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is equally protected even when the liberty itself is a statutory creation of the State. The Touchstone of Due Process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976, 41 L. Ed. 2d 935, 952, *citing, Dent v. West Virginia*, 129 U.S. 114, 123, 9 S. Ct. 231, 233, 32 L. Ed. 2d 623, 626 (1889). Thus Virginia has a constitutional duty to protect against the arbitrary and capricious application of the aggravating factors in § 19.2-264.2 by the sentencing body.

The irreversible nature of the death penalty makes it even more imperative that the accused be protected from arbitrary action of the government. *See, Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 944 (1987) (holding the "unique nature of the death penalty required additional protection during pretrial, guilt and sentencing phases); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976). Hence, the "... Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death." *Murray v. Giarrantano*, 109 S. Ct. 2765, 106 L. Ed. 2d. 713 (1989); *See also, Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980) (trial judge must give jury the option to convict of a lesser offense; *Lockett*, 438 U.S. at 604 (jury must be allowed to consider all of a capital defendant's mitigating evidence). Therefore the severe and irreversible nature of the death penalty requires Virginia judges and attorneys to guide and limit the sentencers' discretion in applying the "vileness factors."

Whether Virginia's "vileness factors" are a federal requirement or a matter of state legislative choice, these factors are unconstitutional as applied in Virginia.

Restrictions on the State's Use of Mental Health Experts in Capital Trials

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There has been some question in recent years whether/under what circumstances the prosecution in a capital murder trial might use psychiatric[1] testimony to support its case at the penalty phase that the defendant should receive the death penalty. To the casual observer, it might appear that the matter was resolved by the United States Supreme Court in its 1983 opinion in *Barefoot v. Estelle.* [2] It was not, however.

Barefoot concerned psychiatric testimony given in response to hypothetical questions posed by the prosecution at the penalty phase of defendant Thomas Barefoot's capital murder trial in Texas. Neither of the psychiatrists who appeared for the state had personally examined Barefoot, yet both testified that, assuming the truth of the statements contained in the prosecution's hypotheticals, Barefoot was a "sociopath" who was not amenable to treatment and who would commit acts of violence in the future if given a chance. Under Texas law at that time, the trier of fact was required to impose the death penalty on a finding of two aggravating factors: (1) that the defendant killed deliberately, and (2) that the defendant would probably commit further acts of violence in the future.

Barefoot was sentenced to death. On appeal, he argued that, given (1) the law's heightened concern for reliability in capital case decision-making and (2) the patent unreliability of psychiatric dangerousness prediction—an unreliability well-documented in the psychiatric literature[3] and forcefully attested to by the American Psychiatric Association in its amicus brief in his case—the state's introduction of psychiatric testimony on the question of his dangerousness violated the Eighth and Fourteenth Amendments to the Constitution. The Supreme Court, however, was not impressed. Writing for the majority, Justice White observed, "[i]f it is not impossible for even a lay person sensibly to arrive at that conclusion [that a defendant is dangerous], it makes little sense, if any, to suggest that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify." Justice White suggested that concerns about the unreliability of prediction testimony properly go to the weight to be accorded such testimony, not to its admissibility: "We are unconvinced . . . that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness . . . ."[4]

The opinion of the Court in *Barefoot*, of course, was concerned solely with questions of constitutional law. The Court did not resolve whether the psychiatrists' testimony satisfied the requirements of Texas law governing the admissibility of expert opinion testimony. Thus, while perhaps not constitutionally objectionable, psychiatric testimony on the question of future dangerousness might be objectionable on state evidence law grounds. Certainly in any state that recognizes the *Frye* [5] test for the admissibility of scientific evidence—a test requiring not only that the witness have specialized knowledge or skills "beyond the ken of the lay person" but also that the subject matter of the testimony have gained general acceptance in the scientific community—psychiatric predictions of future violence would be highly suspect. Even in Virginia, where the *Frye* test recently was rejected in favor of a test speaking more generally in terms of "reliability,"[6] a good argument can be made that dangerousness predictions should be excluded.[7] There can be no guarantee of that such an argument will prevail in a given case, however. Indeed, as a matter of practice, psychiatric predictions of future dangerousness are heard in courtrooms every day.[8]

Fortunately, it should rarely be necessary to resort to the evidentiary objection when the prosecution offers psychiatric evidence in aggravation. Indeed, in the usual case—one in which the psychiatrist's opinion is based on a personal examination of the defendant—a winning objection ordinarily can be made on Fifth, Sixth, or Fourteenth Amendment grounds, or, in Virginia, on statutory grounds.

The United States Supreme Court recognized in *Estelle v. Smith*[9] that Fifth Amendment protection must be accorded a defendant at the penalty phase of a capital trial. The defendant in *Estelle* was sentenced to death on the strength of a psychiatrist's prediction that he would be violent in the future if permitted to live. The psychiatrist's opinion was based on an evaluation he performed prior to trial to assess the defendant's competency to stand trial. The psychiatrist did not warn the defendant that the evaluation might be used to address the issue of future dangerousness. Declaring the psychia-

trist's testimony in violation of the defendant's Fifth Amendment rights, Chief Justice Burger observed:

> "When Dr. Grigson went beyond simply reporting to the court on the issue of competency and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the state recounting unwarned statements made in a post-arrest custodial setting. During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system" and was "not in the presence of [a] person acting solely in his interests." [*Citing Miranda v. Arizona*, 384 U.S. 436, 469 (1966).][10]

The court went on to find a Sixth Amendment violation as well in the state's failure to notify defense counsel that the psychiatric evaluation would encompass the issue of dangerousness. In the absence of such notification, the court held, the defendant was denied the advice of counsel at a "critical stage" of the adversary process.

A more difficult case is presented where the defendant and his or her counsel *have* been notified as to the potential uses of a psychiatric evaluation. Even here, however, effective objections might be made to the state's presentation of evaluation findings in its case-in-chief at the penalty phase. Indeed, to permit the state to present as evidence in aggravation disclosures made by the defendant during an evaluation requested by the defense to explore factors in mitigation, or during an evaluation demanded by the prosecution as a condition to the admissibility of psychiatric evidence for the defense,[11] is to put the defendant to an untenable choice between his or her constitutional rights: the Sixth Amendment right to explore and present clinically derived evidence in mitigation[12] and the Fifth Amendment privilege against self incrimination. The United States Supreme Court, in an analogous case, has ruled that the defendant may not be required to make such choice.[13] *Simmons v. United States*,[14] concerned a defendant who had provided incriminating testimony during a pretrial hearing to suppress evidence in his case. At trial, the prosecution presented the defendant's suppression hearing testimony as evidence of his guilt. The defendant was convicted. In reversing the conviction, the Supreme Court observed that the defendant "was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self incrimination.... In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another."[15]

A number of courts, including the United States Court of Appeals for the Fourth Circuit,[16] have extended the *Simmons* rationale to cases in which incriminating statements made during a pretrial psychiatric evaluation (e.g., to assess criminal responsibility, or "sanity" at the time of the offense) were used at trial as evidence of guilt. The rule that has emerged is that if the defendant participates in such an evaluation and subsequently raises an insanity defense, the prosecution may use statements the defendant made during the evaluation only to address the defendant's claim of insanity, not to prove the elements of the offense charged.[17] May this rationale be extended further to cover the case of the defendant who, during an evaluation to assess factors in mitigation, discloses information that is relevant to factors in aggravation? In a state like Virginia, where, at the penalty phase, the prosecution is obliged to prove particular aggravating factors beyond a reasonable doubt, these aggravating factors might be seen as functionally equivalent to the elements of the crime at the guilt phase. Accordingly, given the Fifth Amendment's applicability to the penalty phase of a capital case[18], it follows that no statements made by the defendant during an evaluation to assess factors in mitigation, and no evidence derived from such statements, should be admissible at the penalty phase to support the prosecution's case in aggravation. Rather, the prosecution's use of such evidence should be limited to addressing claims made by the defense in mitigation. This argument was presented to the United States Supreme Court in a Virginia case, *Smith v. Murray*[19], but the court avoided responding on procedural grounds, finding the defendant's failure to raise the issue in its appeal to the Virginia Supreme Court to be a procedural bar to its subsequent presentation.[20]

Although the Supreme Court still has not resolved the matter, statutes have been enacted in a number of states protecting disclosures made by a defendant during a psychiatric evaluation from use by the prosecution to advance its case in aggravation. In 1986, the Virginia General Assembly enacted such a statute, reflecting very clearly the petitioner's argument in *Smith*:

> No statement or disclosure by the defendant made during a competency evaluation performed pursuant to §19.2-169.1, an evaluation performed pursuant to §19.2-169.5 to determine sanity at the time of the offense, treatment provided pursuant to §19.2-169.2 or § 19.2-169.6 or a capital sentencing evaluation performed pursuant to this section, and no evidence derived from any such statements or disclosures may be introduced against the defendant at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances specified in §19.2-264.4. Such statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense.[21]

Thus, defendants facing capital sentencing proceedings in Virginia courts are afforded a significant degree of statutory protection. Several questions remain, however. First, is there any bar to the prosecution's use of a psychiatrist to respond to hypothetical questions concerning the defendant's future dangerousness, as was done in *Barefoot*? Probably not. Unless the psychiatrist's opinion is based at least in part on statements made by the defendant during an evaluation, neither the Virginia statute nor the Fifth Amendment is applicable. Moreover, there is no Sixth Amendment issue. Thus, the only argument available to the defense under these circumstances, it seems, would be the evidentiary argument discussed above: that psychiatrists cannot reliably predict future dangerousness and, therefore, should not be qualified as experts to state an opinion on the matter. This argument may be bolstered by reference to the professional literature admonishing psychiatrists not to diagnose anyone whom they have not personally examined.[22]

A second, particularly troubling question left unresolved by the Virginia statute concerns psychiatric testimony for the prosecution which ostensibly is presented as evidence in rebuttal to the defendant's case in mitigation, but which, at least implicitly, supports the prosecution's case in aggravation. For example, if a defendant claims "extreme mental or emotional disturbance" at the time of the offense, might the prosecution present as evidence in rebuttal the testimony of a psychiatrist that, during an evaluation, the defendant admitted to having coolly killed on other occasions? In *Buchanan v. Kentucky*[23], the United States Supreme Court ruled that the prosecution, on cross-examination of a mental health expert for the defense at the penalty phase of a capital trial, was free to ask about excerpts from the expert's written report which were less favorable to the defense than those presented on direct examination. "[I]f a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the

reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." The report excerpts in question in *Buchanan*, however, pertained solely to the expert's "general observations about the mental status of petitioner" and included no "statements by petitioner dealing with the crimes for which he was charged." Whether statements about other violent acts would be considered admissible as evidence of mental status (in rebuttal to defense mental status evidence) or would be excluded on Fifth Amendment grounds (as evidence in aggravation) is unclear. Defense counsel in Virginia, however, should be prepared to argue that the plain meaning of the language in the Virginia statute is that, while the prosecution ordinarily may introduce evaluation findings to rebut defense claims in mitigation, if these findings at the same time speak to factors in aggravation, their introduction is barred, at least where the claim in mitigation is not that factor in aggravation do not exist.

What about the case in which the defense claims an absence of aggravating factors? If, for example, the defense decides to argue in mitigation that the defendant is *not* likely to be violent in the future, is the door thereby opened to the prosecution to present psychiatric testimony of future dangerousness as evidence in rebuttal? If so, must the defense first present psychiatric evidence of non-dangerousness, or is the door opened by *any* defense evidence, for example the testimony of a neighbor that "he'd never hurt a flea?" These questions are unresolved.

Conclusion

The use of a mental health expert to support the defendant's case in mitigation at the penalty phase of a capital trial is a hazardous but often essential endeavor. Indeed, the expert's opinion might be viewed as a two-edged sword: it might provide some measure of excuse and suggest to the judge or jury that the defendant does not deserve the ultimate penalty; at the same time, however, it might enhance concerns for dangerousness and suggest that the defendant is particularly appropriate for execution.[24] Counsel must work quite closely with his or her expert in assessing the case in mitigation. If the expert's findings are positive, counsel must seek the expert's assistance in developing strategies for the productive presentation of these findings.[25] If, however, the expert's findings are negative, counsel must be prepared to send the expert packing, exhorting him or her faithfully to observe whatever protection the attorney-client privilege might afford.[26]

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[1]In many states, including Virginia, psychologists as well as psychiatrists may qualify as experts to give testimony in capital trials. For the sake of literary economy, the terms "psychiatrist" and "psychiatric" are used throughout this article to refer not only to psychiatrists but to other qualified mental health professionals as well.

[2]*Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d. 1090 (1983).

[3]See Monahan, *The Clinical Prediction of Violent Behavior* (1981).

[4]In a stinging dissent, Justice Blackman wrote: "In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's word, equates with death itself . . . . Ultimately, when the court knows full well that psychiatrists' predictions of dangerousness are specious, there can be no excuse for imposing on the defendant, on pain of his life, the heavy burden of convincing a jury of laymen of the fraud."

[5]*Frye v. United States*, 293 F. 2d 1013, 1014 (D.C. Cir. 1923).

[6]*O'Dell v. Commonwealth*, 234 Va. 672, 696, 364 S.E.2d 491, 504 (1988).

[7]See Moenssens, *Admissibility of Scientific Evidence: An Alternative to the Frye Rule, 25 Wm. & Mary L. Rev.*, 545 (1984).

[8]Psychiatrists regularly testify as to the future dangerousness of persons facing involuntary commitment to a psychiatric hospital.

[9]Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L. Ed. 2d 359 (1981).

[10]*Id.* at 463.

[11]Under Virginia law, the prosecution may not demand an evaluation of the defendant unless/until the defense gives written notice of an intent to present expert mental health testimony at sentencing on factors in mitigation. Va. Code Ann. §19.2-264.3:1. When such notice is given, the prosecution may have an evaluation to assess "the existence or absence of mitigating circumstances." *Id.* No evaluation of factors in aggravation is permitted. If the defendant refuses to cooperate with an evaluation for the prosecution, the court may bar the presentation of expert mental health testimony for the defense. *Id.* (For a discussion of the constitutionality of this provision, *See*, Bennett, "Is Preclusion Under Va. Code Ann. §19.2-264.3:1 Unconstitutional?" in this issue.)

[12]*Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L. Ed. 2d 53 (1985).

[13]*Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L. Ed. 2d 1247 (1968).

[14]Id.

[15]Id.

[16]*Gibson v. Zahradnick*, 581 F.2d 75 (4th Cir. 1975), *cert. denied*, 439 U.S. 996, 99 S.Ct. 597, 58 L. Ed. 2d 669 (1978).

[17]Va. Code Ann. §19.2-169.7; *see* American Bar Association, *ABA Criminal Justice Mental Health Standards*, Standard 7-3.2 (1989).

[18]*Estelle v. Smith*, supra n. 9.

[19]*Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L. Ed. 2d 434 (1986).

[20]In her opinion for the court, however, Justice O'Connor seemed receptive to the argument. Indeed, as Justice Stevens observed in his dissent, "[t]he record in this case unquestionably demonstrates that petitioner's claim is meritorious.... The Court does not take issue with this conclusion."

[21]Va. Code Ann. §19.2-264.3:1(G).

[22]See Appelbaum, Hypotheticals, Psychiatric Testimony and the Death Sentence, 12 *Bulletin of the American Academy of Psychiatry and Law* 169 (1984); American Bar Association, *ABA Criminal Justice Mental Health Standards*, Standard 7-3.11 (1989).

[23]*Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L. Ed. 2d 336 (1987).

[24]*Penry v. Lynaugh*, 109 S.Ct. 2934, 106 L. Ed. 2d 256 (1989).

[25]*Ake v. Oklahoma*, supra n. 12.

[26]Va. Code Ann. §19.2-264.3:1(D) provides that the evaluation report shall be protected by the attorney-client privilege. When the defense gives notice of an intent to present psychiatric or psychological evidence in mitigation, however, the prosecution must be provided with a copy of the report and "the results of any other evaluation conducted relative to the sentencing proceeding."