2.8 Procedure After Order of Incapacity

Once the court enters an order that the defendant is incapable of proceeding, defense counsel must consider the interplay of (1) the criminal case, which remains pending in criminal court (district or superior) if not dismissed, and (2) involuntary commitment proceedings, which often ensue after an order finding a defendant incapable of proceeding in the criminal case and which are handled in civil district court. This section uses the terms *criminal court* or *judge in the criminal case* when discussing decisions made on the criminal side, and uses the term *district court* or *commitment court* when discussing decisions made on the commitment side.

Although counsel appointed in the criminal case ordinarily does not represent the defendant in the commitment proceedings, those proceedings may bear on the criminal case. Defense counsel therefore should keep track of the commitment proceedings and coordinate with the defendant's commitment counsel. This section reviews the aspects of the commitment proceedings most significant to criminal counsel. For a further discussion of commitment procedures for a defendant found incapable to proceed, see NORTH CAROLINA CIVIL COMMITMENT MANUAL §§ 8.6 through 8.12 (UNC School of Government, 2d ed. 2011).

A. Constitutional Backdrop

In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Court found equal protection and due process violations in the indefinite confinement of a defendant found incapable of standing trial. The Court held that, unless the defendant is civilly committed, the State may hold a defendant no longer than a "reasonable period of time" to determine whether he or she will gain capacity to stand trial. If the defendant is neither likely to gain capacity nor subject to civil commitment, he or she must be released. *See also* NORTH CAROLINA CIVIL COMMITMENT MANUAL § 8.5B (Criminal Court Procedure), at 142–43 (UNC School of Government, 2d ed. 2011) (discussing *Jackson* holding).

In response to *Jackson*, North Carolina adopted procedures for the civil commitment of a defendant found incapable of proceeding. *See* G.S. Ch. 15A, art. 56 Official Commentary. These provisions, discussed below, ordinarily control the disposition of the case after a finding of incapacity to proceed. *Jackson* issues still may arise with "permanently incapable" or "unrestorable" defendants, such as defendants who are mentally retarded (as in *Jackson*) or have brain damage or dementia.

B. Initial Determination of Grounds for Involuntary Commitment

G.S. 15A-1003 provides that if the criminal court judge finds the defendant incapable of standing trial, the judge must decide whether there are reasonable grounds to believe that the defendant meets the criteria for inpatient or outpatient involuntary commitment under art. 5, part 7 in G.S. Ch. 122C. These criteria differ from the standard of capacity to stand trial. For inpatient commitment (confinement at a 24-hour facility), the standard is mentally ill and dangerous to self or others. For outpatient commitment (periodic

outpatient treatment), the standard is mentally ill and in need of treatment to prevent deterioration that would result in dangerousness. *See* G.S. 122C-261(b).

If the criminal court judge finds grounds for involuntary commitment, the judge issues an order to have the defendant taken into custody for examination (a custody order). On entry of the custody order, the defendant becomes a respondent in the involuntary commitment proceeding as well as a defendant in the criminal case until the charges are resolved. At several points in the ensuing commitment process, the defendant may be returned to jail to await further action in the criminal case. The court's order must require the hospital or other institution that has custody of the defendant to report to the clerk if the defendant is to be released from the hospital or institution. G.S. 15A-1004(c); *see also* G.S. 15A-1006 (similar requirement).

Legislative note: Effective for offenses committed on or after December 1, 2013, revised G.S. 15A-1006 provides that if the defendant has gained capacity while committed, the institution having custody of the defendant must provide written notice (not merely "notice" as under the current statute) to the clerk of court. The clerk, in turn, must provide written notice to the district attorney, defendant's attorney, and sheriff, which is a new requirement.

After issuance of a custody order, the commitment proceedings go down one of two tracks, discussed in subsections C. and D., below, depending on whether the offense is designated as violent or nonviolent. (Subsection D., below, discusses the definition of "violent offense.") This designation, which is made by the judge in the criminal case, may significantly affect the defendant's rights in the ensuing commitment process.

C. Commitment Procedure for Nonviolent Offenses

First examination. In cases involving nonviolent offenses, the defendant is examined locally, which should occur within a day or two after issuance of the custody order. *See* G.S. 122C-261(e) (requiring law enforcement officer or other authorized person to take defendant into custody within 24 hours after issuance of custody order); G.S. 122C-263(c) (requiring examination within 24 hours after law enforcement presents the person for examination). This initial examination may take place in the physical presence of the examiner or through the use of telemedicine procedures. *See* G.S. 122C-263(c). The examiner may find:

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

If the local examiner finds grounds for inpatient commitment, the defendant receives a second examination, discussed below, at a 24-hour facility.

If the examiner does not find grounds for inpatient commitment, the next step depends on whether criminal charges are still pending. If criminal charges are no longer pending, the

defendant is released. (If the examiner finds no grounds for inpatient commitment but recommends outpatient commitment, the defendant is released but additional commitment proceedings may take place. *See, e.g.*, NORTH CAROLINA CIVIL COMMITMENT MANUAL § 2.3L (Outpatient Commitment: Examination and Treatment Pending Hearing) (UNC School of Government, 2d ed. 2011).) If the defendant has pending charges and has not obtained pretrial release, the defendant is returned to jail to await further action in the criminal case.

Second examination. If the local examiner finds grounds for inpatient commitment, the defendant is taken to a 24-hour facility, which must conduct a second examination within one day of the defendant's arrival at the facility. *See* G.S. 122C-266; *see also* G.S. 122C-263(d)(2) (person may be detained for up to seven days after issuance of custody order if 24-hour facility is unavailable). The second examiner has the same options as above. If the examiner finds no grounds for commitment or grounds for outpatient commitment only, the defendant is released (back to jail if criminal charges are still pending and the defendant has not obtained pretrial release). If the facility has recommended inpatient commitment, the facility holds the defendant pending a hearing in district court, to be held within ten working days of the day the defendant was taken into custody. The hearing is ordinarily held in the county in which the 24-hour facility is located. *See* NORTH CAROLINA CIVIL COMMITMENT MANUAL § 2.6B (Venue and Transfer of Venue) (UNC School of Government, 2d ed. 2011).

The second examination may occur at any 24-hour facility described in G.S. 122C-252 (including university and veterans hospitals). Usually, the defendant goes to one of the three regional state hospitals (Broughton in Morganton, Cherry in Goldsboro, or Central Regional Hospital in Butner). Each of the regional state hospitals has special counsel to represent respondents held there. Appointed counsel represent respondents at other facilities. Contact information for special counsel may be found on the website of the Office of Indigent Defense Services, www.ncids.org (select "Defender Offices & Depts," then "Special Counsel").

Hearing on inpatient commitment. At the district court hearing on inpatient commitment, the judge has the same options as above—no commitment, outpatient commitment, or inpatient commitment. The first two options require the defendant's release (back to jail if criminal charges are still pending and the defendant has not obtained pretrial release). The judge may order inpatient commitment for an initial period of up to ninety days and may order inpatient commitment for six-month and one-year periods thereafter. *See* G.S. 122C-271; G.S. 122C-276.

Termination of inpatient commitment. When a defendant charged with a nonviolent offense no longer meets the criteria for inpatient commitment, the hospital must release the defendant (back to jail if criminal charges are still pending and the defendant has not obtained pretrial release). *See* G.S. 122C-277(a). The hospital must notify the clerk of court if the defendant is to be released. *See* G.S. 15A-1004(c). In cases in which the defendant has been committed after being found incapable to proceed for a nonviolent offense, the release determination may be made by a district court judge at a hearing on

continued inpatient commitment or by the hospital without a hearing.

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 and before termination of commitment proceedings and release of the defendant. For a further discussion of the re-examination requirement, see *infra* "During period of commitment" (Legislative note) in § 2.8E, Redetermination of Capacity.

D. Commitment Procedure for Violent Offenses

Purposes. The commitment procedures for defendants charged with violent offenses are similar to those for defendants charged with nonviolent crimes, discussed in subsection C., above, but special rules apply to keep defendants charged with violent offenses in continuous custody. A defendant subject to these special rules is sometimes referred to as a "House Bill 95," a reference to the bill enacted in 1981 that revised the applicable statutes in G.S. Ch. 122C. The procedures have been upheld against equal protection and due process challenges. *See In re Rogers*, 63 N.C. App. 705 (1983).

Meaning of violent offense. The criminal court, after finding that a defendant is incapable to proceed and meets the criteria for involuntary commitment, designates the offense as violent or nonviolent. G.S. 15A-1003(a).

The term violent offense is not specifically defined in the pertinent statutes. All provide only that certain procedures must be followed, discussed below, if the defendant is "charged with a violent crime, including a crime involving assault with a deadly weapon." *See, e.g.*, G.S. 15A-1003(a). Reviewing this language, the court in *In re Murdock*, ___ N.C. App. ___, 730 S.E.2d 811 (2012), considered whether this determination should be based on the elements of the charged offense or the underlying facts. The court took a dual approach. It held that courts are generally limited to looking at the elements of the crime. A crime is "violent" only if it has as an element "the use, attempted use, threatened use, or substantial risk of use of physical force against the person or property of another." *Id.*, 730 S.E.2d at 814 (citation omitted). *Murdock* also held that courts may look at the underlying facts to determine whether the charged offense involved assault with a deadly weapon. The court so ruled because the statutes include as a violent crime an offense "involving" assault with a deadly weapon; therefore, the General Assembly intended for courts to examine whether the underlying facts "involved" such an assault. In *Murdock*, the court concluded that the charged offenses—possession of a firearm by a felon and resisting an officer—did not have violence as an element but the underlying facts involved an assault with a deadly weapon and the trial court did not err by designating the offense as a "violent crime."

Practice note: Because the judge in the criminal case makes the initial commitment determination after finding the defendant incapable of proceeding, criminal counsel will be present and should be prepared to make arguments on the defendant's behalf about whether the offense should be designated as violent or nonviolent. The defendant may

have little opportunity to address this critical question again. Because the commitment statutes do not contain an express provision permitting the commitment court to revisit the criminal court's designation, the commitment court may be unwilling to do so. (In *Murdock*, the defendant obtained reviewed of the criminal court's designation of the offense as violent by filing a petition for certiorari in the appellate division.)

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

No release pending hearing. The 24-hour facility must hold the defendant pending a hearing in district court to determine whether the defendant meets the criteria for commitment. *See* G.S. 122C-266(b). The facility may not release a defendant charged with a violent offense on finding that he or she does not meet inpatient commitment criteria, as the facility can for a defendant charged with a nonviolent offense.

Even if the criminal charges are dismissed during the pendency of commitment, the hospital may not release the defendant without a hearing. *In re Rogers*, 78 N.C. App. 202 (1985).

Termination of commitment. Typically, the State is represented at the district court commitment hearing by a staff attorney assigned to the facility by the Attorney General's Office. G.S. 122C-268(b). In cases in which the offense has been designated as violent, the prosecutor in the criminal case may opt to represent the State's interest at the district court hearing. *See* G.S. 122C-268(c); *see also* G.S. 122C-276(d) (rehearings on continued inpatient commitment are subject to the same procedures as for initial hearings).

The hearing is typically held in the county where the facility is located. *See* G.S. 122C-269(a). On motion of "any interested person," venue may be moved to the county in which the person was found incapable of proceeding. *See* G.S. 122C-269(c). The motion to move venue is heard by the commitment court; there is no statutory authority for the criminal court to issue an order "retaining venue" of the commitment proceedings.

If the district court after hearing terminates inpatient commitment, a defendant charged with a violent offense may be released only to the custody of a law-enforcement agency. *See* G.S. 15A-1004(c).

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 and before termination of commitment proceedings and release of the defendant. For a further discussion of the re-examination requirement, see *infra* "During period of commitment" (Legislative note) in § 2.8E, Redetermination of Capacity.

E. Redetermination of Capacity

The criminal court may redetermine capacity at any time during the pendency of the criminal case. *See* G.S. 15A-1007(b). If a defendant has been found incapable to proceed and is involuntarily committed, the defendant's capacity may be reassessed during the period of commitment.

During period of commitment. If the criminal court finds a defendant incapable to proceed and subject to commitment, the court's orders must require the hospital or institution to report periodically to the clerk regarding the condition of the defendant and immediately if the defendant gains the capacity to proceed. *See* G.S. 15A-1004(d) (so stating and also requiring the hospital or institution to report on the likelihood of the defendant's gaining capacity if the hospital or institution is able to make such a judgment); *see also* G.S. 15A-1006 (requiring report to clerk when defendant gains capacity to proceed). On receiving a report that the defendant has gained capacity, the court may hold a supplemental hearing to determine the defendant's capacity. *See* G.S. 15A-1007(a).

Legislative note: Effective for offenses committed on or after December 1, 2013, new G.S. 122C-278 requires a capacity examination before discharge from a hospital or termination of outpatient commitment if the person was found incapable to proceed, was referred by the court for civil commitment proceedings, and was committed for either inpatient or outpatient treatment. The statute does not distinguish between nonviolent and violent offenses. An examination finding a defendant incapable to proceed does *not* itself authorize continued commitment; the person still must meet the criteria for commitment on an inpatient or outpatient basis.

Revised G.S. 15A-1004(c) appears to contain a broader re-examination requirement. That statute, as revised, states that if the defendant is placed in the custody of a hospital or other institution in a proceeding for involuntary commitment, the court "shall also order that the defendant shall be examined to determine whether the defendant has the capacity to proceed prior to release from custody." A defendant may be in the "custody" of a hospital within the meaning of the revised statute when he or she is taken to a 24-hour facility for a second examination to determine the appropriateness of commitment or, in the case of an offense designated as violent, when taken directly to a 24-hour facility for examination. Such a requirement would be broader than the one in G.S. 122C-278, which requires a re-examination of capacity only after the person is actually committed.

For cases involving offenses committed *before* December 1, 2013, re-examination of capacity during the period of commitment is not mandatory. To avoid the ping-pong effect described *infra* in § 2.8G, Problematic Cases, defense counsel may want to make a motion to the criminal court to require that a capacity examination be conducted during the period of commitment. If the defendant is committed at a state hospital, defense counsel may want to discuss this approach with the special counsel attorney representing the client.

At termination of commitment. Once the defendant no longer meets the criteria for inpatient commitment and is released (by the hospital or district court following a hearing depending on the case), the criminal court may reassess the defendant's capacity to proceed. *See* G.S. 15A-1007(a), (b) (authorizing court to hold supplemental hearings on capacity). The reassessment may involve the same procedures as those followed when the defendant's capacity was initially assessed, including a new evaluation of capacity by a local or state examiner and a hearing on capacity in criminal court.

Legislative note: Effective for offenses committed on or after December 1, 2013, revised G.S. 15A-1007(a) requires the district attorney to calendar a supplemental hearing no later than thirty days after receiving notice that the defendant has gained the capacity to proceed. This hearing requirement applies when the defendant is found incapable, is committed, and is later released from commitment. It also appears to apply when the defendant is found incapable, is referred for commitment proceedings, and is found not to be subject to commitment. New G.S. 15A-1007(d) provides that if the court determines in a supplemental hearing that the defendant has gained the capacity to proceed, the case must be calendared for trial at the earliest practicable time. Continuances of more than sixty days beyond the trial date may be granted only in extraordinary circumstances and when necessary for the proper administration of justice.

F. Disposition of Criminal Case While Defendant Incapable to Proceed

The criminal case is not completely held in abeyance while the defendant lacks capacity to proceed. Defense counsel has some options.

Dismissal of charges by court. Under G.S. 15A-1008, the criminal court may dismiss the criminal charges against a defendant who is incapable of proceeding if:

1. it appears to the court's satisfaction that the defendant will not gain the capacity to proceed;
2. the defendant has been deprived of his or her liberty for a period equal to or greater than the maximum permissible period of confinement for the alleged offense; or
3. five years have expired in the case of a misdemeanor, and ten years have expired in the case of a felony, calculated from the date of the determination of incapacity to proceed.

This statute makes dismissal discretionary with the judge. When the defendant is unlikely to gain capacity, however, constitutional grounds may require dismissal. In *Jackson v. Indiana*, 406 U.S. 715 (1972), the U.S. Supreme Court held that a defendant unlikely to gain capacity must be released if he or she does not meet civil commitment standards. *See supra* § 2.8A, Constitutional Backdrop. The Court did not decide whether the criminal charges also must be dismissed, but it suggested that leaving charges open indefinitely might violate speedy trial and due process rights. If defense counsel has difficulty having a motion to dismiss calendared and heard, counsel may be able to proceed by petition for writ of habeas corpus. *See In re Tate*, 239 N.C. 94 (1953).

A special AOC form has been created to ensure that a defendant has counsel in the criminal case to advance these arguments. Criminal counsel originally appointed to represent a defendant would appear to have an obligation to continue representing the defendant in the criminal proceedings. In some instances, however, criminal counsel may no longer be in the case—for example, if the prosecutor has dismissed the case with leave or the defendant has been involuntarily committed for a long time. The form (AOC-SP-210, "Petition and Appointment of Defense Counsel for Committed Respondent Charged with Violent Crime" (Apr. 2008), allows special counsel representing a defendant in commitment proceedings to petition the court to appoint criminal counsel if the defendant is no longer represented by original criminal counsel.

For a further discussion of the circumstances in which counsel may want to make a motion to dismiss on constitutional grounds, see *infra* "Permanently incapable or unrestorable defendants" in § 2.8G, Problematic Cases.

Legislative note: Effective for offenses committed on or after December 1, 2013, G.S. 15A-1008 revises the grounds for dismissal by the court of charges against a defendant found incapable to proceed. The biggest change is that dismissal is mandatory, not discretionary. The substance of the second ground, but not the first and third, was also changed to specify the length of imprisonment required to mandate dismissal. The grounds are:

1. it appears to the satisfaction of the court that the defendant will not gain the capacity to proceed;
2. the defendant has been deprived of his or her liberty, as a result of incarceration, involuntary commitment to an inpatient facility, or other court-ordered confinement, for a period equal to or greater than the maximum permissible term of imprisonment permissible for prior record Level VI for felonies or prior conviction Level III for misdemeanors for the most serious offense charged; or
3. five years have expired in the case of a misdemeanor, and ten years have expired in the case of a felony, calculated from the date of the determination of incapacity to proceed.

If the ground for dismissal is 2., the dismissal is "without leave." This phrasing apparently means that the case is dismissed with prejudice and cannot be refiled. If the ground for dismissal is 1. or 3., the dismissal is "without prejudice to the refiling of the charges" by the giving of written notice by the prosecutor. The "without prejudice" phrasing appears to distinguish a dismissal under 1. or 3. from a dismissal with leave, discussed below. When a case is dismissed with leave, the case may be viewed as still pending, a circumstance that has caused some agencies and programs to take the position that the defendant is not qualified to obtain funding for treatment or other services. A dismissal without prejudice to refiling, in contrast, contemplates that the State may refile the charges but, until it does so, no case is pending. Counsel seeking to arrange for treatment and other services may need to educate involved agencies and programs about the impact of a dismissal without prejudice. Counsel also may want to ask the court to indicate explicitly in an order dismissing a case on ground 1. or 3. that the case is no

longer pending on entry of the order.

Dismissal of charges with leave by prosecutor. Under G.S. 15A-1009, the prosecutor may dismiss the charges with leave after an order of incapacity to proceed. A dismissal with leave removes the case from the docket, but outstanding process retains its validity and need not be refiled; any statute of limitations is also tolled. The prosecutor may reinstitute charges by filing written notice with the defendant, defendant's counsel, and clerk of court.

This option may seem beneficial on the surface—for the defendant because it is a "dismissal" and for the prosecutor because it allows reinstitution of the charges by the filing of a written notice. In actuality, because of the indefinite nature of a dismissal with leave, the potential harms often outweigh any benefits. Some agencies and programs may consider that the criminal charges remain pending if dismissed with leave, making it difficult for the defendant to qualify or obtain funding for needed treatment or other services. *See* KLINKOSUM at 462 (explaining the problems associated with a dismissal with leave). Because it may limit treatment options, a dismissal with leave may not meet prosecutors' interests in reducing potential recidivism by the defendant. A better option for all concerned may be a voluntary dismissal of the case by the prosecutor, which means that the case is no longer pending. If the defendant gains capacity, the prosecutor still may refile the charges. There is no time limit on refiling in felony cases; in misdemeanor cases, the charges generally must be refiled within two years of the date of the offense.

If the prosecutor takes a dismissal with leave rather than a voluntary dismissal, the defendant still may seek dismissal by the court. *See* G.S. 15A-1009(f). A dismissal by the court supersedes a dismissal with leave by the prosecutor. *See* G.S. 15A-1009(e).

Practice note: If the prosecutor has taken a dismissal with leave, defendant may no longer be subject to pretrial release conditions because G.S. 15A-1009(b) states that outstanding process retains its validity "with the exception of any appearance bond." In practice, however, commitment facilities may return the defendant on release from commitment to the custody of law enforcement. If the criminal offense was designated as a violent offense when the defendant was initially found incapable of proceeding, the commitment facility must return the defendant on release from commitment to law-enforcement custody. *See supra* § 2.8D, Commitment Procedure for Violent Offenses (noting that dismissal of criminal charges does not remove House Bill 95 restrictions).

Legislative note: Effective for offenses committed on or after December 1, 2013, G.S. 15A-1009 is repealed. Thus, a prosecutor may no longer take a dismissal with leave. A prosecutor still may take a voluntary dismissal.

Pretrial release. If the defendant is not subject to inpatient involuntary commitment, the criminal court may allow pretrial release, including allowing release of the defendant to the custody of a person or organization agreeing to supervise the defendant. *See* G.S. 15A-1004(b); *see also State v. Gravette*, 327 N.C. 114 (1990) (person or organization

taking custody of defendant must consent; court could not require probation department to supervise defendant who was incapable of proceeding while on pretrial release). Thus, if inpatient commitment is not imposed, is terminated, or is converted to outpatient commitment, the defendant can obtain release by satisfying the conditions of pretrial release.

Jackson v. Indiana, 406 U.S. 715 (1972), would appear to require release, without conditions, when the defendant is unlikely to gain capacity. Any conditions on release would appear to be unenforceable since *Jackson* would not allow reincarceration for violation of the conditions.

Other motions. While a defendant is incapable of proceeding, G.S. 15A-1001(b) permits the court to go forward with any motions that defense counsel can make without the assistance of the defendant. *See also Jackson*, 406 U.S. at 740–41 (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). *Cf. Ryan v. Gonzalez*, ___ U.S. ___, 133 S. Ct. 696 (2013) (death row inmates were not entitled under federal statutes to stay of habeas proceedings when incapable of proceeding; claims were resolvable on record whether or not defendants were capable of proceeding).

If the prosecutor has dismissed the case with leave, it may be difficult for the defense to proceed with motions other than a motion to dismiss, which is specifically authorized by G.S. 15A-1009. If defense counsel wants to proceed on a motion that may limit prosecution of the case or otherwise benefit the defendant, such as a motion to suppress evidence essential to the State's case, counsel should base the request on the authority of *Jackson.*

Legislative note: Effective for offenses committed on or after December 1, 2013, G.S. 15A-1009 is repealed. Thus, a prosecutor may no longer take a dismissal with leave. A prosecutor still may take a voluntary dismissal.

Credit for time served. A defendant who is found incapable to proceed and is involuntarily committed should receive credit for time served while committed or otherwise confined. *See* G.S. 15-196.1. No appellate cases appear to have addressed the issue, however.

G. Problematic Cases

In many instances, the treatment received by a defendant while committed will address the causes of his or her earlier incapacity to proceed and will allow the criminal proceedings to go forward after the commitment ends. Cases sometimes bog down, however, leaving defendants in legal limbo. Two recurring problems and suggested approaches are discussed below.

Ping-pong defendants. The first problem involves what are sometimes called "ping-pong" defendants. Thus, a defendant is found incapable to proceed in the criminal case

and is involuntarily committed on an inpatient basis. Once the defendant no longer meets the criteria for inpatient commitment, he or she is released. If criminal charges are still pending and the defendant has not met pretrial release conditions, the defendant returns to jail. When the defendant first returns to jail, he or she may be capable to proceed but then may decompensate and become incapable again while waiting for the criminal case to be resolved. (In some instances, the treatment received by the defendant while committed will address acute mental health problems, resulting in release because the defendant is no longer dangerous to self or others, but the treatment may not make him or her capable of proceeding according to the test in criminal cases.) The process then begins again, with the defendant evaluated for capacity, recommitted if incapable, released from the hospital once he or she no longer meets inpatient commitment criteria, and so on. *See* Ann L. Hester, Note, *State v. Gravette: Is There Justice for Incompetent Defendants in North Carolina*, 69 N.C. L. REV. 1484 (1991) (criticizing the capacity-commitment loop).This ping-ponging may have several negative effects. It extends the defendant's detention and delays resolution of the criminal case for all concerned; increases transaction costs because the defendant must be examined multiple times and law enforcement must transport the defendant to and from the examinations; and perhaps most importantly may adversely affect the mental health of the defendant, whose condition improves and deteriorates again and again.

The criminal justice and mental health systems have come up with some ways to keep the defendant from returning to jail and decompensating during the pendency of the criminal case. First, a defendant may be able to agree not to contest continued commitment and remain at the commitment hospital and receive treatment there until capable to proceed in the criminal case. Criminal counsel should discuss this approach with the defendant's counsel in the commitment case (usually, special counsel). Some criminal court judges have entered orders directing commitment hospitals to retain custody of defendants who are not yet capable to proceed or who are capable but may decompensate if returned to jail. Such orders may not be statutorily permissible, however, because a commitment hospital may keep a person under inpatient involuntary commitment only if the person meets the criteria for that commitment, not because he or she is incapable to proceed or may become incapable to proceed.

Second, a commitment hospital may find that although the defendant no longer meets the grounds for inpatient commitment, he or she meets the standard for outpatient commitment—essentially, that the defendant is mentally ill and in need of treatment to prevent deterioration that would result in dangerousness. *See* G.S. 122C-263(d)(1); G.S. 122C-266(a)(2). Outpatient commitment requires the person to receive psychiatric treatment in the community. To convince the criminal court to set pretrial release conditions that the defendant can satisfy, defense counsel may need to investigate available local resources and arrange for adequate treatment and supervision of the defendant. Again, defense counsel should discuss this approach with the defendant's commitment counsel, who may be able to help identify available local treatment resources and determine whether funding is available while criminal charges are pending.

If a defendant is unable to meet pretrial release conditions and needs greater mental

health treatment than the jail can provide, the criminal court could enter a "safekeeping order," transferring the defendant to a unit of the state prison system designated by the Division of Adult Correction (DAC). *See* G.S. 162-39(d); G.S. 148-32.1(b3)(2). The current facilities designated for mental health treatment are Central Prison and the N.C. Correctional Institution for Women in Raleigh. If the defendant requires this level of treatment, however, commitment to the mental health system may be more appropriate than placement with DAC. Further, local jails may be reluctant to support this option because they are statutorily obligated to pay the costs of the defendant's stay in the state prison facility.

Legislative note: The 2013 legislation, discussed throughout this chapter, may address some of these issues by requiring, among other things, capacity examinations before release from commitment and expedited handling of the case once the defendant gains capacity. *See supra* "During period of commitment" and "At termination of commitment" (Legislative notes) in § 2.8E, Redetermination of Capacity; *see also infra* Appendix 2-1, Summary of 2013 Legislation.

Permanently incapable or unrestorable defendants. A second problem involves defendants whose condition will not improve—for example, defendants with mental retardation, brain damage, or dementia. No matter how many times they go through the capacity-commitment loop, people with these conditions may never gain the capacity to proceed in the criminal case. These defendants also may not meet the criteria for inpatient commitment because they do not suffer from a mental illness.

The remedy provided by the law in these cases is dismissal of the criminal case or at least release of the defendant. Defense counsel should make a motion to dismiss on statutory and constitutional grounds. *See supra* "Dismissal of charges by court" in § 2.8F, Disposition of Criminal Case While Defendant Incapable to Proceed.

Notwithstanding these legal requirements, a criminal judge may have concerns about dismissing charges against a defendant alleged to have committed a dangerous offense. The judge presiding over the civil commitment proceedings also may be reluctant to find that the person no longer meets the criteria for commitment. (The State may argue, for example, that a person who is mentally retarded and charged with a dangerous offense may not be released from commitment because he or she also suffers from a mental illness and, based on the nature of the charged offense, presents a danger to others.)

Criminal counsel should discuss with commitment counsel potential options that may provide some assurance to the court of continued treatment and supervision of the defendant after release. Locating resources for this population can be challenging. If additional supervision is necessary, counsel may want to explore with the client the possibility of a guardianship, under which the guardian has authority to make treatment decisions for the client once the criminal and commitment cases end. Such an arrangement may help resolve the criminal and commitment cases but at the cost of infringement on the client's personal autonomy. Among other things, a guardian may agree to voluntary admission of the person to a mental health facility for treatment. *See*

NORTH CAROLINA CIVIL COMMITMENT MANUAL Ch. 5 (Voluntary Admission of Incompetent Adults) (UNC School of Government, 2d ed. 2011). For a further discussion of guardianship proceedings and their impact, see NORTH CAROLINA GUARDIANSHIP MANUAL Ch. 1 (Overview of Adult Guardianship) (UNC School of Government, 2008), *available at* www.ncids.org (select "Training and Resources," then "Reference Manuals").

Legislative note: The 2013 legislation, discussed throughout this chapter, may address some of the concerns described above by, among other things, mandating dismissal of the charges if the defendant is unlikely to gain the capacity to proceed. *See supra* "Dismissal of charges by court" (Legislative note) in § 2.8F, Disposition of Criminal Case While Defendant Incapable to Proceed; *see also infra* Appendix 2-1, Summary of 2013 Legislation.

Capacity restoration classes or groups. For some defendants found incapable to proceed, the State hospitals may provide "capacity restoration" classes or groups during their hospitalization. These classes offer instruction on such matters as basic court procedures, the roles of the defense attorney, prosecutor, and judge, and the nature of criminal charges. Opinions vary on the nature and value of these efforts.