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Elizabeth A. Bennett

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A. Introduction

This article will discuss whether the provisions of Va. Code Ann. §19.2-264.3:1 (Supp. 1989) requiring capital defendants either to face possible preclusion of mental mitigation evidence or to cooperate with a state psychiatrist, who can later testify against defendant violate rights guaranteed by the federal constitution. Preclusion may occur in one of two ways; first, failure by the defense to provide timely notice and surrender all reports to the Commonwealth, and second, failure by the defendant to cooperate with the Commonwealth's expert. Under V.C.A. §19.2-264.3:1, the defendant is entitled to the assistance of a mental health expert in the preparation of a case in mitigation. To qualify the defendant need only show that (1) he is indigent and (2) charged with capital murder[1]. Although initially protected by the attorney-client privilege, after the attorney for the defendant gives notice[2] of an intent to present psychiatric evidence in mitigation, the report and the results of any other evaluation or copies of records[3] shall be given to the Commonwealth. Failure to comply may result in preclusion of the defendant's mental mitigation evidence.[4] This is the first of two ways in which preclusion may occur. These disclosure and preclusion requirements raise several potential Fifth and Sixth Amendment issues. First, although the statute provides that "statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense"[5], no mechanism exists to safeguard against the Commonwealth's use of disclosure statements to obtain additional information to be used in its case in chief.

Second, V.C.A. §19.2-264.3:1 requires that a defendant choose between possible preclusion of evidence offered in mitigation, in violation of the Sixth Amendment compulsory process clause, and the Eighth and Fourteenth Amendments as held in *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 85 L. Ed. 2d 53 (1985); *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); and submission to the Commonwealth's expert for examination and evaluation against his will and without the benefit of counsel[6], in violation of his Fifth Amendment right against self-incrimination.

Preclusion can also occur when the defendant fails to cooperate with the Commonwealth's expert, once requested. A danger is also presented by cooperation. Without counsel, defendant may make involuntary self-incriminating statements in violation of Fifth[7] and Sixth[8] Amendment rights as discussed in *Estelle v. Smith*. Putting aside for the moment the important fact that heightened due process standards are applicable in capital cases, the statute in any event permits the Commonwealth to violate the rule established in *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), by compelling the defendant to surrender Sixth, Eighth and Fourteenth Amendment rights in order to assert his Fifth Amendment right. For the reasons set forth below, counsel should carefully balance the effect of preclusion of evidence versus the potential harm of cooperation, and the waiver of rights constitutionally guaranteed.

B. Discussion of the jurisprudence relevant to the issue of mitigation evidence.

For more than a decade, the United States Supreme Court has been consistent in its requirement that states erect no barriers to the presentation and consideration of a virtually unlimited range of mitigating evidence in capital trials. State procedures and evidentiary rules have on occasion had to yield to the compelling importance of this evidence.[9]

Recently, in *Mills v. Maryland*, 484 U.S. 975, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), the Supreme Court discussed the line of cases involving the issue of presentation of mitigation evidence, stating that:

> "It is beyond dispute that in a capital case 'the sentencer [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.'" *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), quoting *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion) (emphasis in original). *See Skipper v. South Carolina*, 476 U.S. 1 (1986). The corollary that "the sentencer may not refuse to consider **or be precluded from considering** 'any relevant mitigating evidence'" is equally "well established." 108 S. Ct. 1860 at 1865. The Court noted that it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio, supra*; *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); by the sentencing court, *Eddings v. Oklahoma, supra*; or by an evidentiary ruling, *Skipper v. South Carolina, supra*.

Therefore, V.C.A. §19.2-264.3:1 which requires that the defendant submit to examination by the Commonwealth's expert or face possible preclusion of evidence proffered in mitigation violates: (1) rights required by the *Lockett* line of cases discussed supra, and (2) *Simmons, supra*, by compelling defendant choose between two constitutionally protected rights, discussed infra in section D.

C. The application of V.C.A. §19.2-264.3:1.

This section provides for the appointment of one or more mental health experts "to evaluate the defendant and to assist the defense in its preparation and presentation of information concerning the defendant's history, character, or mental condition . . . " The report shall be sent solely to the attorney for the defendant and is protected by the attorney-client privilege; except, when the defendant gives notice of an intent to present psychiatric or psychological evidence in mitigation pursuant to subsection (E).[10] Several questions arise when the defendant is forced to undergo psychiatric evaluation which may provide statements or disclosures admissible in rebuttal when relevant to issues in mitigation raised by the defense, or face preclusion of his mitigation evidence.

First, if defendant gives notice of an intent to present psychiatric or psychological evidence in mitigation pursuant to subsection (E), the Commonwealth shall be given not only the report (submitted pursuant to subsection C), but "the results of any other evaluation of defendant's mental condition conducted relative to the sentencing proceeding . . ."[11] This notice allows the Commonwealth to seek ". . . an evaluation concerning the existence or absence of mitigating circumstances relating to the defendant's mental condition at the time of the offense . . ." Second, the court shall order the defendant to submit to the evaluation and refusal to cooperate could result in exclusion of the defendant's expert evidence. It is this threat of exclusion which forces the defendant to submit to evaluation, with knowledge that statements or disclosures made to the Commonwealth's expert shall be admissible in rebuttal when relevant to issues in mitigation raised by the defense. If the court excludes the defendant's expert evidence, the defendant may be prevented from offering mitigation evidence in violation of constitutional rights guaranteed by the Sixth, Eighth and Fourteenth Amendments.

Another potential Fifth Amendment problem arises because no procedures exist to ensure against the Commonwealth's use of disclosure evidence contained in the report in their case in chief. Moreover, disclosure evidence not directly used may nevertheless uncover additional evidence which could be used by the Commonwealth.

D.The balancing of the state's interest versus the defendant's constitutional rights.

A balancing of interests occurs between the state's legitimate interest as identified through its rules, procedures, and statutes, versus the defendant's right to compulsory process and against self-incrimination. In *Chambers v. Mississippi*[12], a non-capital case, certiorari was granted to determine whether petitioner's trial was conducted in accord with principles of due process under the Fourteenth Amendment. In discussing the fundamental right of the accused to present witnesses, the Court addressed the balancing of interests which must occur "to assure both fairness and reliability in the ascertainment of guilt and innocence."[13]

The Court acknowledged that in order to assure both fairness and reliability in exercising the right to present witnesses, the accused must comply with established rules of procedure and evidence.[14] But, noting that the rejected testimony proffered by defendant "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest," the Court also found the testimony critical to Chambers' defense. The Court concluded that the exclusion of critical evidence, and the refusal to permit the cross-examination of the state's witness, denied the defendant ". . . a trial in accord with traditional and fundamental standards of due process." Similarly, defendant's evidence from an expert appointed under V.C.A. §19.2-264.3:1(A) also bears persuasive assurances of trustworthiness, for s/he must qualify as an expert pursuant to the requirements of subsection (A), and the Commonwealth is afforded the right to test the reliability of the testimony through cross-examination.

In fact, that cross-examination may include elicitation of statements made by defendant to the expert that are relevant to his/her testimony and conclusions. The Commonwealth could even call its own expert to testify based on the evidence revealed by the defense expert's testimony. The only thing it cannot do is compel defendant's uncounseled cooperation with its expert.[15]

Generally, there is no issue that defendant's evidence cannot be said to be trustworthy unless it is rebutted. The Commonwealth simply has no right to the assistance of defendant in the preparation of its rebuttal. This is particularly true when that assistance must be obtained in derogation of fundamental rights.

In another non-capital case, *Rock v. Arkansas*[16], the trial judge excluded the defendant's refreshed testimony (refreshed under hypnosis) and ruled that defendant could only testify to matters remembered or stated prior to hypnosis. In reversing her conviction, Justice Blackmun's opinion for the Court recognized that "the right to present relevant testimony is not without limitation," but cautioned that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve."[17] Moreover, he found Arkansas had established a rule that "operates to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced."[18] In reaching this conclusion, the Court discussed previous decisions, including *Chambers v. Mississippi, supra*, noting that "[t]his Court reversed the judgment of conviction, holding that when a state rule of evidence conflicts with the right to present witnesses, the rule may 'not be applied mechanistically to defeat the ends of justice," but must meet the fundamental standards of due process."[19] Virginia has enacted a statute which operates to the detriment of a capital defendant by forcing him either to submit to examination against his will, including interrogation by the Commonwealth's expert, or face preclusion of evidence offered in mitigation. The Commonwealth simply has no legitimate right to weigh in the balance against defendant's compelling right to present witnesses in the penalty phase of a capital trial.

In *Brooks v. Tennessee*[20], a state rule required 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."[21] 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."[22]

In discussing Fourth Amendment rights, the Supreme Court in *Simmons*, held that it is intolerable that one constitutional right should have to be surrendered in order to assert another. One issue presented was whether defendant's constitutional rights were violated when testimony given by him in support of his suppression motion was admitted against him at trial.[23] Petitioner contended that it was reversible error to allow the Government to use against defendant the testimony given by him upon his unsuccessful motion to suppress evidence.[24] Defendant could give testimony only by assuming the risk that the testimony would later be admitted against him at trial. The testimony linked defendant to ownership of a suitcase which a few hours after the robbery was found to contain money wrappers taken from the victimized bank. In considering the effect of this rule, the Court noted that "[a] defendant is 'compelled' to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forego a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit.[25]

> "However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit." The Court, in applying this assumption ". . . to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, [found that] an undeniable tension [was] created."

390 U.S. at 394. The Court concluded that in this case defendant was

> ". . . obligated either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal

> effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another."

Id. The Court held that when a defendant testifies in support of a motion on Fourth Amendment grounds, his testimony may not be admitted against him on the issue of guilt unless he makes no objection. Similarly, V.C.A. §19.2-264.3:1 places a capital defendant in a position where s/he is faced with precisely the same conflict. S/he should strenuously object to the statutory requirement that compels her/him to waive her/his Fifth Amendment privilege against self-incrimination or waive her/his right for the sentencer to consider as a mitigating factor, evidence of her/his character or record and circumstances of the offense proffered as a basis for a sentence less than death.

E. Conclusion.

V.C.A. §19.2-264.3:1 violates a capital defendant's constitutional rights under *Simmons, supra.* This statute compels a capital defendant to waive his Fifth Amendment privilege against self-incrimination by submitting to examination by an expert appointed for the Commonwealth, furnish the experts with statements made by the defendant to his expert, or be precluded from proffering evidence in mitigation as guaranteed by the Sixth, Eighth and Fourteenth Amendments. Furthermore, it is settled that in almost all circumstances the sentencer may not be precluded from considering any relevant information proffered in mitigation. It is as yet not decided whether V.C.A. §19.2-264.3:1, by precluding evidence offered in mitigation (for failure to waive a constitutional right against self-incrimination), violates the line of cases cited most recently in *Mills, supra.*

Accordingly, once the defendant has given notice of intent to use mental mitigation evidence, s/he should advise the Commonwealth that the portion of §19.2-264.3:1 discussed herein requiring defendant to make uncounseled statements against his will to the Commonwealth's mental health professional is in violation of the United States Constitution as applied to her/him and consequently s/he declines compliance with those provisions.

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[1]The court shall then appoint one or more qualified mental health experts, statutorily defined, and evaluations performed pursuant to V.C.A. §19.2-169.5 (Supp. 1989) which governs an evaluation of sanity at the time of the offense.

[2]Notice shall be given to the Commonwealth at least twenty-one days before trial. V.C.A. §19.2-264.3:1(E).

[3]This broadly includes copies of psychological, psychiatric, medical or other records obtained during the course of such evaluation. V.C.A. §19.2-264.3:1(D)(*see* V.C.A. §19.2-169.5 for similar disclosure of results obtained during an evaluation for sanity at the time of the offense).

[4]V.C.A. §19.2-264.3:1(E).

[5]V.C.A. §19.2-264.3:1(G).

[6]For a discussion of the defendant's right to have counsel present during examination, see *Powell v. Texas,* this issue.

[7]In *Estelle,* the Court held that a capital defendant's Fifth Amendment right against compelled self-incrimination precludes the State from subjecting him to a psychiatric examination concerning future dangerousness without first informing the defendant that he has a right to remain silent and that anything he says can be used against him. 451 U.S. at 461-469.

[8]The Court unanimously held that, once a capital defendant is formally charged, the Sixth Amendment right to counsel precludes examination without notification that "the psychiatric examination (will) encompass the issue of their client's future dangerousness." *Id.* at 471.

[9]*Green v. Georgia,* 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979).

[10]V.C.A. §19.2-264.3:1(D).

[11]*Id.*

[12]410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

[13]410 U.S. at 302.

[14]*Id.*

[15]See summary of *Powell v. Texas, supra* at p9 which held that notice must be given to defendant or his attorney that the examinations would encompass the issue of future dangerousness.

[16]483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

[17]483 U.S. at 55, 56 (emphasis added).

[18]*Id.* at 56.

[19]410 U.S. at 302.

[20]406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972).

[21]406 U.S. at 606.

[22]*Id.* at 609, *quoting Malloy v. Hogan,* 378 U.S. 1 (1964).

[23]390 U.S. 382.

[24]*Id.* at 389.

[25]*Id.* at 393, 394, *citing* 4 Wigmore, *Evidence* §1066 (3rd ed. 1940); 8 *id.*, §2276 (McNaughton rev. 1961).