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United States Court of Appeals for the Fourth Circuit

FACTS

At a bench trial in Norfolk, Virginia in 1979, Joseph M. Giarratano was convicted of the rape and murder of Michelle Kline, and the murder of Ms. Kline's mother. After the crimes, Giarratano fled to Jacksonville Florida where he surrendered to a police officer and confessed to the crimes. He confessed again upon his return to Norfolk, but attempted to commit suicide while incarcerated at a local jail. The Norfolk trial court sent Giarratano to the Central State Hospital to determine whether he was competent to stand trial. The examining physician concluded not only that Giarratano was competent to stand trial, but that he was not mentally ill at the time of the offense.

At trial, Giarratano pled not guilty by reason of insanity, but was found guilty of the crimes. Nevertheless, at his request and for the purpose of sentencing, Giarratano was examined at the Forensic Clinic of the University of Virginia to determine whether, at the time of the offense, he was under the influence of extreme mental or emotional disturbance or whether his capacity to appreciate the criminality of his conduct or to conform to the requirements of the law was significantly impaired.

The trial court, after testimony by the director of the clinic, Dr. Robert C. Showalter and State Psychiatrist Dr. Miller M. Ryans, found evidence of future dangerousness and that Giarratano's evidence of "stress and reduced control" did not call for a sentence of life in prison. *See* Va. Code Ann. § 19.2-264.2 and 264.4 (1983 Repl. Vol.). The trial judge sentenced Giarratano to death. The Supreme Court of Virginia affirmed the judgment. *Giarratano v. Commonwealth*, 220 Va. 1064, 266 S.E.2d 94 (1980).

In his habeas corpus petition to the United States District Court for the Eastern District of Virginia, Giarratano asserted that he had not been competent to participate in the sentencing proceedings because he lacked the capacity to provide information to counsel that was necessary to construct his defense. He later sought to amend his incompetency claim to include the guilt phase of his trial as well. He argued that the correct standard with which to evaluate his competency was that stated in *Reese v. Peyton*, 384 U.S. 312, 314, 86 S. Ct. 1505, 1506, 16 L. Ed. 2d 583, 584-5 (1966):

> . . . whether the [defendant] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

The district court rejected the *Reese* standard and used the competency test set forth in *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 789, 4 L. Ed. 2d 824, 825 (1960):

> . . . whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.

The district court refused leave to amend and dismissed the petition. Giarratano filed a timely notice of appeal to the Fourth Circuit.

Giarratano also moved under Rule 60(b) for relief from the order denying him leave to amend his petition to extend his claim of incompetency to the guilt stage of trial. In support of his motion, Giarratano sought to introduce new inconsistencies in the forensic evidence introduced against him at trial, evidence that undermined the reliability of his confessions. The district court denied the motion, stating that Giarratano's evidence in support of the motion was not "new," that it merely "reweighed" the prosecution's evidence. It also held that Giarratano did not demonstrate that his counsel used due diligence to discover the evidence prior to trial. Giarratano appealed this judgment to the Fourth Circuit. This appeal was joined with the appeal from the dismissal of the habeas petition in the Fourth Circuit.

HOLDING

The Fourth Circuit first addressed Giarratano's claims that he was not competent to stand trial. The court held that the district court did not err in applying the *Dusky* standard and that "there is no substantive difference between the two standards." *Giarratano v. Procunier*, 891 F.2d 483, 487 (4th Cir. 1989). "Giarratano's recantation of his confessions several years after his trial and his assertion that now he does not know whether he committed the crimes do not provide an adequate factual basis for granting an evidentiary hearing" to determine whether Giarratano was competent to stand trial. *Id.*

As to Giarratano's Rule 60(b) motion, the Fourth Circuit held that only an abuse of discretion on the part of the district court would warrant overturning the district court's order, and found no such abuse of discretion in Giarratano's case. *Id.*

The Fourth Circuit also discussed four other claims of note, which are discussed in detail below.

I. Admission of Expert Psychiatric Testimony on Future Dangerousness at the Penalty Trial

A. Fifth Amendment Claim

Giarratano claimed that it was error for the trial court to admit the expert testimony of Dr. Ryans at the penalty phase of the trial. Dr. Ryans testified at both stages of the trial based in part on a pretrial sanity evaluation of Giarratano. Giarratano's court-appointed trial counsel was not informed that Giarratano had been taken to Central State or that a sanity evaluation would be made there. Giarratano's statements to Dr. Ryans, who apparently did give Giarratano some warning that they might be used against him should he claim insanity at trial, were therefore made without benefit of counsel in the context of a custodial interrogation. Giarratano's claim on appeal has its basis in the line of cases beginning with *Estelle v. Smith*. *Estelle v. Smith*, 451 U.S. 456, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). The Fourth Circuit rejected the claim, saying that *Smith* did not apply.

Smith took place in the context of a Texas death penalty trial. The future danger aggravator is the same in Virginia and Texas. The trial judge in *Smith* entered an *ex parte* order to examine Smith for competency to stand trial, not as a matter of state law, but as his own personal practice. *Id.*, 451 U.S. at 456-7, 101 S. Ct. at 1870. The psychiatrist made a ninety-minute examination of Smith and pronounced him competent. The psychiatrist did not advise Smith of his right to remain silent. *Id.*, 451 U.S. at 460, 101 S. Ct. at 1872. At trial, Smith did not present an insanity defense. At the sentencing

phase, the State called the psychiatrist as its only witness. Smith had no prior warning that the psychiatrist would testify at sentencing. *Id.*, 451 U.S. at 459, 101 S. Ct. at 1871. The psychiatrist testified as to Smith's extreme future dangerousness over defense objection. Smith was sentenced to death. *Id.* On appeal, the Supreme Court held that "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.*, 451 U.S. 468, 101 S. Ct. at 1876. This holding was grounded in the 5th Amendment and *Miranda v. Arizona*. *Id.*, 451 U.S. at 469, 101 S. Ct. at 1876 (citing *Miranda*, 384 U.S. 436 (1966)). Smith's death sentence was reversed.

At Giarratano's preliminary hearing on February 16, 1979, the trial court appointed counsel for Giarratano and on motion of the Commonwealth ordered Dr. J.S. Santos to conduct a competency examination. The Commonwealth's motion was pursuant to Va. Code § 19.2-169, repealed in 1982. Dr. Santos was unable to determine whether Giarratano was competent to stand trial and recommended emergency hospitalization due to defendant's "mental difficulties." *Giarratano v. Commonwealth*, 220 Va. at 1069, 266 S.E.2d at 97 (1980). Giarratano was admitted to Central State Hospital on February 17, 1979. His defense counsel was not notified of the admission nor of the fact that a further psychiatric examination would be performed there. *Giarratano v. Procunier*, 891 F.2d 483, 489 (1989). Defense counsel raised no objection at trial to the lack of notice or to the psychiatric examination conducted out of his presence. *Id.* Dr. Ryans told Giarratano that he had the "right to speak or remain silent as he chose" but that his "statements could be used against him if he pleaded not guilty by reason of insanity." *Id.* at 488. It is not said in either the Supreme Court of Virginia's opinion or that of the Fourth Circuit at what point Giarratano decided to use an insanity defense, but Giarratano did employ that defense at trial. *See Giarratano v. Procunier*, 891 F.2d at 485; *Giarratano v. Commonwealth*, 220 Va. at 1066, 266 S.E.2d at 95.

The Fourth Circuit held that *Smith* was not controlling. Smith had not been advised of his right to remain silent at his competency evaluation, whereas Giarratano had received such a warning from Dr. Ryans. *Giarratano v. Procunier*, 891 F.2d at 488. Also, Smith did not plead insanity and Giarratano did. Dr. Ryans' testimony was held to be admissible at the guilt phase to rebut Giarratano's plea of insanity. *Id.* Dr. Ryans' testimony was also held admissible at the sentencing phase where Giarratano had made it clear that he would present psychiatric evidence for the purpose of mitigation. *Id.*

ANALYSIS

The critical issue in the Fourth Circuit's discussion of Giarratano's Fifth Amendment claim is whether precedent indicates that a waiver of Fifth Amendment rights for all purposes comes about when a capital defendant elects to put on expert evidence of insanity.

It seems clear from *Smith* and *Buchanan v. Kentucky*, 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987), that there is some waiver of the right to remain silent when defendant offers evidence of insanity at the guilt trial. This waiver clearly covers testimony of a state psychiatrist on the issue of insanity at the guilt phase.

> When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, . . . a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. Smith, 451 U.S. at 465, 101 S. Ct. at 1874.

The Supreme Court in *Smith* also noted that the Fifth Circuit had left open "the possibility that a defendant who wishes to use psychiatric evidence in his own behalf [on the issue of future dangerousness] can be precluded from using it unless he is . . . willing to be examined by a psychiatrist nominated by the state." *Id.*, at n.10 (emphasis added).

In *Giarratano*, the Fourth Circuit apparently went beyond the dictates of existing precedent to hold that the waiver brought about by his insanity evidence was a complete one, extending to the penalty trial. In any event, the Fourth Circuit concluded that Giarratano's use of psychiatric evidence at that proceeding could be conditioned on the Commonwealth's rebuttal from Dr. Ryans: Giarratano's introduction of psychiatric evidence for the purpose of mitigation enabled the prosecution to introduce psychiatric evidence, including that derived from an examination of Giarratano, to show future dangerousness. In *Smith* the Court observed that "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase." *Giarratano v. Procunier*, 891 F.2d at 488 (quoting *Smith*, 451 U.S. at 472, 101 S. Ct. at 1877).

While the U.S. Supreme Court has not answered this question directly, there are indications that it might not reach the conclusion reached by the Fourth Circuit. In *Powell v. Texas*, 109 S. Ct. 3146, 106 L. Ed. 2d 551 (1989), the Court observed: "Nothing in *Smith*, or any other decision of this Court, suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity defense at the guilt stage of trial." *Id.* at 3150 n.3. It is therefore possible that the defendant cannot be put to the choice of either forgoing expert mental mitigation testimony or facing hostile testimony from a state psychiatrist based on compelled statements. *See also* Bennett, *Is Preclusion Under Va. Code Ann. § 19.2-264.3:1 Unconstitutional?*, 2 Capital Defense Digest 24 (Nov. 1989); Fitch, *Restrictions on the State's Use of Mental Health Experts in Capital Trials*, *Id.* at 21. Given these reservations, the Fourth Circuit's holding should be limited to the unique facts of Giarratano's case. However, Virginia attorneys should consider themselves on notice that any decision to offer expert evidence of insanity must be weighed against the possibility that the process will develop evidence which the Commonwealth may seek to use against a client at the penalty trial.

B. Sixth Amendment Claim

Giarratano was examined without prior notice to counsel that the results would be used at the penalty phase on the issue of future dangerousness. *Giarratano v. Procunier*, 891 F.2d at 488-9. This was also the case in *Smith*. *Smith*, 451 U.S. at 470-71, 101 S. Ct. at 1876-77. In *Smith*, the Supreme Court held that this was a violation of the accused's Sixth Amendment right to assistance of counsel. *Id.* Giarratano's counsel was appointed on February 16, 1979, and Giarratano was sent to Central State Hospital on February 17, 1979, for an evaluation without notice to counsel. It is almost certain that the evaluation, upon which at least part of the testimony of Dr. Ryans on the future danger issue was based, took place before there was any decision made by defense counsel to plead insanity. However, neither the state supreme court opinion, *Giarratano v. Commonwealth, supra*, nor the Fourth Circuit's opinion, *Giarratano v. Procunier, supra*, state when this decision was made.

The Fourth Circuit ruled that Giarratano was "not entitled to relief on the basis of his Sixth Amendment claim that his right to counsel was abridged. Giarratano's counsel did not object to the lack of opportunity to consult with his client before the competency or

sanity examination. Nor did he object at the penalty phase to the testimony of the psychiatrist who conducted the examination. The absence of objections raises a procedural bar to the assertion of infringement of Fifth and Sixth Amendment rights, unless Giarratano can show cause for the procedural default and resulting prejudice." *Giarratano v. Procunier*, 891 F.2d at 489. Giarratano sought to overcome the procedural bar by pleading ineffective assistance of counsel, limited to the penalty phase. *Id.* The Fourth Circuit held that the claim of ineffective representation did not justify avoidance of the default. The Fourth Circuit wrote that "trial counsel correctly anticipated *Smith*, which noted that the testimony of a prosecutor's psychiatrist is admissible when the defendant presents psychiatric testimony at the penalty phase . . .. Moreover . . . there was no infringement of Giarratano's Fifth Amendment right to be free of self-incrimination. Giarratano cannot show prejudice." *Id.* at 489-90.

ANALYSIS

In *Powell v. Texas*, the Supreme Court cited *Smith* as holding that ". . . once a capital defendant is formally charged, the Sixth Amendment right to counsel precludes such an examination without first notifying counsel that 'the psychiatric examination [will] encompass the issue of their client's future dangerousness.'" *Powell*, 109 S. Ct. 3146, 3147, 106 L. Ed. 2d 551 (1989). The Court noted that its judgment had been unanimous on this point. Last term's decision in [*Satterwhite v. Texas*, 486 U.S. 249, 108 S. Ct. 1792, 100 L. Ed. 2d 926 (1988)] reaffirmed this Sixth Amendment protection, emphasizing that 'for a defendant charged with a capital crime, the decision whether to submit to a psychiatric examination designed to determine his future dangerousness is "literally a life or death matter" which the defendant should not be required to face without the "guiding hand of counsel." *Id.*, 109 S. Ct. at 3147-8.

It seems clear that *Powell* prohibits, on Sixth Amendment grounds, exactly the sort of competency examination to which Giarratano was subjected without notice to counsel. The Fourth Circuit in this case, however, makes it equally clear that attorneys must object on the record to any failure to notify defense counsel of psychiatric examinations, and to the use of any evidence gained by the Commonwealth after such a failure to notify.

The duties and rights of counsel after notification of the Commonwealth's intention to conduct a psychiatric examination of the accused are not spelled out in *Powell*. Assuming no intention to claim insanity, counsel may wish to consider entering a formal objection, on the record, to any examination ordered at the request of the Commonwealth and either insisting on being present at any such exam, or at the very least directing the client to stand on his right to remain silent. That tactical decision must be made with the knowledge that its effect on defendant's right to present evidence at the penalty trial if he does not submit, and on the right of the Commonwealth to use his statements to its experts against him if he does, is equally unsettled.

II. Virginia's Capital Sentencing Structure is Constitutional.

Giarratano challenged Virginia's "future dangerousness" aggravating factor, arguing that (1) the definition of future dangerousness is vaguely written and (2) that the term is defined in two separate sections of the Virginia Code and that the two statutes are inconsistent. *Compare* Va. Code Ann. § 19.2-264.2 *with* Va. Code Ann. § 19.2-264.4 (1983 Repl. Vol.) (section III(2), *infra*).

A. Vagueness in the Statutes

The Fourth Circuit held, without discussing the language of the statute, that the future dangerousness predicate in Virginia's death penalty statutes is constitutional. The Court cited previous opinions which have approved the factor. *Briley v. Bass*, 750 F.2d 1238, 1245 (4th Cir. 1984); *Smith v. Commonwealth*, 219 Va. 455, 477-78, 248 S.E.2d 135, 148-49 (1978). The Fourth Circuit held that "the constitutionality of the statute is *buttressed* by reading it in the context of the already narrowly defined range of capital offenses." 891 F.2d at 490 (emphasis added) (citing *Lowenfield v. Phelps*, 484 U.S. 231, 244-46. 108 S. Ct. 546, 554-555, 98 L. Ed. 2d 568, 581-583 (1988)). *Lowenfield* held that, while capital murder statutes must "genuinely narrow the class of death eligible persons" to "guide the jury's discretion," *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742, 77 L. Ed. 2d 235 (1983), the narrowing function may be performed at either the guilt phase (through a narrow legislative definition of murders that can be capital) *or* at the penalty phase (through aggravating circumstances). *Lowenfield*, 484 U.S. at 244, 108 S. Ct. at 554, 98 L. Ed. 2d at 581 (1988).

ANALYSIS

To be constitutional, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty *and* must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant*, 462 U.S. at 877, 103 S. Ct. at 2742, (1983); *cf. Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976). In addition, "a State must 'narrow the class of murderers subject to capital punishment' by providing 'specific and detailed guidance' to the sentencer." *McClesky v. Kemp*, 481 U.S. 279, 303-304, 107 S. Ct. 1756, 1772-1773, 95 L. Ed. 2d 262, 286 (1987).

Whether it is permissible to narrow the class of death eligible defendants at the guilt/innocence phase and then justify imposition of the death penalty by application of an unconstitutionally applied aggravating factor is not settled. Although *Lowenfield* held that the constitutionally required narrowing may be done at either phase of a capital trial, factual differences between Louisiana's and Virginia's capital statutes raise doubts about *Lowenfield's* application in Virginia. Louisiana's aggravating factor (risk of death to more than one person) *duplicated* an element of the capital offense. Virginia's aggravating factors are distinctly different from the substantive offenses they "aggravate." Also, unlike Virginia's aggravating factors, Louisiana's factor has never been challenged as constitutionally suspect. *See*, Falkner, *The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor*, 2 Capital Defense Digest 19 (Nov. 1989) (noting that U.S. Supreme Court has declared "vileness" aggravating factor identical to Virginia's factor unconstitutional as applied).

The Fourth Circuit, however, echoed *Lowenfield* and suggested that a state legislature may broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the *sentencing* phase or, as Virginia has done, may narrow the types of murder for which a defendant may become death-eligible at the *guilt* phase of the trial. *Lowenfield*, 484 U.S. at 244, 108 S. Ct. at 554, 98 L. Ed. 2d at 581 (1988).

Regardless of whether the United States Constitution requires narrowing *and* guiding *and* justifying, Virginia may not apply its aggravating factors arbitrarily or capriciously. "A person's liberty is equally protected even when the liberty itself is a statutory creation of the state. The touchstone of Due Process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976, 41 L. Ed. 2d 935, 952 (1974). Since Virginia has chosen to narrow the class of death-eligible defendants at both the guilt and penalty phases, the state has a constitutional duty to apply the aggravating factors fairly and

evenly. *Id.* Insofar as the Fourth Circuit implies that Virginia may pay less attention to its application of its aggravating factors merely because the United States Constitution *may not* require the dual narrowing process chosen by the state, the court arguably erred.

Another question raised by the Fourth Circuit's holding is: if the constitutionality of Virginia's aggravating factors is "buttressed" by the narrowed capital statute at the guilt phase, is the scheme buttressed more under a truly narrow subsection of the statute, like murder of a police officer or murder during an abduction, and less under a broad-sweeping subsection, like murder in the commission of a robbery or the rape at issue in *Giarratano*? *See* Mosely & Richardson, *Robbery, Rape, and Abduction: Alone and As Predicate Offense to Capital Murder*, this issue. It is clear that some of the eight capital murder subsections narrow more substantively than others. *See* Va. Code Ann. § 18.2-31 (1988 and Supp. 1989). This is especially apparent when the construction of the subsections by the Supreme Court of Virginia is considered.

B. Conflict Between § 19.2-264.2 and 264.4

The Fourth Circuit also held that, although Virginia's capital punishment statutes conflict as to the scope of evidence permissible to establish future dangerousness, application of the future dangerousness factor remained constitutionally sound. The Court stated:

> The two dangerousness formulas define future danger the same: a probability that the defendant 'would commit criminal acts of violence that would constitute a continuing serious threat to society.' The texts vary only in the sort of evidence they allow to prove dangerousness.... The variance is not significant. *One statute, § 19.2-264.4(C), simply allows a broader range of evidence to be considered. Because the two definitions are consistent and because neither is vague, we affirm the district court's dismissal of Giarratano's challenge to the sentencing scheme.*

Code section 19.2-264.2 provides:

> 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....

Code section 19.2-264.4(C), by comparison provides:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt 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 he would commit criminal acts of violence that could constitute a continuing serious threat to society....

ANALYSIS

There are *two major differences* in these statutes. The first is indicated by the highlighted portions. The proof that must be considered in the second is significantly broader than the proof required in the second. Significantly, § 19.2-264.2 seems to indicate that, if a defendant had no prior record, he would be ineligible for the death penalty since there would be nothing on which to base an evaluation of the defendant's future dangerousness. The second difference involves the burden and standard of proof: under section - 264.2 seems to allow the court or jury independently to review the defendant's prior criminal record and determine for itself what weight to place upon the record. There is no explicit identification of a standard of proof for this finding. Section 264.4(C) requires the Commonwealth to prove future danger beyond a reasonable doubt. It is difficult to agree with the Fourth Circuit that the two statutes are "consistent." They represent two ends of the spectrum. Section 19.2-264.2 represents a narrow class of evidence which can be given unspecified weight while section 19.2-264.4(C) delineates a large body of evidence which can be used to meet a relatively high standard of proof.

The Fourth Circuit correctly noted that the two statutes *define* future danger in identical language. What is questionable, however, is the apparent conclusion of the court that the constitutional inquiry ends there. Whether a defendant "would constitute a continuing and serious threat to society" is highly dependant upon what proof is admissible to show future danger, who has the burden of proving it, and how much evidence is necessary before future danger can be said to exist. As to those points, the statutes are inconsistent. It is at least surprising that the inconsistency is treated as constitutionally irrelevant.

III. The Sentencing Court Did Not Err in Considering Evidence of Giarratano's Mental Illness and Drug Abuse As Aggravating Factors.

In the Fourth Circuit, Giarratano asserted, as he did at the sentencing hearing, that he suffered from mental illness and from substance abuse. He argued that the trial judge impermissibly considered those facts as aggravating. The Fourth Circuit held that:

> Giarratano's future dangerousness *was based on his voluntary substance abuse* in addition to his prior convictions and other past bad acts and the circumstances surrounding the deaths of the two victims. These are fully set forth in the sentencing memorandum of the trial judge and summarized in the Virginia Supreme Court's decision affirming his conviction (citations omitted). *All are permissible factors in the decision to impose the death sentence.* (emphasis added).

Code section 19.2-264.4 provides that evidence admissible to *mitigate* against a sentence of death includes "the circumstances surrounding the offense, the history and background of the defendant, and any other facts in *mitigation* of the offense." Va. Code Ann. §19.2-264.4 (1983 Repl. Vol.). That section also provides a non-exclusive list of evidence which may be considered in *mitigation* which includes facts that indicate that "... (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or ... (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...." *Id.*

The trial court sentenced Giarratano to death exclusively on the basis of his future dangerousness. *See Giarratano v. Commonwealth*, 220 Va. at 1077-78, 266 S.E.2d at 102 (trial judge's memorandum). The trial judge, after hearing evidence of Giarratano's mental state at the time of the offense, concluded that:

> . . . the evidence of emotional stress and reduced control, while admissible by statute and carefully considered by the court, *is not of such nature* as to mitigate the penalty in this case. *By becoming a habituate of drugs and alcohol one does not cloak himself with immunity from penalty for his criminal acts. Id.* (emphasis added).

ANALYSIS

(1) Comparison to *Penry v. Lynaugh.*

Capital sentencers (either juries or judges) must be advised that they may consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances surrounding the offense. *See Penry v. Lynaugh,* 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989); *see also, Capital Defense Digest,* Vol. 2, No.1 at 2 (Nov. 1989) (briefing and discussing *Penry*). In *Penry,* the Supreme Court invalidated a Texas sentencing scheme which, although it allowed the jury to *consider* Penry's evidence of mental retardation as mitigating, did not allow the jury to give the evidence *mitigating effect.* This was so because, without an instruction informing the jury that it could give mitigating effect to evidence of retardation, such evidence would naturally indicate a greater likelihood of future danger, Texas' only aggravating factor. The Court held that evidence of mental retardation was clearly mitigating. The *Penry* Court reaffirmed that "a sentencer *may not be precluded from considering,* and *may not refuse to consider,* any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death." *Penry,* 109 S. Ct. at 2946 (citing *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) and *Eddings v. Oklahoma,* 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)). "Relevant mitigating evidence" includes any aspect of a defendant's character or record and any of the circumstances of the offense. *Lockett,* 98 S. Ct. at 2964.

Evidence admitted at trial showed that Giarratano was under "extreme emotional distress" and that his capacity to conform his conduct was "substantially impaired" as a result of his tumultuous childhood and his history of substance abuse - statutory *mitigating* factors. Both psychiatrists, however, testified that Giarratano's mental condition, exacerbated by his substance abuse, made him more likely to present a continuing danger to society - treating the evidence as *aggravating.* Viewing the language in the trial judge's memorandum, it appears that the sentencer gave *no independent mitigating effect to Giarratano's mental state.* Thus, *Penry's* "may not refuse to consider" language is implicated. *Penry,* while not controlling, is relevant. Giarratano's mental condition in combination - alcoholism, drug abuse, mental illness and intoxication on the day of the offense - was no more voluntary than Penry's mental retardation. *Cf.* section IV(2), *infra* (discussing substance abuse alone as a mitigating factor). Additionally, Giarratano's mental condition, like Penry's mental retardation, would naturally be considered to add to the likelihood of a defendant's future dangerousness and in fact was found by both psychiatrists to do so.

The difference between *Penry* and *Giarratano* is that in *Penry,* the jury could *consider* Penry's mental retardation evidence as mitigating, but could not give it *mitigating effect.* In *Giarratano,* the trial judge may have *refused to consider* Giarratano's mental mitigation evidence as *mitigating.* The judge, in his memorandum, stated that the evidence was "not of such a *nature* as to mitigate the penalty in this case." He *did not* report that he found the evidence lacking in sufficient *weight* after considering it as mitigating.

Moreover, the choice at the sentencing hearing is between a life sentence and death. Even if the trial judge had considered Giarratano's evidence of substance abuse "of such a nature" to mitigate against a death sentence, Giarratano would still be subject to the second highest punishment available in Virginia. He would *not,* as the trial court suggested, "cloak himself with immunity from penalty for his criminal acts." *Id.*

(2) Addictive Substance Abuse as a Mitigating Factor.

The evidence indicated that Giarratano's history of substance abuse and his tumultuous family background were inextricably connected and, together, contributed to the impairment of his ability to conform his conduct to the law—an expressly designated *mitigating* factor. If, in fact, the trial judge failed to consider the whole package as mitigating, it might well have been because of the "voluntary" nature of the substance abuse. That would explain the correct but irrelevant assertion that by such abuse, Giarratano did not "cloak himself with immunity from penalty." Virginia courts have long and consistently held that voluntary intoxication is legally insignificant in every respect except as it might relate to the existence of premeditation. *See Director of Dept. of Corrections v. Jones,* 229 Va. 333, 329 S.E.2d 33 (1985) (voluntary intoxication is no defense for crimes of robbery and use of firearm in commission of felony); *Chittum v. Commonwealth,* 211 Va. 12, 174 S.E.2d 779 (1970) (no defense to kidnapping and attempted rape); *Jordan v. Commonwealth,* 181 Va. 490, 25 S.E.2d 249 (1943) (no defense to criminal conduct in general). *But see, Griggs v. Commonwealth,* 220 Va. 46, 255 S.E.2d 475 (1979) (voluntary intoxication may negate deliberation and premeditation). *Cf., Arey v. Peyton,* 209 Va. 370, 164 S.E.2d 691 (1968) (voluntary intoxication which produces permanent insanity will not eliminate insanity defense).

Two things should be remembered, however. First, Giarratano's evidence was being considered at the penalty trial, not the guilt/innocence phase. Second, Virginia law is not settled on the question of whether habitual, addictive substance abuse is "voluntary" or "involuntary." *See, e.g. Johnson v. Commonwealth,* 135 Va. 524, 115 S.E. 673 (1923) (involuntary intoxication can be affirmative defense to criminal acts). Indeed, the modern trend in *capital sentencing trials* is to consider any amount of intoxication, even if it is not the result of addictive substance abuse, as mitigating against a sentence of death. *See,* ALI Model Penal Code §210.6(4)(g).

It is suggested that capital defense counsel should characterize any habitual, addictive substance abuse as "involuntary," demonstrating in the words of the Supreme Court of Virginia in *Johnson* that there was an "absence of an exercise of independent judgment on the part of the accused in taking the intoxicant." *Johnson,* 135 VA. at 536, 115 S.E. at 677.

It is suggested further that, even if the trial court does not accept the "voluntary/involuntary" characterization at the guilt/innocence phase, it is the only appropriate portrayal when considering substance abuse at the penalty trial. This is *especially* true when the abuse is linked to a factor that must by law be considered *mitigating,* whatever weight is ultimately assigned to it. If counsel makes this assertion citing the requirements of *Penry, Lockett,* and *Eddings,* a court or jury may consider the evidence as it properly should—as *mitigating.* Even if the court or jury does not do so, counsel should insure that the record reflects the attempt.

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