Chapter 7
Capacity to Proceed

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7.1 Overview

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

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

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

7.2 Resources on Juvenile Capacity Issues

The North Carolina Defender Manual, published by the School of Government, explores in detail the issue of capacity to proceed in criminal cases. *See* 1 NORTH CAROLINA DEFENDER MANUAL Ch. 2, Capacity to Proceed (2d ed. 2013). The issues and case law discussed there generally apply to juvenile proceedings, as capacity to proceed in delinquency cases is determined pursuant to the designated statutes in the Criminal Procedure Act, G.S. 15A-1001, 15A-1002, and 15A-1003, and constitutional requirements.

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

For a discussion of capacity in the context of delinquency proceedings, see LaToya Powell, Incapacity to Proceed and Juveniles, ON THE CIVIL SIDE, UNC SCH. OF GOV'T BLOG (Oct. 13, 2017), and her forthcoming Juvenile Law Bulletin on juvenile capacity.

7.3 Terminology Used in this Chapter

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

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

Individualized education program (IEP) is the unique plan developed for each public school child with a disability who needs special education and related services. The IEP is developed by a team of qualified professionals and the child's parents to address the specific needs of the child within the school setting. The IEP must be designed to meet the requirements of the Individuals with Disabilities Education Act (IDEA), Part B. *See* A Guide to the Individualized Education Program, U.S. Department of Education (July 2000).

7.4 Motions Pending Capacity Proceedings

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

7.5 Standard for Capacity to Proceed to Adjudication

A. Requirement of Capacity

Due process and North Carolina law prohibit the trial or punishment of a person who is legally incapable of proceeding. *See Drope v. Missouri*, 420 U.S. 162, 171–72 (1975); G.S. Ch. 15A, art. 56 Official Commentary (recognizing that North Carolina statutes on capacity to proceed codify the principle of law that a criminal defendant may not be tried or punished when he or she lacks mental capacity to proceed). The requirement of capacity to proceed applies to all phases of a juvenile proceeding. A juvenile may not be "tried, convicted, sentenced, or punished" if mentally incapacitated as defined by statute. G.S. 15A-1001(a); G.S. 7B-2401.

B. Test of Capacity

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

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

Mental illness or defect. The above test has two parts. First, the juvenile must have a mental illness or defect. Conditions that do not constitute a mental illness or defect generally do not support a finding that a person is incapable to proceed. *See State v. Brown*, 339 N.C. 426 (1994) (holding that trial court properly concluded defendant was capable of proceeding where capacity examination indicated that defendant's attitude, not a mental illness or defect, prevented him from assisting in his own defense); *State v. Aytche*, 98 N.C. App. 358 (1990) (upholding finding that the defendant was capable to stand trial despite evidence that the defendant experienced some back pain during trial).

If the juvenile has not been diagnosed with a specific mental illness but is unable to help defend the case because of age or immaturity, counsel should consider arguing that the juvenile's age or immaturity are essentially a "mental defect" for the purpose of determining capacity to proceed. *See generally Timothy J. v. Superior Court*, 150 Cal.

App. 4th 847, 862 (2007) (holding that the juvenile's developmental immaturity could result in incapacity to proceed despite lack of a specific mental illness or defect); *Tate v. State*, 864 So. 2d 44, 48 (Fla. Dist. Ct. App. 2003) (holding that a capacity evaluation was required due to the juvenile's "extremely young age and lack of previous exposure to the judicial system").

In the alternative, counsel should argue that the court can find the juvenile incapable to proceed without determining that the juvenile has a mental illness or defect because the standard for capacity under the Due Process Clause of the United States Constitution does not require a specific mental illness or defect. Instead, the standard is whether the juvenile has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). The California Court in *Timothy J.* found that in determining whether the juvenile was capable "of understanding the proceedings and of cooperating with counsel," the developmental immaturity of the juvenile could be considered without proof of a mental disorder or developmental disability. 150 Cal. App. 4th at 862. The Court discussed at length testimony presented concerning the developmental stage of the juvenile's brain and thinking processes. *Id*. at 853–54.

Capabilities. Second, the mental condition must render the juvenile unable to perform at least one of the functions specified in G.S. 15A-1001(a). The existence of a mental condition alone does not necessarily mean that the juvenile lacks the capacity to proceed. *See State v. Willard*, 292 N.C. 567, 576–77 (1977) (amnesia does not per se render defendant incapable, although temporary amnesia may warrant continuance of trial); *In re I.R.T.*, 184 N.C. App. 579, 582–83 (2007) (although one evaluation noted "progressive decline in intellectual abilities," both reports indicated juvenile could understand legal terms and procedures if explained in concrete terms); *In re Robinson*, 151 N.C. App. 733 (2002) (evidence sufficient to support court's finding of capacity to proceed although private psychologist found moderate mental retardation and schizophreniform disorder).

The three functions listed in G.S. 15A-1001(a) are written in the disjunctive, which means that a juvenile's inability to perform any individual function bars further proceedings. *See State v. Shytle*, 323 N.C. 684, 688 (1989); *State v. Jenkins*, 300 N.C. 578, 582–83 (1980). The Supreme Court and the Court of Appeals sometimes refer to a fourth condition of capacity: the ability to cooperate with counsel to the end that any available defense may be interposed. *See, e.g., State v. Jackson*, 302 N.C. 101, 104 (1981); *State v. O'Neal*, 116 N.C. App. 390, 395 (1994). The Supreme Court has held that trial courts need not make a specific finding on this fourth condition. *See Jenkins*, 300 N.C. at 583. Nevertheless, the court still appears to consider the condition to be a requirement of capacity, treating it as a subset of the statutory test. *See, e.g., Shytle*, 323 N.C. at 688–89.

C. Medication

North Carolina courts have upheld rulings finding defendants who were on medication to be capable to proceed. *See State v. Buie*, 297 N.C. 159, 161 (1979) (upholding finding that defendant was capable of proceeding and stating that the "fact that defendant was competent only as a result of receiving medication does not require a different result"); *State v. Cooper*, 286 N.C. 549, 566 (1975) (medication was necessary to prevent exacerbation of mental illness and did not dull defendant's mind), *disapproved on other grounds in State v. Leonard*, 300 N.C. 223 (1980); *State v. McRae*, 163 N.C. App. 359, 368 (2004) (trial court properly found defendant capable where there was evidence that he took antipsychotic medication during the trial).

It is less clear when the State can use forcible medication to render defendants and juveniles capable to proceed. North Carolina statutes do not specifically authorize treatment or medication to restore capacity. *See, e.g.*, G.S. 122C-54(b) (statute states that forensic examiner must provide treatment recommendation after completing capacity evaluation, but it does not specifically authorize treatment or medication to restore capacity); *see also* 1 NORTH CAROLINA DEFENDER MANUAL § 2.1C, Medication (2d ed. 2013).

In addition, the United States Supreme Court has set constitutional limits on forcible medication. The use of forcible medication to render an adult defendant capable to proceed violates the defendant's right to due process unless it is (1) medically appropriate, (2) substantially unlikely to have side effects that might undermine a trial's fairness, (3) is done only after considering less intrusive alternatives, and (4) is necessary to further important government trial-related issues. *Sell v. United States*, 539 U.S. 166, 179 (2003). The Court held that the use of forcible medication should be "rare" and occur only in "limited circumstances." *Id*. at 169, 180. Applying the criteria in *Sell*, the Fourth Circuit held that the government could not use forcible medication to render the defendant capable to proceed because, among other things, the alleged crimes were non-violent and the defendant had already been confined for a significant amount of time as compared to her possible sentence. *United States v. White*, 620 F.3d 401, 413–14 (4th Cir. 2010). The Fourth Circuit also vacated an order permitting the State to forcibly medicate the defendant where the trial court failed to consider less intrusive means for administering medication, such as a court order backed by contempt sanctions. *United States v. Chatmon*, 718 F.3d 369, 376 (4th Cir. 2013).

D. Time of Determination

The juvenile's capacity to proceed is evaluated as of the time of the adjudicatory hearing or other proceeding. The question of capacity may be raised at any time by the juvenile, the court, or the prosecutor. *See* G.S. 15A-1002(a); *Drope v. Missouri*, 420 U.S. 162 (1975) (capacity issues may arise during trial). When the question of capacity arises before the adjudicatory hearing, the court should determine the question before proceeding with the hearing. *See State v. Silvers*, 323 N.C. 646, 653 (1989); *State v. Propst*, 274 N.C. 62, 69 (1968).

Because capacity to proceed is measured as of the time of the proceeding, more recent examinations or observations of the juvenile tend to carry more weight. *See State v. Silvers*, 323 N.C. 646, 654–55 (1989) (conviction vacated where trial judge based finding of capacity entirely on psychiatric examinations conducted three to five months before trial and excluded more recent observations by lay witnesses); *State v. Robinson*, 221 N.C. App. 509, 516 (2012) (trial judge erred in denying motion for capacity examination at beginning of trial; earlier evaluations finding defendant capable indicated that his condition could deteriorate, and defense counsel's evidence in support of current motion for examination indicated that defendant's mental condition had significantly declined); *State v. Reid*, 38 N.C. App. 547, 549–50 (1978) (trial court's finding of capacity *not* supported by evidence where State's expert testified as follows: defendant was suffering from chronic paranoid schizophrenia; defendant was capable at time of examination two to three months earlier, but condition could worsen without medication; and State's expert had not reexamined defendant and had no opinion on defendant's capacity at time of capacity hearing).

E. Compared to Other Standards

Insanity. Incapacity to proceed refers to the juvenile's ability to understand and participate in the adjudicatory hearing and other proceedings. The question of whether the juvenile is capable to proceed is determined after a juvenile has been alleged to have committed a delinquent act and before or during the adjudicatory hearing on the allegations. In contrast, an insanity defense relates to the juvenile's state of mind at the time the alleged delinquent act occurred. A juvenile who is "insane" at the time of hearing might be found incapable of proceeding. An insanity defense cannot be raised, however, unless the juvenile is capable of proceeding to the adjudicatory hearing. *See State v. Propst*, 274 N.C. 62, 69–70 (1968) (comparing capacity to proceed with insanity).

Admission by the juvenile. The standard of capacity for entering an admission to the allegations is the same as the standard of capacity to proceed to the adjudication hearing with the added proviso that the juvenile also must act knowingly and voluntarily in making any admission. *See Godinez v. Moran*, 509 U.S. 389, 398–99 (1993) (holding that the standard of capacity for a defendant to plead guilty is the same as the standard to stand trial); G.S. 7B-2407 (When admissions by juvenile may be accepted).

F. Burden of Proof

The juvenile has the burden of proof to show incapacity to proceed. *See In re H.D.*, 184 N.C. App. 188 (2007) (unpublished) (*citing State v. O'Neal*, 116 N.C. App. 390, 395 (1994)); *see also Medina v. California*, 505 U.S. 437, 450–51 (1992) (burden of proof to show incapacity to proceed may be placed on defendant). The burden may not be higher than by the preponderance of the evidence. *See Cooper v. Oklahoma*, 517 U.S. 348, 366–67 (1996).

G. Retrospective Capacity Determination

If an appellate court finds that the trial court erroneously failed to determine the juvenile's capacity to proceed, the appellate court has two main options. First, the appellate court can remand the case for a new adjudication hearing. *State v. Robinson*, 221 N.C. App. 509, 516 (2012) (finding that the "proper remedy" where trial court proceeds to trial notwithstanding evidence that the defendant was incapable of proceeding is to vacate the judgment and remand for a new trial if and when defendant is capable of proceeding). Second, the appellate court can remand the case to the trial court to determine whether a retrospective capacity hearing is possible and, if so, determine whether the juvenile was capable of proceeding to trial. *State v. McRae (McRae I)*, 139 N.C. App. 387, 392 (2000) (first North Carolina case on issue authorizing such a hearing, but stating that such a hearing may be conducted "only if a meaningful hearing on the issue of the competency of the defendant at the prior proceedings is still possible"); *see also State v. Whitted*, 209 N.C. App. 522 (2011) (remanding to trial court to determine whether retrospective capacity hearing was possible). This remedy is disfavored. *See State v. McRae (McRae II)*, 163 N.C. App. 359, 367 (2004) (recognizing "the inherent difficulty in making such *nunc pro tunc* evaluations"). In the few cases in which retrospective capacity hearings were held and the results appealed, the court upheld the procedure. *See id.*; *State v. Blancher*, 170 N.C. App. 171, 174 (2005).

7.6 Investigating Capacity to Proceed

A. Duty to Investigate

Counsel has a duty to make a "reasonable investigation" into the juvenile's capacity to proceed to an adjudicatory hearing. *See Becton v. Barnett*, 920 F.2d 1190, 1192–93 (4th Cir. 1990) (counsel must make reasonable investigation into defendant's capacity to proceed and must use reasonable diligence in investigating capacity; counsel may not rely on own belief that defendant was incapable of proceeding). Counsel should first try to discuss with the juvenile the issue of raising capacity and its consequences. However, when counsel has a "good faith doubt" as to the juvenile's capacity to proceed, counsel should file an ex parte motion for a mental health expert or a motion for a capacity hearing. *See* ABA Criminal Justice Standards, Standard 7-4.2(c) (Responsibility for raising the issue of incapacity to stand trial) and Commentary; *see also infra* Appendix 7-1: Practical Tips for Attorneys on Using Capacity; *see generally* 1 NORTH CAROLINA DEFENDER MANUAL § 2.3A, Ethical Considerations (2d ed. 2013). For a further discussion of moving for funds for an expert or for a capacity hearing, see *infra* § 7.8, Obtaining an Expert Evaluation.

B. Sources of Information

Personal interview. A face-to-face meeting—at which counsel can observe the juvenile's speech, thinking, appearance, mannerisms, and other behavior—provides the best opportunity to assess the juvenile's condition and its potential effect on capacity to

proceed. Counsel may observe unusual or inappropriate behavior while interacting with the juvenile. The juvenile's inability to understand a simple explanation of the proceedings, repeatedly asking the same questions, responding to internal stimuli, giddiness, or extreme sadness may be signs of an underlying condition affecting capacity to proceed. Counsel should obtain permission from the juvenile during the meeting to talk with parents or other people who may have information about the juvenile's condition.

Medical history. Counsel should obtain the juvenile's medical history, including any history of mental health treatment, and ask that the juvenile and the parent, guardian, or custodian authorize the release of medical and other records for the juvenile. If the hospital or facility has its own release form, counsel should have the juvenile and the parent, guardian, or custodian sign that form. A sample release form is available on the Juvenile Defender website. Parents and other caretakers may be able to provide more specific information concerning past treatment and diagnoses.

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

School records. School records that reflect poor academic performance, repeated suspensions, or an expulsion may be indicative of mental illness or other disability. Past or continuing concerns about the juvenile's level of functioning may be disclosed in school records. Counsel should review report cards, disciplinary records, and other school records that describe the juvenile's behavior. Under the Family Educational Rights and Privacy Act (FERPA), the school can release such records with the written consent of the juvenile's parent or guardian. 20 U.S.C. § 1232g. A sample release form is available on the Juvenile Defender website. The school can also release the records in response to a subpoena or court order. *See* 1 NORTH CAROLINA DEFENDER MANUAL § 4.7F, Specific Types of Confidential Records (2d ed. 2013). For additional information on obtaining school records, see Jason B. Langberg & Barbara A. Fedders, *How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline: A Primer on Educational Advocacy and Incorporating Clients' Education Histories and Records into Delinquency Representation*, 42 J. L. & EDUC. 653 (2013).

Individualized education program. School records are a particularly good source of information if the juvenile has an Individualized Education Program (IEP), mandated by the federal government for each child in public school who has been identified as having a disability requiring a special education plan. The IEP must be tailored to the juvenile's needs as determined by evaluations and assessments by qualified professionals. As with other school records, the school can release records related to the juvenile's IEP with the written consent of the juvenile's parent or guardian or in response to a subpoena or court order.

Commitment proceedings. The juvenile may have been voluntarily admitted or involuntarily committed in the past. To obtain court records from prior proceedings, counsel may make a motion to the district court that heard the case. *See* G.S. 122C-54(d). For medical records not in the court file, the juvenile and the parent, guardian, or custodian can authorize the appropriate hospital or other facility to release those records. Counsel also may make a motion to the juvenile court to compel production of records from other court proceedings or medical records in the possession of a nonparty. *See generally* 1 NORTH CAROLINA DEFENDER MANUAL § 4.6A, Evidence in Possession of Third Parties (2d ed. 2013).

Other records. Several other types of records may contain relevant information. For example, counsel should review any prior juvenile court records for the juvenile. Similarly, counsel should ask whether the juvenile's parent receives a monthly payment from the Social Security Administration as a result of the juvenile's disability. If so, counsel should review any available records related to the disability payments.

7.7 Consequences of Questioning Capacity

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

A. Potential Benefits

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

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

B. Potential Adverse Consequences

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

- The evaluation may result in disclosure of information that is damaging to the juvenile at disposition and could potentially be admitted during the adjudicatory hearing. Counsel may be able to reduce this risk by moving for an *in camera* review

of the evaluation and for an order limiting the use of the evaluation. *See infra* § 7.9E, Limiting Scope and Use of Examination.

- An evaluation on capacity to proceed before the juvenile makes a motion for funds for an expert (*see infra* § 7.8A, Procedures to Obtain Expert Evaluation) may hurt the juvenile's chance for success on a motion for an expert.
- If found incapable of proceeding and involuntarily committed, the juvenile will be confined for some period, even though there might have been no confinement if adjudicated delinquent, or the confinement might be for a longer period than under a dispositional order, particularly if the underlying offense is a misdemeanor or the juvenile does not have a significant history of delinquency.
- The juvenile may be confined while proceedings to determine capacity are pending. *See* G.S. 15A-1002(b)(2) (court may place defendant in state hospital for up to 60 days for capacity evaluation, although the stay is ordinarily shorter); G.S. 15A-1002(c) (court may order defendant confined after evaluation and pending hearing). It is not uncommon for a juvenile to be placed in a detention facility pending an evaluation. Counsel should request a hearing to review secure custody and argue for release if the juvenile does not meet the statutory criteria. *See infra* § 8.6C, Criteria for Secure Custody Pending Adjudication.
- A finding of incapacity to proceed and subsequent involuntary commitment may stigmatize the juvenile.

7.8 Obtaining an Expert Evaluation

A. Procedures to Obtain Expert Evaluation

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

Ex parte motion. Counsel may obtain the assistance of a mental health expert for the juvenile by filing an ex parte motion with the court. *See* 1 NORTH CAROLINA DEFENDER MANUAL § 5.5, Obtaining an Expert Ex Parte in Noncapital Cases (2d ed. 2013). The motion does not ask the court to determine the defendant's capacity. Rather, it seeks funds for counsel to hire an expert of counsel's choosing to provide assistance on all applicable mental health issues. Once the expert has evaluated the juvenile, counsel will be in a better position to determine whether there are grounds for questioning capacity to proceed. Moving for funds for an expert affords counsel the best opportunity to obtain an expert who is well versed in evaluating, diagnosing, and treating children and adolescents. Counsel should include in the ex parte motion the amount necessary to pay for expert's services. A sample ex parte motion and order for funds for an expert is available on the Juvenile Defender website.

One of the principal benefits of the above procedure is greater confidentiality. Because the motion is ex parte, it does not reveal to the prosecution that counsel has a question about the juvenile's mental condition. Also, if counsel decides not to raise lack of capacity or call the expert as a witness, the prosecution generally does not have a right to the results of the examination. *See* 1 NORTH CAROLINA DEFENDER MANUAL § 4.8C,

Results of Examinations and Tests (2d ed. 2013) (discussing general prohibition in criminal cases on disclosure to State of nontestifying expert's report and circumstances in which disclosure may be allowed).

Motion requesting court to appoint a particular expert. Typically, courts use state facilities or local mental health centers to perform evaluations of capacity to proceed, discussed next, but counsel may request appointment of a specific expert as part of a motion questioning the juvenile's capacity to proceed. *See* G.S. 15A-1002(b)(1a) (court may appoint one or more impartial medical experts). While uncommon in adult criminal cases, in juvenile cases such an appointment may help ensure that the examiner has the necessary qualifications to evaluate children and adolescents.

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

B. Choosing which Motion to Make

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

C. Choosing an Expert

Most examiners have much more experience evaluating the capacity to proceed of adult defendants. Counsel should consider using an evaluator who employs tools and techniques specifically tailored to evaluate children and adolescents. *See* THOMAS GRISSO, *What is Different about Evaluating Youths' Competence to Stand Trial?,* in CLINICAL EVALUATION FOR JUVENILES' COMPETENCE TO STAND TRIAL: A GUIDE FOR LEGAL PROFESSIONALS 15 (2005). When searching for an examiner, counsel should consider the database of experts compiled by the Forensic Resource Counsel at the Office of Indigent Defense Services. Counsel can use the database to identify psychiatric or psychological experts who have experience working with juveniles. The Forensic Resource Counsel cannot guarantee that any individual expert is qualified or is the appropriate expert for a specific case. Consequently, if the database includes an expert who has experience working with juveniles, counsel should independently evaluate the

expert to determine whether he or she is appropriate for conducting a capacity evaluation of the juvenile.

D. Basis for Motion

Counsel should detail the specific conduct or information that warrants funds for an expert or a capacity examination at a state or local facility, including observations of counsel. If the showing for a capacity examination contains confidential information, including information obtained in the course of privileged attorney-client communications, counsel may ask the court to review the information in camera. *See infra* "Contents of motion" in § 7.9A, Moving for Examination. If the motion is for funds for an expert, the motion and accompanying showing should always be made ex parte. *See* 1 NORTH CAROLINA DEFENDER MANUAL Ch. 5, Experts and Other Assistance (2d ed. 2013).

7.9 Examination by Local Examiner or State Facility

Counsel may begin the evaluation of capacity to proceed by obtaining an examination of the juvenile at a state or local mental health facility (rather than moving for funds for an expert, discussed *supra* in § 7.8, Obtaining an Expert Evaluation).

A. Moving for Examination

Time limit. There is no formal time limit on a motion questioning the juvenile's capacity and requesting an examination. Lack of capacity may be raised at any time. *See* G.S. 15A-1002(a). A court may be less receptive, however, to a last-minute motion. *See, e.g.*, *State v. Washington*, 283 N.C. 175, 185 (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 juvenile's capacity to proceed and asking that the juvenile be evaluated. A sample motion and order is available on the Juvenile Defender website. *See also* Form AOC-CR-207B, "Motion and Order Appointing Local Certified Forensic Evaluator" (Dec. 2013); and Form AOC-CR-208B, "Motion and Order Committing Defendant to Central Regional Hospital – Butner Campus for Examination on Capacity to Proceed" (Dec. 2013). 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, 78 (2000) (where defendant demonstrates or matters indicate there is a significant possibility that defendant is incapable of proceeding, trial court must appoint expert to inquire into defendant's mental health); *State v. Taylor*, 298 N.C. 405, 409–10 (1979) (motion must contain sufficient detail to cause "prudent judge" to call for psychiatric examination before determining capacity); *State v. Robinson*, 221 N.C. App. 509, 516 (2012) (trial court erred by denying motion for capacity examination

where defense counsel provided an affidavit detailing his observation that the defendant's mental condition had significantly declined during the week before trial).

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. The juvenile may be able to obtain additional examinations if the report from the first examination has become stale or the juvenile's condition has changed. *See supra* § 7.5D, Time of Determination.

Motion by prosecutor or court for examination. The prosecutor may request an evaluation of capacity to proceed. As with a motion by the juvenile for an examination, the prosecutor must detail the specific conduct warranting an examination. *See* G.S. 15A-1002(a). The prosecutor should give counsel for the juvenile notice of the motion. *See State v. Jackson*, 77 N.C. App. 491, 496–97 (1985) (disapproving of entry of order for examination without notice to defendant); *see also infra* § 7.12B, Fifth and Sixth Amendment Protections (discussing Sixth Amendment right to notice of examination).

Practice note: If the trial court grants a motion by the prosecutor for a capacity examination, defense counsel should consider requesting that the court limit the scope of the examination. *See infra* § 7.9E, Limiting Scope and Use of Examination.

The trial court has the power on its own motion to order an evaluation of the juvenile's capacity to proceed. *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 defense counsel, if there is a bona fide doubt about the juvenile's capacity to proceed. *State v. Staten*, 172 N.C. App. 673, 678 (2005).

B. Who Does Examination

Misdemeanors. On a motion for a capacity examination when the underlying offense alleged is a misdemeanor, the juvenile is evaluated by a local forensic examiner. G.S. 15A-1002(b)(1a). An earlier version of G.S. 15A-1002 permitted the court to refer a juvenile charged with a misdemeanor to a State facility for evaluation after the local examination was completed. However, the General Assembly amended G.S. 15A-1002, effective for offenses committed on or after December 1, 2013, to remove the court's authority to order examinations at State facilities in misdemeanor cases. 2013 N.C. Sess. Laws Ch. 18 (S 45). Local examinations tend to be brief.

Felonies. If the underlying offense alleged is a felony, the court may order a local evaluation or may order the juvenile to a State psychiatric facility. G.S. 15A-1002(b)(1a), (2). To order the juvenile to a State facility without ordering a local evaluation first, the court must find that a state facility examination is more appropriate. G.S. 15A-1002(b)(2). Examinations at state facilities may take longer than local examinations.

There are three state psychiatric hospitals in North Carolina: Central Regional Hospital in Butner, Cherry Hospital in Goldsboro, and Broughton Hospital in Morganton. Of those three facilities, only Central Regional Hospital provides capacity evaluations for juveniles. Juveniles referred to Central Regional Hospital are placed in a separate unit, which complies with the provision in G.S. 7B-2401 prohibiting courts from referring juveniles to facilities where they will come into contact with adults.

C. Providing Information to Examiner

Counsel should ensure that the examiner has access to relevant information concerning the juvenile's mental health. Counsel may relate his or her observations of the juvenile, identify people knowledgeable of the juvenile's condition, transmit copies of relevant records, and provide other relevant information. The National Juvenile Defender Center also recommends that counsel submit a written request to the examiner outlining the specific areas to be addressed in the evaluation. *See* National Juvenile Defender Center, Juvenile Defender Delinquency Notebook at 51–55 (2d ed. Spring 2006).

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). According to G.S. 122C-53, disclosure is allowed to a "client," which is defined by statute as "an individual who is admitted to and receiving service from, or who in the past had been admitted to and received services from, a facility." G.S. 122C-3(6). Disclosure is also allowed pursuant to a written consent to release of information to a specific person, in certain court proceedings, and for treatment and research. G.S. 122C-54 through 122C-56. For juvenile court purposes, the most significant of these exceptions are as follows:

- The facility may provide a report of the examination to the court and prosecutor in the circumstances described in subsection F., below. *See* G.S. 122C-54(b).
- The results of the examination, including statements by the juvenile, could be admissible at subsequent court proceedings. *See infra* § 7.11, Hearing on Capacity to Proceed, § 7.12, Admissibility at Adjudication of Results of Capacity Evaluation; *see also* G.S. 122C-54(a1) (use in involuntary commitment proceedings).
- The facility may disclose otherwise confidential information if a court of competent jurisdiction orders disclosure. *See* G.S. 122C-54(a).

E. Limiting Scope and Use of Examination

A central part of any court-ordered examination is the interview of the juvenile. The interview will likely cover the alleged offense, as the juvenile's understanding of the allegations may bear on capacity to proceed. For recommendations on statutory changes creating greater protections for juveniles, see Lourdes M. Rosado and Riya S. Shah, *Protecting Youth from Self-Incrimination when Undergoing Screening, Assessment and Treatment within the Juvenile Justice System* (2007). Discussed below are options for limiting the scope of an examination. For a discussion of the admissibility of the

examination results, see *infra* § 7.12, Admissibility at Adjudication of Results of Capacity Evaluation.

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

Presence of counsel. There is no constitutional right to the presence of counsel during an examination concerning capacity to proceed. *State v. Davis*, 349 N.C. 1, 20 (1998). There is no prohibition on counsel attending the examination, however. Thus, counsel may request that the examiner allow counsel to be present during the interview portion of the evaluation. If the examiner refuses, counsel may ask the court to exercise its discretion to order that counsel be permitted to attend the interview portion of the examination. *But see Estelle v. Smith*, 451 U.S. 454, 470 n.14 (1981) (noting that presence of counsel during psychiatric interview may be disruptive in some instances).

Court order. Counsel for the juvenile may request a court order limiting the scope and use of the evaluation. Such an order might provide that the examiner is to report to the court on the issue of capacity to proceed only and is not to inquire into any area not necessary to that determination; that the results are to be used for the determination of capacity only and for no other purpose; and that information obtained during the evaluation regarding the alleged offense may not be divulged to the prosecution. Additionally, counsel should request that the evaluation be submitted and remain under seal in the juvenile court file, to be disclosed only pursuant to further order of the court. *See infra* § 7.9F, Report of Examination.

F. Report of Examination

Time of report. Examination reports must be completed within the following time limits, which are described in G.S. 15A-1002(b2). The statute does not set time limits on the holding of the examination, however, except in the last circumstance.

- If the juvenile was charged with a misdemeanor and was in custody at the time of the examination, the report must be completed no later than 10 days after the examination.
- If the juvenile was charged with a misdemeanor and was not in custody at the time of the examination, the report must be completed no later than 20 days after the examination.
- If the juvenile was charged with a felony, the report must be completed no later than 30 days after the examination.
- If the juvenile challenges the determination of the local screener or state facility and the court orders an independent psychiatric examination, that examination and report to the court must be completed no later than 60 days after entry of the order.

The statute allows the court to grant extensions for the preparation of the report of up to 120 days beyond the limits described in G.S. 15A-1002(b2). The statute does not specify a remedy for the failure to complete a report within the statutory time limits.

Limiting disclosure of the report. A copy of the examination report is to be provided to the clerk of court in a sealed envelope addressed to the attention of the presiding judge with a covering statement to the clerk of the fact of the examination and any conclusion as to whether the juvenile has or lacks capacity to proceed. G.S. 15A-1002(d). Additionally, a copy of the report must be provided to defense counsel or to the defendant if not represented by counsel. *Id.* G.S. 15A-1002(d) then states that "if the question of the defendant's capacity to proceed is raised at any time, a copy of the full report must be forwarded to the district attorney." This statutory scheme appears to contemplate that the court and the defense are to get a copy of the report automatically after a capacity examination, but that the prosecutor is to get a copy of the report only if capacity is questioned after the examination and further court proceedings are necessary.

The above-quoted provision of G.S. 15A-1002(d) was added by the General Assembly to limit the prosecution's access to capacity evaluations. Previously, the statute provided for reports to be sent automatically to the defense and the prosecution. 1979 N.C. Sess. Laws Ch. 1313 (S 941). In 1985, 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). Therefore, the statute appears to allow a prosecutor to receive a copy of the evaluation only if capacity continues to be an issue and a hearing is necessary.

In 2003, the General Assembly amended G.S. 122C-54(b) to require facilities to disclose a capacity examination as provided in G.S. 15A-1002(d). 2003 N.C. Sess. Laws Ch. 313 (H 826). This change was part of a larger act dealing with mental health system reform. *Id*. Previously, G.S. 122C-54(b) stated that a facility "may" send the capacity report to the specified persons as provided in G.S. 15A-1002(d). Now, G.S. 122C-54(b) provides that the facility "shall" send the report as provided in G.S. 15A-1002(d). Thus, the disclosure provisions in G.S. 122C-54(b) continue to be linked to the requirements of G.S. 15A-1002(d), authorizing the facility to disclose a capacity examination report only to the extent provided in G.S. 15A-1002(d). As discussed above, G.S. 15A-1002(d) appears to authorize disclosure to the prosecutor only if the defendant's capacity is questioned after the examination and further court proceedings are necessary.

Practice note: State psychiatric facilities have interpreted the 2003 change to G.S. 122C-54(b) as authorizing automatic disclosure of capacity evaluations to the prosecutor. Some local examiners may follow the same practice. Therefore, when requesting a capacity evaluation, defense counsel should ask the court to enter an order prohibiting the facility and evaluators from disclosing the evaluation to the prosecutor except on further order of the court. Counsel should also ensure that the order is transmitted to the facility and the examiner.

7.10 Post-Examination Procedure

A. Reviewing the Examination Report

Counsel should carefully review the examination report once it is completed. For a helpful resource for understanding examination reports, see THOMAS GRISSO, CLINICAL EVALUATIONS FOR JUVENILES' COMPETENCE TO STAND TRIAL: A GUIDE FOR LEGAL PROFESSIONALS (Professional Resource Press, 2005). The book describes some of the clinical and psychological factors that are relevant to the question of the juvenile's capacity and explains what attorneys should expect to see in examination reports.

B. After Examination Finding Juvenile Capable of Proceeding

G.S. 15A-1002(b) states that the court "shall" hold a hearing to determine the juvenile's capacity to proceed after the capacity examination. However, the court might decline to hold a hearing if the evaluation report states that the juvenile is capable of proceeding and counsel does not request a hearing.

If defense counsel fails to request a hearing after the examination and the court fails to hold one, the juvenile's statutory right to a hearing will likely be deemed waived. *See State v. Young*, 291 N.C. 562, 568 (1977) (defendant waived right to a capacity hearing "by his failure to assert that right"). Nevertheless, as a constitutional matter the trial court must hold a hearing, even when defense counsel fails to request one, when the evidence raises a bona fide doubt as to the juvenile's capacity. *State v. McRae*, 139 N.C. App. 387, 391 (2000).

C. After Examination Finding Juvenile Incapable of Proceeding

The provisions of Chapter 15A-1004 through 15A-1008, which list the options available for resolution of a criminal case when the defendant is found incapable of proceeding, are not incorporated into the Juvenile Code. *See* G.S. 7B-2401. Counsel may consider the following alternatives.

Dismissal. Counsel may advocate to the prosecutor that dismissal is the appropriate resolution of the case when the juvenile lacks capacity to proceed. Arrangement for treatment or other plans to address the juvenile's underlying problems will bolster this argument. Dismissal is most appropriate if the juvenile's incapacitating condition is permanent or long-term or if the juvenile is in ongoing or residential treatment. *See also* 1 NORTH CAROLINA DEFENDER MANUAL § 2.8A, Constitutional Backdrop (2d ed. 2013) (discussing constitutional grounds for dismissal of charges against defendant who is unlikely to gain capacity to proceed). Under earlier versions of the Juvenile Code, there was no provision that specifically authorized the State to dismiss a case. In 2015, the General Assembly amended G.S. 7B-2404 to include language expressly permitting prosecutors to dismiss juvenile petitions. 2015 N.C. Sess. Laws Ch. 58 (H 879). The new law, which is effective for offenses committed on or after December 1, 2015, does not

provide any limitations on the grounds for dismissing a case. Thus, dismissal under G.S. 7B-2404 would be an appropriate alternative if the juvenile is incapable to proceed.

Hearing on capacity to proceed. If the prosecutor or court are unwilling to dismiss the case and counsel believes that the client is incapable of proceeding, counsel must request a formal hearing on the juvenile's capacity to proceed. G.S. 15A-1002(b). The statute now bars the parties from stipulating that the juvenile lacks capacity. The statute allows the parties to stipulate that the juvenile has the capacity to proceed, but a court may be unwilling to accept a stipulation if it has a bona fide doubt about capacity. *See supra* § 7.10B, After Examination Finding Juvenile Capable of Proceeding.

7.11 Hearing on Capacity to Proceed

A. Request for Hearing

A hearing on capacity is typically calendared on receipt of the examiner's report, but if one has not been calendared, counsel should specifically request a hearing on capacity to proceed. *See also supra* § 7.10B, After Examination Finding Defendant Capable to Proceed.

B. Nature of Hearing

In practice, a hearing on the juvenile's capacity may be somewhat informal. Nevertheless, a capacity hearing must, at a minimum, afford the juvenile the opportunity to present any evidence relevant to the question of the juvenile's capacity to proceed. *State v. Gates*, 65 N.C. App. 277, 283 (1983).

Although no appellate court has yet addressed the question of whether the North Carolina Rules of Evidence apply at capacity hearings, the operation of Rules of Evidence 101 and 1101 indicate that they apply. *See, e.g.*, *State v. Foster*, 222 N.C. App. 199, 202–03 (2012) (holding that the Rules of Evidence apply to post-conviction DNA testing proceedings because such proceedings are not listed as excluded under N.C. R. Evid. 1101(b) and no statute bars their application to the proceedings). At the least, the courts have stated that the "safer practice" is for the courts to follow the rules of evidence because they may not base findings on inadmissible evidence. *State v. Willard*, 292 N.C. 567, 592 (1977).

G.S. 15A-1002(b1) mandates that the trial court make findings of fact, based on evidence presented at the hearing, to support its determination of the juvenile's capacity to proceed. G.S. 15A-1002(b1). Previously, findings were recommended but not required. *See State v. O'Neal*, 116 N.C. App. 390, 395–96 (1994) (the "better practice" is for judge to make findings).

C. Evidentiary Issues

Examination results. Either party may call the examiner from a court-ordered examination, and the examiner's report is admissible. G.S. 15A-1002(b)(1a), (b)(2).

Opinion testimony. Both lay and expert witnesses may give opinions about whether the juvenile is able to perform the functions listed in G.S. 15A-1001(a). *State v. Silvers*, 323 N.C. 646, 654 (1989). However, neither lay nor expert witnesses may testify that the juvenile is or is not capable to proceed because such testimony involves a legal conclusion. *Id*. If the trial court prevents counsel from presenting proper opinion testimony on the question of the juvenile's capacity to proceed, counsel must make an offer of proof to preserve the testimony in the event of an appeal. *State v. Simpson*, 314 N.C. 359, 370 (1985); *In re H.D.*, 184 N.C. App. 188 (2007) (unpublished).

Testimony by lay witnesses may support or even override expert testimony. In addition to testifying about the functions in G.S. 15A-1001(a), lay witnesses may be in a good position to relate their observations of and dealings with the juvenile. *See State v. Silvers*, 323 N.C. 646 (1989) (vacating conviction and remanding case for failure to allow defendant to present testimony of lay witnesses); *State v. Willard*, 292 N.C. 567 (1977) (upholding finding of capacity based in part on testimony of lay witnesses).

Counsel's observations and opinion. Defense attorneys may offer their own observations and opinions about the juvenile's capacity, but such statements without more may be unpersuasive and may not even be permitted. *See State v. Gates*, 65 N.C. App. 277 (1983) (upholding capacity finding where counsel offered own observations of defendant's behavior but presented no medical evidence); *In re H.D.*, 184 N.C. App. 188 (2007) (unpublished) (counsel's statement that he felt juvenile lacked capacity was not competent evidence and did not provide basis for reversing finding of capacity; court also found no error in trial court's ruling that counsel could not testify about his juvenile client's capacity unless he withdrew from representation). *But see State v. McRae*, 163 N.C. App. 359 (2004) ("Because defense counsel is usually in the best position to determine that the defendant is able to understand the proceedings and assist in his defense, it is well established that significant weight is afforded to a defense counsel's representation that his client is competent"); N.C. Rules of Professional Conduct, Rule 3.7(a)(3) (lawyer may act as advocate at trial in which lawyer is likely to be necessary witness if disqualification of lawyer would work substantial hardship on client), Rule 1.14(c) (lawyer is impliedly authorized to reveal confidential information about client with diminished capacity to extent reasonably necessary to protect client's interest).

D. Objection to Finding of Capacity

If the trial court enters an order finding the juvenile capable to proceed, counsel should object at the conclusion of the capacity hearing and again at the beginning of the adjudicatory hearing to ensure the issue is preserved for appeal. The failure to object waives the issue. *State v. Robertson*, 161 N.C. App. 288, 290 (2003) (requiring that the defendant make a capacity objection at the beginning of trial); *In re Pope*, 151 N.C. App.

117, 119 (2002) (noting lack of objection to capacity at the capacity or adjudication hearing). Counsel should also assert that the finding would violate the juvenile's right to due process. The failure to specify due process as a ground for objection waives the argument on appeal. *State v. Wiley*, 355 N.C. 592, 624 (2002). *But see* 1 NORTH CAROLINA DEFENDER MANUAL § 2.7E, Objection to Finding of Capacity (2d ed. 2013) (suggesting that failure to object may not waive issue).

E. Effect of Finding of Incapacity by Court

When the court finds a juvenile incapable of proceeding, it is authorized by G.S. 15A-1003 to initiate commitment proceedings under Part 7 of Article 5 of Chapter 122C of the General Statutes. *See* G.S. 7B-2401 (stating that G.S. 15A-1003 applies). For a discussion of commitment procedures, see NORTH CAROLINA CIVIL COMMITMENT MANUAL Ch. 2, Involuntary Commitment of Adults and Minors for Mental Health Treatment (2d ed. 2011).

G.S. 15A-1006 and 15A-1007 permit a court to hold supplemental hearings to determine if the defendant in a criminal case has gained capacity to proceed and calendar the criminal case for trial. However, the General Assembly did not make these statutes applicable to juvenile delinquency cases. G.S. 7B-2401. The procedure for bringing a juvenile back to court if he or she later becomes capable is therefore uncertain. Rather than leave the case pending while the juvenile is incapable, some prosecutors may choose to dismiss the case and refile the petition later if the juvenile appears to have gained capacity. Language recently added to G.S. 7B-2404 authorizes a prosecutor to take a voluntary dismissal of a juvenile petition. *See* 2015 N.C. Sess. Laws Ch. 58 (H 879). The statute is unclear about the circumstances in which the prosecutor may refile.

7.12 Admissibility at Adjudication of Results of Capacity Evaluation

The admissibility at the adjudicatory hearing of the results of a court-ordered capacity examination is a complicated topic, reviewed only briefly here. Several arguments, legal and factual, exist for excluding or at least limiting the use of the examination, including the juvenile's statements to and the opinions formed by the examiners. Nevertheless, counsel should anticipate the possibility that the results of a court-ordered examination of capacity to proceed may be admitted. *See supra* § 7.9E, Limiting Scope and Use of Examination.

A. Doctor-Patient Privilege

The doctor-patient privilege does not protect the results of a court-ordered evaluation of capacity to proceed. *See State v. Williams*, 350 N.C. 1, 20–21 (1999); *State v. Mayhand*, 298 N.C. 418, 429 (1979).

B. Fifth and Sixth Amendment Protections

Subject to certain key exceptions (discussed in C., below), the Fifth Amendment privilege against self-incrimination generally applies to capacity evaluations and precludes the admission of evaluation results during the guilt and sentencing phases of criminal trials. *See Estelle v. Smith*, 451 U.S. 454, 468 (1981). The Sixth Amendment right to counsel also precludes the admission of evaluation results during criminal trials if the defendant's counsel does not have notice of the scope and nature of the examination. *Estelle* relied on this additional ground in holding that the results of a capacity examination were inadmissible at trial, reasoning that the defendant was denied the assistance of an attorney in deciding whether to submit to the examination. 451 U.S. at 471. This protection is also subject to certain key exceptions (discussed in C., below).

C. Rebuttal of Mental Health Defense

If the juvenile presents a mental status defense and introduces expert testimony in support of the defense, the results of a capacity evaluation are not protected by the Fifth Amendment and may be admitted to rebut the expert testimony. *Buchanan v. Kentucky*, 483 U.S. 402, 422–23 (1987); *State v. Huff*, 325 N.C. 1, 44 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990); *State v. Atkins,* 349 N.C. 62, 107–08 (1998). A mental status defense includes not only a mental disease or defect, but also an inability to form the requisite intent to commit a crime, which includes the defense of voluntary intoxication. *Kansas v. Cheever*, ___ U.S. ___, ___, 134 S. Ct. 596, 602 (2013). In addition, the Sixth Amendment does not bar the use of the evaluation results because counsel should have anticipated and advised the client that the examination could be used to rebut a mental health defense. *Buchanan v. Kentucky*, 483 U.S. at 425; *State v. Davis*, 349 N.C. 1, 43–44 (1998); *State v. McClary*, 157 N.C. App. 70, 79 (2003). *But see Delguidice v. Singletary*, 84 F.3d 1359 (11th Cir. 1996) (defense counsel did not have notice that an evaluation report from a separate case against the defendant would be used to rebut an insanity defense to unrelated charges).

Under the reasoning of the above decisions, the Fifth Amendment may protect the examination results if the juvenile relies on a mental status defense but does not introduce expert testimony. For example, the U.S. Supreme Court held in *Cheever* that the State may present psychiatric evidence when a defense expert "testifies" or the defendant "presents evidence through a psychological expert . . . ." 134 S. Ct. at 601.

D. Waiver

The U.S. Supreme Court suggested in dicta in *Estelle* that the State might be able to obtain, through *Miranda* warnings, a waiver of the defendant's Fifth Amendment rights for statements made during a capacity evaluation. *Estelle*, 451 U.S. at 469. However, a review of federal and state case law indicates that such waivers are uncommon and, even if obtained, are not a basis for admitting evidence from a capacity evaluation. *See* 1 NORTH CAROLINA DEFENDER MANUAL § 2.9F, Waiver (2d ed. 2013).

Appendix 7-1: Practical Tips for Attorneys on Using Capacity

Prepared by Valerie Pearce

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

15. Be specific and detailed in laying out the circumstances for the judge that show that this was NOT a voluntary, knowing, or intelligent waiver.
16. Prepare for the hearing and subpoena witnesses. Use records and have copies for the court when helpful
17. Prepare your expert. The expert will need to be able to explain the research in simple layman terms and how it applies in this particular case.
18. Decide whether or not you will put the juvenile on the stand and if so, prepare him for what to expect in the courtroom.
19. Be prepared for adverse reactions from the Court and from court personnel. Be prepared to hear such comments as:
    - "If you do this, you will open up the floodgates."
    - "Are you going to raise capacity in every case?"
    - "This is just juvenile court, this court is about treatment and not punitive."
    - "The child needs to accept consequences for his actions and this is a door to services"
    - "Why are you trying to make this court like adult court?"
    - "This is just a delay tactic."
    - "This is a waste of court time and money."

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

    Keep the court focused on this individual child and their individual circumstances.
20. Just because a child says they understand does not make it true.
21. The ability to read does not equal understanding.
22. The law presumes that children under the age of 18 are not capable of deciding about medical treatment, entering into binding legal contracts, or operating automobiles. Why then do we assume that they are capable of understanding complicated legal concepts and waive their constitutional rights?
23. When involved in the suppression hearing, be sure to flesh out all of the details that add up to the totality of the circumstances. Most officers have not been trained on how to interview children. They are focused on obtaining a confession in order to prove their theory of the case and are trained in using adult tactics. Focus on what they did not pick up on and what they did not do as well as what they said and did in the interrogation of the child. Keep the focus on the fact that this was a "child" and not an adult.
24. If the juvenile client takes the witness stand, keep the child focused on how they felt and what their perception was of the interrogation. You want the judge to see through the eyes of the child.
25. If the judge denies the motion to suppress, continue to object for the record so that you do not waive the issue at trial and preserve the issue for appeal.