Summary of 2013 Capacity-Commitment Legislation

John Rubin, © UNC School of Government

Background

During the 2013 legislative session the General Assembly made several changes to the statutes governing capacity determinations and the ensuing proceedings for involuntary commitment of a person found incapable to proceed. *See* S.L. 2013-18 (S 45). The changes, which apply to offenses committed on or after December 1, 2013, grew out of a study committee, co-chaired by Senator Shirley Randleman, a former Superior Court Clerk who had encountered the difficulties described below. The study committee consisted of representatives from the courts, prosecution, law enforcement, defense bar, mental health system, and School of Government as well as members of both the House and Senate.

Under the current statutes, if the judge finds that a person is incapable to proceed in the criminal case, the judge may refer the person for civil commitment proceedings. The proceedings then focus primarily on whether the person meets the criteria for commitment—for inpatient commitment, whether the person is mentally ill and dangerous to self and others. Generally, once a person no longer meets the criteria for commitment, the commitment terminates and the criminal case resumes. If the person has not met pretrial release conditions, he or she returns to jail. Termination of commitment does not necessarily ensure that the person is capable of proceeding in the criminal case, however. Although the person's mental health may have improved during the commitment process, his or her condition may deteriorate after returning to jail, rendering him or her incapable of proceeding in the criminal case. Or, even though released from commitment, the underlying conditions that rendered the person incapable of proceeding in the criminal case may not have been fully addressed. In those circumstances, the capacity-commitment process begins again, with the person cycling through a capacity evaluation, commitment if found incapable, release to jail if no longer subject to commitment, and so on.

In various ways, the legislative changes seek to better integrate the criminal capacity and civil commitment procedures without altering the basic criteria for commitment. To be involuntarily committed and treated in a state psychiatric facility, the person still must meet the mental illness and dangerousness requirements for commitment. The revised statutes do not authorize commitment on the basis that a person is incapable of proceeding; nor do they specifically authorize treatment of a person's incapacity during commitment. However, the revised statutes seek to increase communication between criminal and civil court participants; generate more information about the defendant's capacity to proceed before commitment terminates; expedite proceedings to avoid ping-ponging of defendants between the criminal justice and mental health systems; and set more definite termination dates for the proceedings. Below are highlights of the legislative changes.

Review of Legislative Changes

All of the changes described below are effective for offenses committed on or after December 1, 2013.

Requirement of recommendation in report. If a capacity examination concludes that a defendant is incapable of proceeding, the report must indicate whether the person is likely to gain capacity and include a treatment recommendation for addressing the person's incapacity, which presumably will be available to and can be considered by treating professionals during the commitment process. *See* G.S. 122C-54(b). The revised statute does not specifically authorize treatment or medication to restore capacity. An uncodified section of the legislation directs the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to adopt guidelines for the treatment of people who are involuntarily committed after a determination of incapacity to proceed.

Elimination of second capacity examination in misdemeanor cases. In misdemeanor cases, only local examiners may perform court-ordered capacity examinations. The court may no longer order a capacity examination at a state hospital following a local examination, *See* G.S. 15A-1002(b)(1a) and (2) [current subsection (1) is recodified as subsection (1a)]. This change may free up resources to meet the requirement, discussed below, that capacity examinations be conducted before a person is released from commitment. An uncodified section of the legislation directs the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to adopt rules requiring forensic evaluators appointed under G.S. 15A-1002(b) to meet specified requirements, such as training to be credentialed as a certified forensic evaluator and attendance at continuing education seminars.

Release of confidential records. The judge who orders a capacity examination must order the release of relevant confidential information to the examiner, including the warrant or indictment, the law enforcement incident report, and the defendant's medical and mental health records. The defendant is entitled to notice and an opportunity to be heard before release of the records. *See* G.S. 15A-1002(b)(4). The subsection also states that it does not relieve the court of its duty to conduct hearings and make findings required under relevant federal law before ordering the release of any private medical or mental health information or records related to substance abuse or HIV status or treatment.

Hearing and findings. Revised G.S. 15A-1002(b)(1a) states that the court may call the examiner appointed under that subsection to testify at a capacity hearing with or without the request of the parties. This revision does not appear to change existing law. Revised G.S. 15A-1002(b1) requires the court to make findings of fact to support its determination of capacity or incapacity to proceed; this subsection also states that the parties may stipulate that the defendant is capable of proceeding but may not stipulate to incapacity.

Time limits on completion of reports. The examiner who performs the capacity examination must submit his or her report within specified time limits—for example, in a felony case, within thirty days of completion of the examination. *See* G.S. 15A-1002(b2). The statute allows the court to grant extensions of time for good cause up to a maximum limit. The statute does not set deadlines for the holding of the examinations, however.

Notice to sheriff. The covering statement that must accompany a capacity examination report, indicating the examiner's opinion about capacity, must be provided to the sheriff who has custody of the defendant. The sheriff does not receive the report itself. *See* G.S. 15A-1002(d).

Capacity examinations during commitment. If a person is found incapable of proceeding and involuntarily committed, either on an inpatient or outpatient basis, a capacity examination must be conducted before commitment is terminated and the person discharged. G.S. 122C-278. This provision does not authorize continued hospitalization or outpatient treatment solely on the basis that a person is incapable of proceeding; the person still must meet the criteria for involuntary commitment on an inpatient or outpatient basis.

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

Reporting on status of defendant. If the defendant gains capacity after being committed, the institution having custody of the defendant must provide written notice to the clerk of court (not merely "notice" as under the previous version of the statute). The clerk, in turn, must provide written notice to the district attorney, defendant's attorney, and sheriff, which is a new requirement. G.S. 15A-1006.

The revised statutes also require that reports of re-examination be provided according to the terms of G.S. 15A-1002. *See* G.S. 15A-1004(c) ("A report of the examination shall be provided pursuant to G.S. 15A-1002."). G.S. 15A-1002 has required and continues to require that examiners provide reports of their examinations to the court and defense attorney. It has been less clear when examiners may provide reports to prosecutors. G.S. 15A-1002(d) has permitted and continues to permit disclosure of the report to the prosecutor if the question of the defendant's capacity "is raised at any time." The language and legislative history of G.S. 15A-1002(d) suggest, however, that this phrase contemplates disclosure only if capacity is questioned after the initial examination and further court proceedings are necessary, at which the examination report is a central consideration. Central Regional Hospital and possibly other examiners do not share this view and routinely provide a copy of the examination report to the court, defense attorney, and prosecutor at the same time (unless the defense attorney has obtained a specific order from the court limiting disclosure). Re-examination reports will likely be disclosed in the same fashion (unless defense counsel obtains an order limiting disclosure).

Supplemental hearings on capacity. After receiving notice that the defendant has gained the capacity to proceed, the district attorney must calendar a supplemental hearing on capacity within thirty days. G.S. 15A-1007(a). This hearing requirement applies when the defendant is found incapable, is committed, and is later released from commitment. It also appears to apply when the defendant is found incapable, is referred for commitment proceedings, and is found not to be subject to commitment.

Expedited trial. If the court determines in a supplemental hearing that the defendant has gained the capacity to proceed, the case must be calendared for trial at the earliest practicable time. Continuances of more than sixty days beyond the trial date may be granted only in extraordinary circumstances and when necessary for the proper administration of justice. G.S. 15A-1007(d).

Repeal of dismissal with leave. G.S. 15A-1009 has permitted prosecutors to dismiss cases "with leave" if a person is found incapable to proceed. This provision has proved troublesome because agencies and programs have viewed the criminal case as still pending, which may disqualify the defendant from receiving or obtaining funding for needed treatment and services. The legislation repeals the statute. A prosecutor still may take a voluntary dismissal.

Mandatory dismissal. G.S. 15A-1008 has allowed but not required the court to dismiss the charges against an incapable defendant on any of the grounds indicated in that statute. The biggest change to the statute is that dismissal is mandatory, not discretionary, if any of the grounds exist. The substance of the second ground, but not the first and third, was also changed to specify the length of imprisonment required to mandate dismissal.

An incapable defendant is entitled to dismissal under the revised statute if:

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

If the ground for dismissal is 2., the dismissal is "without leave." This phrasing apparently means that the case is dismissed with prejudice and cannot be refiled. If the ground for dismissal is 1. or 3., the dismissal is "without prejudice to the refiling of the charges" by the giving of written notice by the prosecutor. The "without prejudice" phrasing appears to distinguish a dismissal under either 1. or 3. from a dismissal with leave, discussed above. When a case is dismissed with leave, the case may be viewed as still pending. A dismissal without prejudice to refiling, in contrast, contemplates that the State may refile the charges but, until it does so, no case is pending. Defense counsel seeking to arrange for treatment and other services may need to educate involved agencies and programs about the meaning of a dismissal without prejudice. In seeking a dismissal order on ground 1. or 3., defense counsel also may want to ask the court to indicate explicitly in the order that the case is no longer pending on entry of the order.