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Rotten Social Background Revisited

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I. Introduction

The Eighth Amendment to the United States Constitution mandates that "cruel and unusual punishments" may not be inflicted.[1] To ensure that this constitutional mandate is fulfilled, the convicted capital defendant's sentence must be narrowly tailored in such a way that punishment is individualized to that particular defendant. According to the United States Supreme Court, included in the requirements of the Eighth and Fourteenth Amendments is the requirement that sentencing bodies consider mitigating factors individual to each capital defendant.[2] Although one's socioeconomic status and childhood upbringing have a significant effect on one's behavior and value system, there is still much dispute between defense and prosecution attorneys, as well as among judges, as to what role these factors should play in the context of a criminal trial. Recently, in *Williams v. Taylor*,[3] the United States Supreme Court helped to clarify this issue by declaring that a defendant has a constitutionally guaranteed right to present evidence during the sentencing phase of his capital murder trial of his "nightmarish" childhood, as well as evidence that he has border-line mental retardation.[4]

II. History of "Rotten Social Background"–United States v. Alexander

Rotten Social Background evidence consists of evidence of the defendant's childhood, including squalor, abuse, abandonment, and alcoholism. Judge Bazelon of the United States Court of Appeals for the District of Columbia first raised the idea of using Rotten Social Background evidence as a defense in his

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1. U.S. CONST. amend. VIII.

2. *See* Williams v. Taylor, 529 U.S. 362, 397 (2000) (holding that the defendant had a valid ineffective assistance of counsel claim where defendant's attorney failed to present evidence of his troubled childhood during sentencing phase of capital murder trial); Lockett v. Ohio, 438 U.S. 586, 607 (1978) (explaining that the jury should not be prevented from considering any evidence the defendant proffers regarding his character or record as a mitigating factor).

3. 529 U.S. 362 (2000).

4. *Williams*, 529 U.S. at 395.

dissent in *United States v. Alexander*[5] in 1972.[6] Judge Bazelon expanded upon the "Rotten Social Background," first used by the defense psychiatrist, to describe conditions of socioeconomic and environmental adversity.[7] In *Alexander*, the defendant, Murdock, shot and killed a Marine after the Marine called the defendant a "black bastard."[8] Although the defense psychiatrist would not label Murdock insane, the psychiatrist testified that Murdock suffered from an inability to control his behavior because of his "rotten social background."[9] The defense presented evidence showing that the defendant had suffered from a deprived childhood in the Watts area of Los Angeles, California, and that because he had been subjected to racist treatment in the past, he had learned to fear white people.[10] However, the trial judge instructed the jury to consider only whether Murdock's state of mind met the legal standard for insanity.[11] The judge also instructed the jury to disregard testimony about Murdock's "rotten social background."[12] The jury found the defendant sane and sentenced him to twenty years to life in prison.[13]

In his dissent, Judge Bazelon proposed that the trial judge's rejection of Rotten Social Background evidence may have resulted in an unfair trial for the defendant because the defendant was not able to use this evidence to show he lacked moral responsibility for the murder.[14] Judge Bazelon suggested that, although the defendant's mental impairment was not severe enough to render him insane, the jury might have acquitted him after hearing all of the evidence of his background.[15] Judge Bazelon also suggested that, by allowing this type of background evidence into trials, the court would be accepting its "first-line

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5. 471 F.2d 923 (D.C. Cir. 1973).

6. United States v. Alexander, 471 F.2d 923, 961 (D.C. Cir. 1973) (Bazelon, C.J., dissenting) (stating in his dissent that the jury should have been allowed to consider evidence of the defendant's troubled childhood).

7. *Id.* at 959.

8. *Id.* at 929.

9. *Id.* at 958-59. There are several tests for the insanity defense. Virginia employs the M'Naghten test, which states that the defendant must show that at the time of the offense he was suffering from a defect of reason caused by a disease of mind, such that he did not know the nature and consequences of his act, or that it was wrong. *See* Dejarnette v. Commonwealth, 75 Va. 867, 878 (1881); *see M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843). Under the Model Penal Code's test, insanity is proven by showing that, because of the defendant's mental disease or impairment, he "lacked substantial capacity to appreciate the [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (Official Draft 1985).

10. *Alexander*, 471 F.2d at 958-59.

11. *Id.*

12. *Id.*

13. *Id.* at 927.

14. *Id.* at 960.

15. *Alexander*, 471 F.2d at 958-59.

responsibility for probing and coping" with various societal problems such as racism.[16]

III. Rejecting Rotten Social Background as a Defense

To understand the role Rotten Social Background evidence might play in a capital case, it is important to think about the basic structure of the criminal system. A crime is "an act or omission and its accompanying state of mind which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community."[17] When one's mental state and actions fulfill certain statutorily proscribed elements of a particular crime, he has committed a criminal offense. However, unless the defendant is morally blameworthy, criminal sanctions are usually not applicable.[18] If there are "defenses" that may negate criminal responsibility, these must be taken into consideration in order to determine what, if any, sanctions are appropriate. There are four broad types of defenses.[19] Justification defenses refer to behavior which, because of the particular circumstances, is socially acceptable rather than criminal.[20] Self-defense is one type of justification defense. A second type of defense is the specialized defense, such as "abandonment" or "legal impossibility," which applies to only a few crimes.[21] Nonexculpatory defenses are based on considerations unrelated to the defendant's guilt or innocence, such as statutes of limitation, diplomatic immunity, and infancy.[22] Excuse defenses, on the other hand, acknowledge that while the conduct was wrongful, the defendant is not morally blameworthy.[23] Excuse defenses can be used to negate or mitigate criminal liability.[24] One such defense is the insanity excuse.[25]

In 1985, Richard Delgado wrote an article that examined the viability of using Rotten Social Background as a defense.[26] In his article, Delgado focused

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16. *See id.* at 926 (stating that "[w]e cannot rationally decry crime and brutality and racial animosity without at the same time struggling to enhance the fairness and integrity of the criminal justice system").

17. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 1.01 (2d ed. 1995) (internal quotations omitted) (quoting Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958)).

18. *Id.*

19. *Id.* at 182-84.

20. *Id.* at 182-83.

21. *Id.* at 183-84.

22. *See* Paul Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 229-32 (1982) (stating that nonexculpatory defenses are based on "purely public policy arguments" rather than on the defendant's innocence).

23. *Id.*

24. *See* R. Kent Greenawalt, *Violence-Legal Justification and Moral Appraisal*, 32 EMORY L.J. 437, 442 (1983) (stating that although a defendant's actions were wrong, he may not be morally blameworthy because of "notions of social morality").

25. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 16.03 (2d ed. 1995).

26. Richard Delgado, *Rotten Social Background: Should the Criminal Law Recognize a Defense of*

primarily on the excuse defense, in which the defendant admits to committing the offense, but contends that his blameworthiness is diminished by an excusing factor.[27] Delgado argued that a defendant who has had a Rotten Social Background may not be subjectively at fault; thus his behavior should be excused.[28]

Using Rotten Social Background as a defense treads very close to the use of many other "abuse excuse" defenses. These defenses seek to excuse the behavior of a victim toward the victimizer.[29] These excuses are often dubbed "syndrome" excuses, and they rely on an extrapolation from the general to the specific.[30] Syndromes may be traced to physical and psychological causes, and have predictable effects on behavior, so that experts can identify and label those who suffer from the syndrome.[31]

"Syndrome" defenses require the jury to hear evidence about how members of a certain *group* (battered women, victims of child abuse, urban dwellers, etc.) typically act, and then determine if the *individual* defendant indeed does belong to that group.[32] If the jury finds that the defendant belongs to that group, through deductive reasoning, it should find that the defendant has no moral responsibility for his crime. However, juries often are reluctant to accept such defenses, and courts ordinarily hesitate to allow juries to hear this type of evidence.[33] Being an adult victim of abuse, by itself, does not unduly impair one's moral capacities. Nor does victimhood preclude victimizing. Indeed, judges have traditionally held that evidence pertaining to the defendant's social background, such as poverty or abuse, is irrelevant to the issue of moral blameworthiness.[34]

Under existing law, only defendants with severe disabilities are not held accountable for their crimes. To be acquitted of a criminal offense requires the defendant to meet the very high standard of showing that his actions were not

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Severe Environmental Deprivation?, 3 LAW & INEQ. J. 9 (1985).

27. *Id.* at 16.

28. *Id.* at 23-24.

29. *See* Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 465 (1996) (stating that "abuse excuses" are only sometimes successful because of our "ambivalent attitudes toward self-help violence").

30. *Id.* at 463.

31. *Id.*

32. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.06 (2d ed. 1995) (explaining that in the typical "battered woman syndrome" case, the defense introduces evidence that the defendant subjectively believed she was in danger, and that this belief was objectively reasonable for a person who is suffering from battered woman syndrome).

33. Peter Arenella, *Demystifying the Abuse Excuse: Is There One?*, 19 HARV. J.L. & PUB. POL'Y 703, 704 (1996) (stating that the only abuse excuse for which a defendant may use evidence of past victimization to negate legal responsibility is the insanity defense).

34. *Id.*

"voluntary," and that thus, he should not be held criminally responsible.[35] Rather, it is more common to find cases in which the defendant uses evidence of a rotten social background and early childhood trauma to lessen, rather than fully negate, his criminal responsibility.[36] Therefore, although it may be difficult to meet the standard for insanity, which is a full defense, it may be possible for the defendant to rely on a partial defense, such as "heat of passion," to mitigate the defendant's culpability for the charged offense.[37] These "imperfect" or "partial" defenses do not act in the same way as "abuse excuses" because they do not purport to negate the defendant's blameworthiness.[38]

Using Rotten Social Background as a defense strategy is risky because the defendant must be able to show that his background was so bad that it actually negates an element of the offense, thereby removing any culpability. Because the requirements to prove insanity and other total excuse defenses are so high, and because judges are loathe to admit evidence concerning the defendant's social background during the guilt/innocence stage of a trial, this standard rarely will be met.[39] It would be very difficult to convince a jury that the defendant should not be found guilty of a heinous murder because he grew up in poverty and abuse.

IV. Rotten Social Background As a Mitigator

Virginia has a bifurcated approach to capital murder trials.[40] Under this system, the jury is first called upon to determine if the defendant is guilty.[41] If, after this phase of trial, the defendant is found guilty, the jury then will proceed to the sentencing phase of the trial.[42] In this phase, if the jury has convicted the defendant of capital murder, the jury may choose only between sentencing the

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35. *See* Delgado, *supra* note 26, at 38.
36. *Id.* at 43.
37. Arenella, *supra* note 33, at 704.
38. *Id.*
39. *Id.* at 705.
40. VA. CODE ANN. § 19.2-264.3(A), (C) (Michie 2000).
41. § 19.2-264.3(A).
42. VA. CODE ANN. § 19.2-264.4(A) (Michie 2000). Section 19.2-264.4(A) states:

> Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment . . . . In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

Id.

defendant to life in prison without parole or sentencing him to death.[43] Virginia Code Section 19.2-264.2 states that:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or [that the offense was vile]; and (2) recommend that the penalty of death be imposed.[44]

Section 19.2-264.4(C) states that a defendant may not be sentenced to death until the Commonwealth has proven either the future dangerousness aggravator or the vileness aggravator beyond a reasonable doubt.[45] However, even if the jury does find one or both of the aggravators, it is not required to impose death.[46]

In determining whether a life or death sentence is appropriate, the jury is required under Virginia Code Section 19.2-264.4(B) to consider evidence offered in mitigation by the defendant.[47] This section states that:

> Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) the defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense, or (vi) mental retardation of the defendant.[48]

This section divides mitigating evidence broadly into either evidence pertaining to the facts and circumstances surrounding the offense that somehow make the defendant less morally blameworthy or the personal characteristics of the defen-

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43. *See id.*; *see also* VA. CODE ANN. § 53.1-165.1 (Michie 1994) (stating that "[a]ny person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense"); VA. CODE ANN. § 53.1-40.01 (Michie 1994) (stating that geriatric prisoners convicted of a Class 1 felony offense committed on or after January 1, 1995 are not eligible for parole).

44. VA. CODE ANN. § 19.2-264.2 (Michie 2000).

45. VA. CODE ANN. § 19.2-264.4(C) (Michie 2000) (providing that death penalty may not be imposed unless Commonwealth proves aggravating factors beyond a reasonable doubt).

46. VA. CODE ANN. § 19.2-264.4 (Michie 2000).

47. VA. CODE ANN. § 19.2-264.4(B) (Michie 2000).

48. *Id.*

dant that somehow lessen the defendant's moral culpability. Rotten Social Background, as a mitigator, fits squarely within the latter category, particularly within subsections (ii) and (iv) of the statute. A history of poverty, abandonment, and abuse, while not sufficient to absolutely negate culpability, still may be sufficient to convince a potential juror that the defendant is less morally culpable.

The idea of using a "syndrome" as an excuse is very different from using Rotten Social Background to mitigate a sentence. "Syndrome" evidence supports "a claim that . . . it has significant and predictable effects on perceptions or behaviors, or that experts can accurately identify individuals who fit within its boundaries."[49] This type of "group character" evidence suggests that Rotten Social Background can be used to show that people who fall into a particular group generally act in a particular way.[50] Syndrome evidence is generally excluded, with very few exceptions (such as Battered Women's Syndrome).[51]

In *Jenkins v Commonwealth*,[52] the Supreme Court of Virginia affirmed the defendant's capital murder conviction and death sentence for the killing of his uncle, despite proffered evidence showing that the defendant suffered from "child sexual abuse accommodation syndrome."[53] In *Jenkins*, the defendant sought to admit evidence during the guilt phase of his trial from his former Child Protective Services worker showing that he had been physically and sexually abused as a child.[54] The defendant testified that he was "angry" at his family for the abuse he suffered at their hands as a child, and had planned to kill his uncle.[55] Because there was "uncontradicted evidence" that the defendant's actions had been premeditated and deliberate, the court concluded that the uncle's homicide was committed, as a matter of law, with malice aforethought, and therefore, evidence proffered to prove manslaughter was not admissible.[56] When the defendant argued that such evidence should have been permitted during the penalty phase, the court found that this contention had been procedurally defaulted.[57] On habeas corpus review, the United States Court of Appeals for the Fourth Circuit found that the evidence of the defendant's "childhood sexual abuse accommodation syndrome" was insufficient to find him not guilty.[58]

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49. Mosteller, *supra* note 29, at 463.

50. *Id.*

51. *See* DRESSLER, *supra* note 32; *see also* Mosteller, *supra* note 29, at 466.

52. 423 S.E.2d 360 (Va. 1992).

53. Jenkins v. Commonwealth, 423 S.E.2d 360, 367-71 (Va. 1992) (stating that evidence of the defendant's childhood sexual abuse was not admissible because it was insufficient to find him not guilty).

54. *Id.* at 367-68.

55. *Id.* at 368.

56. *Id.*

57. *Id.* at 369.

58. Jenkins v. Angelone, 168 F.3d 482 (4th Cir. 1999), *available at* No. 98-13, 1999 WL 9944, at *6 (4th Cir. Jan. 12, 1999).

Even though syndrome evidence cannot be used to negate culpability during the guilt phase of trial, defense attorneys may use Rotten Social Background evidence under Virginia Code Section 19.2-264.4(B) to *individualize* the sentence to a particular defendant based on that particular defendant's childhood, history, and environmental background.[59] Thus, one may make a plausible argument that such evidence would have been appropriate in *Jenkins* during the sentencing phase of trial under Virginia Code Section 19.2-264.4(B)(iv) to mitigate the defendant's sentence from death to life in prison.

In *Peeples v Commonwealth*,[60] the Court of Appeals of Virginia held that evidence of the defendant's mental condition, short of insanity, could not be admitted.[61] In *Peeples*, the defendant claimed that he shot the victim in self-defense after an oral disagreement over the sale of marijuana.[62] The defendant sought to admit testimonial evidence from a psychologist that because of his mild mental retardation and "the particular way that [his] mind [was] affected," he had difficulty in perceiving social situations correctly.[63] The defendant contended that he acted in the heat of passion and out of self-defense.[64] The court stated that this evidence was properly excluded during the guilt phase of the trial, because it did not show a "reasonable fear of death or serious bodily injury."[65] The objective facets of the defendant's self-defense and heat of passion claims could not be met by introducing evidence of the defendant's subjective perception of events.[66]

As in *Jenkins*, however, it is possible that this evidence would have been admitted as mitigation evidence during the sentencing phase under Virginia Code Section 19.2-264.4(B)(ii). This subsection, which allows the defendant to present evidence of his subjective state of mind, is not limited by the objective standards applicable in the guilt phase of the trial.[67] One justly may ask whether the mere fact that someone succumbed to early childhood traumas should affect the calculation of what he deserves in the sphere of criminal justice. Richard Delgado wrote that "[d]efendants who have grown up in socially deprived environments do not have the same chances to absorb the majority's legal and moral norms."[68] Although evidence of a defendant's deprived environment may not be admissible to excuse fully the defendant's actions and find him not guilty,

59. VA. CODE ANN. § 19.2-264.4(B) (Michie 2000).

60. 519 S.E.2d 382 (Va. Ct. App. 1999).

61. Peeples v. Commonwealth, 519 S.E.2d 382, 383 (Va. Ct. App. 1999) (en banc) (stating that the defendant could not present evidence of his mental condition to support a claim of heat of passion or self-defense because such evidence could only be presented to show insanity).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 386.

66. *See id.*

67. *See* VA. CODE ANN. § 19.2-264.4(B)(ii) (Michie 2000).

68. Delgado, *supra* note 26, at 38.

evidence of such a background may show that the defendant had an impaired condition of mind that affected his emotional and behavioral processes at the time of the offense, thereby calling for a lesser penalty.[69] To this extent, defense attorneys must present evidence to show how a Rotten Social Background affected the defendant's condition of mind.

V. Previous United States Supreme Court Rulings

The United States Supreme Court has repeatedly found that capital defendants have a constitutional right to present evidence in mitigation during sentencing.[70] The Court has stated that mitigating evidence may include evidence pertaining to the defendant's background.[71] In *Lockett v. Ohio*,[72] the Court held that the Ohio death penalty statute violated the Eighth and Fourteenth Amendments because it did not permit the type of individualized consideration of mitigating factors required by the Constitution.[73] The Ohio death penalty statute only allowed the jury to consider three types of mitigating evidence: whether the victim "induced or facilitated" the offense, whether the defendant acted under duress or coercion, and whether the offense was primarily the product of the defendant's mental deficiency.[74] The Court found that these three mitigators did not sufficiently allow the jury to hear evidence that could mitigate against a death penalty because it did not allow for consideration of factors such as age or the role the defendant played in the offense.[75]

Rather, "the sentencer [must] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[76] The plurality of the Court stated that the Ohio death penalty statute was unconstitutional because it restricted the range of mitigating circumstances that could be considered by the sentencing body.[77]

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69. *See* VA. CODE ANN. § 19.2-264.4(B)(ii), (iv) (Michie 2000).

70. *See* Lockett v. Ohio, 438 U.S. 586, 608 (1978); Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982); Penry v. Lynaugh, 492 U.S. 302, 318 (1989).

71. *See* Penry v. Lynaugh, 492 U.S. 302, 318 (1989) (holding that the jury must be instructed that it could give mitigating effect to evidence of the defendant's mental condition and history of abuse).

72. 438 U.S. 586 (1978).

73. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion of Burger, C.J.) (explaining that "in all but the rarest kind of capital case, [the jury] may not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis in original).

74. *Id.* at 607; *see* OHIO REV. CODE ANN. § 2929.04(B) (West 1979).

75. *Lockett*, 438 U.S. at 608.

76. *Id.* at 604.

77. *Id.* at 608.

The Court reaffirmed the constitutional right to present any relevant mitigating factors for consideration in *Eddings v Oklahoma*,[78] in which the Court held that, just as a state may not enact legislation that prevents the sentencer from considering mitigating factors, the sentencer also cannot refuse to consider any relevant mitigating evidence.[79] Because the defendant was only sixteen years old when he committed the offense, the Court stated that evidence of his background of abuse was particularly relevant *in that particular case*.[80] *Eddings* might be limited by the Court's statement that, because of his age, the defendant was more susceptible to the effects of abuse. However, reading *Lockett* and *Eddings* together, it appears that, while the sentencing body (whether judge or jury) may give mitigating evidence whatever weight it chooses, it may not absolutely refuse to consider the mitigating evidence.

The right of the defendant to present any relevant mitigating circumstances and the responsibility of the jury to consider the mitigating evidence would not mean anything unless the sentencer could give effect to that evidence. In *Penry v Lynaugh*,[81] the Court held that executing people with mental retardation does not violate the Eighth Amendment.[82] However, the Court continued, the jury must be instructed that it could consider and give effect to the mitigating effect of the defendant's mental retardation and history of abuse so that the jury may express its "reasoned moral response" to this mitigating evidence.[83] The Court recognized that, in order to uphold the underlying principles of *Lockett* and *Eddings*, the jury must have the ability to give effect to mitigating circumstances.[84] This would be the only way to ensure that the punishment is directly related to the personal culpability of the criminal defendant.

VI. Rotten Social Background Evidence as a Constitutional Mandate – The Williams *Holding*

Recently, the issue of using Rotten Social Background as a mitigator to a death sentence came before the United States Supreme Court in *Williams v Taylor*.[85] In this case, the Court held that the defendant, Terry Williams, had a valid ineffective assistance of counsel claim because the defense attorney did not

78. 455 U.S. 104 (1982).

79. Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) (stating that the trial judge erroneously refused to consider mitigating evidence of the defendant's violent family history).

80. *Id.* at 115.

81. 492 U.S. 302 (1989).

82. Penry v. Lynaugh, 492 U.S. 302, 318 (1989) (holding that the jury must be instructed that it could give mitigating effect to evidence of the defendant's mental condition and history of abuse); *see also* Reply Br. for Pet'r at *7, Atkins v. Virginia, No. 00-8452, 2002 WL 225883 (U.S. Feb. 12, 2002) (arguing that "an Eighth Amendment rule prohibiting the execution of all persons who suffer from mental retardation is both necessary and appropriate").

83. *Penry*, 492 U.S. at 318.

84. *Id.* at 318.

85. Williams v. Taylor, 529 U.S. 362 (2000).

investigate or present evidence of Williams's history of abuse, commitment in various foster homes, squalor, or border-line mental retardation.[86] This suggests that the defendant has a constitutional right to present evidence of Rotten Social Background, a right that is so fundamental that for an attorney not to present it is the constitutional equivalent of not even having an attorney at all.

On November 3, 1985, Harris Thomas Stone ("Stone") was found dead at his home.[87] Other than his missing wallet, there was no sign of any physical struggle, and the medical examiner who examined Stone's body concluded that he had died of heart failure. The examiner later amended the cause of death to alcohol poisoning, after it was found that Stone's blood alcohol content was .41%.[88] About six months later, Terry Williams ("Williams") sent a letter to Danville's chief of police, in which he admitted to killing Stone.[89] Williams later confessed to murdering and robbing Stone.[90] Williams confessed that when Stone refused to give him his money, he struck Stone on the chest and back with a mattock.[91] When Stone's body was exhumed and an autopsy was performed, it was discovered that Stone had two broken ribs and his left lung had been punctured.[92]

On September 30, 1986, a jury convicted Williams of capital murder.[93] During the ensuing sentencing phase of the trial, the jury found the future dangerousness aggravator, and recommended that Williams should be given the death penalty.[94] Williams's conviction and sentence were affirmed by the Supreme Court of Virginia and his petition for a writ of certiorari was denied by the United States Supreme Court.[95]

Thereafter, Williams began his collateral attack on his conviction.[96] He filed a state petition for a writ of habeas corpus, and, after a hearing, most of his claims were dismissed.[97] In 1996, Williams amended his petition for habeas corpus, this time including several claims of ineffective assistance of counsel.[98] Pursuant to Virginia Code Section 8.01-654(C)(1), the Supreme Court of Virginia assumed jurisdiction, although it asked for the circuit court's findings of fact and

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86. *Id.* at 395-96.
87. *Id.* at 367.
88. Williams v. Commonwealth, 360 S.E.2d 361, 363 (Va. 1987).
89. *Id.* at 363-64.
90. *Id.* at 364.
91. *Williams*, 529 U.S. at 367-68.
92. *Williams*, 360 S.E.2d at 364.
93. *Id.* at 363.
94. *Williams*, 529 U.S. at 370.
95. *Id.*; *see Williams*, 360 S.E.2d at 371, *cert. denied*, Williams v. Virginia, 484 U.S. 1020 (1988).
96. *Williams*, 360 S.E.2d at 371.
97. *Williams*, 529 U.S. at 372.
98. *Id.* at 371.

legal recommendations.[99] The circuit court reported to the Supreme Court of Virginia that, although the conviction was valid, the sentence was not because Williams's attorney did not present evidence of Williams's background as mitigating evidence during the sentencing phase.[100]

However, the Supreme Court of Virginia rejected the circuit court's contention after applying the *Strickland* test for prejudice.[101] The Supreme Court of Virginia decided that there was no reasonable probability that the jury would have handed down a sentence other than death, even if the defendant had presented mitigating evidence of his social upbringing, I.Q. level, and background.[102]

At this point, Williams filed a petition for a federal writ of habeas corpus in the United States District Court for the Eastern District of Virginia under 28 U.S.C. § 2254.[103] The federal district court agreed with the Virginia circuit court; it found that the defendant's attorney had erred by not presenting evidence showing that Williams had been a "good" prisoner (i.e., was not a danger), that he had helped to break up a drug operation in prison, that he had been abused by his father, that he had mild mental retardation, and that his childhood home had been grossly unhygienic.[104] The district court held that the Supreme Court of Virginia had acted "contrary to" federal law, and had applied federal law in an "unreasonable" way.[105] The United States Court of Appeals for the Fourth Circuit disagreed with the district court, and found that the Supreme Court of Virginia had not applied the *Strickland* standard in an unreasonable way.[106] According to the Fourth Circuit, the evidence of Williams's future dangerousness was so overwhelming that he was not prejudiced by the omission of the mitigating evidence of his rotten background.[107]

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99. *See* VA. CODE ANN. § 8.01-654(C)(1) (Michie 2000) (stating that "[w]ith respect to [a habeas] petition filed by petitioner held under the sentence of death, . . . the Supreme Court shall have exclusive jurisdiction to consider and award writs of habeas corpus").

100. *Williams*, 529 U.S. at 371.

101. *See* Strickland v. Washington, 466 U.S. 668, 694 (1984) (holding that the defendant has not suffered prejudice unless it is reasonably probable that the result of the trial would have been different if it were not for counsel's mistakes).

102. *Williams*, 529 U.S. at 372.

103. *Id.*; *see also* 28 U.S.C. § 2254 (Supp. V 1999).

104. *Williams*, 529 U.S. at 395. Records of Williams's home when he was a juvenile described:

> [The home was] a complete wreck . . . There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. . . . The children had to be put in Winslow Hospital, as four of them . . . were definitely under the influence of whiskey.

Id. at 395 n.19.

105. *Id.* at 374.

106. *Id.*

107. *Id.*

Williams again petitioned the United States Supreme Court for a writ of certiorari.[108] This time, the Supreme Court granted his petition and ultimately reversed Williams's sentence and remanded to the trial court for a new sentencing proceeding.[109] The United States Supreme Court found that Williams's petition for habeas corpus indeed did fall under § 2254(d)(1), because the Supreme Court of Virginia, during direct review, had acted "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States."[110] A bulk of the Court's decision dealt with the proper standard for review in federal habeas proceedings.[111] Although that issue is not directly implicated here, it is important to note that the Court held that a writ of habeas corpus may only be granted if the state court's decision was contrary to, or involved an unreasonable application of, a rule of law established by the Supreme Court.[112] The Court applied the test under *Strickland v. Washington*[113] to determine whether Williams could succeed on his ineffective assistance of counsel claim.[114] In order to satisfy the *Strickland* test, the defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness in light of prevailing professional norms; and (2) that he was prejudiced by the ineffective assistance of counsel.[115] In order to show prejudice, the defendant is required to show that, but for counsel's errors, there is a reasonable probability that the outcome would have been different.[116]

The Court held that the Supreme Court of Virginia, in holding that Williams was not prejudiced by his counsel's failure to investigate and introduce evidence regarding his childhood, had acted "contrary to" the clearly established federal law of *Strickland*.[117] The Court stated that, for purposes of § 2254(d)(1), a finding that the state court had acted "contrary to," or had unreasonably applied, clearly established federal law would require more than a mere determination that the federal court would have decided differently from the state court.[118] The Court noted that reversing a state decision on a habeas attack is more difficult than on

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108. Williams v. Taylor, 526 U.S. 1050 (1999) (mem.).

109. *Williams*, 529 U.S. at 399.

110. 28 U.S.C. § 2254(d)(1) (Supp. V 1999).

111. *Williams*, 529 U.S. at 402-16.

112. *Id.*

113. 466 U.S. 668 (1984).

114. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that in order for a defendant to show that he was prejudiced by the ineffective assistance of his counsel, he must show that there is a reasonable probability that his counsel's errors led to a different outcome of the trial).

115. *Id.*

116. *Id.* at 694.

117. *Williams*, 529 U.S. at 397.

118. *See id.* at 409-10 (stating that an unreasonable application of federal law is not the same as an incorrect application of federal law, and that the inquiry into whether the state court unreasonably applied federal law should be objective).

direct appeal.[119] This makes it even more impressive that the Supreme Court reversed Williams's sentence, even under the heightened scrutiny. *Williams*, *Lockett* and *Eddings*, read together, stand for the proposition that in order to meet the defendant's Sixth, Eighth, and Fourteenth Amendment rights, the jury must be given mitigating evidence of a defendant's Rotten Social Background in order to determine properly which sentence is appropriate.

VII. The Double-Edged Sword

After *Williams*, it appears that the criminal defendant has a constitutionally protected right to present evidence of his Rotten Social Background during the sentencing phase as a mitigator against the death penalty. However, this evidence must not be allowed to become an instrument for the prosecution to strengthen its case. There are four predominant reasons for doling out criminal punishments: (1) rehabilitation; (2) retribution; (3) general deterrence; and (4) to protect society through specific deterrence.[120] The fourth reason for punishing criminal perpetrators, the desire to protect our society, may be served by sentencing a defendant who had a horrible childhood to death. The argument supporting death sentences for these defendants is that if a defendant has such a skewed perception of social mores, and has such difficulty conforming his behavior because of his past victimization of abuse, poverty, or mental retardation, there is nothing to keep him from repeating this heinous act. If the defendant does not understand fully the wrongfulness of his actions, and if there will be no deterrent effect, nothing will prevent him from committing the same offenses again. Thus, the prosecution potentially could use the very Rotten Social Background evidence the defendant presents in mitigation to prove the future dangerousness aggravator. Justice O'Connor commented on this dilemma in *Penry*, when she wrote that "Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."[121]

In *Eddings*, the Court held that it was within the jury's discretion how much weight was to be accorded to the mitigating evidence presented by the defendant.[122] However, the Court held that the jury could not choose to give such mitigating evidence *no weight* by refusing to consider such evidence.[123] Based on this rationale, it may be argued that the prosecution should not be allowed to turn the defendant's mitigating evidence against the defendant to prove future dangerousness because using such evidence to prove an aggravating factor for the prosecution would be even more detrimental than allowing the jury to give the mitigating evidence no consideration at all.

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119. *Id.* at 408-09.

120. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03 (2d ed. 1995).

121. Penry v. Lynaugh, 492 U.S. 302, 324 (1989).

122. Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982).

123. *Id.* at 115.

In presenting its mitigation case under Virginia Code Section 19.2-264.4(A)(ii) or (iv), the defendant will likely use mitigation and psychiatric experts to testify about the defendant's mental condition and childhood environment.[124] The prosecution may use the evidence, including the defendant's statements, from these reports to rebut the issues the defendant presents in mitigation, but may not use such evidence to prove an issue, such as future dangerousness, which the defendant does not raise in his mitigation case. Further support for this proposition is provided by the very language of Virginia Code Section 19.2-264.3:1(G), which prohibits the use of any "evidence derived from any such statements or disclosures [made by a defendant to be introduced] against the defendant at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances specified in Section 19.2-264.4."[125] In other words, the Commonwealth may not use disclosures made by the defendant during psychiatric or competency evaluations to prove future dangerousness. While the prosecutor may argue, based on all of the evidence presented at trial, that the defendant constitutes a future danger, she may not use the defendant's statements or disclosures from the actual reports to prove any other element or aggravator.

However, it is important to note that this statute also forbids the prosecution from using any evidence garnered from evaluations pursuant to Virginia Code Section 19.2-169.1 or Section 19.2-169.5 and 19.2-264.3:1, except to rebut issues the defendant raises in mitigation.[126] Section 19.2-169.1 deals with a competency evaluation; Section 19.2-169.5 deals with evaluations performed to determine sanity at the time of the offense.[127] Under the statute, the Commonwealth may use the information gathered from these evaluations to rebut the defendant's mitigating evidence.[128] The prosecution may use this evidence only to show that the defendant's purported mitigator does not exist. For example, if the defendant, after undergoing an evaluation, seeks to present evidence in mitigation that shows that he suffers from fetal alcohol syndrome due to his alcoholic mother, who drank when she was pregnant, the prosecution may only use the evidence from this evaluation to rebut the assertion that the defendant does, in fact, suffer from fetal alcohol syndrome. The prosecutor may use the information to rebut the actual issue being presented as mitigation, but she may not use this evidence to prove future dangerousness.

In determining whether the prosecution is rebutting the defendant's mitigation case, one should look at the function, instead of the source, of the

124. VA. CODE ANN. § 19.2-264.4 (Michie 2000).

125. VA. CODE ANN. § 19.2-264.3:1(G) (Michie 2000).

126. *Id.*

127. VA. CODE ANN. § 19.2-169.1 (Michie 2000); VA. CODE ANN. § 19.2-169.5 (Michie 2000).

128. VA. CODE ANN. § 19.2-264.3:1(G) (Michie 2000).

evidence.[129] If the defendant proffers evidence from a psychiatric evaluation simply to mitigate a death sentence, it is not permissible for the prosecution to use this psychiatric evidence to prove future dangerousness. The only way the prosecution may use this psychiatric evidence against the defendant is if the defendant himself proffers it as anti-future dangerousness evidence. If the defendant uses Rotten Social Background evidence only as a statutory mitigator, it does not attack the Commonwealth's future dangerousness evidence. Mitigation can be analogized to a confession-and-avoidance defense. The defendant's mitigation evidence does not challenge the existence of the aggravator. Rather, it seeks a life sentence despite the aggravator. If the Commonwealth tries to re-prove future dangerousness using the defendant's evidence, it goes beyond the scope of the defendant's case in mitigation. This is prohibited under Virginia Code Section 19.2-264.3:1(G).[130]

VIII. Possible Objections and Concerns

Although *Williams* held that there is a constitutional requirement to present mitigating evidence of a defendant's Rotten Social Background, a question that remains is *how* to present this evidence. Prosecutors can no longer make an objection to the introduction of such evidence on the ground that it is irrelevant, because such evidence has been deemed constitutionally relevant.[131] Therefore, prosecutors can only make technical evidentiary objections. Most of this mitigating evidence will necessarily be in the form of hearsay. Typically, a witness, such as a mitigation expert or Child Protective Services worker, will offer testimony about what others have told her regarding events that happened years, if not decades, ago. It is likely that prosecutors will object to the introduction of such testimony. However, it is important to note that evidentiary rules are more relaxed at the sentencing phase than at the guilt phase.[132] Indeed, the United States Supreme Court has held that if there is evidence that has any tendency to

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129. Failure to make this distinction between function and source is exemplified by Vinson v. Commonwealth, 522 S.E.2d 170, 178 (Va. 1999). During the penalty phase in *Vinson*, the defendant's medical expert testified about the defendant's mental condition and offered excuses for the defendant's behavior, but did not directly argue against future dangerousness. *Id.* Despite defendant's objections, the trial court allowed the Commonwealth to present expert testimony regarding the defendant's future dangerousness. *Id.* The Supreme Court of Virginia upheld the conviction and death sentence, stating that "the trial court properly allowed the prosecutor to present evidence in rebuttal regarding the probability of defendant's future behavior." *Id.*

130. VA. CODE ANN. § 19.2-264.3:1(G) (Michie 2000).

131. Williams v. Taylor, 529 U.S. 362, 397 (2000).

132. *See* Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam) (noting that "[r]egardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment . . . [because the] testimony was highly relevant to a critical issue in the punishment phase").

establish a mitigating fact, it *must* be admitted.[133] In *Green v Georgia*,[134] the Supreme Court reversed a death sentence because the trial court had excluded hearsay evidence that was relevant to the mitigating circumstances.[135]

A potential concern with using Rotten Social Background in mitigation is that it is frequently the case that the victims of capital murder also suffer from rotten social backgrounds. Given this, it is arguable that allowing defendants to use this evidence in mitigation is just continuing the cycle of violence in these environments.[136] Another thing for defense attorneys to watch out for is the trap of being too paternalistic. Defense attorneys should be careful to convey to the jury that they realize that just because the defendant grew up in poverty or suffered does not mean that he does not know right from wrong. This type of paternalism could backfire if there is a juror with a history of Rotten Social Background, who has turned out to be a law-abiding citizen. To avoid this problem, the Rotten Social Background evidence should be used solely to show the subjective state of mind of the defendant at the time of the offense. The Rotten Social Background evidence should not be used to show general traits, as syndrome evidence is used, but rather to show what the *particular* defendant was thinking when he committed the crime. Thus, it is inapposite that a juror who has experienced a Rotten Social Background may not have the same criminal tendency.

IX. Conclusion

In closing, it should be stressed that Rotten Social Background is not itself the mitigator. Rather, defendants should introduce evidence of Rotten Social Background to explain why they are unable to conform to society's legal standards. Using Rotten Social Background as an excuse defense is impracticable, because it is nearly impossible to show that, based on his Rotten Social Background, the defendant did not know the nature and quality of his act. There is typically no disease of mind, and the cognitive requirement of "knowledge" of right and wrong will usually be met as well, because despite a rough childhood, the defendant usually knows that killing is wrong.

Using Rotten Social Background evidence to support the defendant's mitigation case, on the other hand, allows more flexibility in the type of evidence

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133. *Id.*

134. 442 U.S. 95 (1979).

135. *Green*, 442 U.S. at 97. In *Green*, the trial court refused to admit testimonial evidence from a witness that another defendant had confided in the witness that he, and not the defendant on trial here, had killed the victim. *Id.* at 96. Defendant sought to admit this evidence to support his contention that he was not present when the victim was killed, and that he had not participated in her death, but the court excluded the evidence because it was hearsay. *Id.* The Supreme Court held that this exclusion constituted a Due Process violation under the Fourteenth Amendment. *Id.* at 97.

136. Arenella, *supra* note 33, at 708-09.

permitted. Allowing the defendant to proffer evidence showing that he did not have the "capacity to conform" his actions to societal norms or that he did not have the ability to "appreciate the criminality" of his actions gives a broader framework for this evidence to be used. Although Richard Delgado was wrong (especially in jurisdictions like Virginia, which do not follow the Model Penal Code's definition of insanity) about the impact of Rotten Social Background evidence on the guilt/innocence phase of a capital murder trial, his theory fits perfectly as a statutory mitigator in the sentencing phase under Virginia Code Section 19.2-264.4(B)(ii) or (iv).[137]

It is important to make the argument subjective and individual to the *particular* defendant. This is one way to get around the problem of alienating the potential juror who has suffered from a traumatic childhood and still has become a productive, law-abiding member of society. The focus must be on the subjective state of mind of the particular defendant, not on the state of mind of most people who fit into the group into which the defendant fits. Using Rotten Social Background as a mitigator is similar to using "syndrome" evidence in that it requires an extrapolation from the general to the specific. However, the main difference is that syndromes involve automatic response cases, in which the defendant tries to show that, because of past traumas, the circumstances surrounding the offense triggered an automatic response, the same as it would in most people who have suffered the same trauma. In contrast, in using Rotten Social Background evidence during the sentencing phase, the defendant is merely trying to show that the childhood traumas he faced made it difficult for him *in particular* to appreciate fully the wrongfulness of his behavior and to conform his behavior to general social norms.

137. *See* Delgado, *supra* note 26, at 55; *see also* VA. CODE ANN. § 19.2-264.4(B) (Michie 2000).

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