At the time the court compelled disclosure, the defendant had indicated that he intended to call a mental health expert at the capital sentencing proceedings. *See infra* § 2.9D, Rebuttal of Mental Health Defense. When the defendant advised the trial court that he was not going to call a mental health expert, the trial court precluded the State from using any information it had

obtained from the defendant's expert, including the Dix reports on which the expert based his report. The trial court only allowed the prosecution to introduce evidence of an altercation that had occurred at Dix for the purpose of rebutting evidence offered by the defendant that he had acted with respect and honor while at Dix.