

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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HOUSE BILL 1048

Short Title: Incapacity to Proceed Amendments. (Public)

Sponsors: Representatives Randleman, Hurley, Faircloth, and McGuirt (Primary Sponsors).
For a complete list of Sponsors, see Bill Information on the NCGA Web Site.

Referred to: Judiciary Subcommittee A.

May 23, 2012

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 commitment;**
7 **temporary orders.**

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

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

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

27 (2) ~~In the case of a defendant charged with a misdemeanor only after the~~
28 ~~examination pursuant to subsection (b)(1) of this section or at~~ At any time in
29 the case of a defendant charged with a felony, the court may order the
30 defendant to a State facility for the mentally ill for observation and treatment
31 for the period, not to exceed 60 days, necessary to determine the defendant's
32 capacity to ~~proceed; in the case of a defendant charged with a felony,~~
33 ~~if~~ proceed. If a defendant is ordered to a State facility without first having an
34 examination pursuant to subsection (b)(1) of this section, the judge shall
35 make a finding that an examination pursuant to this subsection would be



1 more appropriate to determine the defendant's ~~capacity; the~~capacity. The
2 sheriff shall return the defendant to the county when notified that the
3 evaluation has been ~~completed; the~~completed. The director of the facility
4 shall direct his report on defendant's condition to the defense attorney and to
5 the clerk of superior court, who shall bring it to the attention of the ~~court;~~
6 ~~the~~court. The report is admissible at the hearing.

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

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

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

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

36 (1) The report in a case of a defendant charged with a misdemeanor shall be
37 completed and provided to the court no later than 10 days following the
38 completion of the examination for a defendant who was in custody at the
39 time the examination order was entered, and no later than 20 days following
40 the completion of the examination for a defendant who was not in custody at
41 the time the examination order was entered.

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

45 (3) In cases where the defendant challenges the determination made by the
46 court-ordered examiner or the State facility and the court orders an
47 independent psychiatric examination, that examination and report to the
48 court must be completed within 60 days of the entry of the order by the
49 court.

50 The court may, for good cause shown, extend the time for the provision of the report to the
51 court for up to 30 additional days. The court may renew an extension of time for an additional

1 30 days upon request of the State or the defendant prior to the expiration of the previous
2 extension. In no case shall the court grant extensions totaling more than 120 days beyond the
3 time periods otherwise provided in this subsection.

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

7 (d) Any report made to the court pursuant to this section shall be forwarded to the clerk
8 of superior court in a sealed envelope addressed to the attention of a presiding judge, with a
9 covering statement to the clerk of the fact of the examination of the defendant and any
10 conclusion as to whether the defendant has or lacks capacity to proceed. If the defendant is
11 being held in the custody of the sheriff, the clerk shall send a copy of the covering statement to
12 the sheriff. The sheriff, and any persons employed by the sheriff, shall maintain the copy of the
13 covering statement as a confidential record. A copy of the full report shall be forwarded to
14 defense counsel, or to the defendant if he is not represented by counsel provided, if counsel. If
15 the question of the defendant's capacity to proceed is raised at any time, a copy of the full
16 report must be forwarded to the district attorney-attorney, as provided in G.S. 122C-54(b). Until
17 such report becomes a public record, the full report to the court shall be kept under such
18 conditions as are directed by the court, and its contents shall not be revealed except as directed
19 by the court. Any report made to the court pursuant to this section shall not be a public record
20 unless introduced into evidence."

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

22 "(c) If the defendant is placed in the custody of a hospital or other institution in a
23 proceeding for involuntary civil commitment, the orders must provide for reporting to the clerk
24 if the defendant is to be released from the custody of the hospital or institution. The original or
25 supplemental orders may make provisions as in subsection (b) in the event that the defendant is
26 released. The court shall also order that the defendant shall be examined to determine whether
27 the defendant has the capacity to proceed prior to release from custody. A report of the
28 examination shall be provided pursuant to G.S. 15A-1002. If the defendant was charged with a
29 violent crime, including a crime involving assault with a deadly weapon, and that charge has
30 not been dismissed, the order must require that if the defendant is to be released from the
31 custody of the hospital or other institution, he is to be released only to the custody of a
32 specified law enforcement agency. If the original or supplemental orders do not specify to
33 whom the respondent shall be released, the hospital or other institution may release the
34 defendant to whomever it thinks appropriate."

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

36 **"§ 15A-1006. Return of defendant for trial upon gaining capacity.**

37 If a defendant who has been determined to be incapable of proceeding, and who is in the
38 custody of an institution or an individual, ~~gains~~ has been determined by the institution or
39 individual having custody to have gained capacity to proceed, the individual or institution ~~must~~
40 ~~notify~~ shall provide written notification to the clerk in the county in which the criminal
41 proceeding is pending. The clerk ~~must notify the sheriff to~~ shall provide written notification to
42 the district attorney, the defendant's attorney, and the sheriff. The sheriff shall return the
43 defendant to the county for supplemental hearing pursuant to G.S. 15A-1007, if conducted, and
44 ~~trial, trial and to hold him~~ the defendant for supplemental hearing and trial, subject to the orders
45 of the court entered pursuant to G.S. 15A-1004."

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

47 **"§ 15A-1007. Supplemental hearings.**

48 (a) When it has been reported to the court that a defendant has gained capacity to
49 proceed, or when the defendant has been determined by the individual or institution having
50 custody of him to have gained capacity and has been returned for ~~trial, the trial,~~ in accordance
51 with G.S. 15A-1004(e) and G.S. 15A-1006, the clerk shall notify the district attorney. Upon

1 receiving the notification, the district attorney shall calendar the matter for hearing at the next
2 available term of court, but no later than 30 days after receiving the notification. The court may
3 hold a supplemental hearing to determine whether the defendant has capacity to proceed. The
4 court may take any action at the supplemental hearing that it could have taken at an original
5 hearing to determine the capacity of the defendant to proceed.

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

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

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

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

16 "**§ 15A-1008. Dismissal of charges.**

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

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

21 (2) When the defendant has been substantially deprived of his liberty for a
22 period of time equal to or in excess of the ~~maximum permissible period of~~
23 ~~confinement for the crime or crimes charged;~~ maximum term of
24 imprisonment permissible for prior record level VI for felonies or prior
25 conviction level III for misdemeanors for the most serious offense charged.

26 (3) Upon the expiration of a period of five years from the date of determination
27 of incapacity to proceed in the case of misdemeanor charges and a period of
28 10 years in the case of felony charges.

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

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

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

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

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

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

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

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

49 (1) If the physician or eligible psychologist finds that:
50 a. The respondent is mentally ill;

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

11 The physician or eligible psychologist shall so show on the examination
12 report and shall recommend outpatient commitment. In addition the
13 examining physician or eligible psychologist shall show the name, address,
14 and telephone number of the proposed outpatient treatment physician or
15 center. The person designated in the order to provide transportation shall
16 return the respondent to the respondent's regular residence or, with the
17 respondent's consent, to the home of a consenting individual located in the
18 originating county, and the respondent shall be released from custody.
19 Notwithstanding the provisions of this subdivision, if the order placing the
20 respondent in custody was issued pursuant to G.S. 15A-1003, after making
21 the determination required by this subdivision, the respondent shall be
22 examined for capacity to proceed and released pursuant to the requirements
23 of G.S. 15A-1004(c).

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

1 outpatient commitment after an initial recommendation of inpatient
2 commitment shall be documented and reported to the clerk of superior court
3 in accordance with subsection (e) of this section. If the respondent is
4 temporarily detained and a 24-hour facility is not available or medically
5 appropriate seven days after the issuance of the custody order, a physician or
6 psychologist shall report this fact to the clerk of superior court and the
7 proceedings shall be terminated. Termination of proceedings pursuant to this
8 subdivision shall not prohibit or prevent the initiation of new involuntary
9 commitment proceedings when appropriate. Affidavits filed in support of
10 proceedings terminated pursuant to this subdivision may not be submitted in
11 support of any subsequent petitions for involuntary commitment. If the
12 affiant initiating new commitment proceedings is a physician or eligible
13 psychologist, the affiant shall conduct a new examination and may not rely
14 upon examinations conducted as part of proceedings terminated pursuant to
15 this subdivision.

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

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

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

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

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

- 44 (3) If the physician or eligible psychologist finds that neither condition
45 described in subdivisions (1) or (2) of this subsection exists, the proceedings
46 shall be terminated. The person designated in the order to provide
47 transportation shall return the respondent to the respondent's regular
48 residence or, with the respondent's consent, to the home of a consenting
49 individual located in the originating county and the respondent shall be
50 released from custody. Notwithstanding the provisions of this subdivision, if
51 the order placing the respondent in custody was issued pursuant to

1 G.S. 15A-1003, after making the determination required by this subdivision,
2 the respondent shall be examined for capacity to proceed and released
3 pursuant to the requirements of G.S. 15A-1004(c)."

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

- 8 (1) Complete all training requirements necessary to be credentialed as a certified
9 forensic evaluator.
- 10 (2) Attend annual continuing education seminars that provide continuing
11 education and training in conducting forensic evaluations and screening
12 examinations of defendants to determine capacity to proceed and preparation
13 of written reports required by law.

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

20 **SECTION 11.** Sections 1 through 8 of this act become effective December 1,
21 2012, and apply to offenses committed on or after that date. The remainder of this act is
22 effective when it becomes law.