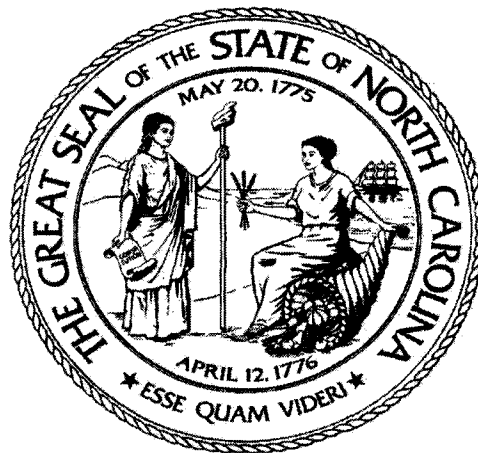


LEGISLATIVE RESEARCH COMMISSION

**INCAPACITY TO PROCEED  
COMMITTEE**

**NORTH CAROLINA GENERAL ASSEMBLY**



**REPORT TO THE  
2012 SESSION  
of the  
2011 GENERAL ASSEMBLY  
OF NORTH CAROLINA**

**APRIL, 2012**

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# TRANSMITTAL LETTER

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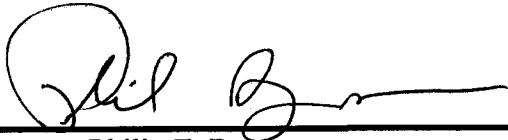
May 16, 2012

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TO THE MEMBERS OF THE 2012 REGULAR SESSION  
OF THE 2011 GENERAL ASSEMBLY

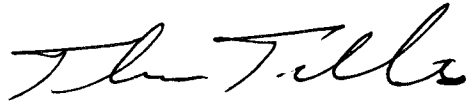
The Legislative Research Commission herewith submits to you for your consideration its report and recommendations to the 2012 Regular Session of the 2011 General Assembly. The report was prepared by the Legislative Research Commission's Committee on Incapacity to Proceed, pursuant to G.S. 120-30.70(1).

Respectfully submitted,



---

Senator Philip E. Berger  
President Pro Tempore of the Senate



---

Representative Thomas R. Tillis  
Speaker of the House of Representatives

Co-Chairs  
Legislative Research Commission

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# LEGISLATIVE RESEARCH COMMISSION MEMBERSHIP

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**2011 – 2012**

**President Pro Tempore of the Senate**

Senator Philip E. Berger

Co-Chair

Senator Thomas M. Apodaca

Acting Co-Chair

Senator Peter S. Brunstetter

Senator Linda D. Garrou

Senator Martin L. Nesbitt, Jr.

Senator Richard Y. Stevens

**Speaker of the House of Representatives**

Representative Thomas R. Tillis

Co-Chair

Representative Timothy K. Moore

Acting Co-Chair

Representative John M. Blust

Representative Justin P. Burr

Representative Mike D. Hager

Representative Edith D. Warren

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## PREFACE

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The Legislative Research Commission, established by Article 6B of Chapter 120 of the General Statutes, is the general purpose study group in the Legislative Branch of State Government. The Commission is co-chaired by the President Pro Tempore of the Senate and the Speaker of the House of Representatives and has five additional members appointed from each house of the General Assembly. Among the Commission's duties is that of making or causing to be made, upon the direction of the General Assembly, "such studies of an investigation into governmental agencies and institutions and matters of public policy as will aid the General Assembly in performing its duties in the most efficient and effective manner" (G.S. 120-30.17(1)).

The Legislative Research Commission authorized the study of Incapacity to Proceed, under authority of G.S. 120-30.17(1). The Committee was chaired by Representative Shirley Randleman.. The full membership of the Committee is listed under [Committee Membership](#). A committee notebook containing the committee minutes and all information presented to the committee will be filed in the Legislative Library by the end of the **2011-2012** biennium.



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# COMMITTEE PROCEEDINGS

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The Legislative Research Commission's Committee on Incapacity to Proceed met four times after the 2011 Regular Session. The Committee's Charge can be found [here](#). The following is a brief summary of the Committee's proceedings. Detailed minutes and information from each Committee meeting are available in the Legislative Library.

The Legislative Research Commission Committee on Incapacity to Proceed was established to consider the adequacy of the involuntary commitment process for a criminal defendant who lacks the capacity to proceed to trial. The Committee was authorized to consider the impact of current law on the limited resources of local law enforcement, hospitals, mental health facilities, and the State's court system while balancing the rights of the accused, victims, and the safety and the general welfare of the public. The Committee was also authorized to consider options for determining whether a defendant is likely to attain the capacity to proceed to trial in the foreseeable future and at what point in the process that determination should be made.

The Committee met four times from November 9, 2011, to April 17, 2012. At each meeting, the Committee provided interested parties an opportunity to be heard on the issues and received public comment. Detailed minutes and information from each Commission meeting are available in the Legislative Library.

## **November 9, 2011 Meeting**

The first meeting of the Legislative Research Commission Subcommittee on Incapacity to Proceed was held on November 9, 2011. Following introductions of those present and opening remarks by Chair Shirley Randleman, the Committee adopted its operating budget. The following presentations were made:

- Committee co-counsel Hal Pell described the genesis of the current procedures relating to a defendant's incapacity to proceed and the need to comply with constitutional due process and equal protection concerns addressed in the 1972 United States Supreme Court case, *Jackson v. Indiana*.
- Committee co-counsel Janice Paul provided the background and overview of the North Carolina laws governing incapacity to proceed and the civil commitment process. A PowerPoint presentation is included in the Committee minutes.
- Chair Randleman described the situation that arose within her community which prompted her to request a study. She reiterated that the Committee's

mission is to promote efficiency and safeguards for everyone, including the general public.

- John Rubin, UNC School of Government noted that the SOG conducts training, consultation, and research for individuals, courts, and the criminal justice system. He discussed the legal standard which applies to incapacity to proceed, which differs from that applied to civil commitment proceedings.
- Brad Greenway, District Attorney for the 29A Prosecutorial District, discussed specific concerns that arise when a defendant has committed a crime, is found incapable to proceed, might never gain the capacity to proceed, but does not meet commitment criteria.
- Andrew Cagle, North Carolina Sheriffs Association, expressed concern over manpower and actual transportation costs associated with transporting defendants between jails and mental health facilities.
- Dr. Mark Hazelrigg, Director of Outpatient Evaluations at Central Regional Hospital, said that the differences in the legal standard for capacity to proceed and the standard for involuntary commitment cause a circular system, and expressed concern that there is no statutory mandate or even suggestion that hospitals provide services designed to restore an individual's capacity to proceed.
- Richard Slipsky, Special Deputy Attorney General, observed that most of the cases start in Superior Court, but after a defendant is released from a commitment, the case comes back in through a District/jail court. He expressed concern about transportation costs as well as the cost of maintaining someone in a state hospital who does not need to be there. He echoed Dr. Hazelrigg's concern that the statutes do not specify restorative measures for capacity, even though most patients who are confined in a hospital would like to have their criminal charges resolved.

The Chair then opened the floor for discussion and questions.

### **January 11, 2012 Meeting**

In its second meeting on January 11, 2012, the Committee had a round-table discussion of various agencies' roles and interest in the incapacity to proceed process, any perceived problems, and potential solutions to those problems. Chair Randleman stressed the importance of coming up with draft legislation that can proceed through the General Assembly during the 2012 Short Session. Details of this discussion are contained in the Committee minutes.

John Rubin, UNC School of Government, presented case studies involving both misdemeanor and felony offenders whose capacity to proceed was questioned.

The floor was opened for questions and comment. Information was exchanged about the following:

- Who is qualified to conduct local forensic examinations;
- The time frame time reporting by the regional hospital;
- The procedure after individuals are released back to jail;
- Problems of decompensating in the jails;
- Issues relating to dismissal of charges;
- Notification to the court and interested parties of the defendant's mental health status;
- Subsequent hearings on restoration of capacity;
- Problems relating to individuals who are housed as safekeepers at Central Prison and who are not receiving mental health treatment;
- Approaches to expedite the process of screening and examination;
- Tracking and monitoring;
- Privacy issues.

Recommendations included:

- The need for judges to take evidence and make findings of fact on capacity to proceed;
- Specific changes to G.S. 15A-1008 relating to dismissal;
- The repeal of G.S. 15A-1009 concerning dismissal with leave when a defendant is found incapable of proceeding;
- Credentialing of forensic examiners.;
- Authorizing examiners to have access to many pieces of information (mental health treatment, criminal background, jail records, indictments, and police investigative reports);
- Mandated treatment to restore an individual's capacity to proceed;
- Implementation of a process to allow forensic units to re-evaluate an individual's capacity before being returned to jail;
- Mandatory training of judges, attorneys, and law enforcement personnel regarding incapacity to proceed and commitment procedures;
- Enhanced coordination, communication between various agencies, and accountability within the process;
- Establishing time limits on the proceedings;
- Greater training of examiners to identify and treat specific mental health disabilities, the establishment of specialized facilities for individuals with such disabilities, and the recognition that people with certain disabilities will most likely never be found capable to proceed in court.

## February 8, 2012 Meeting

The Committee held its third meeting on February 8, 2012. The meeting's focus was on discussing proposed legislation and recommendations designed to make improvements in the capacity to proceed process. The following issues and proposals were discussed:

- Training for local forensic evaluators.
- Re-evaluation of defendants for a capacity determination prior to being returned to the jail from a state facility.
- Forensic evaluators' access to records.
- Time limits for forensic evaluations.
- Reporting a defendant's level of cooperation with the forensic examination.
- Minimum period of inpatient evaluation and observation.
- Requiring that defendants receive treatment to restore capacity to proceed.
- Reports to the court, parties, and communication and tracking issues.
- Notices of supplemental hearings.
- Dismissal of criminal charges.
- Requirement that court make findings of fact as to capacity to proceed.
- Methods of expediting cases for trial.
- Pretrial release for individuals with intellectual or developmental disabilities.
- Transportation issues.
- Bond, placement and other pretrial release issues for individuals with serious mental health issues.

Details of the discussion are contained in the Committee minutes.

After receiving input from Committee members and interested persons, the Committee voted that the General Assembly enact legislation to make changes to the process and procedures regarding incapacity to proceed, as follows:

- To provide that evaluation for misdemeanants be conducted locally only, and not at state facilities.
- To authorize a judge to order the release of confidential information to the forensic examiner.
- To require a court order to include findings of fact to support its determination regarding capacity to proceed.
- To provide time limits for reports to the court.
- To provide that the sheriff receive a copy of the covering statement of the forensic examiner's final report.
- To require that a defendant be examined for a determination of capacity to proceed prior to release from an involuntary civil commitment.
- To specify procedures relating to the return of the defendant for trial upon gaining capacity to proceed.

- To require expedited calendaring of cases for trial after a defendant gains capacity to proceed.
- To require dismissal of criminal charges in specified circumstances.
- To require that reports contain treatment recommendations, if any.
- To make conforming changes to G.S. Chapter 122C.

The Committee voted to include the following possible recommendations in its draft final report:

- That the Committee on Justice and Public Safety study the possibility of mandating that all law enforcement officers have crisis intervention training in order to recognize mental health issues and identify individuals with intellectual/developmental disabilities and to better deal with individuals with mental health issues or intellectual/developmental disabilities during the period of transportation and custody.
- That the Administrative Office of the Courts, in consultation with the School of Government, study whether defense attorneys, prosecutors and judges should be required to receive specific training on recognizing signs of mental illness and dealing with defendants that may be incapable of proceeding, and report the results of that study to the Committee on Justice and Public Safety.
- That the Joint Legislative Oversight Committee on Health and Human Services study the issue of transporting defendants who are being evaluated for determination of capacity to proceed, or who have been found incapable of proceeding. Possible issues to study include, whether the same-gender transportation requirement of G.S. 122C-251 should be repealed and whether it would be appropriate and feasible to develop a system where evaluators from the State facility could evaluate offenders charged with lower level felonies on-site in the county where the charges are pending as an alternative to transporting the offender to the State facility.
- That the Joint Legislative Oversight Committee on Health and Human Services study whether individuals with serious mental health issues or intellectual/developmental disabilities and lack of capacity to proceed should be released from jail to an appropriate mental health placement on a more expedited basis, and if so, the best method and process to facilitate that recommendation.

Rep. Burr informed the Committee that the Joint Legislative Oversight Committee on Health and Human Services was already considering the issue of whether it would be appropriate and feasible to open forensic units specifically focused on evaluating and providing habilitative services for individuals with intellectual or developmental disabilities and specialized in the care of incarcerated individuals diagnosed with intellectual or developmental disabilities.

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## **FINDINGS AND RECOMMENDATIONS**

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### **FINDINGS:**

The Committee finds that comprehensive procedural changes need to be made in the process relating to determinations of a criminal defendant's incapacity to proceed to trial, in view of limited resources of law enforcement, hospitals, and mental health facilities, in consideration of a defendant's legal and mental status as they relate to providing a fair trial, and in order to promote efficiency in the overall judicial process in matters relating to incapacity to proceed. As a result of these findings, the Committee makes the following Recommendations:

### **RECOMMENDATION 1:**

The Committee recommends that the General Assembly enact legislation (attached) to make changes to the process and procedures regarding incapacity to proceed.

### **RECOMMENDATION 2:**

The Committee recommends that the Committee on Justice and Public Safety study the possibility of mandating that all law enforcement officers have crisis intervention training in order to recognize mental health issues and to identify individuals with intellectual or developmental disabilities during period of transportation and custody and to interact with them appropriately.

### **RECOMMENDATION 3:**

The Committee recommends that the Administrative Office of the Courts, in consultation with the School of Government, study whether defense attorneys, prosecutors and judges should be required to receive specific training on recognizing signs of mental illness and intellectual or developmental disabilities and dealing with defendants who may be incapable of proceeding, and report the results of that study to the Committee on Justice and Public Safety.

**RECOMMENDATION 4:**

The Committee recommends that the Joint Legislative Oversight Committee on Health and Human Services continue to study whether it would be appropriate and feasible to open forensic units specifically focused on evaluating and providing habilitative services for individuals with intellectual or developmental disabilities and specialized in the care of incarcerated individuals diagnosed with intellectual or developmental disabilities.

**RECOMMENDATION 5:**

The Committee recommends that the Joint Legislative Oversight Committee on Health and Human Services study the issue of transporting defendants who are being evaluated for determination of capacity to proceed, or who have been found incapable of proceeding. Possible issues to study include: (1) whether the same-gender transportation requirement of G.S. 122C-251 should be repealed; (2) whether it would be appropriate and feasible to develop a system where evaluators from the State facility could evaluate offenders charged with lower level felonies on-site in the county where the charges are pending as an alternative to transporting the offender to the State facility; and (3) whether forensic evaluators can be assigned to each of the three State psychiatric hospitals to minimize the transportation demands on local law enforcement agencies.

**RECOMMENDATION 6:**

The Committee recommends that the Joint Legislative Oversight Committee on Health and Human Services study whether individuals with serious mental health issues, intellectual or developmental disabilities, and lack of capacity to proceed should be released from jail to an appropriate mental health placement on a more expedited basis, and if so, the best method and process to facilitate that recommendation.

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## COMMITTEE MEMBERSHIP

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2011-2012

**Speaker of the House of Representatives Appointments:**

Representative Shirley Randleman, Co-Chair

Representative Justin Burr  
Representative John Faircloth  
Representative Pat Hurley  
Representative Frank McGuirt



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## COMMITTEE CHARGE

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Incapacity to Proceed (H.J.R. 612 - Randleman, Hurley) - The Commission may study the adequacy of the involuntary commitment process for a criminal defendant who lacks the capacity to proceed to trial. In its study, the Commission may consider the impact of current law on the limited resources of local law enforcement, hospitals, mental health facilities, and the State's court system while balancing the rights of the accused, victims, and the safety and the general welfare of the public. The Commission may also consider options for determining whether a defendant is likely to attain the capacity to proceed to trial in the foreseeable future and at what point in the process that determination should be made. The Commission may evaluate the statutory option of taking dismissals in these types of cases for defendants who are charged with nonviolent crimes and for defendants who are charged with violent crimes, how often that option is used, and at what point and under what circumstances that option should be used. In addition, the Commission may consider all of the following: issues related to transportation, including the frequency, distance, and cost associated with the required psychiatric evaluations; duration of involuntary commitment for defendants found incapable of proceeding to trial pursuant to Article 56 of Chapter 15A of the General Statutes and involuntarily committed pursuant to Part 7 of Article 5 of Chapter 122C of the General Statutes; and any other issues the Commission considers relevant to this topic.

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## STATUTORY AUTHORITY

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### NORTH CAROLINA GENERAL STATUTES ARTICLE 6B.

#### **Legislative Research Commission.**

##### **§ 120-30.17. Powers and duties.**

The Legislative Research Commission has the following powers and duties:

- (1) Pursuant to the direction of the General Assembly or either house thereof, or of the chairmen, to make or cause to be made such studies of and investigations into governmental agencies and institutions and matters of public policy as will aid the General Assembly in performing its duties in the most efficient and effective manner.
- (2) To report to the General Assembly the results of the studies made. The reports may be accompanied by the recommendations of the Commission and bills suggested to effectuate the recommendations.
- (3), (4) Repealed by Session Laws 1969, c. 1184, s. 8.
- (5), (6) Repealed by Session Laws 1981, c. 688, s. 2.
- (7) To obtain information and data from all State officers, agents, agencies and departments, while in discharge of its duty, pursuant to the provisions of G.S. 120-19 as if it were a committee of the General Assembly.
- (8) To call witnesses and compel testimony relevant to any matter properly before the Commission or any of its committees. The provisions of G.S. 120-19.1 through G.S. 120-19.4 shall apply to the proceedings of the Commission and its committees as if each were a joint committee of the General Assembly. In addition to the other signatures required for the issuance of a subpoena under this subsection, the subpoena shall also be signed by the members of the Commission or of its committee who vote for the issuance of the subpoena.
- (9) For studies authorized to be made by the Legislative Research Commission, to request another State agency, board, commission or committee to conduct the study if the Legislative Research Commission determines that the other body is a more appropriate vehicle with which to conduct the study. If the other body agrees, and no legislation specifically provides otherwise, that body shall conduct the study as if the original authorization had assigned the study to that body and shall report to the General Assembly at the same time other studies to be conducted by the Legislative Research Commission are to be reported. The other agency shall conduct the transferred study within the funds already assigned to it.

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## LEGISLATIVE PROPOSALS

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GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2011

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D

BILL DRAFT 2011-SA-18A [v.1] (03/01)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)  
4/24/2012 2:01:06 PM

Short Title: Incapacity to Proceed Amendments.

(Public)

Sponsors:

Referred to:

1 A BILL TO BE ENTITLED  
2 AN ACT TO AMEND THE LAWS GOVERNING INCAPACITY TO PROCEED AS  
3 RECOMMENDED BY THE LEGISLATIVE RESEARCH COMMISSION.

4 The General Assembly of North Carolina enacts:

5 SECTION 1. G.S. 15A-1002 reads as rewritten:

6 "§ 15A-1002. Determination of incapacity to proceed; evidence; temporary  
7 commitment; temporary orders.

8 (a) The question of the capacity of the defendant to proceed may be raised at any  
9 time on motion by the prosecutor, the defendant, the defense counsel, or the court. The  
10 motion shall detail the specific conduct that leads the moving party to question the  
11 defendant's capacity to proceed.

12 (b) When the capacity of the defendant to proceed is questioned, the court shall  
13 hold a hearing to determine the defendant's capacity to proceed. If an examination is  
14 ordered pursuant to subdivision (1) or (2) of this subsection, the hearing shall be held  
15 after the examination. Reasonable notice shall be given to the defendant and prosecutor,  
16 and the State and the defendant may introduce evidence. ~~The court:~~

17 (1) ~~May In the case of a defendant charged with a misdemeanor or felony,~~  
18 ~~the court may appoint one or more impartial medical experts, including~~  
19 ~~forensic evaluators approved under rules of the Commission for~~  
20 ~~Mental Health, Developmental Disabilities, and Substance Abuse~~  
21 ~~Services, to examine the defendant and return a written report~~  
22 ~~describing the present state of the defendant's mental health;~~  
23 ~~reports health. Reports so prepared are admissible at the hearing and~~  
24 ~~the hearing. The court may call any expert so appointed to testify at the~~  
25 ~~hearing; any expert so appointed may be called to testify at the hearing~~  
26 ~~by the court at hearing, with or without the request of either party;~~  
27 ~~or party.~~

28 (2) ~~In the case of a defendant charged with a misdemeanor only after the~~  
29 ~~examination pursuant to subsection (b)(1) of this section or at~~  
30 ~~At any time in the case of a defendant charged with a felony, the court may~~  
31 ~~order the defendant to a State facility for the mentally ill for~~

1 observation and treatment for the period, not to exceed 60 days,  
 2 necessary to determine the defendant's capacity to proceed; ~~in the case~~  
 3 ~~of a defendant charged with a felony, if proceed.~~ If a defendant is  
 4 ordered to a State facility without first having an examination pursuant  
 5 to subsection (b)(1) of this section, the judge shall make a finding that  
 6 an examination pursuant to this subsection would be more appropriate  
 7 to determine the defendant's ~~capacity; the capacity.~~ The sheriff shall  
 8 return the defendant to the county when notified that the evaluation has  
 9 been ~~completed; the completed.~~ The director of the facility shall direct  
 10 his report on defendant's condition to the defense attorney and to the  
 11 clerk of superior court, who shall bring it to the attention of the ~~court;~~  
 12 ~~the court.~~ The report is admissible at the hearing.

13 (3) Repealed by Session Laws 1989, c. 486, s. 1.

14 (4) A presiding district or superior court judge of this State who orders an  
 15 examination pursuant to subdivision (1) or (2) of this subsection shall  
 16 order the release of relevant confidential information to the examiner,  
 17 including but not limited to, the warrant or indictment, arrest records,  
 18 the law enforcement incident report, the defendant's criminal record,  
 19 jail records, any prior medical and mental health records of the  
 20 defendant, and any school records of the defendant, after providing the  
 21 defendant with reasonable notice and an opportunity to be heard and  
 22 then determining that the information is relevant and necessary to the  
 23 hearing of the matter before the court and unavailable from any other  
 24 source. This subdivision shall not be construed to relieve any court of  
 25 its duty to conduct hearings and make findings required under relevant  
 26 federal law before ording the release of any private medical or mental  
 27 health information or records related to substance abuse or HIV status  
 28 or treatment. The records may be surrendered to the court, for in  
 29 camera review, if surrender is necessary to make the required  
 30 determinations. The records shall be withheld from public inspection  
 31 and, except as provided in this subdivision, may be examined only by  
 32 order of the court.

33 (b1) ~~If the report pursuant to subdivision (1) or (2) of subsection (b) of this section~~  
 34 ~~indicates~~ The order of the court shall contain findings of fact to support its  
 35 determination of the defendant's capacity to proceed. The parties may stipulate that the  
 36 defendant is capable of proceeding, but shall not be allowed to stipulate that the  
 37 defendant lacks capacity to proceed. If the court concludes that the defendant lacks  
 38 capacity to proceed, proceedings for involuntary civil commitment under Chapter 122C  
 39 of the General Statutes may be instituted on the basis of the report in either the county  
 40 where the criminal proceedings are pending or, if the defendant is hospitalized, in the  
 41 county in which the defendant is hospitalized.

42 (b2) Reports made to the court pursuant to this section shall be completed and  
 43 provided to the court as follows:

44 (1) The report in a case of a defendant charged with a misdemeanor shall  
 45 be completed and provided to the court no later than 10 day following  
 46 the completion of the examination for a defendant who was in custody

1 at the time the examination order was entered, and no later than 30  
2 days following the completion of the examination for a defendant who  
3 was not in custody at the time the examination order was entered.

4 (2) The report in the case of a defendant charged with a felony shall be  
5 completed and provided to the court no later than 30 days following  
6 the completion of the examination.

7 (3) In cases where the defendant challenges the determination made by the  
8 court ordered examiner or the State facility and the court orders an  
9 independent psychiatric examination, that examination and report to  
10 the court must be completed within 60 days of the entry of the order by  
11 the court.

12 The court may, for good cause shown, extend the time for the provision of the report  
13 to the court for up to 30 additional days. The court may renew an extension of time for  
14 an additional 30 days upon request of the State or the defendant prior to the expiration  
15 of the previous extension. In no case shall the court grant extensions totaling more than  
16 120 days beyond the time periods otherwise provided in this subsection.

17 (c) The court may make appropriate temporary orders for the confinement or  
18 security of the defendant pending the hearing or ruling of the court on the question of  
19 the capacity of the defendant to proceed.

20 (d) Any report made to the court pursuant to this section shall be forwarded to the  
21 clerk of superior court in a sealed envelope addressed to the attention of a presiding  
22 judge, with a covering statement to the clerk of the fact of the examination of the  
23 defendant and any conclusion as to whether the defendant has or lacks capacity to  
24 proceed. If the defendant is being held in the custody of the sheriff, the clerk shall send  
25 a copy of the covering statement to the sheriff. The sheriff, and any persons employed  
26 by the sheriff, shall maintain the copy of the covering statement as a confidential record.

27 A copy of the full report shall be forwarded to defense counsel, or to the defendant if he  
28 is not represented by ~~counsel provided, if~~ counsel. If the question of the defendant's  
29 capacity to proceed is raised at any time, a copy of the full report must be forwarded to  
30 the district ~~attorney-attorney~~, as provided in G.S. 122C-54(b). Until such report becomes  
31 a public record, the full report to the court shall be kept under such conditions as are  
32 directed by the court, and its contents shall not be revealed except as directed by the  
33 court. Any report made to the court pursuant to this section shall not be a public record  
34 unless introduced into evidence."

35 **SECTION 2.** G.S. 15A-1004(c) reads as rewritten:

36 "(c) If the defendant is placed in the custody of a hospital or other institution in a  
37 proceeding for involuntary civil commitment, the orders must provide for reporting to  
38 the clerk if the defendant is to be released from the custody of the hospital or institution.  
39 The original or supplemental orders may make provisions as in subsection (b) in the  
40 event that the defendant is released. The court shall also order that the defendant shall  
41 be examined to determine whether the defendant has the capacity to proceed prior to  
42 release from custody. A report of the examination shall be provided pursuant to  
43 G.S. 15A-1002. If the defendant was charged with a violent crime, including a crime  
44 involving assault with a deadly weapon, and that charge has not been dismissed, the  
45 order must require that if the defendant is to be released from the custody of the hospital  
46 or other institution, he is to be released only to the custody of a specified law

Appendix D

1 enforcement agency. If the original or supplemental orders do not specify to whom the  
2 respondent shall be released, the hospital or other institution may release the defendant  
3 to whomever it thinks appropriate."

4 **SECTION 3.** G.S. 15A-1006 reads as rewritten:

5 "**§ 15A-1006. Return of defendant for trial upon gaining capacity.**

6 If a defendant who has been determined to be incapable of proceeding, and who is in  
7 the custody of an institution or an individual, ~~gains~~has been determined by the  
8 institution or individual having custody to have gained capacity to proceed, the  
9 individual or institution must notify~~shall~~ provide written notification to the clerk in the  
10 county in which the criminal proceeding is pending. The clerk must notify the sheriff to  
11 shall provide written notification to the district attorney, the defendant's attorney and the  
12 sheriff. The sheriff shall return the defendant to the county for supplemental hearing  
13 pursuant to G.S. 15A-1007, if conducted, and trial, and to hold him the defendant for  
14 supplemental hearing and trial, subject to the orders of the court entered pursuant to  
15 G.S. 15A-1004."

16 **SECTION 4.** G.S. 15A-1007 reads as rewritten:

17 "**§ 15A-1007. Supplemental hearings.**

18 (a) When it has been reported to the court that a defendant has gained capacity to  
19 proceed, or when the defendant has been determined by the individual or institution  
20 having custody of him to have gained capacity and has been returned for ~~trial, the trial~~  
21 in accordance with G.S. 15A-1004(e) and G.S. 15A-1006, the clerk shall notify the  
22 district attorney. Upon receiving the notification, the district attorney shall calendar the  
23 matter for hearing at the next available term of court, but no later than 30 days after  
24 receiving the notification. The court may hold a supplemental hearing to determine  
25 whether the defendant has capacity to proceed. The court may take any action at the  
26 supplemental hearing that it could have taken at an original hearing to determine the  
27 capacity of the defendant to proceed.

28 (b) The court may hold a supplemental hearing any time upon its own  
29 determination that a hearing is appropriate or necessary to inquire into the condition of  
30 the defendant.

31 (c) The court must hold a supplemental hearing if it appears that any of the  
32 conditions for dismissal of the charges have been met.

33 (d) If the court determines in a supplemental hearing that a defendant has gained  
34 the capacity to proceed, the case shall be calendared for trial at the earliest practicable  
35 time. Continuances that extend beyond 60 days after initial calendaring of the trial shall  
36 be granted only in extraordinary circumstances when necessary for the proper  
37 administration of justice, and the court shall issue a written order stating the grounds for  
38 granting the continuance."

39 **SECTION 5.** G.S. 15A-1008 reads as rewritten:

40 "**§ 15A-1008. Dismissal of charges.**

41 (a) When a defendant lacks capacity to proceed, the court ~~may~~shall dismiss the  
42 ~~charges:~~charges upon the earliest of the following occurrences:

43 (1) When it appears to the satisfaction of the court that the defendant will  
44 not gain capacity to ~~proceed;~~ proceed.

45 (2) When the defendant has been substantially deprived of his liberty for a  
46 period of time equal to or in excess of the ~~maximum permissible~~

~~period of confinement for the crime or crimes charged; or maximum term of imprisonment permissible for prior record level VI for felonies or prior conviction level III for misdemeanors for the most serious offense charged.~~

(3) Upon the expiration of a period of five years from the date of determination of incapacity to proceed in the case of misdemeanor charges and a period of 10 years in the case of felony charges.

(b) A dismissal entered pursuant to subdivision (a)(2) of this section shall be without leave.

(c) A dismissal entered pursuant to subdivision (a)(1) or (a)(3) of this section shall be issued without prejudice to the refiling of the charges. Upon the defendant becoming capable of proceeding, the prosecutor may reinstitute proceeding dismissed pursuant to subdivision (a)(1) or (a)(3) by filing written notice with the clerk, with the defendant and with the defendant's attorney of record.

(d) Dismissal of criminal charges pursuant to this section shall be upon motion of the prosecutor or the defendant, or upon the court's own motion."

**SECTION 6.** G.S. 15A-1009 is repealed.

**SECTION 7.** G.S. 122C-54(b) reads as rewritten:

"(b) If an individual is a defendant in a criminal case and a mental examination of the defendant has been ordered by the court as provided in G.S. 15A-1002, the facility shall send the results or the report of the mental examination to the clerk of court, to the district attorney or prosecuting officer, and to the attorney of record for the defendant as provided in G.S. 15A-1002(d). The report shall contain a treatment recommendation, if any, and any opinion as to whether there is a likelihood that the defendant will gain the capacity to proceed."

**SECTION 8.** G.S. 122C-263(d) reads as rewritten:

"(d) After the conclusion of the examination the physician or eligible psychologist shall make the following determinations:

(1) If the physician or eligible psychologist finds that:

- a. The respondent is mentally ill;
- b. The respondent is capable of surviving safely in the community with available supervision from family, friends, or others;
- c. Based on the respondent's psychiatric history, the respondent is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness as defined by G.S. 122C-3(11); and
- d. The respondent's current mental status or the nature of the respondent's illness limits or negates the respondent's ability to make an informed decision to seek voluntarily or comply with recommended treatment.

The physician or eligible psychologist shall so show on the examination report and shall recommend outpatient commitment. In addition the examining physician or eligible psychologist shall show the name, address, and telephone number of the proposed outpatient treatment physician or center. The person designated in the order to provide transportation shall return the respondent to the respondent's



1 regular residence or, with the respondent's consent, to the home of a  
2 consenting individual located in the originating county, and the  
3 respondent shall be released from custody. Notwithstanding the  
4 provisions of this subdivision, if the order placing respondent in  
5 custody was issued pursuant to G.S. 15A-1003, after making the  
6 determination required by this subdivision, the respondent shall be  
7 examined for capacity to proceed and released pursuant to the  
8 requirements of G.S. 15A-1004(c).

- 9 (2) If the physician or eligible psychologist finds that the respondent is  
10 mentally ill and is dangerous to self, as defined in G.S. 122C-3(11)a.,  
11 or others, as defined in G.S. 122C-3(11)b., the physician or eligible  
12 psychologist shall recommend inpatient commitment, and shall so  
13 show on the examination report. If, in addition to mental illness and  
14 dangerousness, the physician or eligible psychologist also finds that  
15 the respondent is known or reasonably believed to be mentally  
16 retarded, this finding shall be shown on the report. The law  
17 enforcement officer or other designated person shall take the  
18 respondent to a 24-hour facility described in G.S. 122C-252 pending a  
19 district court hearing. If there is no area 24-hour facility and if the  
20 respondent is indigent and unable to pay for care at a private 24-hour  
21 facility, the law enforcement officer or other designated person shall  
22 take the respondent to a State facility for the mentally ill designated by  
23 the Commission in accordance with G.S. 143B-147(a)(1)a. for  
24 custody, observation, and treatment and immediately notify the clerk  
25 of superior court of this action. If a 24-hour facility is not immediately  
26 available or appropriate to the respondent's medical condition, the  
27 respondent may be temporarily detained under appropriate supervision  
28 at the site of the first examination, provided that at anytime that a  
29 physician or eligible psychologist determines that the respondent is no  
30 longer in need of inpatient commitment, the proceedings shall be  
31 terminated and the respondent transported and released in accordance  
32 with subdivision (3) of this subsection. However, if the physician or  
33 eligible psychologist determines that the respondent meets the criteria  
34 for outpatient commitment, as defined in subdivision (1) of this  
35 subsection, the physician or eligible psychologist may recommend  
36 outpatient commitment, and the respondent shall be transported and  
37 released in accordance with subdivision (1) of this subsection. Any  
38 decision to terminate the proceedings or to recommend outpatient  
39 commitment after an initial recommendation of inpatient commitment  
40 shall be documented and reported to the clerk of superior court in  
41 accordance with subsection (e) of this section. If the respondent is  
42 temporarily detained and a 24-hour facility is not available or  
43 medically appropriate seven days after the issuance of the custody  
44 order, a physician or psychologist shall report this fact to the clerk of  
45 superior court and the proceedings shall be terminated. Termination of  
46 proceedings pursuant to this subdivision shall not prohibit or prevent

1 the initiation of new involuntary commitment proceedings when  
2 appropriate. Affidavits filed in support of proceedings terminated  
3 pursuant to this subdivision may not be submitted in support of any  
4 subsequent petitions for involuntary commitment. If the affiant  
5 initiating new commitment proceedings is a physician or eligible  
6 psychologist, the affiant shall conduct a new examination and may not  
7 rely upon examinations conducted as part of proceedings terminated  
8 pursuant to this subdivision.

9 In the event an individual known or reasonably believed to be  
10 mentally retarded is transported to a State facility for the mentally ill,  
11 in no event shall that individual be admitted to that facility except as  
12 follows:

- 13 a. Persons described in G.S. 122C-266(b);
- 14 b. Persons admitted pursuant to G.S. 15A-1321;
- 15 c. Respondents who are so extremely dangerous as to pose a  
16 serious threat to the community and to other patients committed  
17 to non-State hospital psychiatric inpatient units, as determined  
18 by the Director of the Division of Mental Health,  
19 Developmental Disabilities, and Substance Abuse Services or  
20 his designee; and
- 21 d. Respondents who are so gravely disabled by both multiple  
22 disorders and medical fragility or multiple disorders and  
23 deafness that alternative care is inappropriate, as determined by  
24 the Director of the Division of Mental Health, Developmental  
25 Disabilities, and Substance Abuse Services or his designee.

26 Individuals transported to a State facility for the mentally ill who  
27 are not admitted by the facility may be transported by law enforcement  
28 officers or designated staff of the State facility in State-owned vehicles  
29 to an appropriate 24-hour facility that provides psychiatric inpatient  
30 care.

31 No later than 24 hours after the transfer, the responsible  
32 professional at the original facility shall notify the petitioner, the clerk  
33 of court, and, if consent is granted by the respondent, the next of kin,  
34 that the transfer has been completed.

35 Notwithstanding the provisions of this subdivision, if the order placing  
36 respondent in custody was issued pursuant to G.S. 15A-1003, prior to  
37 any release from custody pursuant to this subdivision, the respondent  
38 shall be examined for capacity to proceed and released pursuant to the  
39 requirements of G.S. 15A-1004(c).

40 (3) If the physician or eligible psychologist finds that neither condition  
41 described in subdivisions (1) or (2) of this subsection exists, the  
42 proceedings shall be terminated. The person designated in the order to  
43 provide transportation shall return the respondent to the respondent's  
44 regular residence or, with the respondent's consent, to the home of a  
45 consenting individual located in the originating county and the  
46 respondent shall be released from custody. Notwithstanding the

1 provisions of this subdivision, if the order placing respondent in  
2 custody was issued pursuant to G.S. 15A-1003, after making the  
3 determination required by this subdivision, the respondent shall be  
4 examined for capacity to proceed and released pursuant to the  
5 requirements of G.S. 15A-1004(c)."

6 **SECTION 9.** The Commission for Mental Health, Developmental  
7 Disabilities and Substance Abuse Services shall develop and adopt rules by December  
8 1, 2012, to require forensic evaluators appointed pursuant to 15A-1002(b) to meet the  
9 following requirements:

10 (1) Complete all training requirements necessary to be credentialed as a certified  
11 forensic evaluator.

12 (2) Attend annual continuing education seminars that provide continuing education  
13 and training in conducting forensic evaluations and screening examinations of  
14 defendants to determine capacity to proceed and preparation of written reports required  
15 by law.

16 **SECTION 10.** The Commission for Mental Health, Developmental  
17 Disabilities and Substance Abuse Services shall, by December 1, 2012, adopt guidelines  
18 for treatment of individuals who are involuntarily committed following a determination  
19 of incapacity to proceed and a referral pursuant to G.S. 15A-1003. The guidelines shall  
20 require a treatment plan that uses best practices in an effort to restore the individual's  
21 capacity to proceed in the criminal matter.

22 **SECTION 11.** Sections 1 through 8 of this act become effective December  
23 1, 2012, and apply to offenses committed on or after that date. The remainder of this act  
24 is effective when it becomes law.

