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THE "TWO-EDGED" SWORD: MITIGATION EVIDENCE USED IN AGGRAVATION

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VIII. CONCLUSION

The use of unadjudicated acts for proof of future dangerousness in capital sentencing violates the defendant's rights under the Sixth, Eighth and Fourteenth Amendments. The presentation of such evidence with no articulated standard of proof or cautionary instructions by the judge to guide the jury in its penalty determination fails to meet the reliability standards required in capital sentencing procedures. Admission of the alleged conduct deprives the defendant of the notice, process, and effective assistance of counsel to which he is entitled during the penalty phase. Ultimately, if relevant at all to the issue of future dangerousness, the acts as presented collectively are more prejudicial than probative of defendant's potential future threat to society. Defense counsel must meet the Commonwealth's attack by challenging each unadjudicated act and defeating the overall effect such information could have on a sentencing jury.

THE "TWO-EDGED" SWORD: MITIGATION EVIDENCE USED IN AGGRAVATION

BY: CHARLES F. CASTNER

I. INTRODUCTION

In many capital cases, there really is little question of whether the defendant actually committed the murder. The main issue in the trial occurs during the penalty phase, when the jury is asked to answer the question of whether the defendant should be sentenced to death or life in prison. Therefore, the mitigation evidence offered in the penalty phase of a capital murder trial can be the most important part of the trial for the defendant. The defense lawyer must make sure that he or she has prepared a strong theme for mitigation and that the mitigation evidence is used only to support an argument for mitigation.

One problem which defense lawyers must be prepared to deal with is mitigation evidence that could be used by the prosecution or viewed by the jury to support the aggravating factor of future dangerousness.[1] When the defense relies on the diminished capacity of the defendant or his inability to "conform his conduct to the requirements of law,"[2] the same evidence could be used by the prosecution to argue that the defendant poses a future danger to society because the defendant will always suffer from the mental deficiency. The defense lawyer must be prepared to prevent the prosecutor from posing this argument and to proactively focus the jury's attention on the mitigating aspects of this evidence.

II. THE CONSTITUTIONAL BASIS

In *Zant v. Stephens*,[3] the United States Supreme Court stated that if the state had attached an aggravating label to "conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness," then "due process of law would require that the jury's decision to impose death be set aside." *Stephens'* prohibition of the use of mitigating evidence in such a fashion is best understood in light of the Supreme Court's holdings concerning the defendant's right to introduce mitigating evidence.

The Supreme Court of the United States ruled in *Lockett v. Ohio*,[4] "that the Eighth and Fourteenth Amendments require that the sentencer ... 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." Based on this reasoning, the Court found an Ohio death penalty statute which restricted the range of mitigating circumstances that could be considered by the sentencer to be unconstitutional.[5]

The constitutional right of a defendant to present any relevant mitigating factor and to have it be considered was reaffirmed in *Eddings v. Oklahoma*.[6] In applying the holding of *Lockett*, Justice Powell stated that "just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, **as a matter of law**, any relevant mitigating evidence."[7] Read together, *Lockett* and *Eddings* stand for the proposition that the defendant must be allowed to present any relevant mitigating circumstances and that the sentencer, whether it be judge or jury, **must** consider the mitigating nature of the evidence. The weight to be given the evidence is still left to the sentencer's discretion, but the sentencer may not refuse to consider the evidence.

The right of the defendant to present any relevant mitigating evidence, and the responsibility of the sentencer to consider the mitigating evidence, would not mean anything unless the sentencer could give effect to that evidence. Thus, in *Penry v. Lynaugh*,[8] the Supreme Court held that the sentencer must be able to give effect to the mitigating evidence in determining whether the defendant should be sentenced to death or life imprisonment. The Court recognized that the sentencer must have the ability to give effect to the mitigating circumstance if they were to uphold the underlying principle of *Lockett* and *Eddings*: that punishment should be directly related to the personal culpability of the criminal defendant.[9] Justice O'Connor stated:

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."[10]

In order to protect a defendant's constitutional right to present evidence in mitigation of the defendant's mental or emotional problem, and to have that evidence considered and given effect by the sentencer, the prosecution must not be allowed to penalize the defendant's exercising of a constitutional right by using this same evidence for the purpose of proving an aggravating factor. In addition, the jury must be cautioned that they may not consider the evidence offered in mitigation as proof of an aggravating factor. The danger of this happening was noted by Justice O'Connor in *Penry*, stating that "Penry's mental retardation and history

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1 *See* Va. Code Ann. § 19.2-264.2; § 19.2-264.4(c) (1990).

2 Va. Code Ann. § 19.2-264.4 (B) (iv) (1990). The Virginia sentencing proceeding statute identifies this evidence as mitigating.

3 *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

4 *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original).

5 *Id.* at 608.

6 455 U.S. 104 (1982).

7 *Id.* at 113-14 (emphasis in original).

8 492 U.S. 302 (1989).

9 *Id.* at 319.

10 *Id.* at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

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."[11]

In *Eddings*, the Court held that when considering relevant mitigating evidence, the sentencer "may not give it no weight by excluding such evidence from their consideration."[12] To allow the sentencer to consider mitigating evidence as proof of an aggravating factor would be much worse than having the sentencer not consider the evidence at all. Allowing the Commonwealth to use mitigating evidence to prove an aggravating factor, or allowing the jury to consider the mitigating evidence as aggravating, would violate the holdings of *Lockett*, *Eddings*, *Penry* and *Stephens*.

III. THE STATUTORY BASIS

The Virginia Legislature also has codified the principle that mitigating evidence of a defendant's mental condition cannot be used for the purpose of proving an aggravating factor. Evidence derived from any statement or disclosure made by the defendant "during a competency evaluation performed pursuant to § 19.2-169.1, and evaluation performed pursuant to § 19.2-169.5 to determine sanity at the time of the offense, treatment provided pursuant to § 19.2-169.2 or § 19.2-169.6 or a **capital sentencing evaluation** performed pursuant to this section" cannot be used "at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances specified in § 19.2-264.4."[13] The statute makes clear that although the Commonwealth can use the evidence garnered from these evaluations to rebut the mitigation issues raised by the defense, that is, to argue that the defendant does not suffer from any mental problems or that the problem is not severe enough to affect the defendant's capacity to conform his conduct, the government **cannot** use the evidence to affirmatively prove an aggravating circumstance. The statute does not fully cover the range of constitutional protection discussed in the previous section, but it is evidence of the legislature's recognition of the principle.

IV. KEEPING MITIGATING EVIDENCE MITIGATING

There are basically two ways to keep the defendant's mitigating evidence from being used as proof of an aggravating factor. The first method would deal with preventing the Commonwealth from using the mitigation evidence for the purpose of proving an aggravating factor. If it looks as though the Commonwealth may try to prove future dangerousness using evidence offered in mitigation, the defense lawyer should file a motion in limine to prevent the prosecution from doing so.[14] The problem with this is that it may unnecessarily inform the Commonwealth of any arguments that they were not planning on using to begin with. The defense attorney should have an objection and supporting memorandum in hand ready to go if the Commonwealth does attempt to raise the issue.

Even if the Commonwealth does not directly try to use the mitigating evidence to support an argument of future dangerousness, the effect of the evidence on the jury must be considered. The jury could naturally infer that if the defendant has a mental problem which makes him unable to conform his conduct to the law, he will be a future danger to society. The defense lawyer can proactively try to keep this from occurring by offering a jury instruction which attempts to focus the jury's attention on the evidence as mitigating. The following jury instruction is offered as an example of how such a proactive instruction might look if the "two-edged sword" evidence were organic brain damage that affected the defendant's ability to control himself:[15]

THE *PENRY* JURY INSTRUCTION ON MITIGATION

> The Court instructs the Jury that if you do find that an alleged aggravating circumstance has been proved, that does not automatically or necessarily mean that you should sentence the defendant to death. Before deciding whether a sentence of life in prison or death is appropriate, you are required to consider any evidence that has been presented in mitigation.
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> Mitigating circumstances may include, but are not limited to, any facts relating to the defendant's age, character, education, environment, mental condition, life history and background which might be considered extenuating or tend to reduce his or her moral culpability, or make him or her less deserving of the extreme punishment of death.
>
> **Among the mitigating evidence you have heard is testimony on how the organic brain damage suffered by the defendant significantly impaired his or her ability to control his or her behavior. This evidence of brain damage is a mitigating circumstance affecting the defendant's culpability that you must consider as supporting a sentence less than death. You may use this evidence only as a mitigating circumstance, and should not use it in any manner as proof of an aggravating circumstance.**
>
> You must consider a mitigating circumstance if you find that there is evidence to support it. You are not required to be convinced beyond a reasonable doubt that a mitigating circumstance exists before you must take that circumstance into account as you deliberate this case.
>
> The weight which you give to a particular mitigating circumstance is a matter for your judgment. However, you may not refuse to consider any evidence of mitigation and thereby give it no weight.

This instruction reflects the principle which the Court has established through its holdings in *Lockett*, *Eddings*, *Penry* and *Stephens*. The court should be urged to grant the giving of this instruction as an accurate statement of the law pursuant to section 19.2-263.2,[16] even though it does not conform with the model jury instructions.

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11 *Id.* at 324 (emphasis added).

12 *Eddings*, 455 U.S. at 115.

13 Va. Code Ann. § 19.2-264.3:1(G) (1990) (emphasis added).

14 *Cf. Adams v. Aiken*, 965 F.2d 1306, 1320 (1992). The court held that comments made by the prosecutor to the jury, "You have to be able to cope to function in this world. If you can't cope, you can't function," during closing arguments of the sentencing phase of the trial did not rise to the level of constitutional error because "the prosecutor pressed on the jury no specific conclusion concerning Adam's mental state, nor did he explicitly urge the jury to treat Adam's mentality as an aggravating circumstance." The court's treatment of the claim appeared to recognize that the mitigating evidence could not be used by the prosecution as support for an aggravating factor. *See* case summary of *Adams*, Capital Defense Digest, Vol. 5, No. 1, p. 25 (1992).

15 The proposed language is only part of what should be offered as instructions that fully explain the role of mitigating and aggravating evidence under the statute. The Virginia Capital Case Clearinghouse has developed fuller "mitigation" jury instructions to supplement the traditional model jury instructions which are made available to attorneys representing capital defendants.

16 Va. Code Ann. § 19.2-263.2. Jury instructions. — A proposed jury instruction submitted by a party, which constitutes an accurate statement of the law applicable to the case, shall not be witheld from the jury solely for its nonconformance with model jury instructions (1992, c. 522).

V. CONCLUSION

Because of the importance of mitigation evidence, the defense lawyer must ensure that the evidence offered in mitigation is not used or perceived as proof of the aggravating factor of future dangerousness. Instructing the jury that mitigation evidence proffered by the defendant is to be considered as such, and cannot be considered as proof of an aggravating circumstance, is essential to avoiding the "two-edged sword" dilemma referred to by Justice O'Connor in *Penry v. Lynaugh.* The right to present relevant mitigating evidence, have that evidence considered and given effect, and to not have that evidence used to prove or to be viewed as an aggravating circumstance is guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. It is the defense lawyer's duty and responsibility to assure that the defendant's right is recognized.

APPLYING THE VIRGINIA CAPITAL STATUTE TO JUVENILES

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I. INTRODUCTION

Virginia practitioners increasingly are facing cases where the Commonwealth is seeking the death penalty against juvenile defendants. These defendants sometimes are as young as fifteen years of age. The most desirable outcome, of course, is to prevent the juvenile defendant from ever having to face the possibility of the death penalty. This article explores three ways in which the Virginia death penalty statute may be challenged when it is applied against juvenile offenders. The first challenge explains how the United States Supreme Court's decisions preclude the application of the death penalty against fifteen year-old offenders when, as under the Virginia scheme, the capital punishment statute does not specify a minimum age. The second challenge, based on the United States Supreme Court holdings in *Stanford v. Kentucky*[1] and *Wilkins v. Missouri*[2], focuses on the inadequacy of Virginia's transfer statutes where a defendant who is seventeen years or younger is being certified to face a possible death sentence. The final challenge examines why Virginia's statute allowing a juvenile who is facing the death penalty to waive her transfer hearing also runs afoul of *Stanford* and *Wilkins.*

II. THE STATUTE AS APPLIED TO MINORS UNDER AGE SIXTEEN.

The Eighth Amendment prohibits the infliction of "Cruel and Unusual Punishment." In implementing the mandate of this clause, the Supreme Court repeatedly has recognized that differences exist which must be accommodated in determining the rights and duties of children as compared with those of adults.[3] Similarly, the legislatures in all fifty states have specifically applied this mandate to distinguish the criminal treatment of individuals under age sixteen.[4] However, several states, including Virginia, have provided for special certification procedures that are used to authorize minors below the age of sixteen to stand trial as adults.[5] When such procedures are used to certify minors charged with capital murder and allow them to face the death penalty because the capital statute does not require a minimum age for the imposition of the death penalty,[6] the Eighth Amendment casts grave doubt on the statute's constitutionality.

The Supreme Court has held that in applying the Eighth Amendment's "Cruel and Unusual Punishment" prohibition, judges must be guided by the "evolving standards of decency that mark the progress of a maturing society."[7] In performing that task, the Court looks to the work product of state legislatures and sentencing juries and to the policies behind society's acceptance of specific penalties in certain cases.[8]

The Court applied this analysis in *Thompson v. Oklahoma*,[9] when it addressed the question of whether fifteen year-old offenders could be subject to the death penalty. Like Virginia, the Oklahoma statutes provided special procedures by which a "child"[10] could be tried as an adult,[11] and, as with the Virginia code,[12] the Oklahoma capital murder statute did not state a minimum age. Citing *Coker v. Georgia*,[13] a plurality held that the imposition of the death penalty on an offender under sixteen years of age always would be unconstitutional.[14]

In arriving at its holding, the plurality reviewed "relevant legislative enactments" and referred to a survey of "jury determinations" to support its "judgement that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."[15] Citing *Bellotti v. Baird*[16] and *Eddings v. Oklahoma*,[17] the plurality endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.[18] The *Thompson* plurality also identified data which it saw as establishing a national consensus against subjecting a fifteen year-old to the death penalty. At the time *Thompson* was decided, thirty-seven states had a death penalty. Of these thirty-seven, eighteen states had a set minimum age of sixteen or greater,[19] and no state had specifically set the age minimum at less than age sixteen.[20] In addition, there were thirteen states and the District of Columbia that did not allow the imposition of the death penalty at all. Thus, the plurality found a strong national consensus against the imposition of the death penalty against fifteen year-old defendants.

In support of this national consensus theory, the *Thompson* Court also relied on statistics showing the rarity of fifteen year-olds being

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1 492 U.S. 361 (1989).

2 *Id.* at 361.

3 *Thompson v. Oklahoma*, 487 U.S. 822, 823 (1988). *See also Goss v. Lopez*, 419 U.S. 565, 590-91 (1975). *See* case summary of *Thompson*, Capital Defense Digest, Vol. 1, No. 1, p. 21 (1988).

4 Every State has adopted "a rebuttable presumption" that a person under 16 "is not mature and responsible enough to be punished as an adult," no matter how minor the offense may be. *See Thompson*, 487 U.S. at 825, n. 22 (1988).

5 Va. Code Ann. § 16.1-269(A)(1982).

6 *See* Va. Code Ann. §§ 18.2-31 (1988), 19.2-264.2 to 19.264.5 (1990).

7 *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

8 *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 293 (1976); *Coker v. Georgia*, 433 U.S. 584, 593-597 (1977); *Edmund v. Florida*, 458 U.S. 782, 789-96 (1982).

9 487 U.S. at 820-21.

10 Okla. Stat. tit. 10, § 1101(1)(Supp. 1987).

11 *See* Okla. Stat., tit. 10, § 1112(b)(1981); Va. Code Ann. § 16.1-269 (1982).

12 Va. Code Ann. § 18.2-31 (1988).

13 433 U.S. at 592.

14 *Thompson*, 487 U.S. at 838 (opinion of Stevens, Brennan, Marshall, and Blackmun J.J.)

15 *Id.* at 822-23.

16 443 U.S. 622 (1979).

17 455 U.S. 104 (1982).

18 *Thompson*, 487 U.S. at 834 (opinion of Stevens, Brennan, Marshall and Blackmun, J.J.)

19 *See id.* at 829-30, n.30.

20 *See id.*