

**OFFICE OF THE DEFENDER GENERAL**  
**SUMMARY OF TESTIMONY / SJ. Re: S.3 Competency and Sanity**  
**April 7, 2021**

**GENERAL POSITION:** No problem with the majority of the bill, and defer to other concerned parties testify to the issues they have identified.

**ODG CONCERNS:**

- Sec. 1: Why prevent independent Court appointed evaluator from looking at sanity at the same time they are looking at competence to stand trial?
- Sec. 3: ODG opposes the Amendment to VRCrP, Rule 16.1 in Section 4

**OPPOSITION TO Sec. 4:**

**LEGAL THEORY OF COMPETENCE:** At the beginning of a case everyone has the same interest in theory regarding competency. The prosecutor, defense and the Court are aligned in their interest to have a competent person stand trial. (See State v. Sharrow). It is what is referred to as a jurisdictional issue. That is,

- We are not saying that the State cannot review the Court's expert report and the depose the Court's independent expert and anything that they reviewed.
- We are not saying that the State cannot retain its own expert to review the Court's independent evaluation.
- We are not saying that the State cannot call its expert to testify about the quality of the Court's independent competency and sanity evaluation.
- Remember this is a neutral court psych expert provided through the Department of Mental Health.
- If the State shows the Court expert evaluation is flawed or biased then we agree that there should be a remedy; but that remedy should not violate constitutional principles.

**What Sec. 4 of the bill does:**

- This bill proposes amendment to rule 16.1 to allow the state, in reality, to just continue investigating for the criminal case by interrogating the

Defendant by proxy; that is, a prosecution selected expert witness – which is exactly what the VT Supreme Court, and other Courts around the country say cannot be done.

- The bill as written does not grant the right for a second evaluation of competency or sanity based upon the quality of the evaluation. Rather, when the SA doesn't like the RESULT of the court's independent evaluation in a particular case, the SA will want their own handpicked evaluator to do the work.
- There have been accusations that Defendants expert shop for competency and sanity evaluations, but this amendment is full-on sanctioning of PROSECUTOR expert shopping when they don't like the result of THE COURT'S independent psych evaluation.

### **CONSTITUTIONAL ISSUES ARISE WITH A SECOND PROSECUTOR SELECTED & PAID FOR COMPETENCY & SANITY EVALUATION:**

The Vermont Supreme Court in Sharrow hit on the problem with S.3, Section 4, in proposing to amend Rule 16.1:

- \*308 ¶ 12. Finally, as other courts that have addressed this issue have noted, “[t]he policy reasons behind prohibiting the [State] from obtaining its own competency evaluation are clear.” Bishop v. Caudill, 118 S.W.3d 159, 163 (Ky. 2003).<sup>4</sup>
- Specifically, ordering “an examination for the sole purpose of ascertaining competency, especially if ordered against a defendant's wishes,” creates the risk that the State “would gain \*\*509 the inherent and possibly unfair advantage of gleaning insight as to the defense strategy.” Id. at 164; see also State v. Garcia, 2000-NMCA-014, ¶ 24, 128 N.M. 721, 998 P.2d 186 (rejecting State's argument that “basic principles of fairness” required court to order defendant to submit to a second competency evaluation by State expert after neutral expert reported that defendant was incompetent). State v. Sharrow, 2017 VT 25, ¶¶ 11-12, 205 Vt. 300, 308, 175 A.3d 504, 508–09 (2017).

## **DANGER OF USING AN ADDITIONAL STATE EVALUATION FOR IMPROPER PURPOSES:**

1. An evaluation by a prosecutor-selected expert would effectively enable the prosecutor to interrogate a defendant who has a right to remain silent. And who often does not want to be found incompetent or insane. (SEE: State v. Sharrow, State v. Bean, State v. Tribble ...)
2. The public (victims) have expressed that it do not like the idea that mentally ill people are not “held accountable” i.e., punished, for the result of their actions. However, I think we have to get to the realization that, much like when someone suffers a heart attack and their car runs into a group of people injuring or killing them; a person with severe mental illness is not legally responsible because of their mental illness, just as the person with a heart attack is not responsible for their actions.

## **ODG SUGGESTED AMENDMENT TO THE BILL: DEFINE WHAT “REASONABLE MENTAL EXAMINATION” MEANS:**

Allow the Court to order a second independent psych evaluation by a Court approved psychologist (NOT a prosecution selected and paid expert) if the State can show:

- The first court ordered exam fell below the medical standard of practice for performing the independent psych evaluation (not just disagreement with the result); or,
- There was bias in creating the first court ordered exam;

In such cases:

- We would suggest that the Prosecutor be able to request another independent Court ordered evaluation (NOT a State Attorney selected and paid expert evaluator).

**In summary:** A second evaluation cannot be had just because the State is unhappy with the result or the outcome of the original independent evaluation because to do so would violate the constitutional rights of the defendant.

## What are those constitutional rights?

To allow the state to interrogate a defendant through a proxy, i.e., a prosecution selected psychiatrist/psychologist, would violate Defendant's 5<sup>th</sup> Amendment right to remain silent and not be interrogated by an agent of the prosecution. Defendant has no obligation to provide any testimony or evidence in a criminal prosecution. See also, State v. Sharrow., VT Const., Art. 10, US Cons't., Fifth Amdt.

## Vermont Constitution, Article 10. Rights of persons accused of crime; personal liberty; waiver of jury trial

**That in all prosecutions for criminal offenses**, a person hath a right to be heard by oneself and by counsel; to demand the cause and nature of the accusation; to be confronted with the witnesses; to call for evidence in the person's favor, and a speedy public trial by an impartial jury of the country; without the unanimous consent of which jury, the person cannot be found guilty; **nor can a person be compelled to give evidence against oneself**; nor can any person be justly deprived of liberty, except by the laws of the land, or the judgment of the person's peers; provided, nevertheless, in criminal prosecutions for offenses not punishable by death, the accused, with the consent of the prosecuting officer entered of record, may in open court or by a writing signed by the accused and filed with the court, waive the right to a jury trial and submit the issue of the accused's guilt to the determination and judgment of the court without a jury.

## Fifth Amendment, U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.