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State v. Gravette: Is There Justice for Incompetent Defendants in North Carolina?

Beginning in the 1960s, efforts to reform the nation's mental health care system brought to the forefront a concern for the due process rights of mentally ill people committed to psychiatric facilities.¹ In 1972 the United States Supreme Court focused on the due process rights of mentally ill criminal defendants in *Jackson v. Indiana*² when it held that, absent a civil commitment,³ a state can hold a defendant who is incompetent to stand trial⁴ no longer than is necessary to determine whether he will regain competency.⁵ In response to *Jackson*, the North Carolina General Assembly has adopted statutes permitting the extended commitment of incompetent defendants only through civil commitment proceedings.⁶ The commitment of incompetent defendants for extended

1. Miller & Fiddlemann, *Involuntary Civil Commitment in North Carolina: The Result of the 1979 Statutory Changes*, 60 N.C.L. REV. 985, 986 (1982).

2. 406 U.S. 715, 731-39 (1972).

3. As a result of the mental health movement, almost all states now require compliance with procedural safeguards and a determination that a person is dangerous before permitting the state to confine a person involuntarily in an inpatient mental health care facility. Arvanites, *The Impact of State Mental Hospital Deinstitutionalization on Commitments for Incompetency to Stand Trial*, 26 CRIMINOLOGY 307, 307 (1988). By 1981, 46 states had made these changes. *Id.* See, e.g., FLA. STAT. § 394.467 (1989); MINN. STAT. § 253B.18 (1990); VA. CODE ANN. § 37.1-67.3 (1990). Following these changes in civil commitment law, fewer people are eligible for involuntary civil commitment. Arvanites, *supra*, at 307.

4. Courts began recognizing the doctrine of pretrial incompetency as early as the mid-seventeenth century. S. HALLECK, *THE MENTALLY DISORDERED OFFENDER* 20 (1986). Incompetency should not be confused with insanity at the time of offense. An incompetent defendant may not have been mentally ill at the time of the offense. Winick & DeMeo, *Competence to Stand Trial in Florida*, 35 U. MIAMI L. REV. 31, 36-37 (1980). The United States Supreme Court has held that competency of a defendant is "fundamental to an adversary system of justice." *Drope v. Missouri*, 420 U.S. 162, 172 (1975). A state deprives a defendant of his right to due process of law if it fails to follow procedures "adequate to protect [his] right not to be tried or convicted while incompetent to stand trial." *Id.* (citing *Pate v. Robinson*, 383 U.S. 375, 384-87 (1966)). The trial court "must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Id.* at 181.

5. *Jackson*, 406 U.S. at 738. Before *Jackson*, incompetent defendants faced automatic commitment to mental hospitals for indeterminate periods of time. Winick & DeMeo, *supra* note 4, at 33. One man, found incompetent to stand trial for burglary in 1901, was sent to Matteawan Hospital in New York and remained there for sixty-four years. T. MAEDER, *CRIME AND MADNESS: THE ORIGINS AND EVOLUTION OF THE INSANITY DEFENSE* 118 (1985). The state never dropped the charges against him. *Id.* Another, arrested for stealing a horse and buggy, was sent to the same hospital in 1905; he remained there until 1964, when he finally obtained his release at age eighty-nine. *Id.*

6. Act of Apr. 11, 1974, ch. 1286, 1974 N.C. Sess. Laws 546 (codified at N.C. GEN. STAT. §§ 15A-1001 to -1009 (1988 & Supp. 1990)). Beginning in the 1970s, some states started to provide defendants found not guilty by reason of insanity, as well as incompetent defendants, with the same legal protections as those committed under civil statutes. S. HALLECK, *supra* note 4, at 52. See, e.g., N.C. GEN. STAT. § 15A-1321 (1988). As a result, some defendants acquitted by reason of insanity were permitted to return to the community. T. MAEDER, *supra* note 5, at 132. North Carolina law requires civil commitment of defendants who are acquitted by reason of insanity. N.C. GEN. STAT. § 15A-1321 (1988). This may change soon, however. One North Carolina woman, outraged about the possible release of her daughter's murderer from a state mental hospital, "threw herself into efforts to change the law regarding people found not guilty by reason of insanity. She took time off from her job in a hair-styling salon to gather petitions, shake hands and serve on a study commission." Raleigh News and Observer, April 10, 1991, at 1B, col. 2. On April 9, 1991, North Carolina's House of Representatives, by a vote of 106 to 3, passed a bill requiring automatic commitment

periods only through civil commitment procedures has created a new category of defendants: those who are neither competent to stand trial nor subject to civil commitment.⁷ The appropriate treatment of defendants in this category has perplexed scholars, legislators, and courts seeking to balance the defendant's due process rights against the public's interest in protection from potentially dangerous people.

In *State v. Gravette*⁸ the North Carolina Supreme Court reviewed a trial court's attempt to balance an incompetent defendant's liberty interests against the public's safety concerns.⁹ In *Gravette* the trial court claimed the inherent power of the courts as its basis for a conditional release order not specifically authorized by statute.¹⁰ The North Carolina Supreme Court denied that the trial court had an inherent power to order such a release, noting that "the courts must make do with what is currently provided by the General Assembly."¹¹ The court also suggested that although the General Assembly has provided some alternatives for the treatment of incompetent defendants who will not become competent, the General Assembly's provisions may not be adequate in every case.¹²

This Note assesses the alternatives that the General Assembly has provided for treating defendants who are not competent to stand trial and addresses common concerns about systems for handling incompetent defendants. The Note then examines the adequacy of North Carolina's existing system. Finally, this Note suggests that a statutory amendment could eliminate some of the problems faced by the trial court and the defendant in *Gravette*.

In November 1984 Robert Gravette was assaulted and shot behind his right ear with a .22 caliber pistol.¹³ As a result of the gunshot wound, Gravette suffered organic brain damage.¹⁴ On February 1, 1987, he was arrested and charged with two counts of first degree murder.¹⁵ Soon after the state charged Gravette with murder, his court-appointed counsel moved for a psychiatric eval-

of persons acquitted by reason of insanity and making it more difficult for them to get out of hospitals. *Id.* at col. 1. The new measure, if passed in the senate, will require the defendant to prove, before he may be released, that he is not dangerous to others and that he is not suffering from a mental illness that requires hospitalization. S. 43, General Assembly of North Carolina, 1991 Sess. at 3.

7. Some defendants who are not mentally ill are incompetent to stand trial. For example, a person who is deaf, mute, or mentally retarded is not mentally ill but may not be able to communicate effectively enough to understand her situation. S. HALLECK, *supra* note 4, at 25. Professor Halleck also notes that "[i]ncompetent defendants have, after all, not been tried and their violence has not been proven. Under current commitment standards, 'unrestorable' incompetents who have actually committed violent crimes might be released." *Id.* at 25-26.

8. 327 N.C. 114, 393 S.E.2d 865 (1990).

9. *Id.* at 118, 393 S.E.2d at 868.

10. *Id.* at 122, 393 S.E.2d at 870.

11. *Id.* at 124, 393 S.E.2d at 871 (quoting *In re Swindell*, 326 N.C. 473, 475, 390 S.E.2d 134, 136 (1990)).

12. *Id.* at 121-22, 393 S.E.2d at 870.

13. Response to Petition for Writ of Mandamus, or Alternatively, Prohibition and Response to Petition for Writ of Supersedeas and Temporary Stay at 1, *Gravette*, (Nos. 87-CR-1159, 87-CR-1160) [hereinafter Response to Petition for Writ of Mandamus].

14. *Id.*

15. *Id.* According to the defendant's Response to Petition for Writ of Mandamus, the victims

uation to determine Gravette's competence to stand trial.¹⁶

Over a three-year period, trial courts ordered five evaluations of Gravette's competency to stand trial.¹⁷ Each time, examining psychiatrists recommended that the court find Gravette incompetent to stand trial.¹⁸ Twice, a superior court judge found Gravette incompetent to stand trial.¹⁹ Trial courts ordered evaluations of Gravette for involuntary commitment purposes three times.²⁰ Over this three-year period, Gravette spent a total of nearly thirteen months in state mental institutions.²¹ When he was not hospitalized during this period, Gravette remained confined in the Orange County Jail.

On January 19, 1990, Gravette applied for pretrial release before Judge D.

of these killings were two men who had come into the defendant's house and who were harassing him. *Id.* at 2.

16. *Id.* at 2-4. In addition to organic brain damage, Gravette suffered from diabetes and hypertension. Order Pertaining to Capacity to Proceed and Involuntary Commitment of Person Charged with Violent Crimes at 1, *Gravette*, (Nos. 87-CRS-1159, 87-CRS-1160). He was taking several types of medication for his physical ailments, as well as medication to reduce his compulsiveness and depression, and to help him sleep. *Id.* at 1-2. During a competency hearing on March 21, 1988, he sobbed continuously and shook uncontrollably. *Id.* at 2.

17. Response to Petition for Writ of Mandamus at 2-5.

18. *Id.*

19. *Id.* On March 22, 1988, Judge F. Gordon Battle declared Gravette incompetent to stand trial. *Id.* at 2. On December 14, 1989, Judge Battle found that Gravette was still incompetent to proceed. *Id.* at 5.

20. *Id.* at 2-3. Gravette was involuntarily committed to John Umstead Hospital from March 23, 1988, to July 5, 1988. *Id.* at 2. He returned to the Orange County Jail when doctors at Umstead Hospital found that he was no longer dangerous to himself or others. *Id.* He was again committed to Umstead Hospital for a determination of dangerousness on January 12, 1989. *Id.* at 3. On February 9, 1989, the district court in Granville County found that Gravette was not dangerous to himself or others and returned him to the Orange County Jail. *Id.* On August 10, 1989, Judge Battle committed Gravette to Dorothea Dix Hospital, to assess both whether Gravette could stand trial and whether he was dangerous to himself or others. *Id.* at 4. Gravette returned to the Orange County Jail on December 7, 1989. *Id.*

21. Two days after Gravette's arrest on murder charges, his court-appointed counsel requested an evaluation of Gravette's competency to stand trial. Order Pertaining to Capacity to Proceed and Involuntary Commitment of Person Charged With Violent Crimes at 1. Gravette remained at Dorothea Dix Hospital for evaluation from February 5, 1987 through March 30, 1987. *Id.* More than nine months later, on December 17, 1987, the court again sent Gravette to Dorothea Dix Hospital for a competency evaluation. *Id.* This time, he remained at Dix from December 17, 1987 through January 25, 1988. *Id.* On March 22, 1988, Judge Battle entered an order declaring the defendant incompetent to stand trial. Response to Petition for Writ of Mandamus at 2. Judge Battle also ordered that involuntary civil commitment proceedings take place in district court. *Id.*

The district court committed Gravette to John Umstead Hospital, and he was admitted on March 23, 1988. *Id.* After Gravette's relatively brief stay at that hospital, doctors determined that he was mentally ill but was not dangerous to himself or others. *Id.* As a result of these findings, Gravette was no longer subject to the civil commitment order and returned on July 5, 1988, to the Orange County Jail. *Id.*

On July 7, 1988, the court sent Gravette to Dorothea Dix Hospital for a third evaluation of his competency to stand trial. *Id.* Again, the examining psychiatrist found that Gravette did not have the capacity to proceed to trial. *Id.* at 2-3. As required by the commitment order, Gravette returned to the Orange County Jail on July 25, 1988, and remained there until December 7, 1988, when Judge Robert L. Farmer ordered him returned to Dorothea Dix Hospital for yet another evaluation of his capacity to stand trial. *Id.* at 3. Again Gravette was found incompetent to proceed, and was returned to the Orange County Jail on January 3, 1989. *Id.*

On January 12, 1989, Gravette went to Umstead Hospital to be evaluated both for competency to proceed and for dangerousness to himself or others. *Id.* On February 9, 1989, the court determined that Gravette was not dangerous to himself or others. *Id.* Gravette then returned to the Orange County Jail. *Id.*

B. Herring.²² Judge Herring ordered a conditional pretrial release, assigning custody of Gravette to his then ex-wife.²³ Judge Herring ordered the Durham branch of the State Division of Adult Probation and Parole (DAPP) to supervise Gravette's pretrial release and to make written reports to the court regarding his supervision.²⁴ The Durham DAPP office notified the court that it would not consent to the order and filed a petition in the North Carolina Supreme Court for a writ of mandamus,²⁵ or alternatively, for a writ of prohibition²⁶ to void Judge Herring's order.²⁷

The North Carolina Supreme Court only addressed whether the trial court had statutory or inherent power to compel DAPP, "without its consent, to supervise the conditional release of a pretrial detainee who has not been tried or convicted because of his lack of capacity to proceed to trial."²⁸ The court considered statutes cited by Judge Herring²⁹ as the basis for his order and determined that statutes concerning probation,³⁰ bail and pretrial release,³¹ and capacity to proceed³² did not authorize the trial court's order requiring DAPP

22. *Gravette*, 327 N.C. at 117, 393 S.E.2d at 867. Earlier, on April 3, 1989, Gravette had moved for his conditional release from the Orange County Jail. Response to Petition for Writ of Mandamus at 3. At that time Gravette's psychiatrist proposed conditions on his release, and Gravette's ex-wife agreed to take custody of him. *Id.* at 3-4. On April 7, 1989, Superior Court Judge B. Craig Ellis ordered the proposed release and added the requirement that the probation staff in Durham County supervise Gravette. *Id.* at 4. Judge Ellis received a great deal of publicity after the order, and many North Carolinians wrote to him expressing their concern over the defendant's release. *Id.* Judge Ellis was spared from continued adverse publicity a few days later, when Gravette's ex-wife was unable to take custody of him. *Id.* On June 8, 1989, Gravette again sought his conditional release. *Id.* This time, Judge Ellis refused to grant the motion for conditional release. *Id.*

On August 10, 1989, after Judge Ellis had denied Gravette's motion for release, Superior Court Judge F. Gordon Battle sent the defendant back to Dorothea Dix Hospital again for two purposes: first, to determine whether Gravette was competent to stand trial, and second, to evaluate whether he satisfied the requirements for involuntary civil commitment. *Id.* at 4-5. The hospital returned Gravette to Orange County officials on December 7, 1989. *Id.* at 4. On December 14, 1989, Judge Battle held a hearing, found that Gravette was still incompetent to stand trial, and began involuntary commitment proceedings against him. *Id.* at 5. The court committed Gravette to outpatient treatment on January 12, 1990. *Id.* It is unclear whether he ever received treatment. *Gravette*, 327 N.C. at 121, 393 S.E.2d at 870.

23. *Gravette*, 327 N.C. at 117, 393 S.E.2d at 867.

24. *Id.*

25. A writ of mandamus orders a lower court to perform a duty imposed by law. *Nebel v. Nebel*, 241 N.C. 491, 499, 85 S.E.2d 876, 882 (1955).

26. The writ of prohibition is the counterpart of the writ of mandamus. Instead of ordering a lower court to perform a duty, it orders the lower court not to take an illegal action. *BLACK'S LAW DICTIONARY* 1212 (6th ed. 1990). See, e.g., *In re Greene*, 297 N.C. 305, 313, 255 S.E.2d 142, 147 (1979) (ordering district court judge not to give defendants a sentence other than the one mandated by statute).

27. Petition for Writ of Mandamus or, Alternatively, Prohibition at 1, *Gravette*, (99PA90). DAPP cited, as one of its reasons for refusing to comply with the conditional release order, its fear of civil liability if it voluntarily complied with an order for which there was no statutory authority, especially given the background of this case, see *supra* notes 13-16 and accompanying text, and the potential of harm to third parties. *Gravette*, 327 N.C. at 117, 393 S.E.2d at 867.

28. *Gravette*, 327 N.C. at 119, 393 S.E.2d at 868.

29. *Id.*

30. N.C. GEN. STAT. §§ 15A-1341 to -1347 (1988 & Supp. 1990).

31. *Id.* § 15A-534(a)(3) (Supp. 1990).

32. *Id.* § 15A-1004 (1988).

to supervise the defendant.³³ After determining that no statute authorized the order, the supreme court addressed whether the trial court could imply authority from the statutes it cited as the basis for its order.³⁴ The North Carolina courts resist the doctrine of implied powers;³⁵ in this vein, the court held that "[t]he only powers implied or reasonably inferred from a statute are those essential to effectuate its terms."³⁶ Since there were no applicable statutory provisions in this case, the trial court could not imply authority for the order.

Finally, the court asked whether the superior court had the inherent power to enter the order in question.³⁷ The court did not address this question at great length, remarking that the North Carolina Constitution vests the legislative power of the state in the General Assembly,³⁸ and when the legislature chooses to legislate in a particular area, it is beyond the scope of the court's power to amend that legislation by inserting provisions left out by the General Assembly.³⁹ Although the court acknowledged that North Carolina's statutes do not address adequately the situation presented in this case, it refused to allow the

33. *Gravette*, 327 N.C. at 122, 393 S.E.2d at 870.

34. *Id.*

35. *See id.* at 123-24, 393 S.E.2d at 871. The court noted that, in the past, North Carolina judges have attempted to "craft alternatives based on either the implied or inherent power of the court." *Id.* at 123, 393 S.E.2d at 871. In each of those cases, the court of appeals or the supreme court found the judge in error. *Id.* *See also* Mallard, *Inherent Power of the Courts of North Carolina*, 10 WAKE FOREST L. REV. 1, 14-20 (1974) (citing examples of judicial acts held to exceed courts' authority).

36. *Gravette*, 327 N.C. at 122, 393 S.E.2d at 870. The court quoted Judge Mallard: "[i]mplied powers are such as are necessary to make available and carry into effect those powers which are expressly granted or conferred, and which must therefore be presumed to have been within the intention of the constitutional or legislative grant." *Id.* (quoting Mallard, *supra* note 35, at 12).

37. *Id.* Courts in North Carolina possess three basic types of powers:

(1) those powers embodied in the constitution, which the legislature has no power to change; (2) those powers conferred on the General Court of Justice or one of its divisions by act of the legislature and which do not violate any provisions of the constitution; and (3) those powers of the court that are inherent in it by virtue of the fact that, under the constitution, the judicial power of the state is vested in the General Court of Justice except such as may be constitutionally vested in administrative agencies under article IV, section 3, and in the Court for the Trial of Impeachments under Article IV, section 4.

Mallard, *supra* note 35, at 11. Judge Mallard noted that inherent powers often result from a "lack of specific constitutional or legislative authority as to those matters or things that are reasonably necessary in the proper and correct administration of justice." *Id.* at 12. Inherent powers are "reasonably necessary for the exercise of [the court's] proper function and jurisdiction in the administration of justice and . . . not granted or denied to it by the constitution or by a constitutionally enacted statute." *Id.* at 13. *See* N.C. CONST. art. IV. One example of the court's inherent power is the inherent power "to construe the constitution and to declare acts of the legislative branch of the government unconstitutional." Mallard, *supra* note 35, at 20. *See, e.g.,* Mitchell v. Financing Auth., 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968); Bayard v. Singleton, 1 N.C. (Mart.) 5 (1787). For a discussion of other inherent powers, see Mallard, *supra* note 35, at 20-23.

Although implied powers are sometimes confused with inherent powers, the two types of authority differ. *Id.* at 12. Implied powers are those that a court must invoke to enforce "powers which are expressly granted or conferred and which must therefore be presumed to have been within the intention of the constitutional or legislative grant." *Id.* The *Gravette* court found no statutory basis for the trial judge's order, and therefore found that the trial court could have no implied power to issue the order. *Gravette*, 327 N.C. at 122, 393 S.E.2d at 870.

38. *See* N.C. CONST. art. II, § 1.

39. *Gravette*, 327 N.C. at 123, 393 S.E.2d at 870-71. Inherent power is "limited to such powers as are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction." Hopkins v. Barnhardt, 223 N.C. 617, 619-20, 27 S.E.2d 644, 646 (1943).

trial court to fashion its own remedy.⁴⁰

The supreme court alluded to the trial court's failure to use available statutory options that could have solved the problem in this case. Specifically, the court pointed to the availability of involuntary outpatient commitment procedures and statutes providing for civil incompetency and guardianship.⁴¹ Because the *Gravette* court reviewed the case only to determine whether the trial court could order DAPP to supervise the defendant,⁴² the court did not discuss the applicability of these provisions to incompetent defendants who are not subject to involuntary inpatient commitment.

The United States Supreme Court has characterized the rule requiring defendants to be mentally competent before they can be tried as "fundamental to an adversary system of justice."⁴³ To find a defendant competent, the court must do more than find that "the defendant [is] oriented to time and place and [has] some recollection of events;" it must also ask whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceeding against him."⁴⁴ The North Carolina General Assembly has codified this competency requirement by providing:

No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he 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.⁴⁵

The prosecutor, the defendant, defense counsel, or the court may raise the issue of incapacity to stand trial at any time.⁴⁶

40. *Gravette*, 327 N.C. at 123, 393 S.E.2d at 871-72. The court noted in *Gravette* that it had faced the problem of inadequate treatment alternatives before, particularly in the context of juvenile incompetents. *Id.* at 123-24, 393 S.E.2d at 871. See, e.g., *In re Swindell*, 326 N.C. 473, 475, 390 S.E.2d 134, 136 (1990); *In re Wharton*, 305 N.C. 565, 570, 290 S.E.2d 688, 691 (1982); *In re Brownlee*, 301 N.C. 532, 548, 272 S.E.2d 861, 871 (1981); *In re Jackson*, 84 N.C. App. 167, 173, 352 S.E.2d 449, 453 (1987).

41. *Gravette*, 327 N.C. at 122, 393 S.E.2d at 870; see N.C. GEN. STAT. §§ 122C-271(a)(1) (Supp. 1990), 35A-1101 to -1244 (1987 & Supp. 1990).

42. *Gravette*, 327 N.C. at 119, 393 S.E.2d at 868. For a discussion of the difference between inpatient and outpatient commitment, see *infra* note 57 and accompanying text.

43. *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

44. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam).

45. N.C. GEN. STAT. § 15A-1001(a) (1988). See also *State v. Propst*, 274 N.C. 62, 70, 161 S.E.2d 560, 566 (1968) (case law setting out the competency standard before the legislature adopted section 15A-1001(a)). Despite the defendant's disability, the court can still move forward with any motions that can be handled by defense counsel without the defendant's assistance. N.C. GEN. STAT. § 15A-1001(b) (1988). The trial judge has discretion to determine the competency of a defendant, and this determination is conclusive on appeal if the evidence supports it. *State v. Reid*, 38 N.C. App. 547, 548-49, 248 S.E.2d 390, 391 (1978) (citing *State v. Willard*, 292 N.C. 567, 575, 234 S.E.2d 587, 592 (1977)), *disc. rev. denied*, 296 N.C. 588, 254 S.E.2d 31 (1979).

46. N.C. GEN. STAT. § 15A-1002(a) (Supp. 1990). The fact that the prosecutor can bring up the incompetency issue has disturbed some commentators. Professor Halleck notes that while some prosecutors ask for a competency examination to avoid having a conviction overturned on appeal, prosecutors

have also been known to invoke competency proceedings over the defendant's objection in order to avoid a criminal trial when the State's evidence was weak. Defendants who are

Once the competency issue is before the court, the court can assess the defendant's competency in one of two ways. First, the court may appoint a medical expert who evaluates the defendant, returns a written report on the defendant's mental condition, and possibly testifies at a later hearing.⁴⁷ Second, the court may commit the defendant to "a State mental health facility for observation and treatment for the period necessary to determine the defendant's capacity to proceed [but no longer than sixty days]."⁴⁸ Following the competency evaluation, the court must hold a hearing to determine the defendant's capacity to proceed to trial.⁴⁹

If the court finds the defendant incompetent to proceed to trial, the judge will next consider whether reasonable grounds exist to believe that the defendant meets the criteria for involuntary civil commitment.⁵⁰ If reasonable grounds exist, the judge will issue a custody order, and if the state has charged the defendant with a violent crime, a law enforcement officer will take the defendant to a twenty-four-hour mental health care facility.⁵¹ Thereafter, proceedings are in accordance with the civil commitment statutes.⁵²

When the court finds that a defendant is incompetent to proceed, it must act to safeguard the defendant and to ensure his return for trial if he regains competency.⁵³ The court must include several provisions in its order committing the defendant to a mental health care facility for evaluation. First, the mental health care facility taking custody of the defendant must notify the clerk of court if the defendant becomes eligible for release.⁵⁴ Additionally, if the defendant faces charges of a violent crime, the mental health care facility may release the defendant only into the custody of a law enforcement agency specified in the commitment order.⁵⁵ Finally, the facility must report to the court periodically and inform it of the likelihood that the defendant will regain capacity to proceed to trial.⁵⁶

If the incompetent defendant satisfies involuntary commitment requirements, North Carolina courts may commit him to two basic forms of care: inpatient or outpatient. The state places a person committed to inpatient care in a hospital. A person committed to outpatient treatment is not confined to a hospi-

found incompetent to stand trial commonly spend weeks or even months in a maximum security hospital. . . . Finding a defendant incompetent to stand trial is one way prosecutors can ensure that offenders will, at least temporarily, be kept off the streets.

S. HALLECK, *supra* note 4, at 21-22.

47. N.C. GEN. STAT. § 15A-1002(b)(1) (Supp. 1990).

48. *Id.* § 15A-1002(b)(2). The director of the facility reports on the defendant's mental condition and sends the report to defense counsel and to the clerk of court. *Id.*

49. *Id.* § 15A-1002(b).

50. *Id.* § 15A-1003(a) (1988). If the judge does not find reasonable grounds to believe the defendant satisfies civil commitment criteria, the defendant may seek release. *See id.* §§ 15A-533 to -534 (1988 & Supp. 1990).

51. *Id.* § 15A-1003(a) (1988). The custody order will indicate that the defendant faces charges of a violent crime. *Id.*

52. *Id.*; *see id.* §§ 122C-261 to -277 (1989 & Supp. 1990).

53. *Id.* § 15A-1004(a) (1988).

54. *Id.* § 15A-1004(c).

55. *Id.*

56. *Id.* § 15A-1004(d).

tal, but may receive a variety of treatments. Courts may prescribe for outpatients any services or treatment "either to alleviate the individual's illness or disability, to maintain semi-independent functioning, or to prevent further deterioration that may reasonably be predicted to result in the need for inpatient commitment to a 24-hour facility."⁵⁷

Although treated within the civil commitment scheme, incompetent defendants receive a somewhat different treatment than civil respondents. A qualified physician must examine a civil respondent or a criminal defendant within twenty-four hours of his arrival at an around-the-clock mental health care facility.⁵⁸ The physician will determine whether the patient is dangerous to himself or others; a dangerously mentally ill person is subject to inpatient commitment.⁵⁹ If the physician decides that the patient is not dangerous to himself or others, she will determine whether the patient meets the qualifications for outpatient release.⁶⁰ A mentally ill person is subject to outpatient commitment if she needs treatment to avoid becoming dangerous, is unable to make an informed decision about seeking treatment, and is capable of surviving safely in the community.⁶¹ If the examining physician finds that a civil respondent does not meet the criteria for either inpatient or outpatient commitment, the physician must release the respondent.⁶² When the state has charged a defendant with a violent crime, however, and the court has found him incompetent to proceed, the physician may not release the defendant from the facility until the trial court orders her to do so.⁶³

Once a hospital has taken custody of a civil commitment respondent, the district court must hold a commitment hearing within ten days.⁶⁴ If the hearing is to determine the applicability of inpatient commitment, the respondent has a

57. *Id.* § 122C-3(27) (Supp. 1990).

58. *Id.* § 122C-266(a) (Supp. 1990).

59. *Id.* § 122C-266(a)(1). The court may commit a person to inpatient treatment if he is "mentally ill and dangerous to himself or others, or is mentally retarded, and because of an accompanying behavior disorder, is dangerous to others." *Id.* § 122C-263(d)(2) (1989). A person may be dangerous to himself if, within the relevant past, he has exhibited behavior showing an inability to exercise judgment in daily activities or to satisfy his needs for nourishment, shelter, and other incidents of survival; if he has attempted or threatened suicide and may reasonably be expected to commit suicide without treatment; or if he has mutilated himself or attempted mutilation, and may reasonably be expected to continue doing so without treatment. *Id.* § 122C-3(11)(a) (Supp. 1990). A person is dangerous to others when, in the relevant past, he has inflicted, or has attempted or threatened to inflict, serious bodily harm on another; has created a substantial risk of bodily harm on another; or has engaged in extreme property destruction. *Id.* § 122C-3(11)(b). "Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others." *Id.*

The fact that the respondent needs custodial care as a result of mental illness may not be enough alone to justify inpatient commitment. *In re Doty*, 38 N.C. App. 233, 234, 247 S.E.2d 628, 629 (1978) (decided under former statutory provision, N.C. GEN. STAT. § 122-58.2(1) (1981) (replaced by N.C. GEN. STAT. § 122C-3(11) (Supp. 1990))).

60. N.C. GEN. STAT. § 122C-266(a)(2) (Supp. 1990).

61. *Id.* § 122C-263(d)(1) (1989). In a commitment case of civil origin, the physician's finding that the respondent qualifies for outpatient commitment will result in the respondent's release pending the district court commitment hearing. *Id.* § 122C-266(a)(2) (Supp. 1990).

62. *Id.* § 122C-266(a)(3). At this point the court will terminate commitment proceedings. *Id.*

63. *Id.* § 122C-266(b). Because the statute makes no exception for defendants charged with nonviolent crimes, these defendants would be released as civil respondents would be.

64. *Id.* §§ 122C-267 to -268 (1989 & Supp. 1990). The hearing will be in the district court of

right to appointed counsel, regardless of ability to pay.⁶⁵ At an outpatient commitment hearing the court may, but is not required to, appoint counsel for indigent respondents if the issues in the case are so complex that a respondent needs the assistance of a lawyer.⁶⁶ To commit a person to either inpatient or outpatient treatment, the court must find by "clear, cogent and convincing evidence" that the person satisfies the commitment requirements.⁶⁷

At the district court hearing, the judge may make one of four dispositions: he may commit the respondent to outpatient treatment, inpatient treatment, or a combination of outpatient and inpatient treatment, or he may find that the respondent does not meet the criteria for either outpatient or inpatient commitment.⁶⁸ If the court finds that the respondent does not meet either commitment criteria, the court must discharge her.⁶⁹ If the court finds that the respondent is dangerous to herself or others, the court may order inpatient commitment for up to ninety days.⁷⁰ The court must hold periodic hearings for recommitments.⁷¹ The first recommitment may be for up to 180 days, with subsequent recommitments of up to a year.⁷² Before the mental health care facility may discharge a defendant accused of a violent crime, the court must schedule a rehearing and must notify the district attorney and chief district judge of the prosecuting jurisdiction.⁷³

If the respondent is eligible for outpatient commitment, the court may order commitment of up to ninety days, with periodic rehearings and possible recommitments for 180 days at a time.⁷⁴ A mental health care facility may not force treatment upon a person under an outpatient commitment order.⁷⁵ If a person refuses to comply with treatment ordered by the mental health care facility, the facility must make all reasonable efforts to obtain compliance and must document the efforts made.⁷⁶ If the person is failing to comply but does not

the jurisdiction where the mental health facility is located. *Id.* The district court may grant a continuance of up to five days. *Id.*

65. *Id.* § 122C-268(d) (Supp. 1990).

66. *Id.* § 122C-267(d) (1989).

67. *Id.* § 122C-267(h) to -268(j) (1989 & Supp. 1990). For the specific commitment requirements, see *supra* notes 59-61 and accompanying text.

68. N.C. GEN. STAT. §§ 122C-271(b)(1)-(3) (Supp. 1990).

69. *Id.* § 122C-271(b)(3). The General Assembly has not distinguished incompetent defendants from other respondents at the district court hearing.

70. *Id.* § 122C-271(b)(2).

71. *Id.* § 122C-276(a) (1989).

72. *Id.* § 122C-276(d). Recommitment hearings take place in the district court of the jurisdiction where the mental health facility is located. That court must inform the district court and the district attorney of the prosecuting jurisdiction that rehearings are scheduled. *Id.* § 122C-276(a), (f). At any rehearings, the court has the option of ordering outpatient commitment for a period of up to 180 days. *Id.* § 122C-276(g).

73. *Id.* § 122C-277(b) (1989). The district attorney of the prosecuting jurisdiction may represent the state at the hearing. *Id.* These notification requirements are in addition to the limitations on the defendant's release ordered by the prosecuting jurisdiction. See *supra* notes 53-56 and accompanying text.

74. N.C. GEN. STAT. §§ 122C-271(b)(1) (Supp. 1990), 122C-275(c) (1989). If the court committed the respondent as a result of her being charged with a violent crime, the commitment order must so state. *Id.* § 122C-271(b)(1) (Supp. 1990).

75. *Id.* § 122C-273(a)(1) (Supp. 1990).

76. *Id.*

overtly refuse to comply, the facility may request that the court order the person brought to the facility for examination.⁷⁷ Unless the person presents an immediate danger to himself or others, the facility may not force him to take medication or to receive treatment.⁷⁸ Additionally, a person committed to outpatient treatment may petition the court for termination of the order at any time.⁷⁹ In the case of defendants initially committed as a result of a charge of criminal violence, the facility may not discontinue treatment until the court permits it to do so.⁸⁰

It may appear that once the court finds a defendant incompetent, it treats the defendant as it does any other respondent in a civil commitment proceeding. This appearance is misleading in some situations. Although courts will treat defendants charged with minor crimes as any other person who has been civilly committed, it is more difficult for a person accused of a violent crime to obtain release from a mental institution, even though he has been committed by a civil commitment order. A mental health care facility may release the "pure" civil commitment respondent upon a psychiatrist's determination that the respondent is no longer dangerous to herself or others, but it must notify the court fifteen days before releasing a defendant facing charges of a violent crime.⁸¹ The court then will conduct a hearing on the question of dangerousness before allowing the release of such a defendant.⁸²

Additionally, before releasing an incompetent defendant charged with a violent crime, the court hearing the case must notify the chief district judge and the district attorney in the jurisdiction where the defendant initially was found incompetent to proceed.⁸³ Under North Carolina General Statutes section 15A-1004, the prosecuting jurisdiction generally will have ordered the mental health facility to release the defendant only into the custody of that jurisdiction's law enforcement officers.⁸⁴ Thus, even if one court finds that the defendant is not dangerous to himself or others, the prosecuting jurisdiction still can prevent release of the defendant.⁸⁵ If the defendant still faces charges of a violent crime,

77. *Id.* § 122C-273(a)(2).

78. *Id.* § 122C-273(a)(3). When the examination is over, the defendant may go home unless he poses an immediate threat to himself or others. If the defendant does pose an immediate threat, the facility will take custody of the defendant as permitted under N.C. GEN. STAT. § 122C-263, which provides for inpatient commitment, and the physician's report finding dangerousness may substitute for the initial examination required under this section. *Id.* If the defendant is not dangerous, the court may hold supplemental hearings to amend or terminate the outpatient commitment order if necessary. *Id.* § 122C-274 (Supp. 1990).

79. *Id.* § 122C-274(e).

80. *Id.* § 122C-273(d) (Supp. 1990). Although the outpatient facility must obtain the supervising court's approval to discontinue treatment, officials in the jurisdiction that found the defendant incompetent to stand trial (or not guilty by reason of insanity) must receive notice of the commitment hearing. *Id.* § 122C-277(b) (1989).

81. *Id.* § 122C-277(b).

82. *Id.*

83. *Id.* § 122C-264 (1989).

84. *Id.* § 15A-1004(c) (1988).

85. This is what happened to Robert Gravette. Every time a hospital discharged him, he returned to the Orange County Jail. See Response to Petition for Writ of Mandamus at 2-4.

he will return to the custody of the jurisdiction that originally charged him with the commission of that crime.

North Carolina does not require the court to dismiss charges against an incompetent defendant at any time. The court has discretion to dismiss the charges under some circumstances.⁸⁶ Additionally, the prosecutor may elect to take a dismissal with leave under section 15A-1009. This permits the prosecutor to remove the case from the docket, but allows her to bring the charges again when she determines that the defendant has or will become competent to stand trial.⁸⁷ Both of these provisions give courts more control over the release of defendants initially charged with violent crimes than they have over the release of other people committed to treatment for mental illness.⁸⁸

In *Jackson v. Indiana*⁸⁹ the United States Supreme Court considered whether the unlimited commitment of an incompetent defendant to a mental hospital, based solely on incompetency, deprived the defendant of his fourteenth amendment equal protection and due process rights.⁹⁰ The Court compared Indiana's statute for the commitment of incompetent defendants to its civil commitment statutes and determined that Indiana law provided substantial due process protections for respondents in civil cases, but did not provide such safeguards for incompetent defendants.⁹¹ The fact that the defendant faced criminal charges could not justify such a disparity in due process protection.⁹² The Court held that, because the defendant almost certainly would not regain

86. N.C. GEN. STAT. § 15A-1008 (1988). The court may dismiss charges against an incompetent defendant when it is satisfied that the defendant will not become competent to proceed, when the defendant has already been confined for the maximum length of the sentence that can be imposed for the crime charged, or upon the expiration of five years after the date of the incompetency determination in misdemeanor cases (ten years in felony cases). *Id.*

87. *Id.* § 15A-1009 (1988). The court still may dismiss the charges pursuant to N.C. GEN. STAT. § 15A-1008 (1988); such a dismissal would prevent the prosecutor from bringing the charges again. *Id.* § 15A-1009(e), (f).

88. *Id.* § 122C-277(b) (1989). Regardless of whether charges are still pending, "[i]f the respondent was initially committed as the result of conduct resulting in his being charged with a violent crime," the attending physician recommending release must notify the clerk of the supervising court, and the clerk of court must schedule a hearing. *Id.* The district court and district attorney of the district that initially prosecuted the patient also receive notice and an opportunity to be heard. *Id.*

89. 406 U.S. 715 (1972).

90. *Id.* at 719. Defendant Theon Jackson was mentally retarded, deaf, and mute. *Id.* at 717. He allegedly committed two separate robberies in Marion County, Indiana, in which he stole a total of nine dollars. *Id.* As soon as Jackson pleaded not guilty, the trial court instituted competency proceedings under the Indiana statutory provision. *Id.* Although the two examining psychiatrists testified that Jackson was unlikely to become competent, the court ordered him committed to the Indiana Mental Health Department until the Department could certify to the court that Jackson was "sane." *Id.* at 719. Jackson remained in a mental institution for three and a half years before the Supreme Court heard his case. *Id.* at 739.

91. *Id.* at 720-21. The Court noted that the criminal proceeding did not require the state to provide counsel, release, care for committed defendants, or periodic review of the defendant's condition. *Id.* The civil commitment proceedings did provide such safeguards. *Id.* at 721.

92. *Id.* at 724. The Court noted that in an earlier case it had held that a state prisoner civilly committed at the end of his prison sentence has a right to a jury trial, just as any other person being civilly committed. *Id.* at 723-24 (citing *Baxstrom v. Herold*, 383 U.S. 107, 111, 115 (1966)). If a criminal conviction is insufficient to justify a denial of equal protection, the Court reasoned, certainly the mere filing of charges is also insufficient. *Id.* at 724. See also *Humphrey v. Cady*, 405 U.S. 504, 512 (1972) (commitment of defendant under Wisconsin's Sex Crimes Act could not be renewed without procedural protections provided under civil commitment statute).

competency, the state could not continue to confine him for the purpose of restoring his competency.⁹³ To continue confining him under these circumstances would deprive him of his fourteenth amendment right to equal protection of the laws.⁹⁴

Furthermore, the commitment statute at issue here deprived Jackson of his fourteenth amendment right to due process.⁹⁵ The Court held that, if a person is committed solely because of his incapacity to proceed to trial, the state cannot confine him longer than is reasonable "to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."⁹⁶ If the defendant is not likely to regain capacity, then the state must either release him or commit him through civil procedures.⁹⁷ Even if the defendant is likely to regain competency, any continued commitment "must be justified by progress toward that goal."⁹⁸

The North Carolina General Assembly, in developing the current statutory provisions concerning incompetent defendants, sought to satisfy the requirements established in *Jackson*.⁹⁹ To ensure that a defendant's rights are not violated, the general assembly provided that when a defendant does not have the capacity to proceed, the trial court will initiate civil commitment proceedings.¹⁰⁰ According to the official commentary, the general assembly felt that *Jackson* required the release of non-dangerous incompetent defendants.¹⁰¹ The legislature requires the commitment of incompetent defendants through civil commitment procedures to allow the release of defendants who are not dangerous but who lack capacity for trial.¹⁰²

93. *Jackson*, 406 U.S. at 725-30. The Court reserved the possibility that the State could continue to hold a defendant as long as a recovery was possible. *Id.* at 725.

94. *Id.* at 730.

95. *Id.* at 731.

96. *Id.* at 738.

97. *Id.*

98. *Id.*

99. N.C. GEN. STAT. Chapter 15A, Article 56 commentary (1988).

100. *Id.*; see N.C. GEN. STAT. §§ 15A-1002(b1) (Supp. 1990), 15A-1003 (1988).

101. N.C. GEN. STAT. Chapter 15A, Article 56 commentary (1988).

102. *Id.* Although a court must commit an incompetent defendant through civil commitment procedures, it may use other statutory provisions to avoid releasing an incompetent defendant who does not satisfy the requirements for involuntary civil commitment. See, e.g., N.C. GEN. STAT. §§ 35A-1101 to -1120 (1987 & Supp. 1990) (incompetency proceedings and appointment of guardians), 122C-231 (1989) (voluntary commitment to inpatient mental health care). The *Gravette* court suggested that the district court ordering supervision of a defendant might, through civil proceedings, declare a person incompetent and assign a guardian for that person. *Gravette*, 327 N.C. at 122, 393 S.E.2d at 870. Any person may file a petition for an adjudication of incompetence. N.C. Gen. Stat. § 35A-1105 (Supp. 1990). A court may find a person civilly incompetent if he "lacks sufficient capacity to manage his own affairs or to make or communicate important decisions concerning his person, family, or property whether such lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." *Id.* § 35A-1101(7) (Supp. 1990). In such a proceeding, the respondent has a right to an attorney acting as a guardian ad litem. *Id.* § 35A-1107 (1987).

Once the court finds a person incompetent, it will appoint another person to act as the incompetent's legal guardian. *Id.* § 35A-1120. That guardian may then voluntarily commit the incompetent person to inpatient treatment if she is mentally ill. *Id.* § 122C-231 (1989). Through incompetency proceedings and voluntary commitment, the court may commit the incompetent person to an inpatient facility without finding that person dangerous to herself or others, although the statute does

Ten years after the legislature adopted the dangerousness standard for involuntary inpatient civil commitments, it designed the outpatient commitment alternative, which requires a lower threshold of mental illness for commitment.¹⁰³ Without the outpatient provision, the law had been "letting a needy group slip through its cracks."¹⁰⁴ This group consisted of the chronically mentally ill who would not obtain treatment on their own and would deteriorate without treatment to the point that they would become dangerous to themselves and require hospitalization.¹⁰⁵ Without outpatient commitment, courts could not require a mentally ill person to receive treatment until she committed an act that would satisfy the dangerousness requirement for involuntary inpatient commitment.¹⁰⁶ Because of this limitation, many chronically mentally ill people revolved regularly in and out of state mental hospitals.¹⁰⁷

require that inpatient treatment be the least restrictive treatment alternative. *Id.* § 122C-232(b) (1989).

One limitation on guardianship proceedings is that the court must base its appointment of a guardian on the ward's best interest. *Id.* § 35A-1214 (Supp. 1990). The guardian should make decisions for the incompetent only when the incompetent no longer has the capacity to make those decisions. *Id.* § 35A-1201(a)(3). The General Assembly has determined that "[l]imiting the rights of an incompetent person by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights." *Id.* § 35A-1201(a)(4). Thus, despite the availability of procedures for an incompetency determination and a subsequent voluntary commitment to a mental health care facility, ethical and legal considerations come into play when civil incompetency determinations become a tool for protecting society from a mentally ill person instead of protecting a mentally ill person from society. A court should not appoint a guardian without consideration of the individual's own needs.

103. Hiday & Scheid-Cook, *The North Carolina Experience with Outpatient Civil Commitment: A Critical Approach*, 10 INT'L J. L. & PSYCHIATRY 215, 216 (1987). North Carolina was the first state to develop such an alternative to inpatient commitment. *Id.* at 218. See *supra* note 61 and accompanying text.

104. Hiday & Scheid-Cook, *supra* note 103, at 215.

105. *Id.* Many of these chronically mentally ill people were former patients in state mental hospitals who were released as a result of the social trend toward deinstitutionalization of mental health care. Miller & Fiddleman, *supra* note 1, at 990. Activists in the mental health field had pushed for the closing of state mental hospitals, believing that the patients' communities would provide adequate mental health care. *Id.* In response to this political pressure, state legislatures passed statutes that made it more difficult to commit respondents. *Id.* at 990-991. While some former patients of state mental hospitals were able to adapt to community life, others lived in "urban psychiatric ghettos . . . under conditions much worse than those of the institutions from which they had been discharged." *Id.* at 991-992.

106. Hiday & Scheid-Cook, *supra* note 103, at 216. See also Miller & Fiddleman, *supra* note 1, at 996-97 (discussing the opinion of mental health care officials that a number of people who did well on medication but stopped taking it after discharge could be treated successfully in a community-based treatment program).

107. Hiday & Scheid-Cook, *supra* note 103, at 216. One survey found agreement among mental health center and hospital staffs in North Carolina that outpatient commitment should be used with patients "who have repeatedly responded well to treatment in the hospital . . . but who repeatedly have failed to continue treatment after discharge and eventually return to the hospital unnecessarily." Miller & Fiddleman, *supra* note 1, at 1011 n.114.

Also as a consequence of the deinstitutionalization of mental health care, there are greater numbers of the chronically mentally ill, who previously would have been diverted to mental hospitals through civil commitment, entering the criminal justice system and being found incompetent to stand trial. Arvanites, *supra* note 3, at 317. See also Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 929-30 (1985) (stating that the effect of deinstitutionalization "has been and will continue to be increased use of the criminal process and diversion through the incompetency commitment as an alternative method of providing treatment for mentally ill individuals who commit minor crimes."). See generally L. BACHRACH, *DEINSTITUTIONALIZATION: AN ANALYTICAL REVIEW AND SOCIOLOGICAL PERSPECTIVE* (1976) (providing an analytical review and theoretical synthesis of issues in deinstitutionalization); Klerman, *Better But Not Well: Social and*

The legislature deleted from the outpatient commitment provision some of the due process protections provided for respondents under inpatient commitment proceedings when it lowered outpatient commitment criteria beneath those required for inpatient commitment.¹⁰⁸ As a trade-off for reduced protections in the statute, the legislature provided that outpatient facilities could not force a patient to receive treatment.¹⁰⁹ To encourage mental health centers to use outpatient commitment, the legislature allocated \$2000 a year to mental health centers for each patient they supervised through outpatient commitment.¹¹⁰ Despite the allocation of funds, lawyers and mental health professionals have criticized the statute's prohibition of forced treatment, and some judges and mental health professionals have refused to use it because of its "lack of teeth."¹¹¹ This mistrust of the outpatient commitment alternative is one reason why the trial court refused to release Robert Gravette under this provision.¹¹²

The *Gravette* case shows that, despite good intentions, the North Carolina statutory scheme is significantly flawed. One of those flaws reflects the legal community's mistrust of the outpatient commitment scheme—judges may be reluctant to release incompetent defendants under outpatient commitment for fear that the defendant will become violent before the court can order inpatient commitment. Furthermore, the outpatient commitment provision does not address the problem of an increased number of mentally ill people moving in and out of mental institutions as incompetent defendants. Commentators note that as a result of more stringent requirements for involuntary inpatient commitment, more mentally ill people who at one time would have been institutionalized are ending up on the streets.¹¹³ With more mentally ill people in the community, courts are using "the criminal process and diversion through the incompetency commitment as an alternative method of providing treatment for

Ethical Issues in the Deinstitutionalization of the Mentally Ill, 3 SCHIZOPHRENIA BULL. 617 (1977) (reviewing recent developments in mental health programs). A 1988 study found a rise in the number of commitments resulting from incompetency to stand trial. Arvanites, *supra* note 3, at 317. The same study also found an increase in the seriousness of the charges that the incompetent defendants faced. *Id.* Arvanites suggests that either the more restrictive commitment criteria have resulted in the failure to commit dangerous individuals, or mentally ill people who once would have been hospitalized are going without treatment to the point that they become dangerous and commit crimes. *Id.*

108. Hiday & Scheid-Cook, *supra* note 103, at 217. For a discussion of the constitutionality of North Carolina's outpatient commitment procedures, see Note, *Involuntary Outpatient Civil Commitment Expanded: The 1983 Changes*, 62 N.C.L. REV. 1158 (1984).

109. Hiday & Scheid-Cook, *supra* note 103, at 218; see N.C. GEN. STAT. § 122C-265(c) (1989).

110. Act of July 20, 1983, ch. 864, 1983 N.C. Sess. Laws 1064.

111. Hiday & Scheid-Cook, *supra* note 103, at 218. See also Miller & Fiddleman, *supra* note 1, at 1011 n.114 (discussing opinions of some psychiatrists and judges that people dangerous enough to satisfy the outpatient commitment requirements can be treated effectively only in hospitals).

112. When Judge Herring ordered Gravette's conditional release, he specifically found that outpatient commitment would not provide "reasonable supervision of the defendant, as he would be likely to consume alcoholic beverages and cease taking stabilizing medication, thereby making [Gravette] dangerous to himself and others." Modified Order at 5, *Gravette*, (Nos. 87-CRS-1159, 87-CRS-1160). The specific purpose of outpatient commitment is to provide supervision that will prevent the type of behavior described by Judge Herring.

113. See, e.g., S. HALLECK, *supra* note 4, at 5.

mentally ill individuals."¹¹⁴ Even where state laws specifically limit the length of time for competency determinations, as does the North Carolina statute,¹¹⁵ defendants still may spend a great deal of time in mental hospitals. For example, one commentator has noted that incompetent defendants treated with psychotropic drugs may be confined for extended periods of time.¹¹⁶ Hospitals treat defendants with drugs, stabilize them, and return them to court, where they are found competent.¹¹⁷ Upon returning to jail to await trial, however, defendants rapidly destabilize, and once again they become incompetent.¹¹⁸ A defendant may move from hospital to jail over and over again. One study of incompetent defendants in North Carolina found the average length of hospitalization to be two to three years.¹¹⁹

For example, Robert Gravette spent three years shuttling between the Orange County Jail and various mental hospitals.¹²⁰ In North Carolina, when the state accuses a defendant of a violent crime and commits him to a twenty-four-hour facility for evaluation or treatment, the prosecuting jurisdiction will order the facility to release the defendant only into the custody of a designated law enforcement agency.¹²¹ If the defendant still faces charges, he will return to the custody of the jurisdiction that originally brought him to trial. This happened in *Gravette*; every time the district court found that Gravette did not qualify for inpatient commitment, the hospital sent him back to the Orange County Jail. The court then would send him to another mental health facility for evaluation of competency to stand trial. After the competency evaluation, Gravette again would return to the jail, only to be returned to a hospital for another commitment evaluation. This cycle went on for three years and theoretically could continue for the defendant's lifetime. The cycle terminates only when a judge or a prosecutor exercises her discretion to dismiss or drop the charges against a defendant.¹²²

Gravette was confined to jail and to high security mental health care facilities for three years, while physicians had testified that he probably never would attain capacity to stand trial.¹²³ The judge who heard Gravette's case could have committed him to outpatient care or could have ordered his pretrial release. The court resisted these possibilities because it was not satisfied with the

114. Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform*, 39 RUTGERS L. REV. 243, 246 (1987).

115. N.C. GEN. STAT. § 15A-1002(b)(2) (Supp. 1990).

116. Winick, *supra* note 114, at 248-49.

117. *Id.* See also Miller & Fiddleman, *supra* note 1, at 997 n.58 (listing articles discussing the efficacy of psychotropic medications in maintaining remissions from mental illness).

118. Winick, *supra* note 114, at 248-49. If a defendant continues to take medication and remains stable, he may stand trial based on the chemically-induced competency. *State v. Buie*, 297 N.C. 159, 161, 254 S.E.2d 26, 28 (citing *State v. Potter*, 285 N.C. 238, 248, 204 S.E.2d 649, 656 (1974)), cert. denied, 444 U.S. 971 (1979).

119. R. ROESCH & S. GOLDING, COMPETENCY TO STAND TRIAL 150 (1980).

120. See *supra* note 21. Recall that Theon Jackson, the defendant in *Indiana v. Jackson*, was held only a few months longer than Gravette—three and a half years. 406 U.S. 715, 739 (1972).

121. N.C. GEN. STAT. § 15A-1004(c) (1988).

122. See *supra* notes 86-87 and accompanying text.

123. Order of April 7, 1989, at 1, *Gravette*, (Nos. 87-CRS-1159, 87-CRS-1160).

level of supervision provided under outpatient commitment.¹²⁴ Even if the court had ordered Gravette's release, the criminal charges against him still would have been pending or dismissed with leave¹²⁵ unless the judge determined, in his discretion, that he should dismiss the charges completely. As long as criminal charges are pending or dismissed with leave against a defendant, the state may take custody of him any time the prosecutor thinks the defendant may have regained competency to proceed with the trial.¹²⁶ This permits the prosecutor to reserve the option of reinstituting the cycle of evaluations.

The North Carolina General Assembly should take action to eliminate these cycles of evaluation for several reasons. First, such extended detention may deprive an incompetent defendant of his right to due process of law under the fourteenth amendment. The United States Supreme Court in *Jackson* held that a state could not hold an incompetent defendant longer than "the reasonable period of time necessary to determine whether there is a *substantial probability* that he will attain . . . capacity in the foreseeable future."¹²⁷ Although the *Jackson* Court referred specifically to detention in a mental institution, a defendant who is not dangerous also has a considerable due process interest in not being confined to jail when there is little chance of his becoming competent to stand trial. Furthermore, even if the state does not confine the defendant for the duration of the evaluation cycle, there may be a "denial of due process inherent in holding pending criminal charges indefinitely over the head of one who will never have a chance to prove his innocence."¹²⁸

Second, a substantial delay in bringing a defendant's case to trial may limit the defendant's ability to defend himself effectively.¹²⁹ As time passes, it becomes more difficult to gather evidence.¹³⁰ A defense of insanity often is appropriate for an incompetent defendant; this defense in particular requires proof of the defendant's mental state at the time of the crime and therefore becomes more difficult to prove with the passage of time.¹³¹

Finally, repeated evaluations of the defendant's mental condition are expensive. Hospitalizations may be even more expensive, and detention of a defendant in jail also can be costly.¹³²

Some critics have suggested that a provisional trial of the incompetent de-

124. Modified Order at 5.

125. See N.C. GEN. STAT. § 15A-1009 (1988). If the court has not dismissed the charges against an incompetent defendant, the prosecutor may enter a dismissal with leave. *Id.* at § 15A-1009(a). Such a dismissal results in the removal of the case from the docket; the prosecutor may reinstitute proceedings when the defendant becomes competent or when the prosecutor believes the defendant may soon become competent. *Id.* § 15A-1009(b)-(d).

126. *Id.* § 15A-1009(d).

127. *Indiana v. Jackson*, 406 U.S. 715, 738 (1972) (emphasis added).

128. *Id.* at 740.

129. Winick, *supra* note 114, at 257.

130. *Id.*

131. *Id.*

132. See *id.* at 250. One evaluation of expenses in Dade County, Florida, found that an average incompetent defendant cost the state \$20,351. *Id.* One man had spent more than 10 years in hospitals and in jails being evaluated and treated. *Id.* The state had spent over \$300,000 on his evaluations and incarceration. *Id.*

fendant would ameliorate some of these problems.¹³³ Roesch and Golding, who examined the North Carolina system in the 1970s, recommended such a system.¹³⁴ They proposed that once a court finds a defendant incompetent, the court should hold a hearing to determine whether probable cause for the charges exists.¹³⁵ At this stage, the state would drop the charges if probable cause did not exist.¹³⁶ If probable cause did exist, the court could commit a defendant to a three-month treatment period if it found treatment would likely restore the defendant's competency.¹³⁷ After the three-month period, or immediately following the probable cause hearing if the court determined that a three-month treatment would not restore the defendant's competence, the defendant would participate in a trial or other judicial proceeding to determine his guilt.¹³⁸ The court would use special trial procedures to compensate for the defendant's incapacity.¹³⁹ If a defendant were found not guilty, he would be released. Roesch and Golding suggest monitoring the defendant for competency throughout the trial; in the case of a guilty verdict, the court would make a competency finding after the trial to determine whether the verdict should stand.¹⁴⁰

Roesch and Golding's provisional trial alternative could reduce the time incompetent defendants spend in treatment. This alternative also could exonerate defendants who have a good defense against the charges. They would receive treatment under the civil commitment laws and would no longer be subject to competency evaluations. Defendants found guilty and later determined incompetent, however, still would be subject to continued evaluations and to new trials if they became competent.¹⁴¹ Although the provisional trial solution could remove some permanently incompetent defendants from the criminal justice system, it would not solve the problem altogether. Additionally, courts may be reluctant to accept this alternative, however tempting it may be. The justification for preventing incompetent defendants from coming to trial has been to

133. S. HALLECK, *supra* note 4, at 44-45.

134. R. ROESCH & S. GOLDING, *supra* note 119, at 209-16.

135. *Id.* at 208.

136. *Id.*

137. *Id.*

138. *Id.* at 209.

139. *Id.* at 214. Roesch and Golding suggest several procedures to compensate for the defendant's mental condition. One provision calls for a screening panel that would observe and evaluate the defendant throughout the trial. *Id.* at 209. At a post-trial competency hearing, this would provide evidence of the defendant's mental condition during the trial. *Id.* at 212. Four other procedures would actually alter the way the trial is run. First, the defendant would be entitled to pretrial disclosure of the evidence that the prosecution might use at trial. *Id.* at 210. Second, the prosecution would carry a higher burden of proof than in a normal criminal trial. *Id.* Third, the procedures would require corroboration of prosecution evidence concerning issues which the defendant may be unable to rebut effectively. *Id.* Finally, the judge would instruct the jury to consider favorably any of the defendant's disabilities. *Id.* at 210-211 (citing Burt & Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66-95 (1972)).

140. *Id.*

141. *See id.* at 214-16. Roesch and Golding proposed that if the verdict were set aside because of incompetency, the state could later bring a new trial. A finding of incompetency would not require the judge to set aside the verdict if she found that the defendant's participation in the trial was not critical or that the special trial procedures undertaken to account for the defendant's incompetency permit the verdict to stand. *Id.*

ensure the accuracy of the trial process,¹⁴² and allowing a defendant to be tried despite his incompetency may be a violation of his right to due process of law, whether his lawyer thinks trial is a good idea or not.¹⁴³ Furthermore, the North Carolina Supreme Court requires a court first to determine a defendant's competency to stand trial before a trial may take place.¹⁴⁴ The North Carolina Supreme Court thus may not accept the post-trial competency determination proposed here.

Another possible solution to the problem of repeated psychiatric evaluations and hospitalizations of incompetent defendants is to require the court, at some point, to dismiss the charges against a defendant not subject to civil commitment and unlikely to become competent to stand trial. Before incarcerating an incompetent defendant for an extended period of time, the state could cut its losses and protect an incompetent defendant's rights by treating him as any other civil respondent in a commitment case. Although judges and prosecutors currently have discretion to do this, political pressure on judges and prosecutors may make it difficult for them to exercise discretion in dismissing or dropping charges, even when the defendant is not violent and will never be competent.¹⁴⁵ This is especially true when the state has charged a defendant with a violent crime; in that situation a judge or prosecutor runs the risk of incurring public wrath if he drops the charges against the defendant.

The state does have an interest in protecting the public from dangerous people. The involuntary civil commitment statutes address this interest by allowing the state to hospitalize a person who is dangerous to himself or to others.¹⁴⁶ North Carolina's civil commitment scheme also provides for a lesser degree of supervision, designed to permit some mentally ill people—those who are likely to become dangerous without treatment, but who are not dangerous so long as they follow their treatment plans—to receive treatment in the community. The State should order treatment and supervision within this outpatient treatment system for defendants who are incompetent, but not dangerous, and who will never become competent.¹⁴⁷ Removing these people from the criminal

142. *Drope v. Missouri*, 420 U.S. 162, 171 (1975); see, e.g., *Hamm v. Jabe*, 706 F.2d 765, 767 (6th Cir. 1983) (trial court may halt trial over objection once it becomes convinced of defendant's incompetency, even though defense wants trial to continue); *Meeks v. Smith*, 512 F. Supp. 335, 338 (W.D.N.C. 1981) (holding that a defendant who is incompetent to stand trial may not enter a guilty plea); *Commonwealth v. DelVerde*, 398 Mass. 288, 291, 496 N.E.2d 1357, 1359 (1987) (incompetent defendant could not accept guilty plea agreed to by his attorney and guardian ad litem).

143. But see *Drope v. Missouri*, 420 U.S. 162, 182 (1975) (Court stated that a post-trial determination of competency "may have advantages, at least where the defendant is present at the trial and the appropriate inquiry is implemented with dispatch.").

144. *State v. Thompson*, 285 N.C. 181, 185-86, 203 S.E.2d 781, 784 (citing *State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 566 (1968)), cert. denied, 419 U.S. 867 (1974).

145. In *Gravette* the judge who granted the first order received a large amount of mail from people objecting to the release. See *supra* note 22. The custody plans fell through, and the next time the defense proposed the release, the judge refused. Response to Petition for Writ of Mandamus at 4. Judges and district attorneys are elected to their positions in North Carolina and consequently may be inclined to respond to political pressures. N.C. CONST. art. IV, § 16; N.C. GEN. STAT. §§ 7A-60(b), 7A-140 (1989).

146. N.C. GEN. STAT. §§ 122C-261 to -277 (1989).

147. Florida has adopted provisions for the outpatient commitment of incompetent defendants.

justice system will prevent unnecessary state expenditures on evaluations and will ensure that the state neither hospitalizes nor incarcerates a person who is incompetent but not dangerous.

The general assembly could make this change by requiring courts to drop charges against incompetent defendants in certain situations.¹⁴⁸ The current statute for dismissal of charges against an incompetent defendant provides:

When a defendant lacks capacity to proceed, the court may dismiss the charges:

- (1) When it appears to the satisfaction of the court that the defendant will not gain capacity to proceed; or
- (2) When the defendant has been substantially deprived of his liberty for a period of time equal to or in excess of the maximum permissible period of confinement for the crime or crimes charged; or
- (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.¹⁴⁹

The General Assembly should revise the statute to provide the following:

When a defendant lacks capacity to proceed, the court *must* dismiss the charges:

- (1) *When the defense shows, by a preponderance of the evidence, that the defendant will not become competent to proceed with a trial in the foreseeable future; or*
- (2) When the defendant has been substantially deprived of his liberty for a period of time equal to or in excess of the maximum permissible period of confinement for the crime or crimes charged; or
- (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.¹⁵⁰

Amending the statute in this way will provide a means of appeal for incompetent defendants who are not likely to become competent. Because the decision to drop the charges would no longer be discretionary, a higher court could review the trial judge's refusal to dismiss charges. The statute would provide the

FLA. STAT. § 916.17 (1989); FLA. R. CRIM. P. 3.219. Unlike North Carolina, Florida distinguishes between criminal and civil commitments. See FLA. STAT. § 916.13 (1989).

148. Florida law requires the court to dismiss charges against an incompetent defendant in some situations, without prejudice to bring charges against the defendant if he regains competency. FLA. R. CRIM. P. 3.213(a). The court must drop charges after five years for a person facing a felony charge, or after one year if the person faces a misdemeanor charge, when there is "no substantial probability" that the defendant will become competent to stand trial. *Id.* If the defendant meets commitment criteria, the court will commit the defendant to the Department of Health and Rehabilitative Services, where he will receive treatment through the civil mental health care provisions. *Id.* at 3.213(b).

149. N.C. GEN. STAT. § 15A-1008 (1988).

150. Italicized portions represent suggested changes.

trial judge with an evidentiary standard for determining the permanency of the defendant's incompetent condition. At the same time, the judge's finding of fact that a defendant will become competent to stand trial would be overturned only if clearly erroneous,¹⁵¹ thus providing a safeguard if the judge reasonably believes the defendant will regain capacity.

If a statute such as the one suggested in this Note had been in effect while the state had custody of Robert Gravette, Gravette's attorney could have moved for a dismissal of the charges once it became apparent that Gravette suffered from permanent brain damage and probably never would become competent to stand trial. If the trial court had denied Gravette's request for a dismissal of the charges, Gravette could have appealed to the North Carolina Court of Appeals for relief based on the statute, arguing either that the trial court had found him permanently incompetent and had erred in refusing to drop the charges or that the trial court was clearly erroneous in its finding that he would become competent to stand trial in the foreseeable future. Although Gravette still may have remained confined to jail and mental hospitals if it were not clear that he was permanently incompetent, he would have had a better chance of obtaining his release if a statute such as the one suggested had been in place.

Although North Carolina has made substantial improvements in its system for handling incompetent defendants, the state persists in denying some incompetent defendants' due process rights by leaving criminal charges hanging over their heads. Pending criminal charges provide courts with authority to limit an incompetent defendant's freedom for substantial periods of time. In the interests of both state expenditures and defendants' rights, courts should drop charges when a defendant will be unable to proceed to trial in the foreseeable future. Changing the statute to require judges to drop charges when conditions reflect permanent incompetence could ensure that the state neither imprisons permanently incompetent defendants for lengthy periods of time awaiting competency nor shuttles them repeatedly to mental institutions for periodic competency evaluations.

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151. *State v. Rogers*, 68 N.C. App. 358, 372, 315 S.E.2d 492, 503, *disc. rev. denied* 311 N.C. 767, 319 S.E.2d 284 (1984), *appeal dismissed*, 469 U.S. 1101 (1985).