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DOUGLAS S. COLLICA

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# ALICE IN WONDERLAND INTERPRETATIONS: RETHINKING THE USE OF MENTAL MITIGATION EXPERTS

BY: DOUGLAS S. COLLICA

## I. Introduction

Virginia Code section 19.2-264.3:1 (hereinafter "3:1") appears to be a valuable tool to assist in developing and presenting evidence in mitigation—and it can be. Recent interpretations of the statute by the Fourth Circuit Court of Appeals, however, are so bizarre that they call for attorneys to rethink the use of 3:1 and mental health experts granted under that statute. Specifically, counsel may wish to give more serious consideration to making full use of the expert provided under 3:1 short of offering the expert's testimony. In any event, a record must be made and issues preserved in the hope that the Fourth Circuit Court of Appeal erroneous rulings discussed below will someday be reviewed by the United States Supreme Court. Further, the effective use of the statute presents numerous trial and tactical choices that must be intelligently made in each case. This article will introduce counsel to all of these issues.

## II. The Statute and its Relation to Tactical Decisions

### A. The Statute

#### 1. Who?

Section 3:1 provides one or more court-appointed mental health experts for indigent defendants charged with capital murder.<sup>1</sup> 3:1 does not require absolute indigency, only a showing that the defendant is unable to pay for the experts. 3:1 does not limit defendants to one such expert, and more than one expert may be appointed under the statute or in conjunction with appointment under *Ake v. Oklahoma*.<sup>2</sup> The statute provides a broad mandate as to the role of appointed experts.<sup>3</sup> 3:1 experts are to be members of the defense team, not neutral evaluators. And while the statute provides that the defendant is not entitled to the expert of his choice, proper preparation can increase the likelihood of that result. Defense counsel should have previously consulted with available experts, have particular candidates in mind, and make the availability and suitability of these experts known to the court. The statute makes no mention of, and does not envision, any involvement by the Commonwealth in this matter.

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

<sup>2</sup> 470 U.S. 68 (1985). In *Ake*, the Court held that the Due Process Clause requires that indigent defendants be provided the "raw materials" and "basic tools" necessary to marshal their defense. *Id.* at 77 (citations omitted). The Court further held that mental health experts are "basic tools" and the right to such an expert attaches once an indigent defendant shows that insanity will be a significant factor in his defense. *Id.* at 82-83. Virginia has recognized that the holding of *Ake*, as clarified in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (defendants have the right to the "basic tools of an adequate defense") applies to other types of experts. *Husske v. Commonwealth*, 1996 WL 517738 at \*5 (Va. Sept. 13, 1996).

<sup>3</sup> According to the statute, the defense expert appointed under 3:1 is "to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition, including (i) whether the defendant acted under extreme

## 2. The Report

Mental health experts appointed under 3:1 are required, under subsection (C), to submit a written report to defense counsel. This "section (C) report" must contain 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>4</sup>

An important threshold decision concerns the content of this report. It comes initially only to defense counsel and is protected by attorney-client privilege.<sup>5</sup> As discussed below, however, the report may later come into the hands of the Commonwealth's Attorney and a prosecution expert.

Consequently, it is important that counsel maintain a good relationship with the 3:1 expert. The expert may naturally be inclined to produce a very lengthy report to demonstrate the thoroughness of the evaluation. This, however, is not necessary. By the language of the statute, the written report need only contain basic yes or no answers to the questions posed in the statute and noted above. For example, in answering whether there are other factors in mitigation, the answer given in the report may simply be "there are." In fact, while defense counsel will want to have very detailed verbal communications with the expert, it is probably a good idea, at the outset, to stress to the expert the very minimal statutory requirements of the written report.<sup>6</sup>

## 3. Testimony by Defense Expert?

The tactical decisions made in addressing the above issues become important because counsel must now decide whether to have the expert testify in the event of a penalty trial, or to continue using the expert without having the expert give testimony. The consequences of this decision are discussed below.

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 at the time of the offense; 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." Va. Code Ann. § 19.2-264.3:1(A) (emphasis added).

<sup>4</sup> Va. Code Ann. § 19.2-264.3:1(C).

<sup>5</sup> Va. Code Ann. § 19.2-264.3:1(D).

<sup>6</sup> It is also important that counsel first do their own complete investigation, conceptualize a preliminary theory of mitigation, and discuss this theory with the expert before the expert conducts her evaluation. See Konrad, *Getting The Most And Giving The Least From Virginia's "Mental Mitigation Expert" Statute*, Capital Defense Digest, vol. 3, no. 2, p. 22 (1991).

The first consequence of deciding to have the 3:1 expert give testimony is that the Commonwealth may obtain reciprocal examination of the defendant. Once the defense intends to present testimony of an expert witness to support a claim in mitigation, defense counsel must notify the attorney for the Commonwealth.<sup>7</sup> The Commonwealth may then seek an evaluation by its own mental health expert. If defense counsel has given notice and the Commonwealth requests this reciprocal evaluation, the court shall appoint one or more qualified experts to perform such an evaluation.<sup>8</sup> The court shall then also order the defendant to submit to such an evaluation, and advise the defendant that a refusal to cooperate with the Commonwealth's expert could result in exclusion of the defendant's expert evidence.<sup>9</sup>

The text of 3:1 would appear to limit the scope of this reciprocal examination to that "concerning the existence or absence of mitigating circumstances relating to the defendant's mental condition at the time of the offense."<sup>10</sup> It would not appear to be intended as an opportunity for the Commonwealth to exhaustively search for evidence that might support a claim of future dangerousness.<sup>11</sup> The Commonwealth's expert is required to submit, to the attorney for the Commonwealth, a written report containing the expert's findings and opinions.<sup>12</sup> However, 3:1 does not require the Commonwealth to provide the defendant with this report or copies of any psychiatric, psychological, medical or other records obtained during the evaluation. Nor does the statute require the Commonwealth to give notice to the defendant of the intent to present testimony of its mental health expert.

Another consequence of the decision to have the expert testify is the requirement to turn over to the Commonwealth the section (C) report and other reports.

As noted, the need to keep the written report as minimal as allowable is due to the fact that the report can end up in the hands of the Commonwealth's Attorney. After the defense has given notice of the intent to present testimony of an expert witness to support a claim in mitigation, defense counsel must then give the Commonwealth's Attorney a copy of the section (C) report "and the results of any other evaluation of the defendant's mental condition conducted relative to the sentencing proceeding and copies of psychiatric, psychological, medical or other records obtained during the course of such evaluation."<sup>13</sup> Note that the statute does not specify how soon after giving notice the defense must turn over its section (C) report and other reports. It is only fair that defense counsel not give the Commonwealth copies of the reports until after the Commonwealth has conducted its evaluation of the defendant.

The requirement that defendants who present testimony of a 3:1 expert give the Commonwealth a copy of the expert's report places these

defendants at a great disadvantage in comparison to defendants who are able to hire their own experts or who obtain such expert assistance under *Ake*. While defendants with retained experts or experts appointed under *Ake* also must give notice to the Commonwealth of their intent to present expert mitigation evidence, the requirement to turn over to the Commonwealth the expert's report arguably does not apply because the disclosure provision envisions only the report required by 3:1 and other records obtained during the course of the 3:1 evaluation.

#### 4. Limits on Commonwealth Reciprocal Expert

The statute contains an important limitation on the Commonwealth's use of any evaluation performed by its mental health expert. The Commonwealth may not introduce, at the sentencing phase, and for the purpose of proving either vileness or future dangerousness, any of the defendant's statements or disclosures or any evidence derived from such statements or disclosures. According to the statute, "[s]uch statements or disclosures shall be admissible only in rebuttal and only when relevant to issues in mitigation raised by the defense."<sup>14</sup> These limitations, however, are not self-executing. Defense counsel must be vigilant to confine evidence and testimony of the Commonwealth's expert to "rebuttal." "Rebuttal" in this sense should not mean, for example, that as soon as the defense has introduced testimony that the defendant is ordinarily a nice guy, the Commonwealth may then introduce expert testimony, derived from the defendant's statements or disclosures, that he will be dangerous in the future.

#### B. The Statute and its Relation to Constitutional Requirements

##### 1. The Defendant's Right to Have the "Basic Tools" Necessary For His Defense

The Virginia statute was enacted in the aftermath of *Ake v. Oklahoma*.<sup>15</sup> The United States Supreme Court has held that Due Process requires that indigent defendants be provided the "raw materials"<sup>16</sup> and "basic tools" necessary to marshal their defense.<sup>17</sup> In *Ake*, the Court held that mental health experts are such "basic tools" in cases where sanity will be a significant factor in the defense.<sup>18</sup> In capital cases, mental health experts can be "basic tools" in the preparation and presentation of mitigation evidence to be introduced at the penalty phase of the trial. Appointment of a mental health expert under *Ake* requires a substantial

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

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

<sup>9</sup> *Id.* Note, however, that as to the latter, the defendant must first be advised, in open court, that his refusal to cooperate may be grounds for the preclusion of the testimony of his own expert. The threatened exclusion of the defendant's mental mitigation expert evidence raises several constitutional issues which will not be addressed in this article. For a discussion of these constitutional concerns see Bennett, *Is Preclusion Under Va. Code Ann. § 19.2-264.3:1 Unconstitutional?*, Capital Defense Digest, vol. 2, no. 1, p. 24 (1989). Notice of the intent to prevent expert testimony is to be given 21 days prior to trial and the statute also authorizes preclusion of defense evidence for failure to comply with this provision. Va. Code Ann. § 19.2-264.3:1(E).

<sup>10</sup> Va. Code Ann. § 19.2-264.3:1(F)(1). Compare Va. Code Ann. § 19.2-264.3:1(A). See also note 3 (discussing the broader scope of the defense expert's mandate).

<sup>11</sup> One of the two possible factors the Commonwealth must prove beyond a reasonable doubt to render the defendant eligible for the death penalty is "that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that [the defendant] would commit criminal acts of violence that would constitute a continuing serious threat to society." Va. Code Ann. § 19.2-264.4(C).

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

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

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

<sup>15</sup> 470 U.S. 68 (1985).

<sup>16</sup> *Id.* at 77.

<sup>17</sup> *Id.* (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)).

<sup>18</sup> *Id.* at 82-83. As noted earlier, the Supreme Court of Virginia held in *Husske* that the *Ake* holding applies to other types of experts. *Supra*, n. 2.

and detailed showing by the defendant.<sup>19</sup> Virginia's statutory entitlements are less stringent. 3:1 mandates expert assistance to defendants who must show only that they are charged with capital murder and are unable to pay for such an expert.

## 2. What Does Defendant Say to Commonwealth's Expert and How Can It Be Used?

Is the Commonwealth's reciprocal expert the equivalent of an interrogating law enforcement officer? Does the defendant have a Fifth Amendment right to remain silent and the right to advice of counsel at this examination? Can these rights be waived? The answer to all of these questions is "yes." Two questions arise, however: What constitutes a waiver of these rights? What are the consequences of failure to waive?

In *Estelle v. Smith*,<sup>20</sup> the defendant was charged with capital murder and the court ordered a psychiatric examination to determine his competency to stand trial. Defense counsel was not notified of the competency evaluation. During the competency examination the defendant gave statements to the psychiatrist. After conviction and during the penalty trial, the State put the psychiatrist on the stand as an expert witness. He testified that based on his evaluation of the defendant during the competency examination, he believed the defendant was a future danger.<sup>21</sup>

The Supreme Court held that the Fifth Amendment protection against compelled self-incrimination applies at the penalty phase of capital murder trials.<sup>22</sup> Consequently, *Miranda* warnings must be given to capital defendants before they are examined by mental health experts for the State. If a capital defendant is not informed of his right to remain silent and that anything he says to the expert can, and will, be used against him, then the State may not present any testimony by that expert that rests on the defendant's statements made during the examination.<sup>23</sup>

United States Supreme Court precedent suggests that waiver and submission to examination by the State's expert may be a prerequisite for defendants who wish to put on expert testimony in support of a mental state defense. In *Estelle*, the Court hinted that such a requirement might be the only practicable way to put the defendant's expert mental mitigation evidence to sufficient adversarial testing. The Court noted that when a defendant does introduce psychiatric evidence to support his defense, his silence may deprive the State of the only effective means of controverting his proof. Accordingly a defendant may be required to submit to an examination by the State's mental health expert.<sup>24</sup>

<sup>19</sup> While no court has explicitly formulated a checklist of what must be included in an *Ake* motion, many courts require a showing as to the following factors: (1) type of expert; (2) type of assistance; (3) name, qualifications, and fees 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; and (10) supporting information for all of these factors. Konrad, *supra* note 6, at 22 (citing Monahan, *Obtaining Funds For Experts In Indigent Cases*, Champion, August, 1989). It should be noted, however, that because the detailed showing required under *Ake* cannot be made without revealing defense theories and other privileged or otherwise undiscoverable material, defense counsel should be permitted to make the showing *ex parte*. A brief and memorandum of law in support of the right to proceed *ex parte* is available from the Virginia Capital Case Clearinghouse.

<sup>20</sup> *Estelle v. Smith*, 451 U.S. 454 (1981).

<sup>21</sup> *Id.* at 456-457, 459-60.

<sup>22</sup> *Id.* at 463.

<sup>23</sup> *Id.* at 468-69.

<sup>24</sup> *Id.* at 472.

<sup>25</sup> 483 U.S. 402 (1987).

The Supreme Court made this clear in *Buchanan v. Kentucky*,<sup>25</sup> which involved defense expert evidence in support of the defense of extreme mental or emotional disturbance, which could be sufficient to reduce the offense from murder to manslaughter.<sup>26</sup> The Court held that a defendant who has interjected the issue of a mental defense has waived, at least in part, his Fifth Amendment privilege against self-incrimination. At the very least, the State may rebut the defendant's mental defense evidence with evidence from the reports of the examination with the defendant's own expert. Furthermore, such defendants may be compelled to submit to a reciprocal examination by the State's mental health expert.<sup>27</sup>

The United States Supreme Court has not held, however, that waiving Fifth Amendment protection is a prerequisite to putting on expert testimony in mitigation at a capital penalty trial. In fact, the Court has not looked kindly on any procedural barriers to the presentation of mitigation evidence.<sup>28</sup>

Thus, notwithstanding the preclusion sanctions authorized in 3:1 and the likely requirement that Fifth Amendment rights are waived as a condition precedent to presentation of a mental state defense such as insanity or extreme mental or emotional disturbance, it is by no means settled law that capital defendants must, or do, waive their rights relative to their penalty trial evidence.

## 3. The Right to Notice and the Role of Defense Counsel Regarding the Commonwealth's Reciprocal Examination

In addition to the Fifth Amendment protections discussed above, once formal charges have been brought against a defendant, the defendant has full blown Sixth Amendment rights. The Sixth Amendment right to assistance of counsel requires effective assistance of counsel, which, in turn, requires that capital defense counsel be notified, in advance, that the defendant is to be examined by a mental health expert for the State, and that the examination will encompass the issue of future dangerousness. The defendant must have "the assistance of [counsel] in making the significant decision of whether to submit to the examination and to what end the [State expert's] findings could be employed."<sup>29</sup> In *Powell v. Texas*<sup>30</sup> and *Satterwhite v. Texas*,<sup>31</sup> the Supreme Court spoke again on the implications of the Sixth Amendment to capital defendants ordered to submit to State mental health expert examinations. The Court

<sup>26</sup> *Id.* at 423.

<sup>27</sup> *Id.* at 422-24.

<sup>28</sup> See *Lockett v. Ohio*, 438 U.S. 586 (1978) (requiring death penalty schemes to allow consideration as mitigating factor any aspect of defendant's character or record and any circumstances of the offense that defendant proffers as basis for sentence less than death); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (finding constitutional error in sentencing court's conclusion that it could not consider defendant's troubled family history as mitigating factor); *Mills v. Maryland*, 486 U.S. 367 (1988) (holding unconstitutional death penalty sentencing instructions which reasonable juror could interpret as requiring unanimous jury finding on presence of mitigating factors); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (finding error where trial court's instructions did not allow jury to consider, as mitigating factors, evidence of defendant's mental retardation and childhood abuse); and *McKoy v. North Carolina*, 494 U.S. 433 (1990) (striking down statute that precluded consideration of mitigating factor unless all jurors found it to be present).

<sup>29</sup> *Estelle*, 451 U.S. at 471.

<sup>30</sup> 492 U.S. 680 (1989).

<sup>31</sup> 486 U.S. 249 (1988).

held that defense counsel must be given clear notice of the purpose and scope of the examination.<sup>32</sup>

In *Estelle*, the Commonwealth's expert had examined the defendant and submitted a report to the court in which the expert termed the defendant "a very severe sociopath."<sup>33</sup> Even though defense counsel were aware that the expert's report had been submitted and was located in the trial court's file of the case, the Court held that there had not been clear notice because counsel were not notified in advance that the examination would encompass the issue of the defendant's future dangerousness.<sup>34</sup>

The Court re-emphasized the notice requirement in *Powell* and *Satterwhite*. In *Powell*, the Court stated that it recognized that the notice required by the Sixth Amendment was a separate and distinct question from that of the waiver of Fifth Amendment privileges. The Court explained that in *Buchanan* it had addressed the separate Sixth Amendment issue and concluded that "on the facts of that case, counsel knew what the scope of the examination would be before it took place."<sup>35</sup> The *Powell* Court then held that where defense counsel did not know that the Commonwealth's examination would involve the specific issue of future dangerousness, the notice was insufficient under the Sixth Amendment.<sup>36</sup> In *Satterwhite*, the trial judge granted the State's motion to examine the defendant to determine, among other things, the defendant's future dangerousness. The expert reported to the court in a letter that in his opinion the defendant had a severe antisocial personality disorder, was extremely dangerous, and would commit future acts of violence.<sup>37</sup> The State's motion, the court's order, and the expert's letter were in the trial court's file of the case. Even so, the Court held that such constructive notice to defense counsel did not satisfy the clear notice requirement of the Sixth Amendment.<sup>38</sup>

Application of these rules to Virginia's death penalty scheme would certainly not suggest that the "clear notice of purpose and scope" requirement is satisfied by the Commonwealth's request for reciprocal examination. As mentioned, the language of the statute itself would seem to forbid evaluating for future dangerousness at all.<sup>39</sup>

Once the question of sufficient notice is settled, unanswered issues remain regarding the defendant's Sixth Amendment right to counsel. The defendant's Fifth Amendment right to counsel under *Estelle* entitles him to advice on whether and how to communicate with the Commonwealth's expert. It is likely that the full Sixth Amendment right to counsel, which emerges after formal charging, must encompass more. Similar to the post-indictment right to be present at lineups,<sup>40</sup> for example, it is

arguable that defense counsel have the right to be present at the Commonwealth's evaluation.

### III. Off With Their Heads! The Fourth Circuit Interprets 3:1

#### A. The Distinction Between "Defense" and "Mitigation"

The Supreme Court of Virginia and the Fourth Circuit Court of Appeals have resolved the waiver issue against capital defendants in a way that ignores the important distinction between fairness to the Commonwealth when the defendant is asserting a defense, and the presentation of mitigation evidence. Nevertheless, under *Estelle* and *Buchanan* these are questions about which reasonable jurists could differ.

On the question of notice to counsel, the scope of the Commonwealth's examination, and permissible limits to the Commonwealth's expert's testimony, however, recent holdings of the Fourth Circuit Court of Appeals are so bizarre as to require a complete rethinking of the use of 3:1 experts.

Against the constitutional backdrop outlined above, the Fourth Circuit Court of Appeals recently decided *Payne v. Netherland*<sup>41</sup> and *Savino v. Murray*.<sup>42</sup>

The court, without recognizing or discussing the important distinction between mental state defenses and capital mitigation evidence, relied on *Estelle* and *Buchanan* to find that waiver of Fifth Amendment rights was required and had occurred.<sup>43</sup> As noted, this is a question also left unsettled by the United States Supreme Court, but is one about which reasonable persons could differ.<sup>44</sup>

The court's holdings with respect to the notice requirement and other aspects of the plain language of 3:1, however, were so bizarre as to require a complete rethinking by defense counsel of how best to use the resource provided by the statute.

*Payne* was a case in which, prior to the enactment of 3:1, defense counsel requested an evaluation of the client to determine his competency to stand trial. Somehow, the Fourth Circuit Court of Appeals decided that this provided the "purpose and scope" notice that the Commonwealth's expert would examine the defendant on and testify to future dangerousness, as constitutionally required by *Estelle*, *Powell* and *Satterwhite*. In *Payne*, the Fourth Circuit Court of Appeals held that the Commonwealth could introduce against the defendant, for the purpose of proving future dangerousness during its case in chief at the penalty trial,

<sup>32</sup> *Powell*, 492 U.S. at 685; *Satterwhite*, 486 U.S. at 255-256.

<sup>33</sup> *Estelle*, 451 U.S. at 459.

<sup>34</sup> *Id.* at 470-71.

<sup>35</sup> *Powell*, 492 U.S. at 685.

<sup>36</sup> *Id.*

<sup>37</sup> *Satterwhite*, 486 U.S. at 253.

<sup>38</sup> *Id.* at 255.

<sup>39</sup> In *Stewart v. Commonwealth*, 245 Va. 222, 243-47, 427 S.E.2d 394, 407-08 (1993), the Supreme Court of Virginia appeared to hold otherwise, saying that 3:1 permits the Commonwealth's expert to evaluate future dangerousness as well.

<sup>40</sup> *United States v. Wade*, 388 U.S. 218 (1967) (holding that post-indictment lineup was critical stage of prosecution at which defendant was as much entitled to aid of counsel as at trial itself; thus both defendant and counsel should have been notified of impending lineup, and counsel's presence should have been requisite to conduct of lineup, in absence of intelligent waiver). See also *Kirby v. Illinois*, 406 U.S. 682, 690 (1972)

(holding that police station showup after arrest but before indictment or other formal charges was not "criminal prosecution" at which petitioner had constitutional right to be represented by counsel.

<sup>41</sup> 1996 WL 467642 (4th Cir. (Va.) Aug. 19, 1996) (unpublished table opinion). See also case summary of *Payne*, Capital Defense Journal, this issue.

<sup>42</sup> 82 F.3d 593 (4th Cir. 1996). See also case summary of *Savino*, Capital Defense Journal, this issue.

<sup>43</sup> *Payne*, 1996 WL 467642 at \*5; *Savino*, 82 F.3d at 604.

<sup>44</sup> The court was considerably less clear about what constitutes a waiver and when it occurred. In *Savino*, the court stated that "[i]n essence, the defendant waives his right to remain silent . . . by indicating that he intends to introduce psychiatric testimony." 82 F.3d at 604. However, in *Payne* the court held that under the reasoning of *Savino* waiver occurred when "[the defendant] introduced the psychiatric evidence relating to his future dangerousness." 1996 WL 467642 at \*5 (emphasis added).

testimony by the Commonwealth's psychologist who had conducted the competency evaluation. The expert testified that it was his opinion that the defendant constituted a continuing serious threat to society. The expert also testified that his opinion was based on the defendant's past criminal history, other scrapes with the law, and the circumstances of the present crime.<sup>45</sup>

A competency evaluation is neither an effort to establish a "mental state defense," nor even "mental mitigation." It is a question on which the law requires all parties to have an interest.<sup>46</sup> A competency evaluation provides no adversarial advantage to anyone and it is inconceivable that the court could find a request for such an evaluation to equal notice that it would produce future dangerousness testimony. Certainly, the *Estelle* line of cases does not give clear notice that a competency evaluation will encompass the issue of the defendant's future dangerousness. Neither does 3:1 give such notice.

In addition to reinforcing its suspect interpretations concerning notice and waiver,<sup>47</sup> the court, in *Savino*, showed how permissive it would be toward the Commonwealth's expert, even when future dangerousness testimony is given first, during the Commonwealth's case in chief, rather than in rebuttal. In *Savino*, the prosecution's expert testified, during the Commonwealth's case in chief at the penalty trial, that it was his opinion that there was a "high probability that Savino would be a future danger to society."<sup>48</sup> The expert also testified that his opinion was not based on statements made by Savino, but was instead formulated on the basis of three independent factors: Savino's previous criminal history, the nature of the crime, and Savino's history of drug abuse.<sup>49</sup> The court credited this account in spite of the fact that it was revealed that the report prepared by the Commonwealth's expert contained references to statements made by Savino during the evaluation.<sup>50</sup> Rather than viewing this as casting doubt on the expert's credibility, the court seemed more concerned that it was revealed during cross-examination of the defense expert.<sup>51</sup> The Fourth Circuit Court of Appeals held that 3:1 differentiates between a defendant's statements, and an expert's opinion based upon such statements. The court held that neither 3:1 nor the Constitution precluded the introduction of the opinion testimony of the Commonwealth's expert.<sup>52</sup>

If mere assertion of non-reliance on statements or evidence derived therefrom is to be so casually accepted, it is another indication that the best course of action may be to insulate the client altogether from examination by prosecution experts.<sup>53</sup>

#### IV. Conclusion

Unless and until the United States Supreme Court grants *certiorari* to review the interpretations contained in *Savino* and *Payne* in light of its established constitutional requirements, the two cases call for rethinking several aspects of the use of 3:1.

First, it calls for rethinking the choice of whether it is essential that the expert actually testify. Counsel can still make very effective use of the mental mitigation expert without subjecting the defendant to examination by an expert for the Commonwealth. The expert can be of tremendous assistance in helping defense counsel to investigate and interpret the significance of the family history and other life experiences of the defendant. The expert can also help to formulate the theory of mitigation and assist in the preparation for presenting the mitigation story. However, the expert does not have to be the one to relate that story to the jury. Lay witnesses, such as family members and friends, school teachers, and correctional facility employees may be able to tell the mitigation story, and do so in a more convincing fashion. In addition, if defense counsel encounters testimony of a mental health expert for the Commonwealth who has not interviewed the defendant but will testify to the defendant's future dangerousness, the defense's mental health expert could be an invaluable resource in assisting defense counsel in preparation for cross-examination of the Commonwealth's expert.

Second, if defense expert testimony is deemed essential, make intelligent tactical choices concerning disclosure of reports, how the client will deal with the Commonwealth's expert, assertion of Sixth Amendment counsel function such as presence at the Commonwealth's evaluation, and confining the Commonwealth's evidence to rebuttal.

Third, make an appellate record on Sixth, Eighth and Fourteenth Amendment grounds ensuring that the record reflects, at a minimum, objections to (a) insufficient notice, and (b) any barriers to full presentation of the defense's case in mitigation.

Joseph Savino is dead. Joe Payne's death sentence was commuted at the last moment. The present import of the use and misuse of expert testimony by the Commonwealth will remain unknown. These cases serve as a warning to the defense community, however, that every effort must be made to enforce the strictures of the law forbidding the casual and unchallenged use of questionable evidence designed to play upon the fears of jurors.

<sup>45</sup> *Id.* at \*2.

<sup>46</sup> The United States Supreme Court has "repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.'" *Cooper v. Oklahoma*, 116 S.Ct. 1373, 1376 (quoting *Medina v. California*, 505 U.S. 437, 453 (1992); *Drope v. Missouri*, 420 U.S. 162, 171-172, (1975); *Pate v. Robinson*, 383 U.S. 375, 378 (1966)). The Court has also stated that "the significance of this right [is not] open to dispute . . . . Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *Id.* at 1376-77 (quoting *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975); *Riggins v. Nevada*, 504 U.S. 127, 139-140 (1992) (concurring opinion of Justice Kennedy)). The Court has held that "the right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination." *Id.* at 1377 n.4 (cita-

tions omitted).

<sup>47</sup> In *Savino*, the Fourth Circuit held that 3:1, both on its face and by its operation, provides defense counsel with adequate notice that the defendant waives his Fifth Amendment rights by requesting a psychiatric evaluation pursuant to the statute. 82 F.3d at 604.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 605.

<sup>50</sup> *Id.*

<sup>51</sup> *Savino*, at 82 F.3d 605.

<sup>52</sup> *Id.* at 603, 605.

<sup>53</sup> Even this may not guarantee that the defense will not face expert testimony on future dangerousness from prosecution experts who have not interviewed the defendant at all. That is what the prosecution's expert in Texas, Dr. Grigson, turned to after *Estelle*. At least, however, the task of undermining the credibility of such testimony should be easier, especially with the assistance of a non-testifying defense expert.

