

Ask and the Commonwealth Shall Receive: The Imbalance of Virginia's Mental Health Expert Statute

Mark J. Goldsmith*

I. Introduction

Shortly before Dean Beckford went on trial for his life in a Richmond, Virginia courtroom in 1997, the prosecution moved for an order requiring his attorneys to disclose any psychiatric evidence they planned to introduce at his capital sentencing should he be convicted. In addition, the prosecutors wanted the defense to turn over all information that the defense mental health evaluators had reviewed or considered while evaluating Beckford. Finally, so as to be in a position to rebut Beckford's mitigating evidence at sentencing, the prosecution wanted the judge to require Beckford to submit to a pretrial evaluation (including, presumably, detailed questioning about the facts of the crime and his own participation in it) by mental health evaluators selected by, and reporting to, the prosecuting attorneys.¹

The defense opposed the motion, citing Beckford's Fifth Amendment rights against compelled self-incrimination. The court recognized the Government's need to be able to prepare for possible psychiatric testimony at sentencing. However, it fashioned stringent protections to ensure that this limited right to discovery did not turn into an unconstitutional windfall of Government access to the confidences and files of a defendant who had not yet been convicted of any crime. The court determined that while the mental health evaluations would be conducted prior to trial, the examination reports would remain sealed until the jury found the defendant guilty and the defense subsequently confirmed its intent to present mitigating mental health evidence during the sentencing phase.²

* J.D. Candidate, May 2006, Washington and Lee University School of Law; B.A. University of California, Los Angeles, March 2003. The author would like to thank Shannon Borromeo for her love, patience, and understanding. The author is also indebted to Professor David Bruck and the members of Virginia Capital Case Clearinghouse, especially Justin Shane, Tamara Graham, and Jessica Tanner. The author is also grateful to his family for their unending encouragement and support.

1. Beckford v. United States, 962 F. Supp. 748, 751–52 (E.D. Va. 1997).
2. *Id.* at 752, 763–65.

As it happened, Dean Beckford was charged in a federal court governed by the Federal Rules of Criminal Procedure.³ Had he been tried in a Virginia state courtroom just a few blocks away, however, the prosecution's request for pretrial access both to Beckford himself and to the results of much of his lawyers' investigation would have been treated very differently. Unlike the federal court, which limited pretrial disclosures to the minimum necessary to allow the prosecution a fair opportunity to prepare mental health rebuttal case, the Virginia circuit court would have been obligated under Virginia Code section 19.2-264.3:1 ("3:1") to order Beckford to relinquish all his mental health evidence to the prosecuting attorneys prior to trial, once his lawyers decided to present mental health mitigation in the event of conviction.⁴ In addition, the prosecution's experts would have gained access to Beckford for a non-confidential pretrial interview.⁵ In addition, despite a statutory provision that on its face strictly limits the prosecution's in-court use of its own evaluation to rebuttal of the specific mitigating factors alleged by the defense, Supreme Court of Virginia decisions have so eviscerated this restriction as to provide little or no protection to a capital defendant trying to decide whether to risk cooperating with the prosecution's mental health expert.⁶

This article addresses several issues that arise when a indigent capital defendant exercises his right to a mental health evaluation and to present mental health expert evidence in mitigation. Part II examines a capital defendant's constitutional right to mental health expert evidence and the codification of that right in Virginia's 3:1 statute. Part III discusses the prosecution's limited right to the use of mental health testimony as rebuttal evidence during the sentencing phase of a capital trial and explores the Fifth Amendment restrictions on the Commonwealth's right to such evidence. This Part also examines federal case law regarding the disclosure of mental health evidence to the prosecution and compares 3:1 to its federal counterpart. Part IV considers the problem of balancing a capital defendant's right against self-incrimination against the

3. *Id.* at 751–52.

4. *See* VA. CODE ANN. § 19.2-264.3:1 (Michie 2004) [hereinafter 3:1] (providing the qualifications and procedures necessary for acquiring and using a government appointed mental health expert for a capital defendant).

5. *See* VA. CODE ANN. § 19.2-264.3:1(F)(1) (granting the Commonwealth one or more mental health experts to examine the defendant upon notice from the defense of its intent to introduce mental health expert evidence in mitigation).

6. *See* Jackson v. Commonwealth, 499 S.E.2d 538, 553 (Va. 1998) (permitting the prosecution to introduce mental health evidence relating to future dangerousness as long as such evidence did not directly state that the defendant presented a future danger to society); Stewart v. Commonwealth, 427 S.E.2d 394, 408 (Va. 1993) (determining that 3:1 does not prevent the prosecution from presenting mental health evidence to support a finding of future dangerousness); Savino v. Commonwealth, 391 S.E.2d 276, 281 (Va. 1990) (holding that once a defendant notifies the State of his intention to present mental health expert evidence in mitigation, he waives his entire Fifth Amendment privilege against self-incrimination).

prosecution's right to rebut mental health evidence. Specifically, this Part explores the benefits and consequences of withholding mental health mitigation evidence from the prosecution until the defendant has been found guilty and has confirmed his intent to introduce such mitigating testimony. Part V considers whether 3:1 violates an indigent capital defendant's Fifth Amendment right against self-incrimination.

II. Presenting Mental Health Expert Mitigating Evidence

A. The Right to Offer Mitigating Evidence in a Capital Sentencing Proceeding

For more than three decades, the United States Supreme Court has distinguished the death penalty from other judicially imposed punishments.⁷ The death penalty is the one sentence that cannot be judicially corrected if improperly imposed, and "its severity and irrevocability" mandate careful judicial examination.⁸ Thus, to minimize the arbitrary or capricious imposition of a death sentence, the procedural safeguards of a capital case exceed those of other criminal trials.⁹ One of these safeguards, the presentation of mitigation evidence during the sentencing phase of a bifurcated capital trial, introduces the defendant's background for the jury's consideration and allows the sentencing body to make an individualized determination.¹⁰ Moreover, mitigating evidence enables the defense to counter both the graphic details of the offense and the evidence introduced against the defendant.¹¹

*Lockett v. Ohio*¹² and subsequent Supreme Court cases established the general principle that no relevant mitigating evidence may be excluded from the jury's consideration in determining a capital defendant's sentence.¹³ The Supreme

7. See *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part) (noting that in the twelve years since *Furman*, "every [Supreme Court justice] has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment"); *Furman v. Georgia*, 408 U.S. 238, 248 n.11 (1972) (plurality opinion) (requiring a capital sentencing scheme to provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not").

8. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion).

9. *Id.*

10. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (concluding 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" (emphasis omitted)).

11. See Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 362-64 (1997) (discussing the constitutional requirement that a jury consider a defendant's background before imposing a death sentence).

12. 438 U.S. 586 (1978).

13. *Lockett*, 438 U.S. at 604; see *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) (stating that

Court has concluded that “the ‘meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding’ than in any other context.”¹⁴ Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹⁵ Therefore, it follows that “‘[r]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.’”¹⁶ If evidence could persuade a reasonable juror to impose a sentence less than death, a state cannot preclude the sentencer from considering it.¹⁷ Complying with the constitutional requirement concerning mitigating evidence in a capital case, Virginia statutory law permits, at the penalty phase, the introduction of any evidence relevant to sentencing and provides an illustrative, non-exhaustive list of potentially relevant mitigating factors.¹⁸

B. *Ake v. Oklahoma*

In 1985 the United States Supreme Court decided *Ake v. Oklahoma*¹⁹ and solidified an indigent defendant’s constitutionally protected right to a competent psychiatrist to aid the defense in a capital case.²⁰ Once “a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access” to a competent mental health expert.²¹ However, a defendant’s right to such an expert is restricted, and the Court specifically rejected the contention “that the indigent defendant has a constitutional right to choose a psychiatrist of his

“the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence”); *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987) (finding that “[s]tates cannot limit the sentencer’s consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty”).

14. *Tennard v. Dretke*, 124 S. Ct. 2562, 2570 (2004) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)).

15. FED. R. EVID. 401.

16. *Tennard*, 124 S. Ct. at 2570 (quoting *McKoy*, 494 U.S. at 440).

17. *Id.*; see *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) (stating that “a State cannot preclude the sentencer from considering ‘any relevant mitigating evidence’ that the defendant proffers in support of a sentence less than death” (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982))).

18. See VA. CODE ANN. § 19.2-264.4(B) (Michie 2004) (listing possible mitigating factors, including whether “the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance”).

19. 470 U.S. 68 (1985).

20. *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985) (holding that an indigent defendant has the right to have the state provide a mental health expert to assist in the presentation of mitigating evidence).

21. *Id.*

personal liking or to receive funds to hire his own.”²² The ruling left to the states the decision of who should choose the mental health expert.²³ In response, the Virginia legislature enacted 3:1 slightly more than a year after *Ake*.²⁴

C. 3:1

Although the state legislature enacted 3:1 in 1987, the substance of the statute has not changed since its inception nearly twenty years ago.²⁵ Codifying *Ake*, the statute guarantees an indigent capital defendant a mental health expert to assist the defense in preparing and presenting mitigation evidence.²⁶ Satisfying the minimal requirements of 3:1 demands little of the defense.²⁷ The statute further requires the court-appointed expert to produce a report on the history, character, and mental state of the defendant at the time of the offense.²⁸ Although the report initially is protected by the attorney-client privilege, defense counsel must relinquish all gathered information to the Government if the defense decides to use the evaluation in court as mitigating evidence.²⁹ Section

22. *Id.* at 83.

23. *Id.*

24. *See* VA. CODE ANN. § 19.2-264.3:1 (Michie 2004) (providing the qualifications and procedures necessary for acquiring and using a government-appointed mental health expert for a capital defendant).

25. Amendments in 1987 and 1996 added further qualifications for experts and expanded the professions available for appointment. *Id.* A 2003 amendment made grammatical changes to the statute. *Id.*

26. VA. CODE ANN. § 19.2-264.3:1(A). The statute provides in part:

Upon (i) motion of the attorney for a defendant charged with or convicted of capital murder and (ii) a finding by the court that the defendant is financially unable to pay for expert assistance, the court shall appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of [mitigating] information.

Id.

27. *See id.* (requiring only a motion by the defense and a finding that the defendant is indigent).

28. VA. CODE ANN. § 19.2-264.3:1(C). The statute provides:

The expert . . . shall submit to the attorney for the defendant a report concerning the history and character of the defendant and the defendant’s mental condition at the time of the offense. The report shall include the expert’s opinion as to (i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense, (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired, and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant’s mental condition at the time of the offense.

Id.

29. VA. CODE ANN. § 19.2-264.3:1(D). The statute provides:

3:1(D) requires the defense to turn over the mental health report and all other records related to the examination.³⁰

Furthermore, section 3:1(F) grants the prosecution, upon request, a second court-appointed expert to evaluate the defendant further for possible rebuttal of the first expert's findings.³¹ Upon any attempt by the defendant to assert his right against self-incrimination by refusing to cooperate fully with the prosecution's expert, the court may exclude the testimony of the defense's court-appointed expert.³² The statute also requires the Commonwealth's expert to complete an evaluation report and to deliver it to both the prosecution and the defense.³³

Lastly, Virginia Code section 19.2-264.3:3 ("3:3") limits the prosecution's potential use of evidence obtained pursuant to 3:1.³⁴ The statute forbids the use of the defendant's statements and evidence derived therefrom to prove future dangerousness at the penalty phase.³⁵ Furthermore, the section restricts the use of such statements to rebuttal evidence during the sentencing proceeding.³⁶

The report described in subsection C shall be sent solely to the attorney for the defendant and shall be protected by the attorney-client privilege. However, the Commonwealth shall be given the report and the results of any other evaluation of the defendant's mental condition conducted relative to the sentencing proceeding and copies of psychiatric, psychological, medical or other records obtained during the course of such evaluation, after the attorney for the defendant gives notice of an intent to present psychiatric or psychological evidence in mitigation.

Id.

30. *Id.*

31. VA. CODE ANN. § 19.2-264.3:1(F)(1) (Michie 2004). The statute states that "[i]f . . . the Commonwealth . . . seeks an evaluation concerning the existence or absence of mitigating circumstances relating to the defendant's mental condition at the time of the offense, the court shall appoint one or more qualified experts to perform such an evaluation." *Id.*

32. *See* VA. CODE ANN. § 19.2-264.3:1(F)(2) ("If the court finds . . . that the defendant has refused to cooperate with an evaluation requested by the Commonwealth, the court may . . . bar the defendant from presenting his expert evidence.").

33. VA. CODE ANN. § 19.2-264.3:1(F)(1).

34. VA. CODE ANN. § 19.2-264.3:3 (Michie 2004) [hereinafter 3:3]. This statute was formerly § 19.2-264.3:1(G) until the Virginia General Assembly re-codified the statute as § 19.2-264.3:3 in 2003. For clarity, this article will refer to both statutes as 3:3. The statute states in part:

No statement or disclosure by the defendant made during . . . a mental condition evaluation performed pursuant to § 19.2-264.3:1 . . . and no evidence derived from any such statements or disclosures may be introduced against the defendant at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances [of future dangerousness or vileness]. Such statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense.

Id.

35. *Id.*

36. *Id.*

D. *The Supreme Court of Virginia's Interpretation of 3:3*

Although the language of 3:3 appears to restrict the prosecution's use of mental health testimony, the Supreme Court of Virginia's interpretation of the statute has undermined the value of this protection. In *Savino v. Commonwealth*,³⁷ the court seemingly ignored the requirements of 3:3 and affirmed the trial court's decision to permit the State to introduce both non-rebuttal and future dangerousness 3:1 mental health evidence during the penalty phase.³⁸ Similarly, in *Stewart v. Commonwealth*,³⁹ the court concluded that the Commonwealth's use of mental health testimony by a "rebuttal" expert is not restricted to rebutting mitigation.⁴⁰ Furthermore, *Jackson v. Commonwealth*⁴¹ found no error in the prosecution's introduction of mental health evidence to support a finding of future dangerousness.⁴² Part IV of this article discusses in greater detail the consequences of the Supreme Court of Virginia's interpretation of 3:3 and proposes a potential solution to the resulting constitutional concerns surrounding 3:1.⁴³

III. *The Prosecution's Use of Mental Health Expert Evidence*

A. *Right to Rebuttal Evidence*

1. *The Applicability of Estelle v. Smith*

In *Estelle v. Smith*,⁴⁴ the Supreme Court recognized the Fifth Amendment concerns raised by the prosecution's use of a mental health expert's evaluation of a capital defendant.⁴⁵ Although the defense had not placed Ernest Smith's competency or sanity into issue, the Texas trial judge ordered a pretrial mental health evaluation of the defendant to determine his competency to stand trial.⁴⁶ The examining psychiatrist, Dr. James Grigson, conducted an interview, confirmed the defendant's fitness to stand trial, and submitted a report of his

37. 391 S.E.2d 276 (Va. 1990).

38. *Savino*, 391 S.E.2d at 281–82.

39. 427 S.E.2d 394 (Va. 1993).

40. *Stewart*, 427 S.E.2d at 408.

41. 499 S.E.2d 538 (Va. 1998).

42. *Jackson*, 499 S.E.2d at 553.

43. *See infra* Part IV.B (discussing the consequences of *Savino* and its interpretation of 3:1 and 3:3).

44. 451 U.S. 454 (1981).

45. U.S. CONST. amend. V (stating that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself"); *see Estelle v. Smith*, 451 U.S. 454, 464–65 (1981) (concluding that the State's use of disclosures made by the defendant during the pretrial psychiatric examination implicated the Fifth Amendment's right against self-incrimination).

46. *Estelle*, 451 U.S. at 456–57, 457 n.1.

findings in the form of a letter.⁴⁷ At the penalty phase of the capital trial, the prosecution called Dr. Grigson as the State's only witness.⁴⁸ Based on the pretrial interview, he testified in detail that he believed Smith presented a continuing threat to society, and the Texas jury returned a sentence of death.⁴⁹

Although the Supreme Court found that coerced submission to the prosecution's mental health expert may violate a defendant's Fifth Amendment right against self-incrimination, the circumstances of *Smith* limit its holding to the introduction of mental health expert testimony as non-rebuttal evidence.⁵⁰ The facts of the case do not directly implicate Virginia's mental health expert statute because much of the Court's decision in *Smith* focused on the prosecution's failure to notify the defense of its intention to introduce Dr. Grigson's testimony as evidence during the penalty phase and the defense's failure to give notice of or introduce mental health expert testimony.⁵¹ In contrast, 3:1 requires the defense to provide the Commonwealth with notice of its intent to present mental health expert evidence in mitigation before the prosecution's right to its own evaluation arises.⁵² Moreover, the Court in *Smith* specifically acknowledged that "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase."⁵³ Citing several decisions by Courts of Appeal, the Court noted that a defendant intending to present psychiatric testimony may be required to submit to an evaluation by the State's expert.⁵⁴

47. *Id.* at 457.

48. *Id.* at 460.

49. *Id.* at 459–60. Dr. Grigson stated the following:

(a) that Smith "is a very severe sociopath"; (b) that "he will continue his previous behavior"; (c) that his sociopathic condition will "only get worse"; (d) that he has no "regard for another human being's property or for their life, regardless of who it may be"; (e) that "[t]here is no treatment, no medicine . . . that in any way at all modifies or changes this behavior"; (f) that he "is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so"; and (g) that he "has no remorse or sorrow for what he has done."

Id.

50. *See* Christopher Slobogin, Estelle v. Smith: *The Constitutional Contours of the Forensic Evaluation*, 31 EMORY L.J. 71, 76 (stating that "[t]he explicit holding of *Estelle* is of limited applicability").

51. *Smith*, 451 U.S. at 461, 466.

52. *See* VA. CODE ANN. § 19.2-264.3:1(D) (Michie 2004) (requiring the defense to relinquish its mental health expert's report to the prosecution "after the attorney for the defendant gives notice of an intent to present psychiatric or psychological evidence in mitigation").

53. *Smith*, 451 U.S. at 472.

54. *Id.* at 465–66; *see* United States v. Cohen, 530 F.2d 43, 47–48 (5th Cir. 1976) (permitting the defendant to be required to submit to a mental health evaluation by the prosecution's expert); Karstetter v. Cardwell, 526 F.2d 1144, 1145 (9th Cir. 1975) (same); United States v. Bohle, 445 F.2d 54, 66–67 (7th Cir. 1971) (same); United States v. Weiser, 428 F.2d 932, 936 (2d Cir. 1969) (same); United States v. Albright, 388 F.2d 719, 724–25 (4th Cir. 1968) (same); Pope v. United States, 372 F.2d 710, 720–21 (8th Cir. 1967) (same).

Despite the limitations of its actual Fifth Amendment holding, *Smith* recognized that a defendant's Fifth Amendment protections may preclude the prosecution's mental health expert testimony under certain circumstances.⁵⁵ It also provides two principles important to an analysis of Virginia's mental health expert statute. The Court concluded that for purposes of the Fifth Amendment's guarantee against self-incrimination, there is no distinction between the guilt/innocence and penalty phases of a bifurcated capital trial.⁵⁶ The Court also found that testimony obtained from communications during a mental health examination of a defendant constitutes testimonial, rather than real, evidence.⁵⁷ These two principles will play significant roles in this article's Fifth Amendment analysis of 3:1.⁵⁸

2. *Buchanan v. Kentucky*

Although *Smith* acknowledged that the prosecution's introduction of mental health expert testimony violates an accused's Fifth Amendment right when the evaluation is neither initiated nor used by the defense, the Supreme Court did not explicitly address the constitutional implications of the prosecution's right to use such testimony as rebuttal evidence until *Buchanan v. Kentucky*.⁵⁹ After David Buchanan's arrest for murder, the prosecution and defense jointly requested a psychological evaluation, and at his non-capital trial, the defendant introduced reports and letters of the his mental condition to establish the affirmative defense of extreme emotional disturbance.⁶⁰ In response and over Buchanan's objection, the prosecution introduced damaging evidence from the psychological evaluation that the court had ordered upon the request of both parties.⁶¹ The jury found the defendant guilty, the state supreme court affirmed, and the Supreme Court granted certiorari.⁶²

55. *Smith*, 451 U.S. at 466.

56. *Id.* at 462–63.

57. *See id.* at 463–65 (concluding that evidence presented by the prosecution's mental health expert is testimonial because "the State used as evidence against the respondent the substance of his disclosures during the pretrial psychiatric examination").

58. *See infra* Part V (conducting a Fifth Amendment analysis of 3:1).

59. *Smith*, 451 U.S. at 466; *see Buchanan v. Kentucky*, 483 U.S. 402, 422–23 (1987) (stating that "if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested").

60. *Buchanan*, 483 U.S. at 409.

61. *Id.* at 411–12.

62. *Id.* at 412–14.

Recognizing *Smith* as the applicable precedent for addressing Buchanan's objection to the State's use of the psychological examination, the Supreme Court distinguished the two cases without difficulty.⁶³ The Court stated that

if a defendant requests [a psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.⁶⁴

Because the defendant need not take the stand to introduce his own psychiatric evidence, prohibiting the State from presenting rebuttal mental health evidence would leave the prosecution with no means to respond.⁶⁵ Consequently, the Court concluded that "[t]he introduction of such a report for this limited rebuttal purpose does not constitute a Fifth Amendment violation."⁶⁶

B. Fifth Amendment Limitations on the Prosecution's Right to Evidence

1. Related Work Product Concerns

Although not a Fifth Amendment issue per se, the work product doctrine also focuses on the inappropriately forced disclosure of evidence. Recognized by the Supreme Court in *Hickman v. Taylor*,⁶⁷ the common law doctrine protects from discovery materials that are "prepared by an adversary's counsel with an eye toward litigation."⁶⁸ The protection, however, is not absolute.⁶⁹ The Court qualified the protection by stating that upon showing that the "production of [relevant and non-privileged] facts is essential to the preparation of [the] case, discovery may be had."⁷⁰ *Buchanan* held that the prosecution was entitled to the court-appointed mental health expert reports once a capital defendant declared his intention to present mental health evidence in mitigation, but there is no Supreme Court authority approving the disclosure of all materials related to the evaluation, as required by Virginia's 3:1(D) statute.⁷¹ Furthermore, because 3:3

63. *Id.* at 422–24. The Court noted that not only had the defense joined the prosecution's motion for the psychological evaluation, but also that Buchanan's entire defense relied on its ability to establish his extreme emotional disturbance. *Id.* at 423–24.

64. *Id.* at 422–23.

65. *Id.* at 423.

66. *Buchanan*, 483 U.S. at 423–24.

67. 329 U.S. 495 (1947).

68. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The Court also stated that "[t]his work is reflected . . . in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." *Id.*

69. *Id.*

70. *Id.*

71. *Buchanan*, 483 U.S. at 422–25; see VA. CODE ANN. § 19.2-264.3:1(D) (Michie 2004) (stating

precludes the Commonwealth from introducing mental health evidence for purposes other than rebutting mitigating evidence during penalty phase, the prosecution cannot plausibly contend that such evidence is necessary for the preparation of the guilt/innocence phase of a capital case.⁷² Therefore, the Supreme Court's work product doctrine calls into question 3:1(D)'s disclosure requirements that exceed the mandate of *Buchanan*.

2. *Kastigar v. United States*

Although Supreme Court of Virginia precedent may suggest otherwise, a prosecutor does not have carte blanche to disregard the Fifth Amendment right against self-incrimination of an indigent capital defendant who indicates his intention to introduce mental health evidence in mitigation.⁷³ In *Kastigar v. United States*,⁷⁴ the defendants refused a court order to answer questions before a grand jury despite a guarantee of immunity.⁷⁵ Because the grant of immunity barred the use of any direct or indirect evidence obtained through the compelled testimony, the Supreme Court upheld the trial court's findings of contempt and rejected the defendants' claims of Fifth Amendment violations.⁷⁶ However, to ensure that the prosecution could not exploit any indirect fruits of the compelled testimony, the Court "impose[d] on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."⁷⁷ Although the case revolved around the protections afforded by immunity, *Kastigar* established that the

that upon notice of the defendant's intent to present mental health evidence in mitigation, "the Commonwealth shall be given the report and the results of any other evaluation of the defendant's mental condition conducted relative to the sentencing proceeding and copies of psychiatric, psychological, medical or other records obtained during the course of such evaluation").

72. See VA. CODE ANN. § 19.2-264.3:3 (Michie 2004) (limiting the Commonwealth's use of 3:1 testimony to rebuttal of the defendant's evidence in mitigation).

73. See *Stewart*, 427 S.E.2d at 407–08 (citing *Savino* to support the contention that 3:1 does not prohibit a mental health expert's opinion regarding future dangerousness); *Savino*, 391 S.E.2d at 281 (holding that "when a defendant gives . . . notice [that he intends to present evidence of his mental condition in the penalty phase of trial], he waives his fifth amendment privilege against the introduction of psychiatric testimony by the prosecution").

74. 406 U.S. 441 (1972).

75. *Kastigar v. United States*, 406 U.S. 441, 442 (1972).

76. *Id.* at 459–62.

77. *Id.* at 460. In an earlier immunity case, the Court stated that "[o]nce a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 n.18 (1964).

prosecution's use of a defendant's compelled testimony must be strictly limited to the purpose for which it is authorized.⁷⁸

Virginia's 3:3 statute allows the State to use mental health evidence only in rebuttal during the sentencing proceeding.⁷⁹ However, because 3:1 delivers to the prosecution the mental health evaluation reports of both parties' experts, the Commonwealth has access to the defendant's protected disclosures before the commencement of the guilt/innocence phase.⁸⁰ Consequently, *Kastigar* serves as an indigent capital defendant's only protection against the prosecution's indirect use of this evidence for investigatory leads.

3. United States v. Beckford

In the federal context, *United States v. Beckford*⁸¹ addressed the Fifth Amendment concerns raised by the prosecution's access to mental health expert evidence prior to the defendant's introduction of such evidence in mitigation.⁸² Before the commencement of Beckford's capital trial, the Government filed a motion requesting the defense to comply with Federal Rule of Criminal Procedure 12.2 ("Rule 12.2").⁸³ At the time of the trial, Rule 12.2 had not yet been amended to accommodate special issues that arise from the bifurcation of capital trials.⁸⁴ Because the rule only addressed guilt/innocence-phase defenses such as insanity, *Beckford* confronted the conflict between the defendant's need for penalty-phase procedures for securing and presenting mental health expert evidence in mitigation and the Government's need to prepare for possible rebuttal.⁸⁵

Recognizing the need to balance the defendant's Fifth Amendment right against self-incrimination and the prosecution's right to rebuttal mental health expert evidence, the district court concluded that the interests of both parties would be best served by "deferring the release to the Government of the Government's expert reports and the defense expert reports until after a finding of guilt necessitates a decision by the defendants on how to proceed with the

78. See Welsh S. White, *Government Psychiatric Examinations and the Death Penalty*, 37 ARIZ. L. REV. 869, 885–86 (1995) (discussing the safeguards to protect a defendant's Fifth Amendment privilege against self-incrimination).

79. VA. CODE ANN. § 19.2-264.3:3 (Michie 2004).

80. VA. CODE ANN. § 19.2-264.3:1(D),(E) (Michie 2004).

81. 962 F. Supp. 748 (E.D. Va. 1997).

82. *Beckford*, 962 F. Supp. at 761–63.

83. *Id.* at 751–52; see FED. R. CRIM. P. 12.2 (providing the procedures necessary for obtaining and using mental health evidence in a federal capital trial).

84. See *Beckford*, 962 F. Supp. at 754 n.3 (noting that "under the terms of the federal death penalty statute, the [current] Federal Rules of Evidence [were] inapplicable to sentencing phase proceedings").

85. *Id.* at 761–65.

penalty phase.”⁸⁶ Because statements made during a court-ordered mental health examination cannot be used in any manner against the defendant during the guilt/innocence phase, the district court ruled that such reports should remain sealed until the penalty phase of the capital trial.⁸⁷ Furthermore, the court reasoned that “[m]aking the report of the examination available to the prosecution before conclusion of the guilt phase would present the risk of inadvertent use and would lead to difficult problems respecting the source of prosecution evidence and questioning in the guilt phase.”⁸⁸ Lastly, the court anticipated the possibility that a defendant ultimately would choose not to introduce mental health expert evidence during the penalty phase.⁸⁹ Because the Government is only entitled to examine the defendant to secure mental health expert evidence for rebuttal purposes, “[t]he results of any examination by the Government experts and the defense experts shall be released to the Government . . . only after that defendant confirms his intent to offer mental health or mental condition evidence in mitigation” during the penalty phase of the capital trial.⁹⁰ In this way, the district court protected the capital defendant’s right against self-incrimination without infringing upon the prosecution’s right to access rebuttal mental health evidence.

4. United States v. Hall

Less than two years after *Beckford*, the Fifth Circuit rejected a federal capital defendant’s contention that sealing the results of pretrial mental health examinations was constitutionally mandated.⁹¹ In *United States v. Hall*,⁹² the defendant unsuccessfully contended that the trial court could not condition his right to present psychiatric evidence in mitigation upon his submission to a government expert’s psychiatric evaluation.⁹³ In the alternative, Hall argued that in the interests of protecting his Fifth Amendment right, the court should have sealed the results of the mental health examinations until after the guilt/innocence phase.⁹⁴ The Fifth Circuit, however, determined that such a rule

86. *Id.* at 761.

87. *Id.* at 762.

88. *Id.* at 762 n.11.

89. *Id.* at 762.

90. *Beckford*, 962 F. Supp. at 764. The court recognized and addressed the notice implications raised by the requirement of the defendant’s post-guilt/innocence phase confirmation. *Id.* The district court provided a defendant with a two-day window, following the return of a guilty verdict, in which to confirm or disavow his intent to introduce mental health expert evidence at the penalty phase. *Id.*

91. *United States v. Hall*, 152 F.3d 381, 398–99 (5th Cir. 1998).

92. 152 F.3d 381 (5th Cir. 1998).

93. *Hall*, 152 F.3d at 398–99.

94. *Id.*

was unnecessary.⁹⁵ The court cited *Alderman v. United States*⁹⁶ to demonstrate that once the defense makes a showing that the prosecution's evidence has been influenced by the defendant's protected statements, "the government 'has the ultimate burden of persuasion to show that its evidence is untainted.'" ⁹⁷ Thus, the court reasoned that *Alderman's* tainted-evidence test afforded Hall sufficient means to preclude the prosecution's introduction of evidence improperly influenced by the disclosures made during the defendant's mental health examination.⁹⁸

Although *Hall* indicated that sealing mental health reports until the sentencing phase of a capital trial was not constitutionally mandated, the Fifth Circuit recognized *Beckford's* reasoning.⁹⁹ In fact, the court "acknowledge[d] that such a rule is doubtless beneficial to defendants and that it likely advances interests of judicial economy by avoiding litigation over whether particular pieces of evidence that the government seeks to admit prior to the defendant's offering psychiatric evidence were derived from the government psychiatric examination."¹⁰⁰ Such considerations also appear to have motivated the Supreme Court and Congress to re-examine the appropriateness of the disclosure requirements of Rule 12.2.¹⁰¹

5. Federal Rule of Criminal Procedure Rule 12.2

In 2002 amendments to Rule 12.2 addressed the Fifth Amendment implications of recent case law.¹⁰² The substantive 2002 amendment to Rule 12.2 replicated the sealing procedures implemented in *Beckford* and recommended in *Hall*.¹⁰³ Specifically, Rule 12.2(c)(2) requires that

the results and reports of any [court-ordered] examination . . . must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition.¹⁰⁴

95. *Id.* at 399.

96. 394 U.S. 165 (1969).

97. *Hall*, 152 F.3d at 399 (quoting *Alderman v. United States*, 394 U.S. 165, 183 (1969)).

98. *Id.*

99. *Id.*

100. *Id.*

101. See FED. R. CRIM. P. 12.2, cmt. to 2002 Amendments (citing *Beckford* and *Hall* to support sealing the results of mental health examinations until the penalty phase of a capital trial).

102. *Id.*

103. *Id.*

104. FED. R. CRIM. P. 12.2(c)(2).

Thus, Congress effectively codified *Beckford's* prophylactic rule requiring the sealing of the government expert's reports until the conclusion of the guilt/innocence phase and thereby averted what might have become routine "taint" litigation in many federal capital cases.¹⁰⁵ The Virginia legislature, however, has proven to be less progressive.¹⁰⁶

IV. Balancing a Capital Defendant's Fifth Amendment Right and the Prosecution's Right to Rebuttal Evidence

A. Brooks v. Tennessee and Jenkins v. Anderson

Striking a balance between a capital defendant's constitutional privilege against self-incrimination and the prosecution's entitlement to rebuttal 3:1 evidence is imperative in light of the dangers of the prosecution's pretrial access to mental health reports. In 1972 the Supreme Court employed a balancing test in *Brooks v. Tennessee*¹⁰⁷ to strike down a state law requiring a defendant to testify prior to any other defense witnesses or not at all.¹⁰⁸ The Court weighed the defendant's right to remain silent against the State's interest in preventing the testimonial influence of the other defense witnesses and concluded, despite the State's legitimate concerns, that the prosecution's interests were insufficient to override the defendant's constitutional right.¹⁰⁹

Similarly, in *Jenkins v. Anderson*,¹¹⁰ the Court used a balancing test to determine that the State's use of the defendant's pretrial silence for impeachment purposes did not violate his right to remain silent.¹¹¹ The Supreme Court weighed the potential burden imposed on defendants' right to remain silent against the State's interest in "enhanc[ing] the reliability of the criminal process."¹¹² The Court concluded that "[o]nce a defendant decides to testify, '[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.'" ¹¹³

105. *Id.*

106. *See* VA. CODE ANN. § 19.2-264.3:1(D) (Michie 2004) (requiring the defense to relinquish its mental health expert's report to the prosecution "after the attorney for the defendant gives notice of an intent to present psychiatric or psychological evidence in mitigation").

107. 406 U.S. 605 (1972).

108. *Brooks v. Tennessee*, 406 U.S. 605, 611–12 (1972).

109. *Id.* at 611.

110. 447 U.S. 231 (1980).

111. *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980).

112. *Id.* at 236–38.

113. *Id.* at 238 (quoting *Brown v. United States*, 356 U.S. 148, 156 (1958)).

*B. Sealing the Mental Health Expert Reports Until the Defense's
Post-Guilt/Innocence-Phase Confirmation*

Applying a Fifth Amendment balancing test to resolve the constitutional tensions created by 3:1 requires weighing a defendant's right against self-incrimination and the Commonwealth's interest in obtaining rebuttal mental health evidence. This approach was taken by the federal district court in *Beckford*.¹¹⁴ Because the prosecution is barred from using or otherwise benefiting from the mental health expert reports during the guilt/innocence phase, the *Beckford* court reasoned that the appropriate balance required that the examination reports be sealed until the sentencing phase of the capital trial.¹¹⁵ Conversely, the court concluded that pretrial notice and the right to its own examination adequately protected the prosecution's right to rebuttal evidence.¹¹⁶ Weighing the interests of both parties allowed the court to implement procedures that protected the rights of both the defendant and the prosecution.

In contrast, 3:1 fails to strike an appropriate balance, and as a result, the statute unconstitutionally burdens a defendant's Fifth Amendment right against self-incrimination. Specifically, 3:1 unnecessarily grants the Commonwealth unfettered access to mental health examinations—both the defendant's and its own—before the guilt/innocence phase of the capital trial.¹¹⁷ Moreover, the Supreme Court of Virginia's interpretation of the statute permits both the prosecution's use of mental health expert evidence in its sentencing case-in-chief and to prove future dangerousness.¹¹⁸

1. Unnecessary Commonwealth Pretrial Access to Mental Health Reports

Buchanan and 3:3 only require an indigent capital defendant, upon request for a mental health expert, to waive his Fifth Amendment privilege against self-incrimination regarding *rebuttal* mental health evidence.¹¹⁹ In addition, Virginia

114. *Beckford*, 962 F. Supp. at 761–62.

115. *Id.* at 762.

116. *Id.* at 763.

117. See VA. CODE ANN. § 19.2-264.3:1(D) (Michie 2004) (requiring the defense to turn over the mental health evaluation report and records upon declaring an intention to present such evidence during the sentencing proceeding); VA. CODE ANN. § 19.2-264.3:1(E) (requiring the defense to provide notice of its intention to present mitigating evidence at the sentencing proceeding “at least 21 days before trial”).

118. See *Stewart*, 427 S.E.2d at 407–08 (concluding that 3:1 does not prohibit a mental health expert's opinion regarding future dangerousness); *Savino*, 391 S.E.2d at 281 (holding that “when a defendant gives . . . notice [that he intends to present evidence of his mental condition in the penalty phase of trial], he waives his fifth amendment privilege against the introduction of psychiatric testimony by the prosecution”).

119. See VA. CODE ANN. § 19.2-264.3:3 (Michie 2004) (restricting the Commonwealth's use of disclosures made during a 3:1 evaluation to rebuttal evidence during the penalty phase); *Buchanan*, 483 U.S. at 422–23 (establishing the prosecution's right to the mental health experts' reports for

law precludes the Commonwealth from introducing statements made during 3:1 evaluations or evidence derived therefrom for purposes other than rebuttal evidence during the sentencing phase of a capital trial.¹²⁰ Although the prosecution is barred from any use of the mental health evaluation reports prior to the defense's use of such evidence during the penalty phase, 3:1 needlessly delivers to the Commonwealth both its and the defense experts' findings prior to trial.¹²¹ Although the prosecution is constitutionally prohibited from exploiting any information contained in the reports, the State's access to the examinations' details poses an unacceptable risk that it may impermissibly gain investigatory leads that could aid it in prosecuting the defendant and in developing its case-in-chief on the issue of penalty.

2. *Savino and the Commonwealth's Non-Rebuttal Use of Mental Health Evidence*

In *Savino*, the Supreme Court of Virginia addressed a Fifth Amendment objection to the State's mental health expert statute.¹²² Joseph Savino pleaded guilty, and the trial court convicted him of robbery and murder during the commission of a robbery while armed with a deadly weapon.¹²³ In accordance with 3:1, the defense had requested a mental health expert and gave notice of its intent to present the expert evidence in mitigation.¹²⁴ The court then granted the Commonwealth's motion for the appointment of a second expert.¹²⁵

During the penalty phase of the trial, the prosecution's case-in-chief included mental health testimony from the Commonwealth's appointed "rebuttal" expert.¹²⁶ The expert opined that at the time of the offense Savino was not suffering from mental illness, that he was under no serious mental or emotional disturbance, and that he was in no way impaired from appreciating or controlling his behavior.¹²⁷ Furthermore, the expert testified, over the defense's objection, that Savino's criminal past indicated a high probability of his future

rebuttal purposes).

120. VA. CODE ANN. § 19.2-264.3:3.

121. VA. CODE ANN. § 19.2-264.3:1(D), (F).

122. *See Savino*, 391 S.E.2d at 281 (holding that "when a defendant gives . . . notice [that he intends to present evidence of his mental condition in the penalty phase of trial], he waives his fifth amendment privilege against the introduction of psychiatric testimony by the prosecution").

123. *Id.* at 277 (citing VA. CODE ANN. § 18.2-31(d) (Michie 2004)).

124. *Id.* at 281; *see* VA. CODE ANN. § 19.2-264.3:1(A), (E) (Michie 2004) (providing an indigent defendant with access to a mental health expert upon request and requiring a criminal defendant to give notice of his intent to present mental health expert evidence in mitigation).

125. *Savino*, 391 S.E.2d at 281; *see* VA. CODE ANN. § 19.2-264.3:1(F)(1) (granting the Commonwealth one or more mental health experts to examine the defendant upon notice from the defense of its intent to introduce mental health expert evidence in mitigation).

126. *Savino*, 391 S.E.2d at 280.

127. *Id.*

dangerousness.¹²⁸ Savino offered no mental health evidence in mitigation, and the trial court sentenced him to death.¹²⁹

On appeal, Savino relied upon *Smith* to argue that 3:1 violated his Fifth Amendment right against self-incrimination.¹³⁰ However, the *Savino* court distinguished *Smith* on the grounds that Smith neither requested a psychiatric evaluation nor introduced psychiatric evidence.¹³¹ The court further cited *Buchanan* and *Powell v. Texas*¹³² for the proposition that “when a defendant requests a psychiatric examination in order to prove a mental-status defense, he is deemed to have waived the right to raise a fifth amendment challenge to the prosecution’s use of evidence obtained through that examination to rebut the defense.”¹³³ Relying on *Buchanan* and *Powell*, the Supreme Court of Virginia concluded that 3:1 does not violate a defendant’s Fifth Amendment right.¹³⁴

On habeas corpus review, the Fourth Circuit affirmed the Supreme Court of Virginia’s holding.¹³⁵ Among other contentions, Savino asserted that the testimony of the Commonwealth’s mental health expert violated his Fifth Amendment right against compelled self-incrimination.¹³⁶ The court first observed that a defendant complying with 3:1 is not entitled to Fifth Amendment protection against the introduction of rebuttal mental health expert evidence.¹³⁷ However, rather than applying *Buchanan* to find that such a defendant waives his right to remain silent regarding *rebuttal* evidence, the Fourth Circuit inappropriately concluded that once such a defendant gives notice of his intent to present mental health evidence in mitigation, he surrenders his *entire* right against compelled self-incrimination.¹³⁸ Therefore, after *Savino*, an indigent capital defendant’s request pursuant to 3:1 effectively opens the door for the

128. *Id.*

129. *Id.* at 277.

130. *Id.* at 281; *see* U.S. CONST. amend. V (stating that “[n]o person shall . . . be compelled in any criminal case to be a witness against himself”); *see also* *Smith*, 451 U.S. at 468 (holding that the admission of psychiatric evidence from an evaluation that the defense did not initiate violated the defendant’s Fifth Amendment rights).

131. *Savino*, 391 S.E.2d at 281.

132. 492 U.S. 680 (1989).

133. *Savino*, 391 S.E.2d at 281; *see* *Powell v. Texas*, 492 U.S. 680, 684 (1989) (noting that *Smith* and *Buchanan* allow the prosecution to use evidence obtained in the defense expert’s evaluation of the defendant to rebut the defense); *Buchanan*, 483 U.S. at 422–23 (stating that at a minimum, the prosecution is entitled to mental health evidence for rebuttal purposes once a defendant requests a mental health examination or introduces such evidence).

134. *Savino*, 391 S.E.2d at 281.

135. *Savino v. Murray*, 82 F.3d 593, 606 (4th Cir. 1996). *See generally* C. Cooper Youell, IV, Case Note, 9 CAP. DEF. J. 21 (1996) (analyzing *Savino v. Murray*, 82 F.3d 593 (4th Cir. 1996)).

136. *Savino*, 82 F.3d at 603.

137. *Id.* at 604.

138. *Id.* at 604–05.

prosecution to use the fruits of a mental health evaluation against him, even if the defendant ultimately chooses not to introduce such evidence in mitigation.¹³⁹ Although such procedures smack of a Fifth Amendment violation, both the Supreme Court of Virginia and the Fourth Circuit have so far approved them.¹⁴⁰

Absent from the Fourth Circuit's *Savino* opinion is an adequate examination of 3:3.¹⁴¹ The court accurately stated that the statute only permits the rebuttal use of the defendant's statements or disclosures made during a 3:1 examination.¹⁴² However, the Fourth Circuit's declaration that "the statute does not preclude use of the opinion of the Commonwealth's examiner for establishing an aggravating circumstance" is a misrepresentation of Virginia law.¹⁴³ In fact, 3:3 clearly states that "no evidence derived from any such statements or disclosures may be introduced against the defendant at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances [of future dangerousness or vileness]."¹⁴⁴ The two statements are irreconcilable, and both the Fourth Circuit and the Supreme Court of Virginia have declined subsequent opportunities to resolve this conflict.¹⁴⁵

3. *The Commonwealth's Use of Mental Health Evidence to Prove Future Dangerousness and Savino's Progeny*

Three years after the court's decision in *Savino* and while *Savino*'s federal habeas appeal was still pending, the Supreme Court of Virginia confirmed its interpretation of 3:1.¹⁴⁶ In *Stewart*, the court once again addressed a defendant's contention that Virginia's statute forbids the prosecution's rebuttal evaluation of future dangerousness.¹⁴⁷ The court "[held that] the provisions of Code § 19.2-264.3:1(F) do not limit the scope of the expert's examination to matters of

139. *Id.*

140. *See id.* (affirming the Supreme Court of Virginia's interpretation of 3:1 and 3:3); *Stewart v. Angelone*, No. 97-26, slip op. at 11 (4th Cir. May 29, 1998) (same); *Stewart*, 427 S.E.2d at 408 (same); *Savino*, 391 S.E.2d at 281 (concluding that 3:1 does not violate an indigent capital defendant's Fifth Amendment right against self-incrimination).

141. *Savino*, 82 F.3d at 603-06.

142. *Id.* at 605.

143. *Id.*

144. VA. CODE ANN. § 19.2-264.3:3 (Michie 2004).

145. *See Stewart*, No. 97-26, slip op. at 11 (affirming the Supreme Court of Virginia's interpretation of 3:1 and 3:3); *Stewart*, 427 S.E.2d at 408 (concluding that 3:1 does not violate an indigent capital defendant's Fifth Amendment right against self-incrimination).

146. *See Stewart*, 427 S.E.2d at 408 (citing *Savino* to support the contention that 3:1 does not prohibit a mental health expert's opinion regarding future dangerousness).

147. *Id.* at 407-08. *See generally* Mari K. Simmons, Case Note, 6 CAP. DEF. J. 21 (1993) (analyzing *Stewart v. Commonwealth*, 427 S.E.2d 394 (Va. 1993)).

mitigation.”¹⁴⁸ The irony of such a conclusion is that the supreme court was correct.¹⁴⁹ Subsection F of 3:1 does not limit expert testimony to mitigation; 3:3 does.¹⁵⁰ However, rather than conduct its own analysis, the court relied on *Savino*’s conclusions and “[found] no reason to modify those rulings.”¹⁵¹

In the years since *Savino* and *Stewart*, the Supreme Court of Virginia has remained steadfast in its analysis of 3:1. In *Jackson*, it permitted the prosecution’s introduction of expert testimony that “[J]ackson exhibited more of the risk factors for future violent acts ‘than many of the other [criminal] defendants [the mental health expert had] evaluated.’”¹⁵² Despite 3:3’s preclusion of any evidence “derived from” statements made during the mental health examinations, the court found no error in the trial court’s admission of the testimony.¹⁵³ Because the expert “quantified neither the extent of those factors nor the probability of Jackson’s future dangerousness and he did not opine that Jackson would be a danger in the future,” the court found no violation of 3:3.¹⁵⁴ In other words, unless the prosecution’s expert explicitly testifies during the sentencing proceeding that a defendant presents a future danger to society, Virginia state courts are unlikely to recognize a violation of 3:3.

Most recently, the Supreme Court of Virginia in *Winston v. Commonwealth*¹⁵⁵ rejected the defendant’s assertion that, as an alternative to 3:1, *Ake* provided a direct, constitutionally mandated avenue for the appointment of a mental health expert for mitigation.¹⁵⁶ The court viewed the strategy as an unacceptable attempt to avoid the statutory notice requirements and determined that a Virginia capital defendant is not entitled to a mental health expert on grounds independent of 3:1.¹⁵⁷ Consequently, 3:1 appears to be the only means by which an indigent capital defendant may secure the services of a mental health expert.

148. *Stewart*, 427 S.E.2d at 408.

149. See VA. CODE ANN. § 19.2-264.3:1 (Michie 2004) (providing the qualifications and procedures necessary for acquiring and using a government-appointed mental health expert for a capital defendant).

150. See VA. CODE ANN. § 19.2-264.3:1(F) (granting the Commonwealth one or more court-experts to evaluate the mental health of the defendant and prescribing the procedures thereto); VA. CODE ANN. § 19.2-264.3:3 (Michie 2004) (proscribing the use of evidence derived from statements made during a 3:1 evaluation to establish future dangerousness or vileness and limiting the prosecution’s use of such statements to rebuttal evidence).

151. *Stewart*, 427 S.E.2d at 408.

152. *Jackson*, 499 S.E.2d at 553 (quoting the mental health expert’s testimony from the penalty phase).

153. *Id.*

154. *Id.*

155. 604 S.E.2d 21 (Va. 2004).

156. *Winston v. Commonwealth*, 604 S.E.2d 21, 33–34 (Va. 2004). For a complete discussion and analysis of *Winston*, see generally Justin B. Shane, Case Note, 17 CAP. DEF. J. 347 (2005) (analyzing *Winston v. Commonwealth*, 604 S.E.2d 21 (Va. 2004)).

157. *Winston*, 604 S.E.2d at 33–34.

Without judicial enforcement of the 3:1 procedures in their entirety, indigent capital defendants face a dilemma: the declaration of an intention to present mental health expert evidence in mitigation entitles the prosecution to the results of at least two evaluation reports, the contents of which the State may use to rebut evidence offered by the defendant during sentencing and to establish an aggravating circumstance in its penalty phase case-in-chief. As Virginia law stands, defendants are forced to consider these consequences in addition to the inevitable danger that the prosecution may exploit the contents of the mental health reports and benefit indirectly from its early access to the defendant's protected statements.

4. *Sealing Mental Health Expert Reports to Properly Balance a Defendant's Fifth Amendment Right and the Commonwealth's Right to Rebuttal Evidence*

Deferring the release of the mental health expert reports to the Commonwealth until post-guilt/innocence-phase confirmation of the defense's intention to present such evidence during the penalty phase provides a simple and equitable solution to the Fifth Amendment concerns raised by 3:1. *Beckford* thoroughly addressed the benefits of such procedures in the federal context, and the same analysis is relevant and applicable to Virginia's 3:1 statute.¹⁵⁸ Because the State's use of mental health evidence is limited to rebuttal evidence at penalty phase, the elimination of the threat that the prosecution will indirectly benefit from the protected disclosures should not unfairly affect the Commonwealth. Not only does sealing safeguard the defendant's Fifth Amendment interests, but it also promotes judicial efficiency by removing the need for *Kastigar*-type inquiries to resolve allegations of taint of prosecution evidence.¹⁵⁹ The prosecution remains unharmed, and the defendant's privilege against self-incrimination is protected.

In addition to eradicating the possible temptation to misuse a defendant's protected statements, withholding the 3:1 reports from the prosecution until the defense's post-guilt/innocence-phase confirmation of intent to use mental health evidence in mitigation also enforces a plain reading of the statute. Despite *Savino* and its progeny, 3:3 clearly forbids the use both of statements made during a mental health evaluation and of evidence derived from such statements for non-rebuttal purposes or to prove future dangerousness.¹⁶⁰ Delivering the 3:1 reports only after the defendant reaffirms his intention ensures the State's compliance with the statutory limitation of mental health expert testimony as rebuttal

158. See *supra* Part III.B.3 (discussing the role of *Beckford* as a precursor to the 2002 amendment to Rule 12.2).

159. See *supra* Part III.B.2 (discussing the burden on the prosecution to establish that evidence allegedly tainted by protected disclosures was obtained through an independent source).

160. VA. CODE ANN. § 19.2-264.3:3 (Michie 2004).

evidence.¹⁶¹ Again, sealing protects the defendant's Fifth Amendment right against self-incrimination without injury to the prosecution.

V. *Fifth Amendment Analysis of 3:1*

Despite its language and broad application, the Fifth Amendment does not provide an absolute protection against self-incrimination.¹⁶² The Constitution states that a criminal defendant cannot be "compelled . . . to be a witness against himself," thus protecting a defendant from coerced and self-incriminating evidence.¹⁶³ For purposes of Fifth Amendment protection, however, the Supreme Court in *Schmerber v. California*¹⁶⁴ distinguished between physical and communicative evidence.¹⁶⁵ Stated plainly, the Court concluded that "the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."¹⁶⁶ Therefore, the Fifth Amendment requires a disclosure to be self-incriminating, compelled, and testimonial to invoke the constitutional protection.¹⁶⁷ However, 3:1 needlessly and impermissibly risks the violation of a capital defendant's Fifth Amendment right, and the Supreme Court of Virginia's interpretation of the statute violates the privilege outright.

A. *Self-Incriminating*

In *Hoffman v. United States*,¹⁶⁸ the Supreme Court addressed the self-incrimination element of the Fifth Amendment.¹⁶⁹ The privilege against self-incrimination "extends to answers that would in themselves support a conviction . . . [and] embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant."¹⁷⁰ However, because the Court addressed self-incrimination in the context of a criminal prosecution, *Hoffman* is not directly

161. *Id.*

162. *See* U.S. CONST. amend. V (stating that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself").

163. *Id.*

164. 384 U.S. 757 (1966).

165. *Schmerber v. California*, 384 U.S. 757, 763–64 (1966).

166. *Id.* at 764.

167. *See* Donna H. Lee, *In the Wake of Ake v. Oklahoma: An Indigent Criminal Defendant's Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. REV. 154, 176 (1992) (stating that "the key factors in a fifth amendment inquiry are whether the disclosure is testimonial, self-incriminating, and compelled").

168. 341 U.S. 479 (1951).

169. *Hoffman v. United States*, 341 U.S. 479, 486–87 (1951).

170. *Id.*

applicable to the penalty phase of a bifurcated death-penalty trial. The defendant would have already been prosecuted and convicted of capital murder.¹⁷¹

In *Smith*, the Supreme Court eliminated any distinction between self-incrimination for the purposes of conviction and for the purposes of sentencing.¹⁷² Writing for a unanimous Court, Chief Justice Burger stated that the Court “[could] discern no basis to distinguish between the guilt and penalty phases of respondent’s capital murder trial so far as the protection of the Fifth Amendment privilege is concerned.”¹⁷³ Therefore, information gained from a defendant and presented during the sentencing phase of a capital trial is self-incriminating if it directly supports the imposition of a death sentence or provides a “link in the chain of evidence” that leads to the imposition of a death sentence.¹⁷⁴

A mental health expert’s evaluation of a criminal defendant may delve into his personal history and thought processes and potentially could expose the defendant’s narrative of the crime and both adjudicated as well as unadjudicated prior criminal conduct that would otherwise have remained confidential.¹⁷⁵ Although *Buchanan* entitles the prosecution to the mental health evidence the defense intends to present during the penalty phase, 3:1 unnecessarily delivers this evidence to the Commonwealth prior to the commencement of the trial.¹⁷⁶ Because Virginia’s mental health expert statute grants the prosecution complete access to the defense’s expert report and to a second expert examination before the start of the guilt/innocence phase, the prosecution has the unfettered opportunity not only to discover otherwise inaccessible evidence as it readies its case for a conviction but also to prepare its affirmative case for death at the

171. See VA. CODE ANN. § 19.2-264.3 (Michie 2004) (describing the bifurcation into guilt/innocence and penalty phases of a Virginia capital trial).

172. See *Smith*, 451 U.S. at 462–63 (finding no difference between guilt/innocence and sentencing phases of a capital trial for purposes of Fifth Amendment protection).

173. *Id.*

174. *Hoffman*, 341 U.S. at 486.

175. See *White supra* note 78, at 870 (discussing the types of information that can be obtained through a psychiatric examination).

176. See VA. CODE ANN. § 19.2-264.3:1(D) (Michie 2004) (stating that upon notice of the defendant’s intent to present mental health evidence in mitigation, “the Commonwealth shall be given the report and the results of any other evaluation of the defendant’s mental condition conducted relative to the sentencing proceeding and copies of psychiatric, psychological, medical or other records obtained during the course of such evaluation”); *Buchanan*, 483 U.S. at 422–23 (stating that “if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested”).

sentencing phase.¹⁷⁷ Thus, the intolerably high risk that the statute will yield self-incriminating evidence satisfies the first factor of a Fifth Amendment inquiry.

Furthermore, *Savino* and subsequent cases actually permit the Commonwealth to introduce in its sentencing case-in-chief evidence obtained through 3:1 examinations.¹⁷⁸ Rather than restricting the State to the statutory limits of mental health expert evidence, the Supreme Court of Virginia has endorsed the prosecution's non-rebuttal use of such evidence to support its case for the death penalty.¹⁷⁹ Thus, 3:1 meets the self-incriminating component of the analysis.

B. Compelled

The second factor in the Fifth Amendment analysis is compulsion, and the Supreme Court has held that the "government cannot . . . impos[e] sanctions to compel testimony which has not been immunized."¹⁸⁰ Addressing the issue on a case-by-case basis, the Court has recognized multiple penalties that amount to impermissible compulsion, including the following: contempt sanctions,¹⁸¹ disbarment and damage to professional reputation,¹⁸² loss of income and economic penalties,¹⁸³ and the loss of the right to participate in political associations.¹⁸⁴ While each of these sanctions places unacceptable hardships

177. See VA. CODE ANN. § 19.2-264.3:1(D) (providing the Commonwealth with access to the defense expert's report and findings once the defendant gives notice of the intent to use mental health evidence in mitigation); VA. CODE ANN. § 19.2-264.3:1(F)(1) (stating that, upon notice, the court will appoint one or more mental health experts for the Commonwealth to evaluate the defendant and the findings will be made available to both the prosecution and the defense); see also *White*, *supra* note 78, at 870 (stating that "[d]uring the psychiatric examination, the government psychiatrist may learn of prior conduct that would not otherwise be accessible to the government").

178. *Savino*, 391 S.E.2d at 280; see *Jackson*, 499 S.E.2d at 553 (permitting the Commonwealth's introduction of mental health expert testimony regarding the defendant's propensity to commit future violent acts); *Stewart*, 427 S.E.2d at 408 (citing *Savino* to support the contention that 3:1 does not prohibit a mental health expert's opinion regarding future dangerousness).

179. See *Jackson*, 499 S.E.2d at 553 (permitting the Commonwealth's introduction of mental health expert testimony regarding the defendant's propensity to commit future violent acts); *Stewart*, 427 S.E.2d at 408 (permitting the prosecution's use of mental health testimony for purposes other than rebuttal evidence).

180. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977); see *Lee*, *supra* note 167, at 177-78 (stating that "[c]ompulsion can consist of either direct external sanctions or indirect modes of coercion designed to force self-incriminating disclosures").

181. See *Murphy*, 378 U.S. at 55 (finding that giving a defendant the options of self-incrimination, perjury, or contempt constitutes compulsion).

182. See *Spevack v. Klein*, 385 U.S. 511, 516 (1967) (finding that "[t]he threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion").

183. See *Lefkowitz v. Turley*, 414 U.S. 70, 71, 82 (1973) (concluding that the cancellation of contracts and the five-year disqualification from contracting constituted impermissible compulsion).

184. See *Cunningham*, 431 U.S. at 808 (depriving a defendant his office in a political party

upon a defendant, the Supreme Court has yet to establish a bright-line rule for evaluating the appropriateness of such compulsion.

In *Lefkowitz v. Cunningham*,¹⁸⁵ the Supreme Court held that the “government cannot . . . impos[e] sanctions to compel testimony which has not been immunized.”¹⁸⁶ To the extent that 3:3 protects the statements a defendant makes during a mental health evaluation by limiting the prosecution’s use to rebuttal evidence, the statute seemingly falls within the bounds of acceptable compulsion.¹⁸⁷ However, because the State receives the mental health reports prior to the guilt/innocence phase of the capital trial, 3:1’s security is reduced to a requirement that the prosecution be able to demonstrate an independent source for evidence suspected of being tainted by the defendant’s protected statements.¹⁸⁸ This burden shift mandated by *Kastigar* does not rise to the level of “immunity” envisioned in *Cunningham*.

In addition to the unacceptable advantages that the Commonwealth may enjoy during the guilt/innocence phase—the indirect fruits of the mental health reports—the Supreme Court of Virginia’s interpretation of 3:1 removes the teeth of the 3:3 protections.¹⁸⁹ Consequently, 3:1 now requires a defendant to testify in a manner constitutionally inconsistent with *Cunningham*. Therefore, 3:1 compels a criminal defendant to submit to the prosecution’s expert evaluation upon threat of the loss of the right to present highly relevant mitigating evidence.¹⁹⁰

C. Testimonial

The Fifth Amendment does not prohibit the prosecution’s access to and use of all compelled and self-incriminating evidence. For example, a criminal

constituted compulsion).

185. 431 U.S. 801 (1977).

186. *Cunningham*, 431 U.S. at 806.

187. See VA. CODE ANN. § 19.2-264.3:3 (Michie 2004) (restricting the Commonwealth’s use of disclosures made during a 3:1 evaluation to rebuttal evidence during penalty phase).

188. See *Kastigar*, 406 U.S. at 460 (stating that “the prosecution [has] the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony”).

189. See *Jackson*, 499 S.E.2d at 553 (permitting the prosecution to introduce mental health evidence relating to future dangerousness as long as such evidence did not directly state that the defendant presented a future danger to society); *Stewart*, 427 S.E.2d at 407–08 (determining that 3:1 does not prevent the prosecution from presenting mental health evidence to support a finding of future dangerousness); *Savino*, 391 S.E.2d at 281 (holding that once a defendant notifies the State of his intention to present mental health expert evidence in mitigation, he waives his entire Fifth Amendment privilege against self-incrimination).

190. See VA. CODE ANN. § 19.2-264.3:1(F)(2) (Michie 2004) (allowing the court to bar the defense’s mitigating expert evidence if the defendant does not cooperate fully during the prosecution’s expert examination).

defendant may be required to cooperate with the prosecution by “submit[ting] to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.”¹⁹¹ Although such “real” evidence is not constitutionally offensive, the Fifth Amendment protects a defendant’s self-incriminating disclosures of a *testimonial* nature.¹⁹² The distinction between real and testimonial nature is an essential element of a Fifth Amendment inquiry.¹⁹³

The Supreme Court has held that requiring a defendant “to disclose the contents of his own mind” is paradigmatic of testimonial evidence because of its communicative character.¹⁹⁴ Furthermore, the Court in *Smith* concluded that evidence presented by the prosecution’s mental health expert was testimonial because “the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination.”¹⁹⁵ Thus, information that is damaging to a defendant and gained by the prosecution through a mental health examination of the defendant pursuant to Virginia’s 3:1 statute is testimonial. Requiring a defendant to disclose incriminating mental health evidence to the Commonwealth without limiting the prosecution’s use of such evidence to rebuttal testimony constitutes impermissible compulsion under the Fifth Amendment.

VI. Conclusion

Although 3:1 protects an indigent capital defendant’s right to present mental health expert evidence in mitigation during penalty phase, *Savino* and subsequent cases established the Commonwealth’s court-sanctioned right to circumvent the very protections 3:1 was instituted to protect. Contrary to the provisions of the statute, the prosecution may introduce mental health evidence in its sentencing case-in-chief, rather than rebuttal.¹⁹⁶ Similarly, a State may introduce non-rebuttal expert testimony of a defendant’s potential future

191. *Schmerber*, 384 U.S. at 764.

192. *See Lee*, *supra* note 167, at 175–81 (discussing the components of a Fifth Amendment analysis).

193. *See* Peter Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31, 38–40 (1982) (distinguishing real evidence from testimonial evidence).

194. *See Curcio v. United States*, 354 U.S. 118, 128 (1957) (determining that such a compelled disclosure of evidence “is contrary to the spirit and letter of the Fifth Amendment”); *see also Doe v. United States*, 487 U.S. 201, 210 (1988) (stating that “in order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information”).

195. *Smith*, 451 U.S. at 465; *see Slobogin*, *supra* note 50, at 85–87 (describing the testimonial nature of clinical data).

196. *See Savino*, 391 S.E.2d at 281 (holding that “when a defendant gives . . . notice [that he intends to present evidence of his mental condition in the penalty phase of trial], he waives his fifth amendment privilege against the introduction of psychiatric testimony by the prosecution”).

dangerousness under the condition that the witness gives no explicit opinion regarding the aggravating factor.¹⁹⁷

Because the Supreme Court of Virginia does not adequately safeguard a defendant's Fifth Amendment right against self-incrimination, amending 3:1 to provide sealing procedures comparable to Rule 12.2 would provide the necessary protections. Virginia courts should deliver the mental health reports to the Commonwealth only after the guilt/innocence phase and upon the defendant's confirmation of his intent to use such evidence during the sentencing proceeding. Because the State is restricted to using mental health testimony only as rebuttal evidence during the penalty phase, such procedures would not unfairly burden the Commonwealth and would protect the defendant's Fifth Amendment privilege against self-incrimination.

As interpreted by the Supreme Court of Virginia, 3:1 violates the Fifth Amendment. An analysis of the statute reveals mental health evidence obtained by a 3:1 examination to be self-incriminating, compelled, and testimonial. Because the Supreme Court of Virginia has proven unwilling to enforce the statutory language, amending the disclosure rules of 3:1 to mirror those of Rule 12.2 appears to be the only feasible solution to the Fifth Amendment violation.

197. See *Jackson*, 499 S.E.2d at 553 (permitting the Commonwealth's introduction of mental health expert testimony regarding the defendant's propensity to commit future violent acts); *Stewart*, 427 S.E.2d at 407-08 (citing *Savino* to support the contention that 3:1 does not prohibit a mental health expert's opinion regarding future dangerousness).