2.9 Admissibility at Trial of Results of Capacity Evaluation

A. Generally

The admissibility at trial of the results of a court-ordered capacity examination is a complicated topic, reviewed briefly below. Although there are several arguments for excluding or at least limiting the use of the examination, counsel should anticipate the possibility that the contents and results of a court-ordered capacity examination, including the defendant's statements and examiner's opinions, may be admitted at trial. *See also State v. Allen*, 322 N.C. 176 (1988) (prosecutor could cross-examine defense expert at pretrial hearing on motion to suppress about capacity report; defense expert had reviewed report and disagreed with it [although not discussed in the opinion, prosecutor likely could have used the report, under the authorities discussed in subsection D., below, to rebut the defendant's claim that his mental infirmity rendered the confession involuntary]).

The results of the capacity evaluation may be used as well by the defense if relevant to the trial of the case. *See State v. Bundridge*, 294 N.C. 45 (1978) (finding of incapacity admissible at trial where defendant raised insanity defense).

For a discussion of potential ways to limit the capacity examination itself, see *supra* § 2.5E, Limits on Scope and Use of Examination.

B. Effect of Doctor-Patient Privilege

The doctor-patient privilege does not protect the results of a court-ordered evaluation of capacity to proceed. *See State v. Taylor*, 304 N.C. 249 (1981), *abrogation on other grounds recognized by State v. Simpson*, 341 N.C. 316 (1995); *see also State v. Williams*, 350 N.C. 1 (1999) (to extent doctor-patient privilege exists, G.S. 8-53.3 authorizes court to override privilege if necessary to proper administration of justice).

C. Fifth and Sixth Amendment Protections

Fifth Amendment. Subject to a significant exception for rebuttal of a mental health defense (discussed in subsection D., below), the Fifth Amendment privilege against self-incrimination applies to evaluations of capacity to proceed and precludes use of the results at the guilt-innocence or sentencing phase of a trial. *See Estelle v. Smith*, 451 U.S. 454 (1981).

Although *Estelle* was a death penalty case, the principle should apply to noncapital cases as well. Also, although *Estelle* involved a capacity examination initiated by the court, it should make no difference whether the court, prosecutor, or defendant requests the examination. *See Witt v. Wainwright*, 714 F.2d 1069, 1076 (11th Cir. 1983), *rev'd on other grounds*, 469 U.S. 412 (1985).

Sixth Amendment. The Sixth Amendment right to counsel precludes a psychiatric examination of the defendant without notice to defense counsel of the scope and nature of the examination. *Estelle* relied on this additional ground in holding that the results of a capacity examination were inadmissible at trial, reasoning that the defendant was denied the assistance of his attorney in deciding whether to submit to the examination. *Estelle*, 451 U.S. 454, 470–71; *see also Powell v. Texas*, 492 U.S. 680 (1989) (reversing conviction on Sixth Amendment grounds because defendant did not have notice that capacity evaluation would inquire into future dangerousness for purposes of capital sentencing proceeding). This protection is also limited by the exception for rebuttal of a mental health defense, discussed in subsection D., below.

D. Rebuttal of Mental Health Defense

If the defendant relies on a mental health defense at trial and presents expert testimony in support of the defense, the results of a court-ordered capacity examination are admissible to rebut the testimony. The courts have held that the Fifth Amendment does not apply in this instance. *See Buchanan v. Kentucky*, 483 U.S. 402 (1987); *State v. Huff*, 325 N.C. 1 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990); *see also State v. Davis*, 349 N.C. 1, 40–42 (1998) (in capital case in which defendant relied on defenses of insanity and diminished capacity at guilt-innocence phase and defense expert relied on capacity examination in forming opinion, Fifth Amendment did not bar prosecution from using statements made by defendant during the capacity evaluation to cross-examine defendant's mental health expert at sentencing); *State v. Atkins*, 349 N.C. 62, 107–08 (1998) (no violation of Fifth Amendment by prosecution's use of capacity examination to rebut mental health evidence offered by defendant at sentencing phase of capital trial; the court found that defendant presented a defense strategy alleging a learning disorder, an adjustment disorder, and disturbances of emotion and conduct; the defendant's mental health expert also relied on the capacity report as a basis for his opinion).

The courts also have held that the Sixth Amendment does not bar use of capacity examination results because counsel should anticipate and advise the client that the examination could be used to rebut a mental health defense. *See State v. Davis*, 349 N.C. 1, 43–44 (1998) (reaching this conclusion notwithstanding that the trial court apparently limited the scope of the capacity evaluation to a determination of capacity only); *State v. McClary*, 157 N.C. App. 70, 77–79 (2003) (following this reasoning and finding no Sixth Amendment violation). *But see Delguidice v. Singletary*, 84 F.3d 1359 (11th Cir. 1996) (defense counsel did not have notice that capacity evaluation would concern sanity).

Under the reasoning of *Buchanan* and *Huff*, the Fifth Amendment may still protect the examination results if the defendant relies on a mental health defense but does not introduce expert testimony. *See State v. Williams*, 350 N.C. 1 (1999) [discussed under subsection E., below].

Courts have also held that the prosecution may only offer evidence from a capacity evaluation to rebut the mental condition raised by the defendant; the evidence cannot be submitted on the issue of guilt. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH

STANDARDS, Standard 7-3.2 & Commentary (1989) (citing cases), *available at* www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html; *see also* 5 LAFAVE, CRIMINAL PROCEDURE § 20.5(c), at 481 (discussing similar limitation on prosecution's use of court-ordered mental health examination after defendant gives notice of mental health defense). A jury may have difficulty grasping this distinction, however, even with a limiting instruction.

E. Rebuttal of Other Evidence

In *State v. Williams*, 350 N.C. 1, 21–23 (1999), the defendant decided not to put on any expert mental health testimony during either the guilt-innocence or sentencing phase of a capital trial; and, the trial court granted the defendant's request to preclude the prosecution from using evidence of the capacity evaluation of the defendant. The court held, however, that the defendant opened the door to the prosecution's use of a portion of the capacity evaluation by introducing evidence during sentencing that he had acted respectfully while in jail awaiting trial. The trial court therefore did not err in allowing the prosecution to bring out evidence that the defendant had threatened to fight two staff members while at Dorothea Dix Hospital. *Cf. State v. Harris*, 323 N.C. 112 (1988) (State could not cross-examine defendant at trial about fight he got into with another patient while at Dorothea Dix Hospital for capacity evaluation; fight was not relevant to defendant's credibility under Evidence Rule 608(b), and State articulated no reason for admitting evidence under Rule 404(b)).

F. Waiver

Estelle and other U.S. Supreme Court decisions involving psychiatric examinations suggested in dicta that a defendant might be able to waive his or her Fifth Amendment rights after proper *Miranda*-style warnings. In none of those cases, however, did the U.S. Supreme Court actually allow admission of the evaluation results on waiver grounds, and the dicta from the cases may be a dead letter. Most cases, including those in North Carolina, have found that the prosecution may use evidence from a capacity examination only when necessary to rebut a mental health defense by the defendant. *See* Robert P. Mosteller, *Discovery against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567, 1615 n.159 (1986) (suggesting that more reasonable reading of *Estelle* is that prosecution's use of psychiatric examination is limited to responding to mental health defense raised by defendant).

If a waiver argument is made, several arguments may be made against it:

- By ordering the defendant to submit to a capacity evaluation, the court effectively has compelled the defendant to cooperate with the examiners; therefore, the examination results may not be used against the defendant except to rebut a mental health defense. *See generally Kastigar v. United States*, 406 U.S. 441 (1972) (if the State compels testimony, neither the testimony nor its fruits may be used in a criminal prosecution); *Mincey v. Arizona*, 437 U.S. 385 (1978) (involuntary statements are not admissible for any purpose). For similar reasons, a defendant should not lose constitutional

protections by being the one who moves for a capacity evaluation. A defendant cannot be said to have waived such rights by asserting the right not to be tried while incapable, and defense counsel may be obligated to raise capacity even without the client's consent. *See supra* § 2.1A, Requirement of Capacity; § 2.3A, Ethical Considerations; *see also United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984) (en banc) (Scalia, J., plurality opinion) (decision analyzes why trial judge may order psychiatric examination and prosecution may use results to rebut insanity defense; court finds that it is at best fiction to say that defendant knowingly and voluntarily waives Fifth Amendment rights by pleading insanity).

- A defendant may not be required to surrender one constitutional right (the right against self-incrimination) to gain the benefit of another (the right not to be tried while incapable to proceed). *See Collins v. Auger*, 428 F. Supp. 1079 (S.D. Iowa 1977) (defendant is entitled to examination to determine capacity to stand trial; if the giving of a *Miranda* warning made the defendant's statements admissible, the defendant would be placed in a situation where he must sacrifice one constitutional right to claim another), *rev'd on other grounds*, 577 F.2d 1107 (8th Cir. 1978) (agreeing with principle and finding further, contrary to lower court, that use of defendant's statements to psychiatrist to establish guilt was not harmless error and warranted vacating of conviction); *see also generally Simmons v. United States*, 390 U.S. 377, 394 (1968) (finding it "intolerable" that defendant would have to give up Fifth Amendment right against self-incrimination to assert Fourth Amendment claim); *State v. White*, 340 N.C. 264 (1995) (citing *Simmons* with approval).
- The North Carolina courts should interpret North Carolina law as prohibiting the use of a capacity evaluation at trial except to rebut a mental health defense. *See* JOHN PARRY, MENTAL DISABILITY LAW: A PRIMER 67 (American Bar Association, 5th ed. 1995) (some jurisdictions, by statute or court decision, limit admissibility of capacity evaluations).
- Facilities ordinarily do not adequately advise defendants of their right to remain silent, and defendants' cooperation with examiners does not constitute a waiver of their right to remain silent. *See, e.g.*, *State v. Huff*, 325 N.C. 1 (1989) (facility made inconsistent statements to defendant about confidentiality of examination; court did not address whether warnings were sufficient or whether defendant waived rights), *vacated on other grounds*, 497 U.S. 1021 (1990).
- The defendant's mental condition (which the court found to be in question when it ordered the capacity examination) precluded a knowing and voluntary waiver of rights.