



Spring 4-1-1991

## GETTING THE MOST AND GIVING THE LEAST FROM VIRGINIA'S "MENTAL MITIGATION EXPERT" STATUTE

Helen L. Konrad

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlucdj>



Part of the [Criminal Procedure Commons](#), [Fourteenth Amendment Commons](#), and the [Law Enforcement and Corrections Commons](#)

### Recommended Citation

Helen L. Konrad, *GETTING THE MOST AND GIVING THE LEAST FROM VIRGINIA'S "MENTAL MITIGATION EXPERT" STATUTE*, 3 Cap. Def. Dig. 22 (1991).

Available at: <https://scholarlycommons.law.wlu.edu/wlucdj/vol3/iss2/12>

This Article is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Capital Defense Journal by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

<sup>102</sup>Va. Code Ann. § 19.2-264.2 (1990).

<sup>103</sup>See Falkner, *supra* note 4, at 19 (discussing eighth amendment challenges to Virginia's vileness aggravating factor).

<sup>104</sup>See *Lowenfield v. Phelps*, 484 U.S. at 246 (holding that because Louisiana's capital murder scheme performs constitutionally mandated narrowing in guilt phase, additional statutory requirement to find aggravating factors before sentencing defendant to death has no constitutional significance).

<sup>105</sup>See Falkner, *supra* note 4, at 20 (stating that after *Lowenfield* decision, it is unclear whether federal Constitution requires Virginia to have separate list of aggravating factors).

<sup>106</sup>See *id.* (same).

<sup>107</sup>See *id.* (same).

<sup>108</sup>An assumption made only for the purposes of this argument. See Falkner, *supra* note 4, at 20-21 (discussing arguments against *Lowenfield* counter-argument).

<sup>109</sup>See Va. Code Ann. § 19.2-264.2 (1990).

<sup>110</sup>See *Wolff v. McDonnell*, 418 U.S. at 557 (holding that state creation of conditional statutory right to good time implicates federal due process).

<sup>111</sup>See *Paul v. Davis*, 424 U.S. at 710 (stating that when state law has recognized and protected liberty interest, interest attains constitutional status); see also *Wolff v. McDonnell*, 418 U.S. at 557 (where state has accorded citizen liberty interest, state must accord minimum procedures appropriate under circumstances and required by due process clause to insure that liberty interest is not arbitrarily abrogated).

<sup>112</sup>*Greenholtz v. Nebraska Penal Inmates*, 442 U.S. at 13.

<sup>113</sup>See Falkner, *supra* note 4, at 20 (discussing necessity of communicating adequate narrowing constructions of Virginia's statutory aggravating factors to sentencer).

<sup>114</sup>See *Johnson v. Commonwealth*, 220 Va. 146, 149, 255 S.E.2d 525, 526-27 (1979) (With exception of murder for hire, Commonwealth can only seek death penalty against immediate perpetrator of killing), *cert denied*, 450 U.S. 920 (1981).

<sup>115</sup>See Hobart, *supra* note 5, at 23 (discussing Virginia habeas procedure).

<sup>116</sup>See Konrad, *Getting the Most and Giving the Least from Virginia's "Mental Mitigation Expert" Statute*, Capital Defense Digest, this issue (1991).

## GETTING THE MOST AND GIVING THE LEAST FROM VIRGINIA'S "MENTAL MITIGATION EXPERT" STATUTE

BY: HELEN L. KONRAD

When planning the trial strategy for a capital murder case, a mental health expert's assistance can be invaluable. At the same time, it can create unforeseen problems. This paper initially will present the various methods of obtaining mental health expert assistance and will then compare the advantages and disadvantages of each method. The focus, however, will be to decipher Virginia's statutory provision for providing mental health expert assistance, and to explain how the statute works in practice.

The United States Supreme Court has held that the Due Process Clause requires that indigent defendants be provided the "raw materials" and "basic tools" necessary to marshal their defense. In *Ake v. Oklahoma*, the Court more specifically held that the right to a mental health expert is such a "basic tool" and it attaches once the indigent defendant shows that insanity will be a significant factor in his defense.<sup>1</sup> The rationale of *Ake* has been extended beyond cases where sanity is at issue. In a capital case, use of a mental health expert can be a "basic tool" in the presentation of mitigation evidence at the penalty phase of the trial.

*Ake's* progeny, however, holds that before the right to the expert attaches, the defendant must make a detailed and persuasive showing that the expert is necessary and that the defendant would not receive a fair trial without the assistance of the expert.<sup>2</sup> At present no court has explicitly formulated a checklist of what must be included in an *Ake* motion to meet this detailed and persuasive showing. Nonetheless, the following is a synopsis of factors that many courts are currently requiring:

1. Type of expert.
2. Type of assistance.
3. Name, qualifications, fees etc. of the expert.
4. Reasonableness of the cost.
5. Objective bases for the request.
6. Subjective bases for the request.
7. Legal necessity.
8. Legal entitlement to defense experts.
9. Inadequacy of available state experts.
10. Supporting information for all of these factors.<sup>3</sup>

The advantages of seeking expert assistance under *Ake* are really twofold: first, that the attorney is forced to develop a theory of mitigation almost as a condition of receiving the appointment of the expert, and second, that once appointed, the expert operates as a "defense consultant," assisting in the preparation and presentation of the defendant's case.

The disadvantages are first, that despite the constitutional basis for the right, no specific showing can ensure appointment of the expert. Second, this amorphous, yet "basic tool" showing, also must be heavily substantiated. Finally, *Ake* does not give the defendant the right to an expert of the defendant's choosing or even to get the funds to hire an expert of the defendant's choosing.

Unlike the detailed showing required to receive expert assistance under *Ake*, Virginia's three statutory entitlements to receive assistance are less stringent. A capital defendant may receive a competency evaluation, but only to ensure that the defendant has the capacity to understand the proceedings against him or to assist his attorney in his own defense.<sup>4</sup> A capital defendant may also receive a sanity evaluation, but that inquiry is limited to the defendant's sanity at the time of the offense, and only as it is relevant to the presentation of an insanity defense.<sup>5</sup>

Virginia's third statutory entitlement (3:1), and the most important one for a capital defendant, is especially attractive because it automatically provides expert assistance to a defendant merely if (1) he is charged with or convicted of capital murder, and (2) he is indigent.<sup>6</sup> This easy access is both enhanced and undermined by many specific provisions of the statute requiring a more detailed inquiry.

As stated above, an indigent defendant charged with or convicted of capital murder necessitates that the "court appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition."<sup>7</sup> This disjunctive language permits a situation where the indigent defendant is charged with capital murder and petitions the court for a mental health expert. Once the defendant is convicted of capital murder, the attorney moves the court again for another mental health expert on a different issue concerning the defendant's history, char-

acter, or mental condition. Although *Ake* also provides for multiple experts, a distinct detailed showing would be required for each request. Therefore, recourse to multiple experts through 3:1 would be much more expedient.

In addition to determining when a defendant can obtain expert assistance, the statute specifies the topics discoverable through expert assistance. The first two permissible areas of inquiry are the existence or absence of statutory mitigating factors.<sup>8</sup> The remaining inquiry is a more general license to determine the existence or absence of other mitigating factors outside of the statute.<sup>9</sup>

Similar to the pre-trial determination of a mitigation theory necessary to present an adequate *Ake* motion, effective use of 3:1 requires that the attorney investigate and formulate a theory of mitigation and discuss it with the expert prior to the actual evaluation. For example, the defense attorney should tell the evaluator if she suspects that the defendant was abused as a child (under *Ake*, #6 subjective bases), or if the defendant often exhibits improper affect (under *Ake*, #5 objective bases).

When the evaluation is completed, but before any written report is prepared, the attorney should again discuss with the expert the viability of the mitigation theory posited, as well as any specific results obtained. This oral discussion is also necessary so that the attorney may reinvestigate any open issues, and more accurately assess whether or not the expert should be called to testify at all in the defendant's trial. Assuming the expert should be called, the attorney must adequately prepare the expert beyond these initial conversations.

Whether or not the expert testifies, the statute requires that the expert prepare and submit a report to the defendant's attorney.<sup>10</sup> However, given the Commonwealth's potential to discover the report if the expert is called to testify, the report should be carefully drafted. The statute specifically provides that the report include:

the expert's opinion as to (i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense, (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired, and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense.<sup>11</sup>

The first two elements require a conclusion about the existence or absence of statutory mitigating factors. Similarly, the third requirement necessitates a conclusion about the existence or absence of "other factors" relating to the defendant. However, the language of the third requirement does not insist on an elaboration of those other factors — just whether or not any exist. Therefore, this prong can be satisfied completely by a yes or no response. Any specification of what these factors are and how they manifest themselves should only be relayed to the defense attorney orally.

The phrasing of the written report is crucial because the statute requires that the report, and any other evaluations of the defendant's mental condition, be turned over to the Commonwealth if the defendant's attorney notifies the Commonwealth that she intends to "present psychiatric and psychological evidence in mitigation pursuant to subsection E."<sup>12</sup> Because of the broad discovery implications of this provision, several important points are worth noting.

First, if the defense intended to call a mental health expert secured under *Ake* and not under Virginia's 3:1 entitlement, then the defense would still have to notify the Commonwealth, as provided in subsection E. However, the defense would not have to turn over the report generated following the *Ake* evaluation as part of the "other evaluations" because the statute only contemplates complete disclosure when a 3:1 report exists in addition to other evaluations.

Similarly, the disclosure requirement only applies if the defense intends to present mental health expert testimony, as contemplated by subsection E of the statute. In other words, if the defense intends to present lay mental health testimony or no testimony at all, just presentation of various records, then the Commonwealth does not need to be notified nor do the reports and evaluations need to be disclosed.

Finally, the statute provides that the disclosure take place *after* the defense gives the Commonwealth notice of its intent. However, the statute is ambiguous as to how long "after." Because the statute does not say that the disclosure should take place contemporaneously with the notice, the defense attorney should never be compelled to do so. In fact, fairness should compel the attorney to retain any and all reports to be disclosed until the Commonwealth provides discovery that it is constitutionally obligated to disclose, but not required to disclose under any specific time frame.

Beyond acting as a triggering device for the disclosure of reports, the notice provision itself is fraught with problems. The statute expressly states that the notification must occur when the defense "intends, in the event of conviction, to present testimony of an expert witness to support a claim in mitigation."<sup>13</sup> A tenable argument is that the notice of intent, and therefore the disclosure, is required only when the defendant is in fact convicted of capital murder. The actual intent to present expert testimony in the penalty trial might not be definitively decided at an earlier time.

The statute is internally inconsistent, however, because it goes on to specify that this notice of intent should take place "at least twenty-one days before trial," when defense may have no idea whether or not she will present expert testimony at the penalty phase of the trial.<sup>14</sup> Further, if the defense does not provide notice within this time frame, the defense may be precluded from offering the expert testimony. The most rational reading of this inconsistency is that "trial" refers to the penalty trial and not the guilt phase of the capital murder trial. If subsection A can be read that a defense attorney could request a second expert after a conviction, then subsection E could be read that the notice would be provided to the Commonwealth at the time of that second request, with at least a twenty-one day continuance before the penalty trial actually began.

However, if the appointment of a second expert did not occur and the penalty phase immediately followed the conviction, then the requirement to provide notice or risk preclusion of evidence is not constitutionally sound, assuming that the defense has not yet decided whether or not it intends to call the expert. Two United States Supreme Court cases support this proposition. In *Williams v. Florida* the Court upheld a Florida statute requiring the defense to disclose ahead of trial alibi witnesses that it intended to call.<sup>15</sup> Because the defense had never denied that they intended to call those witnesses, the Court reasoned that such a statute does not compel disclosure, it merely accelerates the timing of this disclosure.<sup>16</sup>

Conversely, the United States Supreme Court in *Brooks v. Tennessee* struck down a state rule requiring that a criminal defendant "desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."<sup>17</sup> The Court determined that the rule was "... an impermissible restriction on the defendant's right against self-incrimination, 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.'"<sup>18</sup>

The two cases are not inconsistent because *Williams* permits pre-trial discovery, as long as the defense has solidified its intentions and notifying the prosecution will merely accelerate the prosecution's access to that information. On the other hand, as in *Brooks*, requiring the defendant to testify first or risk forfeiting his right to do so compels the defense to assess the value of the defendant's testimony before defense counsel adequately can determine whether that testimony is really necessary.

Therefore, 3:1's requirement to disclose twenty-one days before trial, an intention to call an expert to testify in the penalty trial is only enforceable if the defense counsel's intentions are in fact certain. If they are not, the defense cannot be compelled to assess the value of the expert's testimony before the moment in which the expert will be called. More accurately in the context of a capital case, a state may not compel a defendant to surrender sixth, eighth, and fourteenth amendment rights if he wants to assert his Fifth Amendment rights.<sup>19</sup>

Virginia's 3:1 does not only threaten preclusion of defense evidence for failing to notify the Commonwealth of an intention to use expert testimony, 3:1 also threatens preclusion of defense expert testimony if the defendant does not cooperate with an independent Commonwealth's expert evaluation of the defendant, as provided in subsection F.<sup>20</sup> The defense should ensure that the Commonwealth's evaluation is in fact independent by refraining from disclosing any of the defense reports required by subsections C and D until after the Commonwealth's evaluation has taken place.

Second, the statute limits the scope of this independent examination to the "existence or absence of mitigating circumstances relating to the defendant's mental condition at the time of the offense."<sup>21</sup> By definition, then, the evaluation cannot include inquiry into future dangerousness. In addition, the defendant should be warned that the Commonwealth's expert is not permitted to go into issues of unrelated acts or crimes.

This warning is especially important because subsection G precludes the Commonwealth's use of any of defendant's statements, or evidence derived from the defendant's statements or disclosures, in its case-in-chief. "Such statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense."<sup>22</sup> As a practical matter, before the Commonwealth makes any use at the penalty trial of information gained through 3:1, defense counsel should request a side-bar and verify exactly what issues in mitigation have been raised by the defense as a means of narrowing what the Commonwealth may rebut.

Although 3:1's initial qualifying requirements are not difficult to meet, as compared to an *Ake* request, the subsequent statutory requirements expose the defense case in mitigation to some pretrial discovery by the Commonwealth. Nevertheless, the assistance provided in 3:1, properly utilized, may be crucial for a capital defendant

and defense attorneys should not be scared away by its potential pitfalls. Rather, a structured strategy should be undertaken to give the Commonwealth no more than the statute clearly requires and the Constitution permits. The Commonwealth can only move beyond the bounds of the statute, as this article has described, if defense attorneys permit it.

<sup>1</sup>*Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

<sup>2</sup>*See Little v. Armentrout*, 835 F.2d 1240, 1245 (8th Cir. 1987) (en banc) (where identification from victim was only evidence linking defendant to crime, and identification came after hypnosis, court reversed and remanded defendant's post-conviction habeas petition which found failure to appoint a hypnotist was not error), *cert. denied*, 487 U.S. 1210 (1988).

<sup>3</sup>Monahan, *Obtaining Funds for Experts in Indigent Cases*, *Champion*, August, 1989.

<sup>4</sup>Va. Code Ann. § 19.2-169.1 (1990).

<sup>5</sup>Va. Code Ann. § 19.2-169.5 (1990).

<sup>6</sup>Va. Code Ann. § 19.2-264.3:1(A) (1990).

<sup>7</sup>Va. Code Ann. § 19.2-264.3:1(A) (1990).

<sup>8</sup>Va. Code Ann. § 19.2-264.3:1(A) (1990).

<sup>9</sup>Va. Code Ann. § 19.2-264.3:1(A) (1990).

<sup>10</sup>Va. Code Ann. § 19.2-264.3:1(C) (1990).

<sup>11</sup>Va. Code Ann. § 19.2-264.3:1(C) (1990).

<sup>12</sup>Va. Code Ann. § 19.2-264.3:1(D) (1990).

<sup>13</sup>Va. Code Ann. § 19.2-264.3:1(E) (1990).

<sup>14</sup>Va. Code Ann. § 19.2-264.3:1(E) (1990).

<sup>15</sup>*Williams v. Florida*, 399 U.S. 78 (1970).

<sup>16</sup>*Williams*, 399 U.S. at 85.

<sup>17</sup>*Brooks v. Tennessee*, 406 U.S. 605, 606 (1972).

<sup>18</sup>*Brooks*, 406 U.S. at 609 (*quoting Malloy v. Hogan*, 378 U.S. 1 (1964)).

<sup>19</sup>*Simmons v. United States*, 390 U.S. 377, 392-94 (1968) (unconstitutional to force defendant to surrender fifth amendment right to raise fourth amendment objection).

<sup>20</sup>Va. Code Ann. § 19.2-264.3:1(F) (1990).

<sup>21</sup>Va. Code Ann. § 19.2-264.3:1(F) (1990).

<sup>22</sup>Va. Code Ann. § 19.2-264.3:1(G) (1990).

## STATUS OF SUPREME COURT CASE LAW HELPFUL TO CAPITAL DEFENDANTS

BY: STEVEN K. HERNDON  
GINGER M. JONAS

The purpose of this article is to assist capital defense counsel in their preparation for future cases by identifying and assessing the current status of Supreme Court cases that have been particularly helpful to capital defendants. First, some of the most useful Supreme Court cases will be highlighted. Against this background, decisions which suggest a retreat by the Court will be evaluated.

In its 1972 decision in *Furman v. Georgia*,<sup>1</sup> the United States Supreme Court held that all death penalty statutes, as applied, were unconstitutional because they failed to guide the sentencer's discretion.<sup>2</sup> In 1976, the Supreme Court struck down North Carolina and Louisiana statutes containing mandatory death sentence provisions, but upheld Georgia, Florida, and Texas death penalty statutes that sufficiently guided the sentencer's discretion.<sup>3</sup>

The 1976 decisions outlined the fundamental eighth amendment requirements that death penalty statutes must comply with in order to pass constitutional scrutiny. The constitutionally required elements are that a statute must narrow the class of death eligible defendants,

and guide the jury's discretion to ensure an individualized determination on the appropriateness of the death sentence.<sup>4</sup> Since 1976, the Court has further defined these principles, and subsequently established the present constitutional boundaries of these fundamental eighth amendment requirements.

### AGGRAVATING FACTORS

#### I. Vague Statutory Aggravating Factors:

One of the approved means to guide jury discretion is to allow the sentencer to consider certain factors that aggravate a homicide, thereby setting it apart from an ordinary murder.<sup>5</sup> However, some of the general statutory terms employed for this purpose may be constitutionally deficient.

In *Godfrey v. Georgia*,<sup>6</sup> the Supreme Court held that a Georgia trial court's application of an unconstitutionally vague aggravating