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To: House Judiciary Committee

From: The Attorney General's Office, prepared by David Scherr, Assistant Attorney General

Re: Constitutionality of S.3, Section 4

Section 4 of S.3 is constitutional and does not violate a defendant's Fifth Amendment right against self-incrimination. Section 4 is necessary for the reasons stated in Section II of this memo.

I. Constitutionality of S.3, Section 4

Vermont's statutes currently protect against the violation of a defendant's right against self-incrimination for all compelled competency and sanity evaluations.[1] The statutory protection against self-incrimination found in 13 VSA § 4816(d) applies to all such evaluations and would apply to the proposed evaluations in Section 4 as well.

Every compelled competency and sanity evaluation—not just the ones proposed in Section 4—presents a potential constitutional problem. Any such evaluation, including those that are permitted now, could violate a defendant's Fifth

[1] The currently permissible compelled evaluations include court-ordered competency evaluations (13 VSA §§ 4814(a)(2) and (4)), court-ordered sanity evaluations (13 VSA §§ 4814(a)(1) and (3)), and court-ordered sanity evaluations upon a prosecutor's motion (Vermont Rule of Criminal Procedure 16.1(a)(1)(I)).

Amendment right against self-incrimination. These evaluations require a defendant to speak to someone other than their lawyer about their mental state. This is the type of compelled disclosure of information that the Fifth Amendment protects against.

But the legislature has already resolved this constitutional problem in 13 VSA § 4816(d). That section provides that "[n]o statement made in the course of the examination by the person examined, whether or not he or she has consented to the examination, shall be admitted as evidence in any criminal proceeding for the purpose of proving the commission of a criminal offense or for the purpose of impeaching testimony of the person examined."

That is a sweeping protection against self-incrimination. It applies not just to the charge in question, but to any crime the defendant might confess to or describe during an evaluation, and to any criminal proceeding that may occur, whether the defendant's own or another.

For the argument to be correct that Section 4 is unconstitutional, the proposed evaluation would have to present some special constitutional problem that does not apply to the currently permissible evaluations. It does not. The currently permissible compelled evaluations include court-ordered competency and sanity evaluations (13 VSA § 4814(a)), as well as court-ordered sanity evaluations upon motion of the prosecutor (VRCP 16.1(a)(1)(I)). If anything, court-ordered sanity evaluations, whether on the court's own motion or the prosecutor's, present greater potential problems regarding self-incrimination and revelation of potential defenses because they inquire about sanity at the time of the alleged offense—and may delve into facts and theories relevant to the alleged offense. But those are permitted, and nobody is now arguing that they are unconstitutional. Competency examinations, by contrast, do not investigate mental state at the time of the alleged offense but rather at the time the examination is performed. For these reasons, the proposal in Section 4 presents no different or greater constitutional concern than those already resolved by 13 VSA § 4816(d).

It is important to remember that Section 4 does not grant a prosecutor the unilateral power to compel a second competency evaluation. A prosecutor may make the request, but only a judge can order the evaluation.

These competency evaluations used to be standard practice in Vermont—this proposal is not an innovation. The practice was ended in 2017 by the Vermont Supreme Court in State v. Sharrow, 2017 VT 25. The Court ended the practice not

because it was unconstitutional but because the statutes and court rules did not explicitly permit it. This proposal grants that permission.

II. Policy Need for Section 4

The need for this proposal is compelling. For a disagreement about competency to be meaningfully contested and litigated there needs to be competing expert testimony. Without a second expert opinion a genuinely contested hearing is unlikely because a judge will be reluctant to overrule an expert without hearing a competing expert's opinion. Clinical experts abiding by all applicable professional standards can—and often do—arrive at different conclusions about competency. This proposal will allow for a meaningful hearing, and in doing so may allow for speedier trials in key cases.

The interests of justice weigh heavily in favor of finality and reducing unnecessary trial delays. Victims of serious crimes, and their relatives, can suffer real additional harm when they must wait for a trial without any closure, and without any certainty or even estimate about when a trial may occur. The trial itself can be a traumatizing experience, and survivors should not be unnecessarily subjected to an uncertain and potentially emotionally fraught wait for a trial whose date is unknown. This committee heard powerful testimony from the relative of a murder victim who had to endure such a wait.

Finally, the longer a delay in a trial the less reliable the evidence (such as witness testimony) may become. This is harmful to the interests of everyone involved in a trial.