Chapter 8

Commitment of Defendants Found Incapable of Proceeding

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8.1 Overview

A defendant in a criminal trial must have the capacity to proceed, that is, to be able to understand the nature of the proceedings and be able to participate in the defense of the case. If the defendant meets the standard for "incapacity to proceed" under Chapter 15A of the North Carolina General Statutes (hereinafter G.S.), the criminal procedure statutes, the trial cannot go forward. The criminal court judge must then determine if the defendant meets the criteria for involuntary commitment under Chapter 122C, the mental health statutes. If so, the defendant is referred by the criminal court for involuntary commitment under the provisions of Chapter 122C. The defendant is sometimes called a "House Bill 95," a reference to the legislative bill number for the original applicable statutes.

The primary provisions of Chapter 15A governing determination of incapacity to proceed and referral for civil commitment proceedings also apply to juveniles alleged to be delinquent under Chapter 7B. A reference to a defendant in this chapter generally applies as well to a juvenile alleged to be delinquent.

This chapter will discuss briefly the criminal court procedures that result in the defendant becoming a respondent in an involuntary commitment proceeding. The focus will be on the Chapter 122C procedures for the involuntary commitment of defendants found incapable of proceeding and the interplay between the relevant provisions of Chapter 122C and Chapter 15A.

8.2 North Carolina Defender Manual: Capacity to Proceed

The North Carolina Defender Manual chapter entitled "Capacity to Proceed" (Chapter 2 in Volume 1, Pretrial) provides a comprehensive explanation of the relevant criminal court procedures from the viewpoint of the defendant's attorney. The Defender Manual is available on the Office of Indigent Defense Services website, www.ncids.org, under reference manuals. A new edition of the Defender Manual, including the "Capacity to Proceed" chapter, is forthcoming in 2011. Counsel is referred to that chapter for additional information concerning the

criminal statutes governing capacity to proceed.

8.3 Terminology Used in this Chapter

"Defendant" means, for the purpose of this chapter, an individual charged with a crime in a criminal court proceeding.

"Delinquent juvenile" is "[a]ny juvenile who, while less than 16 years of age but at least 6 years of age, commits a crime or infraction under State law or under an ordinance of local government, including violation of the motor vehicle laws." G.S. 7B-1501(7).

"Incapacity to Proceed" describes the condition of a defendant 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 courts and courts of other states, may also use the terms interchangeably.

"Incapacity to Proceed" distinguished from "Insanity Defense." Incapacity to proceed is determined after a defendant has been charged with a crime and prior to or during the trial on those charges. The incapacity refers to the defendant's ability to understand and participate in the criminal trial. An insanity defense relates to the defendant's state of mind at the time the alleged crime was committed. A defendant who is "insane" at the time of trial might be found incapable of proceeding. An insanity defense to the crime charged cannot be raised unless the defendant is capable of proceeding to trial and entering a plea.

"Incompetent" means 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," of the North Carolina General Statutes and for whom a guardian has been appointed pursuant to that chapter. *See* G.S. 35A-1101(7), (8). For a discussion of proceedings to appoint a guardian, see JOHN L. SAXON, NORTH CAROLINA GUARDIANSHIP MANUAL (UNC School of Government 2008), *available at* www.ncids.org (under reference manuals).

"Respondent" means, for the purpose of this chapter, a defendant in a criminal proceeding who has been referred by the criminal court for involuntary commitment upon a finding of reasonable grounds to believe the individual is mentally ill and dangerous to self or others.

8.4 Applicability to Adults and Juveniles Alleged to Be Delinquent

The provisions of Chapter 15A on incapacity to proceed apply to adult criminal defendants. The primary provisions, G.S. 15A-1001 through 15A-1003, apply as well to juveniles alleged to be delinquent. G.S. 7B-2401. For a discussion of incapacity issues in juvenile delinquency proceedings, see Chapter 7, "Capacity to Proceed," of LOU A. NEWMAN, ALYSON GRINE, & ERIC J. ZOGRY, NORTH CAROLINA JUVENILE DEFENDER MANUAL (UNC School of Government 2008), *available at* www.ncids.org (under reference manuals).

8.5 Determination of Incapacity to Proceed

A. Standard for Determination

To be found incapable of proceeding, the defendant must be unable, by reason of mental illness or defect, to do one of the following:

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

G.S. 15A-1001(a).

Case law: Determination of capacity to proceed.

State v. Shytle, 323 N.C. 684 (1989) (stating and applying test); ***State v. Jenkins,*** 300 N.C. 578 (1980) (stating and applying test).

B. Criminal Court Procedure

Defender Manual. For a more extensive discussion of criminal court procedures, see Chapter 2, "Capacity to Proceed," of the North Carolina Defender Manual (Volume 1, Pretrial), *available at* www.ncids.org (under reference manuals).

Flowchart of criminal and civil commitment proceedings. Appendix 8-1 to this chapter, "Capacity and Commitment Flowchart," traces the interplay between criminal and civil commitment proceedings, highlighting the major steps in the process.

Motion. The question of the defendant's capacity may be raised at any time during the criminal court proceedings. A motion may be made by the prosecutor, the defendant, defense counsel, or the court. The motion must set forth the reasons the movant questions the defendant's capacity to proceed. G.S. 15A-1002(a).

Capacity examination. When a motion is made questioning a defendant's capacity, the court may order a local examination by "impartial medical experts, including forensic evaluators," to determine the defendant's current mental condition. The resulting report is admissible at the hearing on capacity. In addition, the examiner may be called to testify by the court at the request of either party. G.S. 15A-1002(b)(1). It is not required by statute that an examination be ordered, but the court typically orders one when the issue of capacity has been raised.

Examination at state facility: misdemeanors. Only after an initial examination by a medical expert may a defendant charged with a misdemeanor be ordered by the court to a state facility for the mentally ill for further evaluation. This might be done because the results of the first examination were not definitive or because the court wants an in-depth evaluation before proceeding. The defendant may be admitted to the state facility for no more than sixty days for observation and treatment necessary to determine capacity to proceed. G.S. 15A-1002(b)(2). As a practical matter, once undertaken, the typical state facility evaluation is far shorter than the sixty-day maximum.

Examination at state facility: felonies. The court may bypass the initial, local examination for a defendant charged with a felony upon finding that an evaluation at a state facility for the mentally ill would be more appropriate. This evaluation may also be ordered following an initial evaluation. In either instance, the evaluation at the state facility may be no more than sixty days for observation and treatment necessary to determine capacity to proceed. G.S. 15A-1002(b)(2). As a practical matter, once undertaken, the typical state facility evaluation is far shorter than the sixty-day maximum.

Report to court. A report of the results of any court-ordered evaluation must be sent to the defense attorney and to the clerk of superior court for delivery to the court. The report is admissible at the hearing on capacity. G.S. 15A-1002(b)(2). It remains a confidential record, however, until introduced into evidence. If the defendant's capacity is questioned following the examination, the full report must be forwarded to the district attorney. G.S. 15A-1002(d). Notwithstanding this limitation, State facilities have been releasing the capacity report to the district attorney when they release the report to the court and the criminal defense attorney, unless the defense attorney has obtained a court order restricting disclosure.

Hearing. If the defendant's capacity to proceed has been questioned, the criminal court must hold a hearing on the issue of the defendant's capacity to proceed. The hearing must occur after any court-ordered examinations.

The statute does not set forth detailed procedures for the hearing. Both the State and the defendant may present evidence and, if an examination was ordered, the

examiner may be called to testify. The reports of any examinations are admissible in evidence. G.S. 15A-1002(b).

After hearing the evidence, the court must determine whether the defendant is capable of proceeding upon the criminal charges. If the defendant has the necessary capacity, the trial may proceed on the charges.

Disposition upon finding of incapacity to proceed. If the court finds that the defendant lacks the capacity to proceed, the criminal statute provides several alternative dispositions:

1. The court may enter "appropriate orders to safeguard the defendant and to ensure his return for trial in the event that he subsequently becomes capable of proceeding." Appropriate orders include any of the procedures allowed under Article 26 of the Criminal Procedure Act (Chapter 15A of the North Carolina General Statutes), entitled "Bail." G.S. 15A-1004(a), (b).
2. The court may dismiss the charges:
   i. when it appears that the defendant will not gain the capacity to proceed;
   ii. when the defendant has been confined for a period equal to or in excess of the maximum sentence for the crime charged; or
   iii. five years from the date of the finding of incapacity to proceed for misdemeanor cases or ten years for felony cases. G.S. 15A-1008.
3. The prosecutor may dismiss the charges with leave. G.S. 15A-1009(a).
4. The court may refer the defendant for civil commitment proceedings.

Constitutional principles also may require release of the respondent. *See Jackson v. Indiana,* 406 U.S. 715 (1972), discussed below.

Case law: The indefinite confinement of a defendant found incapable of proceeding, without a civil commitment proceeding required to commit any other person, is unconstitutional.

Jackson v. Indiana, 406 U.S. 715 (1972). The U.S. Supreme Court considered the case of a criminal defendant found unable to proceed to trial and committed to an institution under Indiana law until determined to be "sane." The defendant was deaf and mute with the mental functioning of a preschool child and with limited sign language skills. He was charged with two robberies of money and goods with a total worth of $9.00. *Id.* at 717.

Two psychiatrists were appointed by the court to evaluate the defendant's capacity to proceed to trial, followed by a "competency hearing." The examiners reported that the defendant had almost nonexistent communication skills and lacked the intelligence to develop those skills. Both agreed that the condition of the defendant was unlikely to improve, and a deaf-school interpreter through whom the doctors had tried to communicate with the defendant testified that there

were no facilities in the state available to provide treatment designed to improve his condition. *Id*. at 718–19. The trial court found that the defendant "'lack(ed) comprehension sufficient to make his defense'" and committed him to the Indiana Department of Mental Health until such time as the Department certified to the court that the defendant was "sane." *Id*. at 719.

Due Process. The U.S. Supreme Court reviewed the provisions of Indiana law governing involuntary civil commitment for those termed "feeble-minded" and those found to be "mentally ill." The Court noted that in both instances the commitment statutes required an application for commitment with accompanying physician's certificate, examination by two court-appointed physicians, appointment of counsel, notice, and a hearing. Persons committed as feeble-minded may be released at any time the superintendent of the institution determines it is justified by the mental and physical condition of the person. Persons committed as mentally ill had a right to appeal the court's decision and could also be discharged in the discretion of the superintendent of the institution. *Id*. at 721–23. The state did not afford all of these procedures to the defendant. Further, the Court noted that the defendant's commitment rested on proceedings that did not bring into play or even consider any of the articulated bases for indefinite commitment. "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 737–38.

Equal Protection. The Court noted that it had previously held in *Baxstrom v. Herold*, 383 U.S. 107 (1966), that persons involuntarily committed upon completion of a prison sentence are entitled to the same protection of the law afforded to others civilly committed. The Court extended the *Baxstrom* ruling to the situation here, stating that the standard for commitment of one charged with a crime should not be more lenient, nor the criteria for release more stringent, than what is generally applicable to one who does not have criminal charges pending. 406 U.S. at 730.

Holding. The court held that the Indiana statute allowing the defendant to be committed indefinitely after being found incompetent to stand trial without the procedural protections afforded those committed under the general statutory provisions for civil commitment violated the defendant's right to equal protection under the law and was a violation of due process. *Id.* at 730, 738. The court also stated:

> "We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit

indefinitely any other citizen, or release the defendant."

Id. at 738.

8.6 Referral of Defendant for Civil Commitment Proceedings

A. Determination by Criminal Court

After finding the defendant incapable of proceeding, the court must determine whether the defendant meets the criteria for involuntary commitment under Chapter 122C. The presiding judge has discretion to hold a hearing on the commitment issue but is not required to do so. If "reasonable grounds to believe" that the criteria for involuntary commitment exist, the presiding judge must make findings of fact and issue a custody order. The custody order has the same effect as the custody order issued by the clerk or magistrate after the filing of a petition for involuntary commitment. G.S. 15A-1003(a); *see supra* § 2.3B. The custody order of the criminal court must specify that the clerk shall be notified if the defendant is to be released from the custodial facility. G.S. 15A-1004(c); *see infra* Appendix A, Form AOC-SP-304.

Upon entry of the custody order, the defendant becomes a respondent in the involuntary commitment proceeding, as well as being a defendant in the criminal case until the charges are dismissed.

Defendant charged with violent crime. If the defendant was charged with a violent crime, the custody order issued by the presiding judge must order a law enforcement officer to take the defendant directly to a 24-hour facility. The order must state that the defendant was charged with a violent crime and was found incapable of proceeding. G.S. 15A-1003(a). The order must also provide that the facility may release the defendant only to the custody of a specified law enforcement agency. G.S. 15A-1004(c); *see* Appendix A, Form AOC-SP-304.

Temporary detention of defendant pending involuntary commitment proceedings. The court may enter "appropriate orders for the temporary detention of the defendant" pending the involuntary commitment proceeding. G.S. 15A-1003(b).

B. Law Enforcement Officer to Assume Custody or to Transport

The law enforcement officer designated by the custody order of the court must take the respondent into custody within twenty-four hours of entry of the order. G.S. 122C-261(e).

If the defendant was charged with a violent crime and found incapable of proceeding, the law enforcement officer must take the respondent directly to a 24-

hour facility. G.S. 122C-263(b). Otherwise, the usual procedures of Chapter 122C apply (G.S. 15A-1003(a)), and the respondent is transported for an examination by a physician or eligible psychologist. *See supra* § 2.3D and E.

C. First Examination Requirements

Defendant not charged with a violent crime and found incapable of proceeding. The procedures and standards applicable to respondents initially taken into custody under Chapter 122C for a first examination apply. G.S. 15A-1003(a); *see supra* § 2.3E, F, and H.

The criminal court judge may enter an order specifying conditions of the defendant's release if outpatient commitment is recommended or if no grounds for commitment are found. The order may include any of the conditions of Article 26 of the Criminal Procedure Act (Chapter 15A of the North Carolina General Statutes), entitled "Bail," including designating an individual or organization to assume custody and supervision of the defendant if released. G.S. 15A-1004(b).

Defendant charged with a violent crime and found incapable of proceeding. The procedures and standards applicable to respondents initially taken into custody under Chapter 122C apply (G.S. 15A-1003(a)), with the following exceptions:

- The initial examination takes place at the 24-hour facility. G.S. 122C-263(b).
- The examining physician may not release the respondent until ordered to do so by the district court judge presiding over the involuntary commitment proceedings. *Compare* G.S. 122C-266(a) (2), (3) (permitting release by physician in other instances).

See supra § 2.3E.

D. Second Examination by Physician

Defendant not charged with a violent crime and found incapable of proceeding. If the first examiner finds that the criteria for involuntary commitment exist, the procedures and standards applicable to respondents initially taken into custody under Chapter 122C apply. G.S. 15A-1003(a). A second examination must then be performed. G.S. 122C-266(a); *see supra* § 2.3I.

A physician must perform the second examination. If the physician finds after the second examination that the criteria for involuntary commitment exist, the respondent must be held at the facility pending the district court hearing on involuntary commitment. G.S. 122C-266(a)(1).

If the second examiner does not find that the criteria for involuntary commitment exist, the respondent must be released. G.S. 122C-266(a)(3). The release is

subject, however, to conditions that may be imposed by order of the criminal court. These may include bail or placing the defendant in the custody of a designated person or organization. G.S. 15A-1004(b).

Defendant charged with a violent crime and found incapable of proceeding. The statute provides for an examination by a physician of a respondent charged with a violent crime and found incapable of proceeding under the standards and procedures applicable to respondents initially taken into custody under Chapter 122C. G.S. 15A-1003(a), 122C-263(b), 122C-266(a); *see also supra* § 2.3I. However, there is only one examination, at the 24-hour facility, and the examiner may not release the respondent pending the district court hearing, even if the criteria for involuntary commitment no longer exist. G.S. 122C-266(b).

8.7 Attorney Representation

A. Attorney for Respondent

Upon determination by the second examiner that the criteria for involuntary commitment exist, a district court hearing must be held within ten days of the date the respondent was taken into custody. G.S. 122C-268(a). The respondent is then entitled to representation for the involuntary commitment hearing. Special Counsel represents respondents held at a state facility. G.S. 122C-270(a). Counsel is appointed for respondents held at other facilities. For a discussion of the role and responsibilities of counsel, see *infra* Appendix C, "Working with Clients."

The criminal defense attorney does not ordinarily represent the respondent at the involuntary commitment hearing.

B. Attorney for State

Attorney representation for the state's interest is generally the same as for respondents not found incapable of proceeding. *See supra* § 2.5B. The exception is that the district attorney for the county where the respondent was charged with a violent crime and was found incapable of proceeding may elect to represent the state's interest at the commitment hearing. G.S. 122C-268(c). Otherwise, because a defendant found incapable of proceeding is usually sent to one of the state facilities, the staff attorney from the Attorney General's office assigned to the facility will represent the state. G.S. 122C-268(b).

8.8 Preparation for Hearing

Contact with defense attorney. In addition to the usual prehearing preparation, the respondent's attorney should take extra steps when the respondent has been found incapable of proceeding on criminal charges. Because the respondent may

be subject to further criminal proceedings, the attorney should contact the respondent's criminal defense attorney, who can shed light on the defense strategy. For example, the defense attorney might be aware of the state's objective, which might be supervised placement in the community rather than a prison sentence.

Note that the defendant's criminal defense attorney is not entitled to notice of the involuntary commitment proceeding under the statutes. Commitment counsel must therefore initiate contact if information is required from the defense attorney.

Because the defense attorney knows of the commitment through the criminal proceedings, counsel is not divulging confidential information by making contact. Still, the better practice is to obtain the client's permission prior to contacting the defense attorney.

Contact with district attorney. After talking with the defense attorney, or if unable to contact the defense attorney, counsel may consider contacting the district attorney. The district attorney is entitled to notice of the involuntary commitment proceedings, so this would not be revealing confidential information. Counsel must take care, however, not to relate any confidential information to the district attorney.

The purpose of this contact is to determine the state's objective in the case, which might affect the strategy in the involuntary commitment case. For example, the district attorney may be planning to dismiss the charges or to dismiss the charges with leave. Supervised placement that would prevent repeated minor crimes related to the mental illness, such as trespass, might be a satisfactory resolution for the state.

Contact with witnesses. Potential witnesses might include individuals connected to the criminal proceeding, including family members. Counsel should check to see if there are orders preventing the defendant from contacting a victim or victims and honor those orders. Consent of the respondent should be obtained before contacting witnesses because of the confidentiality of the proceedings.

Family members might be able to testify as to the respondent's danger to others or lack thereof. A person willing to provide housing or supervision could be valuable to the respondent's case.

8.9 Hearings

A. Time Limit for Hearing

The involuntary commitment hearing in district court must be held within ten

days of the date of the custody order issued by the criminal court. G.S. 122C-268(a), 122C-261(e).

B. Venue and Change of Venue

Defendant not charged with a violent crime. The hearing is held in the county where the facility is located. The statute provides further that the respondent may object to venue, and the hearing is then held in the county where the petition was initiated. G.S. 122C-269(a).

Defendant charged with a violent crime. Venue is in the county where the facility is located, unless a motion to change venue is filed. The statute provides that upon motion of "any interested person," the proceeding may be moved to the county where the respondent was found incapable of proceeding "when the convenience of witnesses and the ends of justice would be promoted by the change." G.S. 122C-269(c). It appears that both the State and the respondent could move for change of venue under this provision.

If venue is transferred back to the county where the defendant was found incapable of proceeding, the rules of Chapter 122C regarding place of hearing apply. The hearing is not to be held in a regular courtroom if the respondent objects, "if in the discretion of a judge a more suitable place is available." G.S. 122C-268(g).

C. Continuances

The standards and procedures applicable to routine involuntary commitment proceedings apply. *See supra* § 2.6E.

D. Discharge Pending Hearing

Defendant not charged with a violent crime. A respondent who was not charged with a violent crime may be released at any time pending the district court hearing if the criteria for involuntary commitment no longer exist. G.S. 122C-266(d). The release is subject, however, to conditions that may be imposed by order of the criminal court. These may include bail or placing the defendant in the custody of a designated person or organization. G.S. 15A-1004(b).

Defendant charged with a violent crime. A respondent who was charged with a violent crime may not be released pending the district court hearing. The respondent may be released only if so ordered by the district court following the hearing. G.S. 122C-266(b).

E. Not Contesting/Not Resisting

Although not specifically provided by statute, a respondent may choose to "not

contest" or may be "not resisting" because unable to comprehend and participate in the proceedings. For a discussion of the factors involved in making these determinations, see *supra* § 2.6F.

F. Waiver of Appearance

The respondent's presence may be waived by counsel with the permission of the court as in any other involuntary commitment hearing. G.S. 122C-268(e). For a discussion of the issues involved in waiving the respondent's appearance, see *supra* § 2.6G. *See also infra* Appendix B, "Waiver of Appearance and Order Allowing Waiver of Appearance."

G. Criteria for Involuntary Commitment

The criteria for involuntary commitment are the same as for respondents not referred through the criminal justice system. *See supra* § 2.6H.

H. Evidence

The evidentiary standards and burden of proof are the same as for respondents not referred through the criminal justice system. *See supra* § 2.6J.

Note: Chapter 15A provides that "[e]vidence used at the hearing with regard to capacity to proceed is admissible in the involuntary civil commitment proceedings." G.S. 15A-1003(c).

8.10 Dispositional Alternatives

Defendant not charged with a violent crime. The dispositional alternatives for respondents not referred through the criminal justice system are available to the district court at the involuntary commitment hearing. *See supra* § 2.7A.

If the respondent is either released or committed to outpatient treatment, conditions of release imposed by order of the criminal court apply. These may include bail or placing the defendant in the custody of a designated person or organization. G.S. 15A-1004(b).

Defendant charged with a violent crime. The dispositional alternatives for respondents not referred through the criminal justice system are available to the district court for respondents charged with a violent crime, with some additional requirements. *See supra* § 2.7A. If the district court orders either inpatient or outpatient commitment, it must note on the order that the respondent was charged with a violent crime and found incapable of proceeding. G.S. 122C-271(b)(1), (2).

If the respondent is either released or committed to outpatient treatment,

conditions of release imposed by order of the criminal court apply. These may include bail or placing the defendant in the custody of a designated person or organization. G.S. 15A-1004(b).

8.11 Rehearings

Involuntary commitment rehearings for respondents initially found incapable of proceeding are generally subject to the same provisions and standards as for respondents initially taken into custody under Chapter 122C. *See supra* § 2.9; *see also* G.S. 122C-276(a) (if the respondent was charged with a violent crime and found incapable of proceeding, the clerk must give notice of the time and place of the rehearing to the district court judge, clerk of superior court, and district attorney in the county in which the respondent was found incapable of proceeding). The proceedings remain subject to any special conditions imposed at the initial involuntary commitment hearing in criminal court following a finding of incapacity to proceed.

8.12 Termination of Commitment

Defendant not charged with a violent crime. A committed respondent who was not charged with a violent crime, who was found incapable of proceeding, and who no longer meets the involuntary commitment criteria may be released without a separate hearing on the issue of release. G.S. 122C-277(a). Any conditions of release imposed by order of the criminal court continue to apply. These may include bail or placing the defendant in the custody of a designated person or organization. G.S. 15A-1004(b). If the criminal court order does not specify to whom the defendant is to be released, the facility may release the defendant "to whomever it thinks appropriate." G.S. 15A-1004(c).

The facility must report "to the clerk if the defendant is to be released from the custody of the hospital or institution." G.S. 15A-1004(c).

Defendant charged with a violent crime and found incapable of proceeding. A committed respondent charged with a violent crime and found incapable of proceeding may not be released without an order of the district court. The attending physician must notify the clerk in the county where the facility is located fifteen days before the proposed discharge or release. The clerk must schedule a district court hearing, which is in effect a rehearing. G.S. 122C-277(b); *see infra* Appendix A, Form DMH 5-76-01.

The dispositional criteria for an initial hearing on involuntary commitment apply. *See supra* § 2.7. At the hearing on release, however, the attending physician would presumably testify that either the respondent is no longer mentally ill or is

no longer dangerous to self or others. Counsel for the respondent should subpoena the attending physician if necessary.

Counsel, along with the respondent, will have to decide if the respondent will testify. The court may be less likely to order discharge without the testimony of the respondent. The respondent's testimony and presentation could either jeopardize or enhance the chances for release.

If the respondent is released from involuntary commitment, the respondent may be released only to the custody of the law enforcement agency specified in the criminal court order originally referring the defendant for involuntary commitment. G.S. 15A-1004(c).

8.13 Supplemental Hearings in Criminal Court

The criminal court may hold a supplemental hearing when:

- the defendant has been returned for trial after the facility having custody has determined that the defendant has regained capacity or the court has received a report that the defendant has regained capacity (G.S. 15A-1007(a)); or
- the court determines that a hearing should be held to inquire into the defendant's condition (G.S. 15A-1007(b)); or
- any of the conditions for dismissal of the criminal charges have been met. G.S. 15A-1007(c); *see* G.S. 15A-1008. *See also Jackson v. Indiana,* 406 U.S. 715 (1972), discussed *supra* in § 8.5B.

8.14 Defendant's Return to Stand Trial Upon Regaining Capacity

The defendant must be returned to stand trial if capacity to proceed is regained and the charges have not been dismissed. The criminal court may also order that the defendant be returned to jail or be granted pretrial release pending the criminal court trial. G.S. 15A-1004(e).

If the defendant has been in the custody of a facility, the facility must notify the clerk in the county where the criminal case is pending of the change in the defendant's status. The clerk must then notify the sheriff of that county to transport the defendant back to the county for further criminal proceedings. G.S. 15A-1006.

Prepared by John Rubin, April 2010
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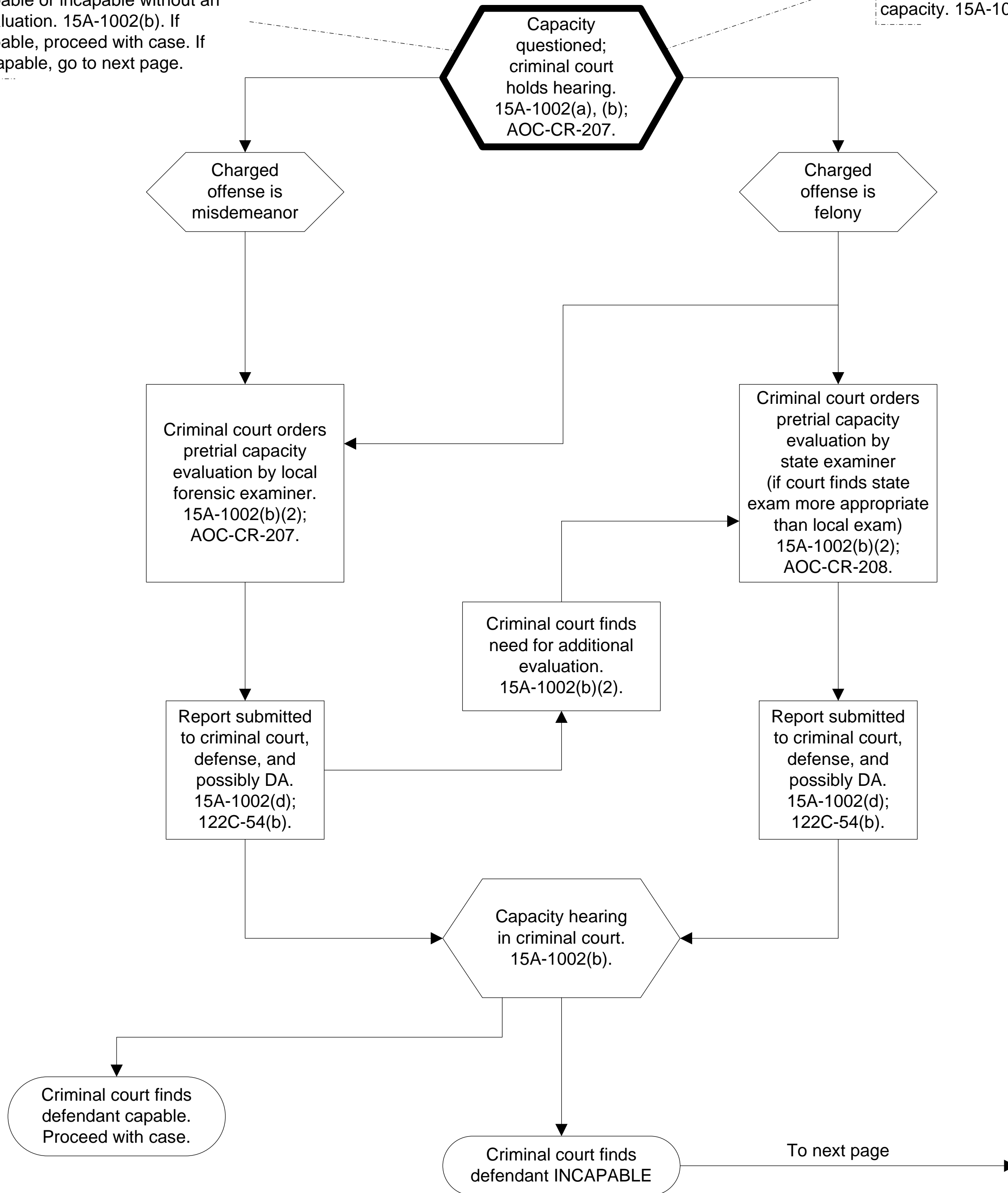
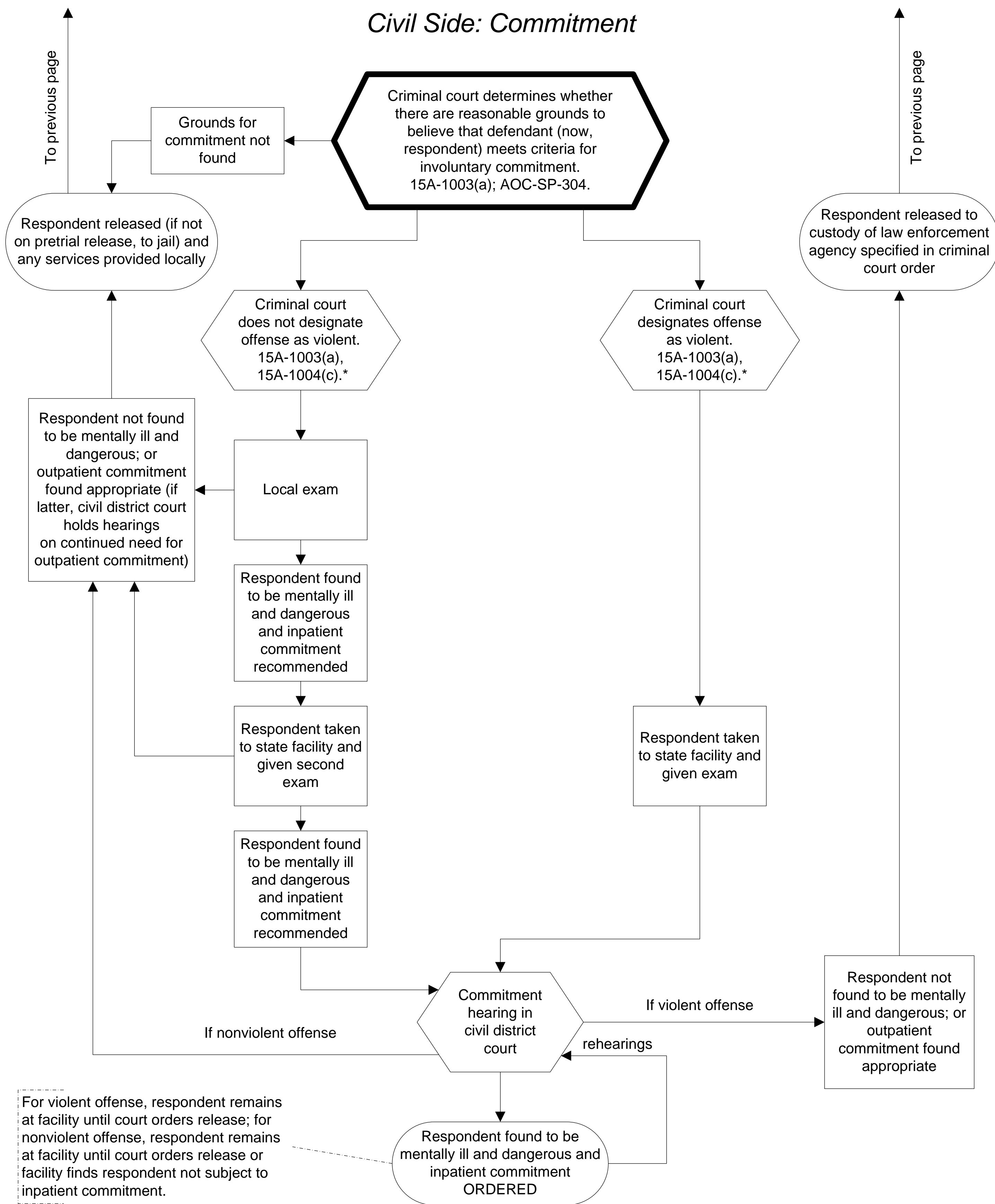
Capacity and Commitment Flowchart



*At a supplemental hearing, the court may find the defendant capable or incapable of proceeding, modify pretrial release conditions, find that the defendant meets the statutory criteria for dismissal under GS 15A-1008, or find that the defendant is constitutionally entitled to dismissal under *Jackson v. Indiana,* 406 U.S. 715 (1972). If the defendant is incapable and is not entitled to dismissal, the prosecutor still may take a dismissal or, as provided in GS 15A-1009, enter a dismissal with leave (although dismissal with leave may make it difficult for the defendant to obtain treatment because criminal charges remain pending).



*Various statutes in GS 122C distinguish between the handling of nonviolent and violent offenses following a finding of incapacity and referral for commitment proceedings. For a more detailed discussion of those requirements, see Chapter 8 of the North Carolina Civil Commitment Manual, available at www.ncids.org under Reference Manuals.