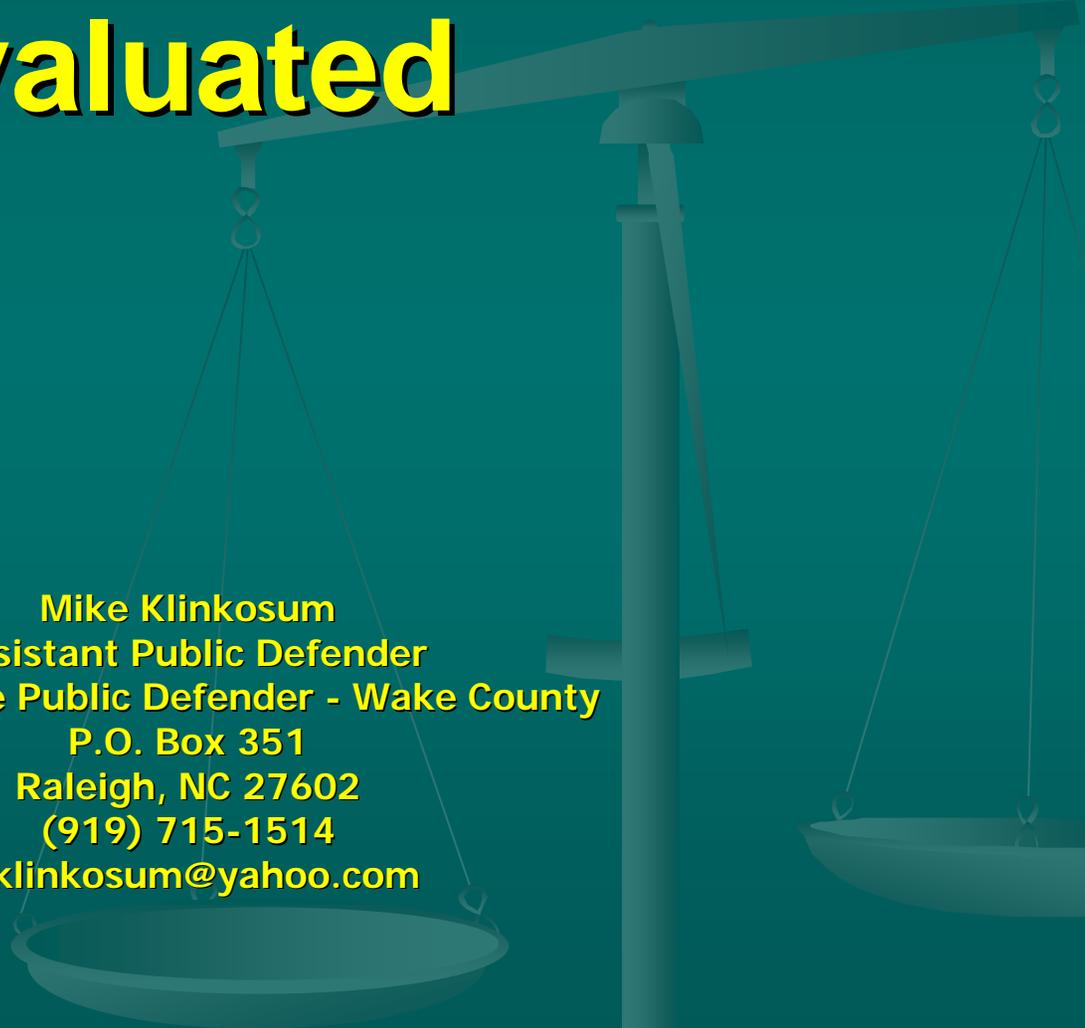


# Capacity to Proceed: How to Get Your Client Evaluated



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# Constitutional Issues

## ■ Due Process

- Conviction of a person incompetent to proceed to trial violates right to fair trial
- Violated when state fails to provide adequate procedures for determining competence
- There can be no trial or further prosecution if defendant is incompetent
- Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)
- Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975)

# Drope v. Missouri

[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense may not be subjected to a trial.

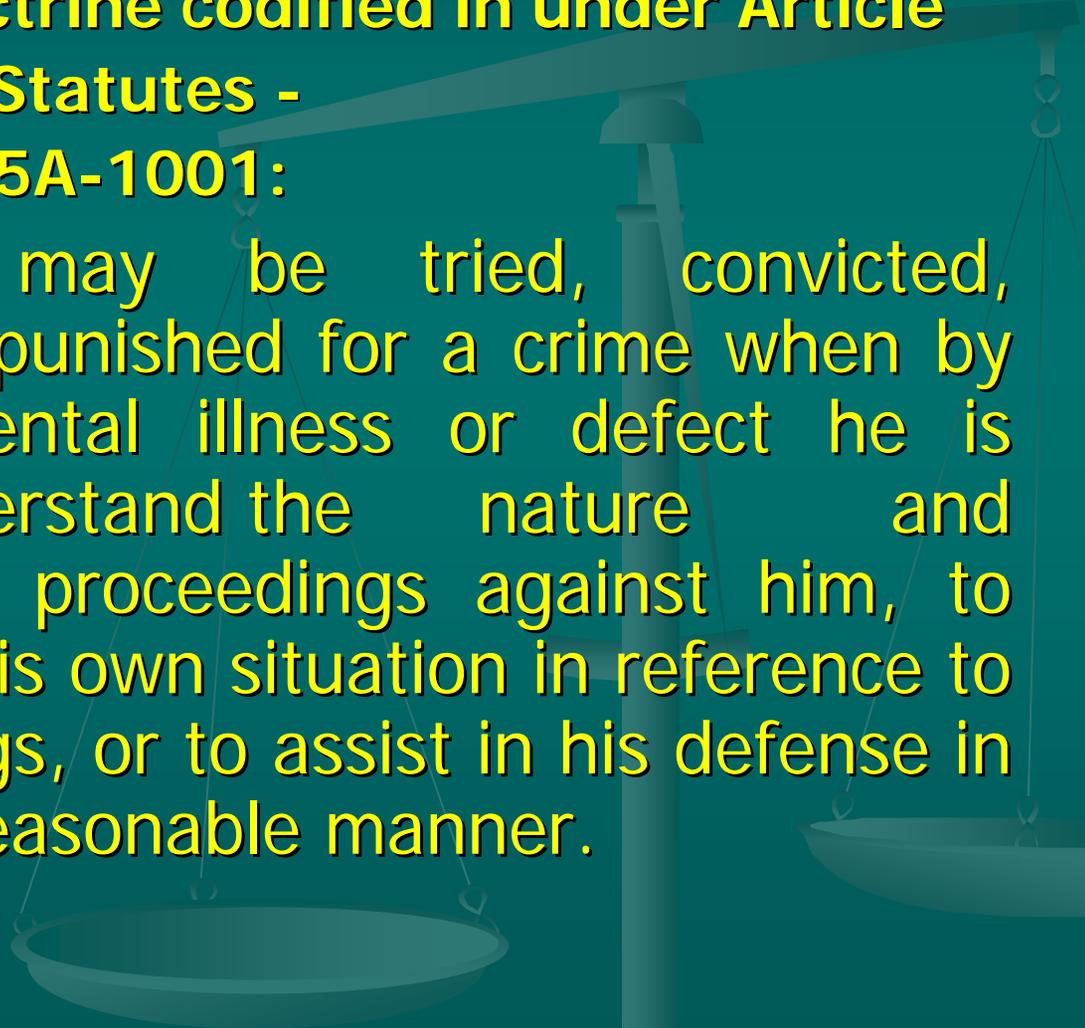
- The Constitution prescribes one standard of competence which governs pleas and trials.

# The Standard of Determining Incompetence

**Constitutional doctrine codified in under Article 56 of NC General Statutes -**

**N.C.Gen.Stat. § 15A-1001:**

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.



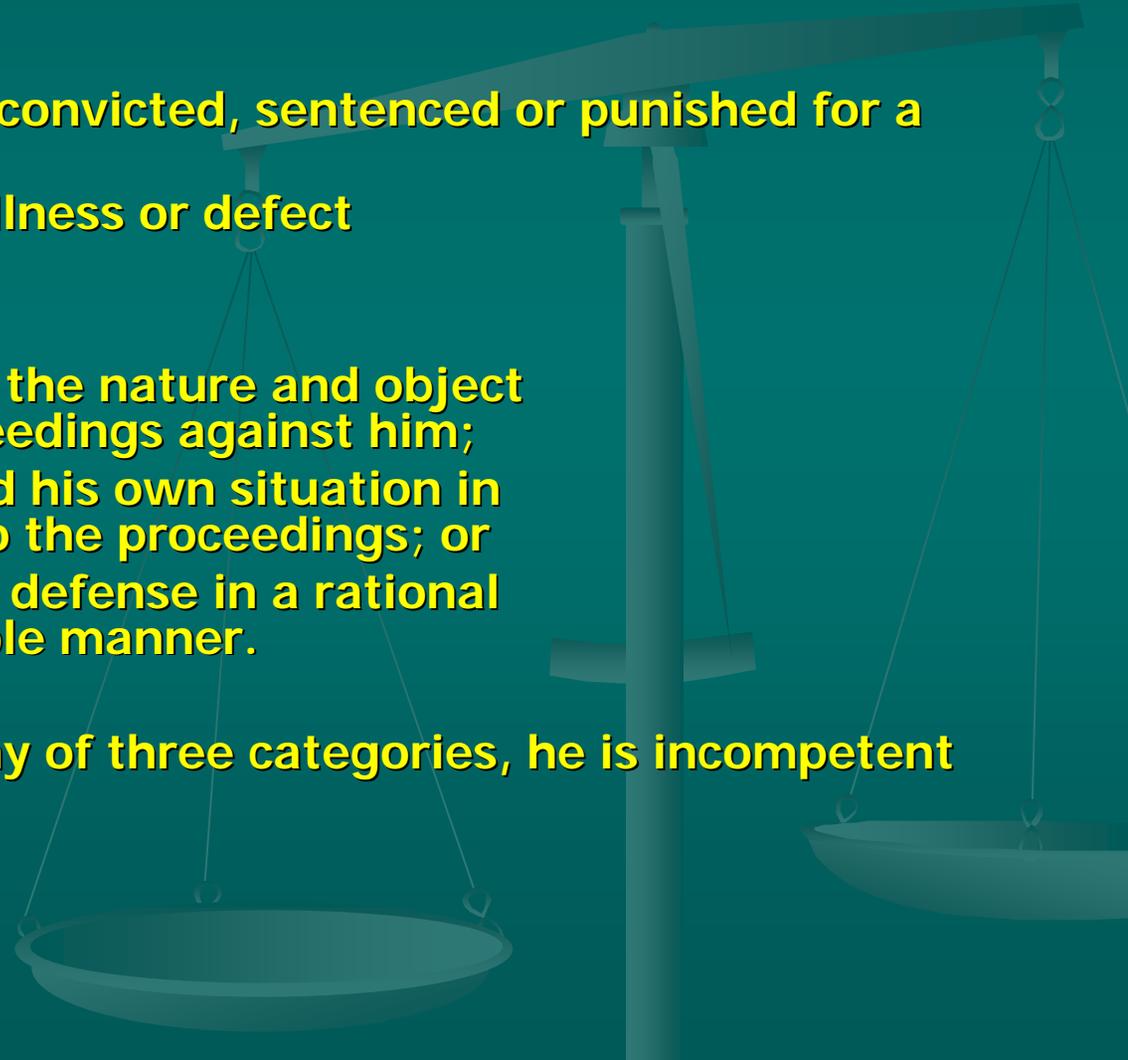
# Two Part Test

**N.C.Gen.Stat. § 15A-1001:**

**No person may be tried, convicted, sentenced or punished for a crime when**

- 1. By reason of mental illness or defect**
- 2. He is unable to:**
  - a. understand the nature and object of the proceedings against him;**
  - b. comprehend his own situation in reference to the proceedings; or**
  - c. assist in his defense in a rational or reasonable manner.**

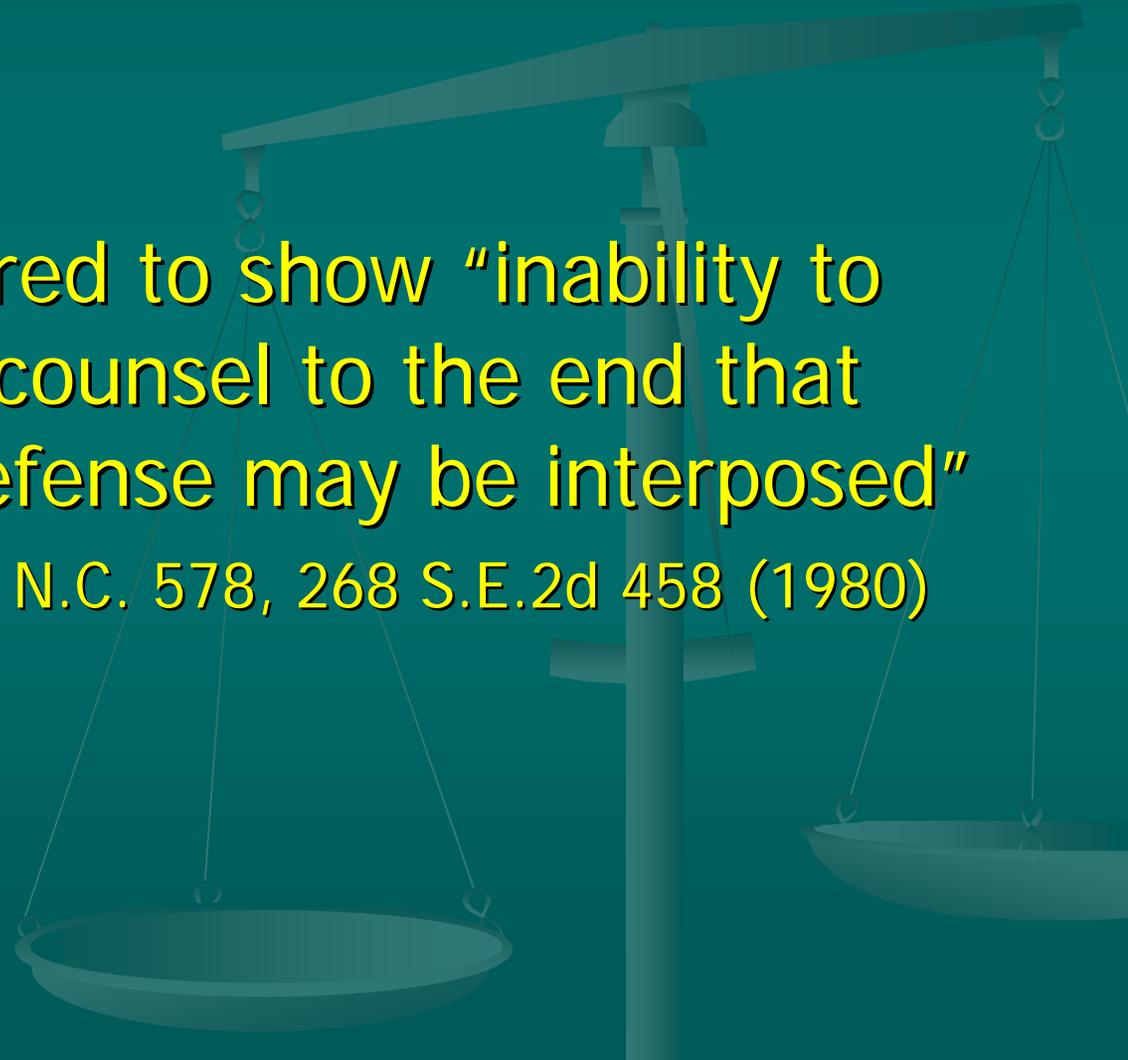
**If client is deficient in any of three categories, he is incompetent to stand trial**



# Assisting Defense in Rational Manner

No longer required to show “inability to cooperate with counsel to the end that any available defense may be interposed”

State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980)



# Assisting Defense in Rational Manner

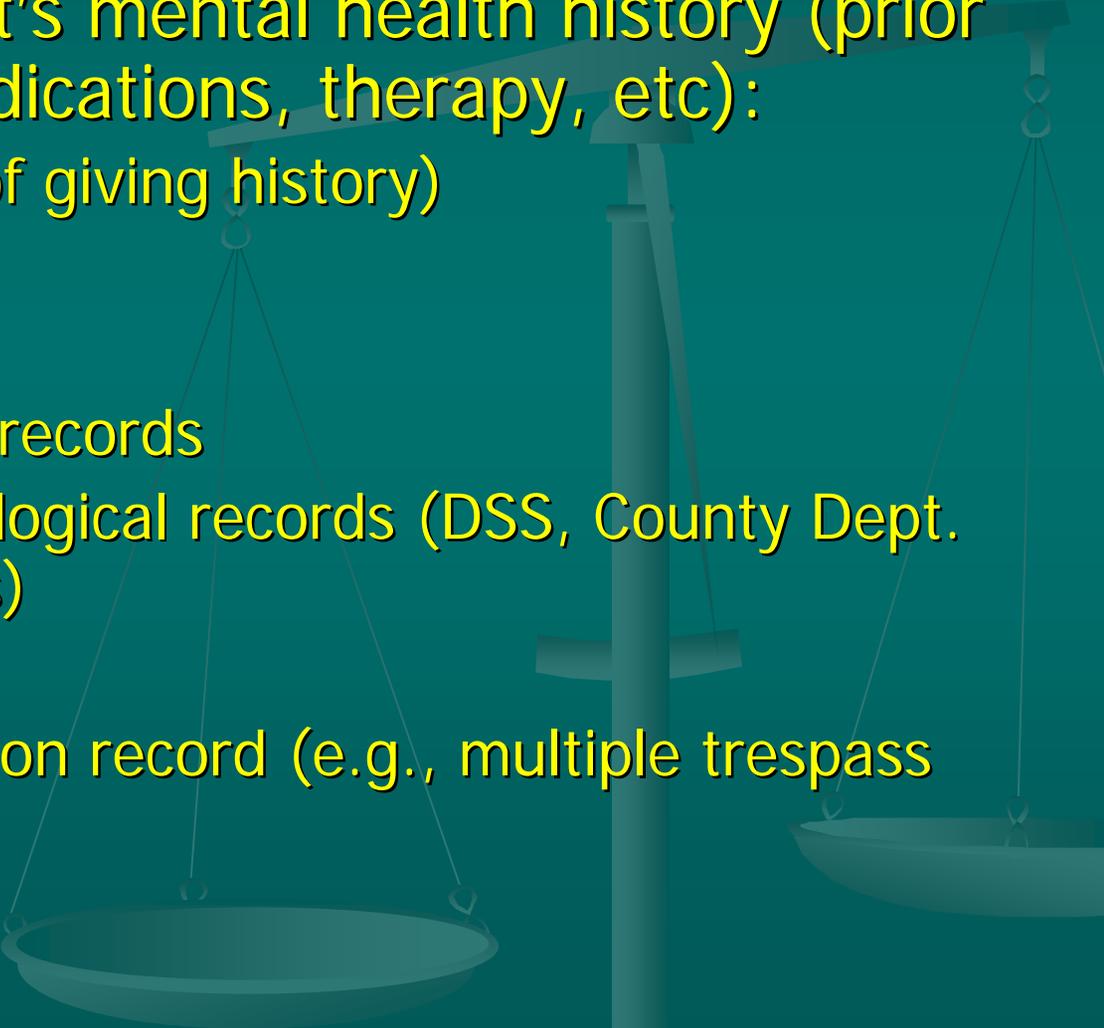
- Third prong is probably where incapacity is most often found:

"I've been charged because I'm a secret agent for the government and they are trying to get rid of me. There is a biological implant in my head that allows the government to see everything I see and do. I'm not talking to you anymore unless you get me an MRI so we can show the implant in my head. We can use the MRI at trial to show what they've done to me. That's how we are going to prove I'm innocent.

# When you suspect your client may be incapable of proceeding to trial:

- Get release for records from client (if possible – may not be capable of signing release)
  - Obtain ex parte court order for release of client's records
- 

# When you suspect your client may be incapable of proceeding to trial:

- Dig into your client's mental health history (prior commitments, medications, therapy, etc):
    - Client (if capable of giving history)
    - Client's family
    - Jail records
    - Prior commitment records
    - Psychiatric/Psychological records (DSS, County Dept. of Human Services)
    - School Records
    - Arrest and conviction record (e.g., multiple trespass charges).
- 

# When you suspect your client may be incapable of proceeding to trial:

## ■ GET YOUR OWN MENTAL HEALTH EVALUATION IF POSSIBLE

- Ex Parte Motion for \$\$\$ for Defense Mental Health Expert
  - Due Process (14<sup>th</sup> Amendment)
    - Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)
  - Effective Assistance of Counsel (6<sup>th</sup> Amendment)
    - State v. Ballard, 333 N.C. 515, 428 S.E.2d 178 (1993)
  - N.C.Gen.Stat. § 7A-450(b) – “...other necessary expenses of representation.”

# Ex Parte Motion for Funds For Expert Assistance

- State v. Ballard, 333 N.C. 515, 428 S.E.2d 178 (1993) – Constitutional right to ex parte hearing.

When the indigent defendant is seeking the assistance of a psychiatric expert, the "strong reasons for conducting the hearing *ex parte*" are especially applicable. To expose to the State testimony and evidence supporting a defendant's request for an independent psychological evaluation and a psychiatrist's trial assistance lays bare his insanity or related defense strategy. A hearing open to the State necessarily impinges upon the defendant's right to the assistance of counsel and his privilege against self-incrimination. We hold that these constitutional rights and privileges, guaranteed by the [Fifth](#), [Sixth](#), and [Fourteenth Amendments to the United States Constitution](#), entitle an indigent defendant to an *ex parte* hearing on his request for a psychiatric expert.

See also, State v. Bates, 333 N.C. 523, 428 S.E.2d 693 (1993) and State v. Greene, 335 N.C. 548, 438 S.E.2d 743 (1994) (error for trial court to deny *ex parte* hearing on motion for mental health expert).



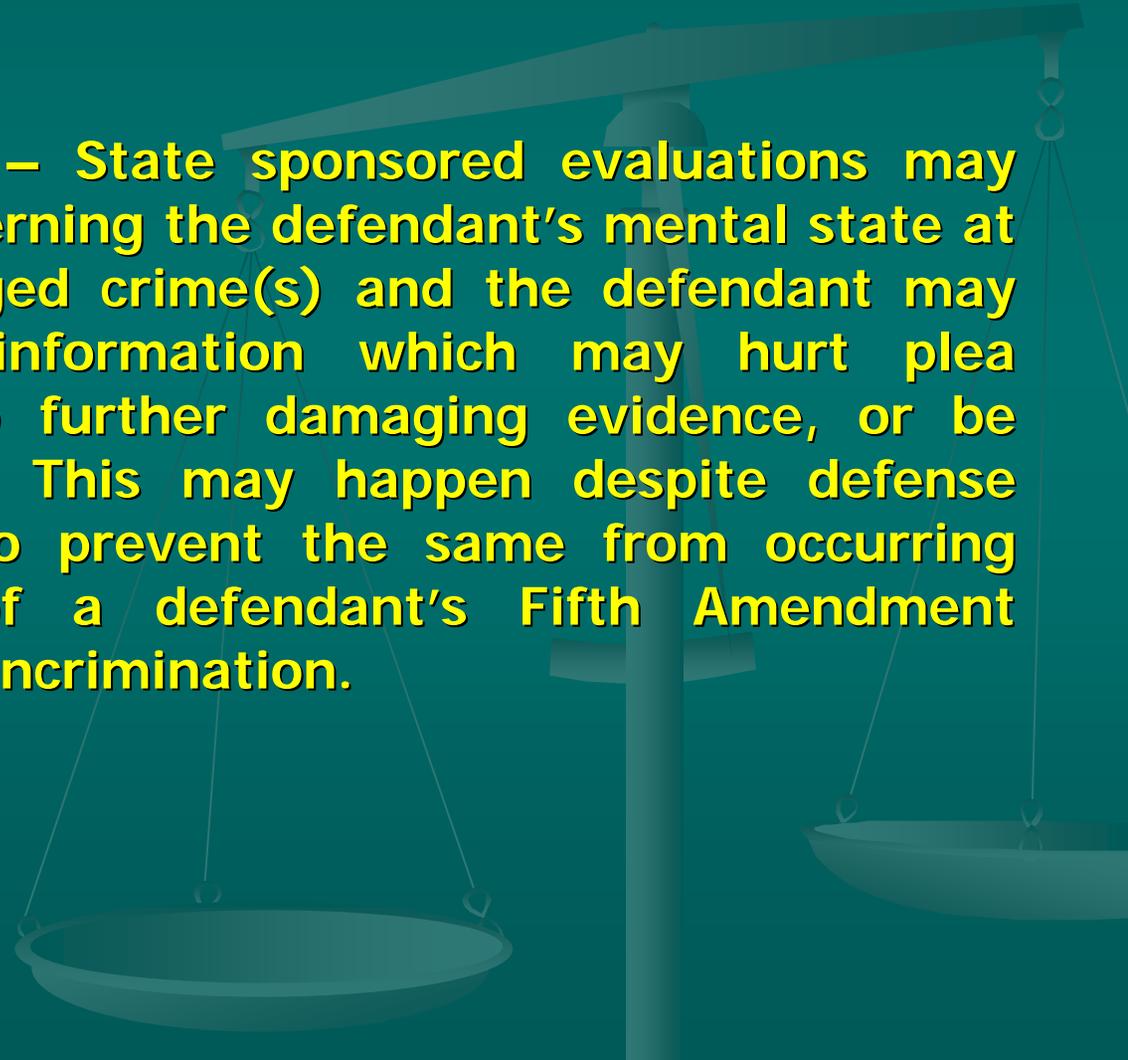
**Try to Get Your Own  
Expert Before Raising  
the  
Issue of Competency**

# Reasons for Retaining a Private Expert Before Raising Competency

- Confidentiality – A private mental health expert retained by the defense is bound by the attorney-client privilege in communications with the client. Also bound by privileges and ethics of the particular profession of the expert (e.g., doctor-patient privilege).
- The reports generated by state-sponsored mental health evaluations are disseminated to the presiding judge and, if capacity to proceed is again raised (and sometimes without it being raised), to the prosecutor. Such a procedure provides little, if any, safeguards for ensuring that confidential information, not related to a determination of capacity to proceed, is not disseminated to other parties or the prosecution. By retaining a private mental health expert, defense counsel has more opportunity to establish the confidential matters into which an evaluation should not delve.

# Reasons for Retaining a Private Expert Before Raising Competency

- **Scope of evaluation – State sponsored evaluations may stray into areas concerning the defendant’s mental state at the time of the alleged crime(s) and the defendant may disclose damaging information which may hurt plea negotiations, lead to further damaging evidence, or be admissible at trial. This may happen despite defense counsel’s attempts to prevent the same from occurring through assertion of a defendant’s Fifth Amendment privilege against self-incrimination.**

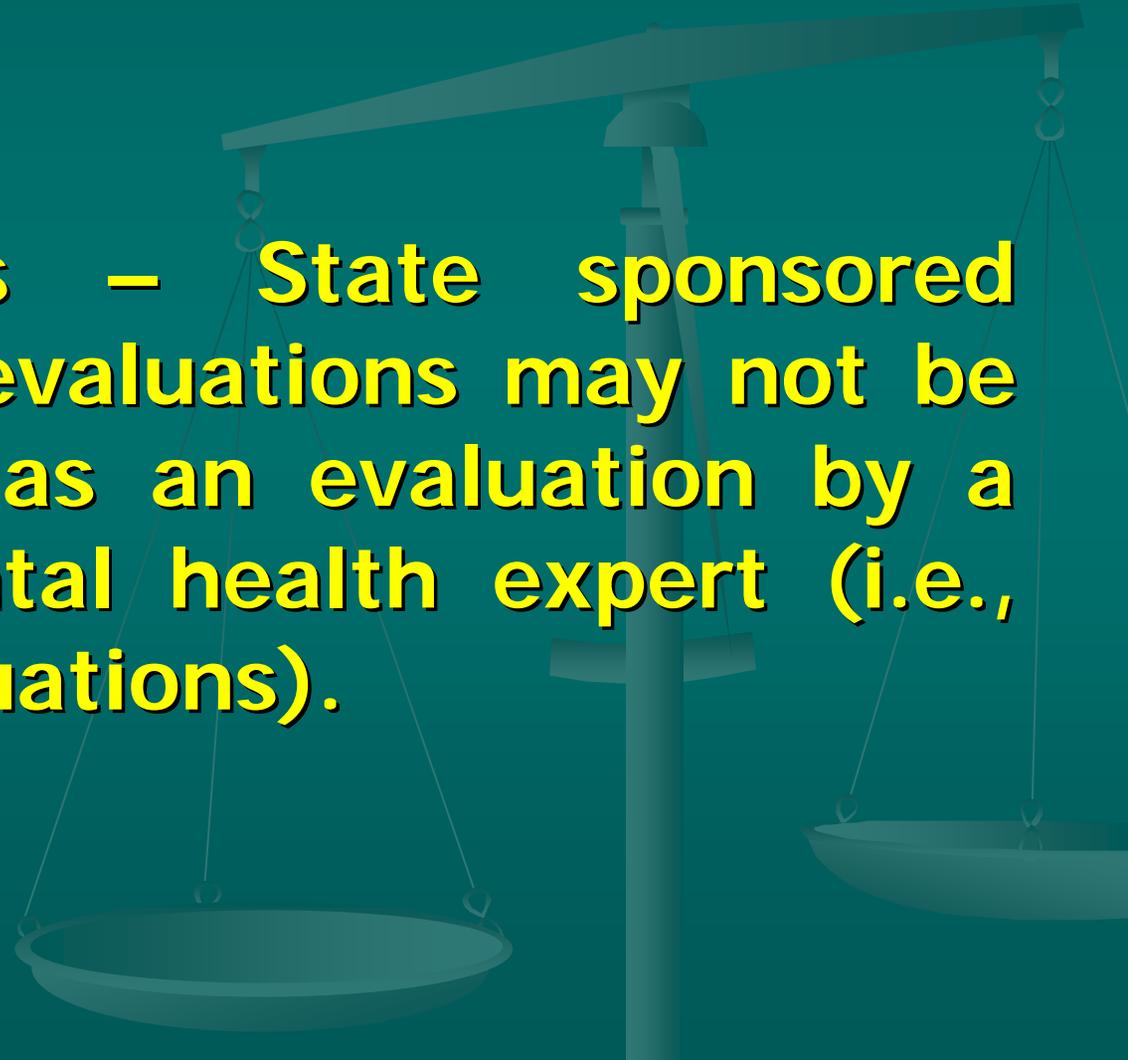


# Reasons for Retaining a Private Expert Before Raising Competency

- **Harm to Future Motions** - A state-conducted competency evaluation may hurt a motion by the defendant to obtain an expert on a mental health defense (i.e. insanity, diminished capacity) or other mental health issues. In some instances, courts have denied motions for expert assistance in light of the results of a state-conducted competency evaluation. Sometimes the courts have appointed the state's competency examiner as the defendant's expert rather than provide the defendant with funds to hire his or her own expert.

# Reasons for Retaining a Private Expert Before Raising Competency

- **Thoroughness** – State sponsored competency evaluations may not be as thorough as an evaluation by a retained mental health expert (i.e., drive-by evaluations).



# The Procedure

- Ex Parte Motion for Funds for Expert Assistance
  - Most judges are now aware of this procedure and the constitutional reasons for it (State v. Ballard, 333 N.C. 515, 428 S.E.2d 178 (1993) – Constitutional right to ex parte hearing).
  - Submit Motion and proposed Ex Parte Order to judge or by letter with copies to judge's chambers
  - Make sure that within the order is a directive that a copy of the motion and the order be sealed in the court file for appellate review.
  - If judge grants the motion, place motion and signed order (after file stamping) in court file under seal. Keep copy for your file and one for expert (for proof of allocation of funds so he/she can get paid)
  - Do not serve the Ex Parte Motion or Order on the prosecution. That defeats the whole purpose!

# “Particularized Need”

The manner in which the “particularized need” is shown varies from defense attorney to defense attorney. Some attorneys make a detailed showing of need in the text of the motion itself, while others make a general showing in the motion and present the grounds and evidence illustrating need to the judge at the time the motion is given to the judge. Regardless of which procedure is used, defense counsel should be prepared to give the judge all of the evidence supporting the particularized need, in order to make the motion as persuasive as possible and to preserve the record for appeal.

# “Particularized Need”

- Expert Name
- Credentials
- Fees
- Field of Expertise
- Work to be Performed
- Why Expert is Needed – Identify issues you intend to pursue and show how expert will assist. To the extent possible, provide specific facts supporting your position.
  - State v. Jones, 344 N.C. 722, 477 S.E.2d 147 (1996) – trial court erred in failing to allow funds for psychiatrist where only defense possible was diminished capacity.

# “Particularized Need”

- In seeking funds for a mental health expert, the “particularized need” is often the charge itself. Mental state of a defendant is always at issue in a criminal case (remember “mens rea”). Insanity is affirmative defense to all crimes.
- Most cases that deal with ex parte motions and orders for experts center around mental health issues (e.g., State v. Ballard, 333 N.C. 515, 428 S.E.2d 178 (1993) and State v. Bates, 333 N.C. 523, 428 S.E.2d 693 (1993)).

# What if Your Ex Parte Motion is Denied?

- Get more facts and evidence showing why you need an expert and renew the motion.
- State v. Jones, 344 N.C. 722, 477 S.E.2d 147 (1996) – NC Supreme Court ruled trial court erred in denying renewed request for funds for psychiatrist. Defense counsel renewed with affidavit supporting the request.
- Get a court reporter and ask the judge to hear and rule on motion again in chambers (Protect the Record).
- Have the court issue an order denying the motion and have motion and order sealed in court file for appellate review (Protect the Record).

# What if Ex Parte Hearing is Denied?

- If the court denies you an ex parte hearing when you approach in chambers, file a motion for an ex parte hearing and request one on the record.
- DO NOT divulge the reasons for needing expert assistance or the type of expert. Put into motion the fact that you need an ex parte hearing to protect confidentiality and defense strategy and the law that supports the right to an ex parte hearing.
- If hearing is again denied, you have placed on the record that you asked for an ex parte hearing and the reasons for such a hearing.

# What if Ex Parte Hearing is Denied?

If the court denies the initial request for expert assistance on an ex parte basis and then denies the motion for an ex parte hearing, defense counsel must decide whether to make the motion for funds for expert assistance in open court, thereby potentially exposing privileged and incriminatory information to the prosecution, or forgo the motion and give up the possibility of obtaining funds for an expert.

In making the decision, defense counsel should be mindful of the implications for appeal:

# What if Ex Parte Hearing is Denied? (Appeal Implications)

- If the defendant makes the motion in open court and the trial judge refuses to enter an order funding an expert, the defendant has not waived the judge's refusal to hold an ex parte hearing. The issue for appeal would be that the defendant could have made a stronger showing if he or she had been allowed to do so *ex parte*.
- If the defendant opts not to pursue the motion in open court, *State v. Ballard* indicates that the defendant need not make an offer of proof for appellate review of the trial judge's refusal to hold an ex parte hearing; however, if defense counsel has strong evidence of the need for expert assistance, he or she may want to ask the trial court for leave to submit the evidence under seal.

# What About Dix?

- If you must have your client sent to Dorothea Dix:
- Make sure you have exhausted your attempts to obtain your own expert.
- Make sure you have done some investigation into your client's mental health history.
- If your client has a mental health history, get a release or court order for records (do this ex parte also if possible).
- Make sure you contact Dorothea Dix Hospital to find out who is evaluating your client and the name of the evaluator's assistant.
- Make sure that you communicate with the evaluator and/or the assistant – the attorney is often the best source of information regarding the third prong of competency (rationally assisting in own defense).
- Thoroughly review client's mental health records, if you have them, before you turn them over. Talk with others in your office with experience in this area before turning over records.

# What About Dix?

- Try to limit the focus of the evaluation to competency and not capacity at the time of the crime. Put that in the Order if possible.
- Make certain (in writing) that Dix staff know that focus is limited and that your client will not discuss the the alleged offense(s) without your presence. This is particularly necessary when the prosecutor or the court has your client sent to Dix. Assert 5<sup>th</sup> and 6<sup>th</sup> Amendment rights (Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)).
- Try to be present during evaluation if possible. State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998) the North Carolina Supreme Court held that the trial court did not violate the defendant's Sixth Amendment right to counsel by refusing to allow defense counsel to be present at a competency evaluation. However, Davis does not foreclose defense counsel from being present in all circumstances. Trial courts may also have discretion to allow defense counsel to be present.