Capital Defense Journal

Volume 2 | Issue 2 Article 7

Spring 4-1-1990

CRITICAL POINTS IN THE PROGRESS OF A CAPITAL CASE

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or to the tests which the Commonwealth used to link Spencer to the murder. There is, however, at least one recent example of successful employment of the latter line of defense against DNA evidence.

In *People v. Castro*, 545 N.Y.S.2d 985 (1989), a successful challenge to the DNA matching test linking Castro to a murder was made. The evidence linking Castro to the murder victim consisted of bloodstains on his wristwatch. *Castro* at 985. Lifecodes Corp. performed a DNA matching test on DNA from the bloodstains on the wristwatch and determined that they matched those of the victim. *Id.* at 985-6. Castro's attorney, Peter Neufeld, fielded a team of five expert witnesses to challenge the Lifecodes data. *Id.* at 986. Eventually, although the New York Court of Appeals ruled that the DNA matching test was a valid procedure, it questioned the reliability of the actual procedure used in this case.

> The rule for declaring a measured match must be the same rule which is used for declaring a match between the measurements and the data pool. **This was not done in this case.** Because of this error, **the population frequencies reported by Lifecodes in this case are not generally accepted by the scientific community.** This mistake might have been corrected by remeasuring the bands, rematching them to the data pool, and then recalculating the allele frequencies. **However, this procedure was not undertaken in this case.** Accordingly, the statistical probabilities noted would have been precluded or substantially reduced . . .

Castro at 998 (emphasis added). The New York Court of Appeals found that this rendered the results so unreliable that they were "inadmissible as a matter of law." *Id.* at 999.

Castro illustrates the dangers inherent in "infallible" methods of identification. No analytical technique is any more reliable than the technician performing the procedure or the sample being analyzed. Further, the more complicated the procedure, the greater the need for safeguards to ensure reliability. An article in the December 1989 issue of *Student Lawyer* (Williams, "Conviction by Chromosome," p. 26) quotes Edward Lander, an expert witness for the defense in *Castro*, on the need for greater reliability in forensic testing: "At present, forensic science is virtually unregulated — with the paradoxical result that clinical laboratories must meet higher standards to be allowed to diagnose strep throat than forensic labs must meet to put a defendant on death row."

Ultimately, concentration on the reliability of particular, complicated forensic testing showed in *Castro* that Lifecodes' own test results excluded defendant as the perpetrator of the crime. *Castro* at 998.

It is suggested that Virginia attorneys faced with DNA matching test evidence study the *Castro* opinion. Although highly technical, it provides a readable and detailed explanation of the entire matching procedure and illustrates how the procedures were successfully challenged in that particular case. The opinion also lists numerous articles and learned treatises upon the subject. For these reasons it is an excellent starting place for research.

CRITICAL POINTS IN THE PROGRESS OF A CAPITAL CASE

By: Elizabeth A. Bennett

I. Introduction

In the progress of capital as compared with non-capital trials, there are points at which the capital trial presents unique challenges and responsibilities for defense counsel. In addition, there are points where the importance of matter also present in non-capital trials is enhanced. This article does not undertake exhaustive treatment of those points, it merely identifies them—some are also discussed elsewhere in this issue.

II. Pretrial Motions: Unique Resource Requirements in Capital Cases.

A. Securing Time and Resources

1. Mental Mitigation

a. Va. Code Ann. § 19.2-264.3:1 (Supp. 1989).

This section provides for the mandatory appointment of a mental health expert upon a showing that defendant is indigent and either has been charged with or convicted of capital murder. The function of the mental health expert is to evaluate the capital defendant and to assist in the preparation and presentation of evidence in mitigation to be presented during the sentencing phase of the trial. An alternative means of securing the assistance is to obtain appointment under the Constitutional authority originating in *Ake v. Oklahoma*[1]. Under *Ake*, however, a substantial showing is required by the defendant. The burden of making this showing must be weighed against the significant disadvantages which arise when defendant moves under § 19.2-264.3:1. Va. Code Ann. § 19.2-264.3:1 compels a capital defendant to waive his Fifth Amendment privilege against self-incrimination by submitting to examination by an expert appointed for the Commonwealth, furnish that expert with reports containing statements made by the defendant to his expert, or face possible preclusion of the testimony of his expert[2] at the capital penalty trial.

b. *Ake v. Oklahoma*

1. Introduction

As will be seen in the following sections, *Ake* is not only authority for securing expert mental mitigation assistance, but may also authorize other expert assistance deemed to constitute "basic tools" of an effective defense.

While the showing required under *Ake* is substantial, counsel should be permitted to make it *ex parte*. This is premised upon the fact that this showing cannot be made without revealing defense theories or other privileged undiscoverable material to the Commonwealth. Clearly this information would not be discoverable from a defendant who could afford to retain his own expert. One benefit of pursuing the *Ake* process is that it forces counsel to develop a theory of mitigation in order to show what defensive matters, particular to the case, require expert assistance for their preparation and presentation.

Counsel should consider moving on both constitutional and statutory grounds. First, counsel could make the *Ake* motion, supported by the *ex parte* showing. If appointment is denied, a motion under § 19.2-264.3:1 could follow, with appropriate objection

to its preclusion provisions.

2. Essential elements of an *Ake* motion.

In order to trigger the appointment of an expert, the motion must allege the "specific facts supporting the costs, terms and purposes of the experts."[3] Although no bright line test exists, it is clear that counsel must show that without the assistance of the requested expert, there could be no fair trial. For example, in *Volanty v. Lynaugh*,[4] defendant's "bare assertion" that addiction rendered him temporarily insane was insufficient to make that issue a significant factor in the case. In that case, counsel failed to offer any supporting evidence at the pre-trial hearing. However, in *Little v. Armontrout*,[5] the 8th Circuit en banc remanded for consideration and determined that failure to appoint a hypnotist was error. In *Little*, the only evidence linking defendant to the crime was the identification from the victim, made after hypnosis.

Two cases, *Messer v. Kemp*[6] and *Moore v. Kemp*[7] serve to illustrate further the showing required. In *Messer*, the court held that denial of a motion for expert psychiatric assistance did not deprive the defendant of a fundamentally fair trial due to three omissions in the required showing. The motion failed to describe the problems that could be reasonably anticipated, how the appointment of a psychiatrist might aid in the defense, and finally, what specific behavior by the defendant would lead one to conclude that the issue of his mental health would be an issue in the case.[8] Again in *Moore*, the court upheld the denial of the appointment of independent experts requested to examine blood, hair and physical evidence. The court concluded that counsel failed to "advise the court of the kind of expert required and [the] role [the] expert would play."[9] The *Moore* court continued, requiring that the motion must "create a reasonable probability that expert assistance was necessary to the defense and the denial of requested expert assistance would render petitioner's trial unfair."[10] No case has definitively set out the prerequisites for granting an *Ake* motion. Post *Ake* cases suggest, however, that the following matters are relevant and should be alleged in the motion and supported with evidence where applicable:

1. The type of expert: Counsel should be specific about the particular area of expertise needed.

2. The type of assistance: This is an area where one category **does not** cover all. Counsel must list each request with particularity: investigation, testing (medical or psychological), consultation, whether s/he will testify at pretrial, the guilt/innocence or sentencing phases, etc.

3. The name of the expert, or qualifications and fee schedule: If possible, counsel should submit the name of the expert along with the motion. If unknown, counsel should include a reference to the fact that defendant is entitled to an expert as qualified as the one used by the Commonwealth.

4. Reasonableness of the cost: This can be supported by providing affidavits from similar experts in the community.

5. Objective bases for the request: Counsel should list all of the factual reasons for the request as well as the defenses you need to explore (Legal necessity argument).

6. Subjective bases for the request: It is useful for counsel to relate any observation made regarding the behavior of the defendant.

The memorandum in support of the motion for funds for an expert investigator should include the constitutional authority in support of the motion.[11] Selected portions of the arguments that might be made from that authority are included in the sections that follow.

3. Motion for Appointment of Expert Investigator, Forensic Specialist, or Other Essential Expert Witness.

In *Ake*, recognizing the imbalance between the resources available to a State versus an indigent defendant, the United States Supreme Court found that the Constitution required appointment and payment for the "basic tools of an adequate defense."[12] Note that the Court makes clear that its decision does not mean that "the indigent defendant has a constitutional right to a psychiatrist of his own personal liking or to receive funds to hire his own."[13] The reasoning in *Ake* set forth and grounded the right to an expert in the Due Process Clause. The Court's language acknowledges the reality of the adversarial setting when discussing the importance of psychiatry in the courtroom.

> [B]y organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then making out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them.[14]

Since *Ake* dealt with the issue of insanity, application to other expert assistance must be made carefully. Clearly, the allocation of resources implicates the Sixth Amendment right to the effective assistance of counsel, a necessary component of Due Process. The U.S. Supreme Court found in *Strickland v. Washington*[15], that Due Process requires "meaningful adversarial testing" of the prosecution's case. Therefore, in the proper case, this Sixth Amendment rationale also supports the appointment of an expert.

4. Motion for Continuance.

In order to provide the effective assistance of counsel to which the defendant is entitled, investigation, research and preparation is required beyond that essential in non-capital cases. Counsel is required to inquire into every aspect of the history of the accused, his character, and the circumstances of the offense that might serve as a basis for a sentence less than death.[16] Moreover, counsel must familiarize himself with the constitutional claims which have been and are being raised in the lower federal courts. If adequate time to do so is not allowed, defendant will be unable to make and adequately preserve a record of the valid claims which are currently available to him.[17]

Due to the unique nature of the capital trial, extensive preparation must be made for the sentencing phase of trial in order to prepare rebuttal of the expected evidence the Commonwealth will introduce in aggravation as well as develop evidence to provide a case in mitigation. At the hearing on a motion for continuance, counsel should ensure through evidence proffered and representations to the court that the record clearly reflects the need for time to accomplish each specific task essential to capital defense. The record should also reflect defendant's contention that the continuance is required by the Sixth Amendment of the United States Constitution. Counsel should provide as much of the following evidence to support the motion as possible. First, all scientific reports which need to be

analyzed by an expert, including, fingerprinting, handwriting, autopsies, mental examination by the Commonwealth, blood, urine or breath tests, semen analysis, DNA fingerprinting, or gas chromatography. Second, physical evidence requires analysis by an expert, including, weapons, ballistics, clothes, hair, blood, and fibers. Third, the appointment of a mental health expert to show defendant's history, character, mental condition or results of any neurological examination conducted on the defendant. Fourth, information obtained by conducting an independent investigation of all aspects of the defendant's life. Note that counsel should never limit the investigation because of lack of cooperation on the part of the defendant or because the defendant instructs counsel not to investigate or present evidence.[18]

Documentary evidence should contain birth records, school records, hospital and mental health records, institutional, court, probation and parole records, and military records. Interview as many people as possible who have ever known the defendant, including parents, siblings, relatives, teachers, employers, co-workers, ministers or other church people, institutional personnel. In essence, include those persons identified in the records obtained, by the defendant, or identified by others interviewed.

III. Jury Selection Procedure in Virginia.

This section will discuss problems unique to capital voir dire. The setting in which that process occurs is also important and can be affected by pretrial motions. *See* Plimpton and Lee, *Capital Pretrial Motions: Added Dimensions*, this issue.

A. Consideration of Mitigation

Jury selection procedure is typically thought to be within the discretion of the trial court as a matter of State law. However, due to the unique requirements of capital cases, the Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution are directly implicated. Defense counsel must insist that they be allowed the time and latitude necessary to elicit reliable answers from prospective jurors. The applicable standard for removal of a prospective juror for cause is whether or not the views of the juror would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[19] Counsel is entitled to question prospective jurors about any matter that could prevent or substantially impair performance according to law. In order to establish effective voir dire, counsel must be alert to attempts to "rush" the process, thereby prohibiting necessary questioning. If opportunity to pursue certain questioning is not allowed, a proper record must be made.

The Virginia General Assembly has listed five factors to be considered mitigating on the issue of death or life imprisonment, although they by no means represent an exhaustive list. Recently, in *Mills v. Maryland*[20], the Supreme Court discussed the line of cases involving the issue of presentation of mitigation evidence, stating that:

> It is beyond dispute that in a capital case "the sentencer [may] not be precluded from considering, **as a mitigating factor**, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*[21], 455 U.S. 104, 110 (1982), quoting *Lockett v. Ohio*[22], 438 U.S. 586 (1978) (plurality opinion) (emphasis in original).

Therefore, a prospective juror should be disqualifiable if the juror is unable to consider honestly giving weight to any particular factor counsel might present as a reason to choose life rather than death. Conversely, prospective jurors are not excludable for cause if they can **consider** any penalty and all mitigating factors according to law.[23] In *Wainwright v. Witt*,[24] the majority held that the proper standard for judging qualification of prospective jurors is the "prevent or substantially impair" language previously announced in *Adams v. Texas*[25]. Capital voir dire must allow meaningful exploration by counsel of all these matters.

The Supreme Court of Virginia has supported severe limitations on voir dire. Appellate review is often made difficult, however, because counsel fail to make a proper record of what they propose to ask and why it is relevant.

Even when a record is made, however, the position of the Supreme Court of Virginia can only be characterized as restrictive. In *Buchanan v. Commonwealth*,[26] the court stated that, since a criminal defendant has no right to individual voir dire, it follows that, there is no right to individual **sequestered** voir dire. Moreover, during voir dire, Buchanan's counsel sought to ask prospective jurors:

> (1) Do you believe that a death sentence is the only appropriate punishment for capital murder?

In discussing the standard applicable to questions asked during voir dire, the court held that "to be relevant, a question to a prospective juror must **necessarily disclose or clearly lead to the disclosure of opinion or prejudice.**"[27] Finding this question virtually identical to one properly rejected in *Patterson v. Commonwealth*[28], the court held that the question was "vague, argumentative, and non-specific." Counsel's ability to conduct voir dire meaningfully was further frustrated in *Mackall v. Commonwealth*.[29] In *Mackall*, the Supreme Court of Virginia concluded that counsel could determine whether or not a juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" by inquiring as to whether the juror had views on the propriety of the death penalty but could not inquire into what those views might be.

B. Exposure to Publicity

The Sixth Amendment guarantees the accused in a criminal case the right to a "fair trial" and an "impartial jury."[30] An impartial jury need not be an uniformed jury.[31] The standard, stated in *Irvin v. Dowd*,[32] is that a juror or potential juror must be able to "lay aside their impression or opinions and render a verdict based on the evidence presented in court."[33] Where pretrial publicity is widespread and of such a prejudicial nature that a potential juror could not lay aside his or her personal impressions, an "inference" of actual prejudice is permissible.[34] Questions asked during voir dire regarding pretrial publicity, like those involving the consideration of mitigation evidence, should not have to be leading or conclusory. However, another question asked in *Buchanan, supra*, was:

> (1) From what you have read or heard about this case in the newspapers, what impression do you have about this case?

The court determined that this question failed to **necessarily disclose or clearly lead to the disclosure of opinion or prejudice** because it was vague and unfocused.

C. Challenging Application of the Capital Statute.

1. Motion to Prohibit the Imposition of the Death Penalty.

Two grounds for this motion will be discussed. First, is a failure to guide the jury's discretion in its consideration of the two statutory aggravating factors as required under *Furman v. Georgia*[35], *Godfrey v. Georgia*[36], and *Maynard v. Cartwright*[37]. Second, that failure to give the jury adequate instructions on mitigation, use of model jury instructions, and jury verdict forms inhibits the jury from giving independent weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation, in violation of *Lockett* and *Mills*.

Sections 19.2-264.2 through 19.2-264.5 of the Code of Virginia, as amended 1950, violate the Eighth and Fourteenth Amendments.

a. Virginia's "vileness predicate" fails to guide jury discretion as required by *Furman*, *Godfrey*, and *Maynard*.

The Supreme Court interprets post-*Furman* statutes with the understanding that the qualitative difference of death demands a corresponding difference in the need for reliability in the determination that death is the appropriate punishment.[38] The *Brown* court determined that the "sentencers may not be given **unbridled discretion** in determining the fates of those charged with capital offenses."[39] In *Godfrey*, the jury sentenced the defendant to death upon a finding of the vileness aggravating factor. The Supreme Court held that the aggravating factor could not constitutionally support the death verdict because it created the uncontrolled discretion of a basically uninstructed jury.[40] Virginia's vileness predicate is based upon the same one found in *Godfrey*. Although the Supreme Court of Virginia purportedly placed a limiting instruction on the vileness predicate, in practice the construction not only fails to save the defect condemned in *Godfrey* and *Maynard v. Cartwright*, but aggravates the problem by confusing the jury and inviting an unguided and standardless verdict.

b. Virginia's future dangerousness predicate fails to guide jury discretion as required by *Furman* and *Gregg v. Georgia*[41] resulting in the arbitrary imposition of the death penalty.

Under the Virginia sentencing procedure section 19.2-264.4, the jury may impose the death sentence if it finds a probability beyond a reasonable doubt that the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society." Courts in Virginia have allowed the use of prior unadjudicated criminal conduct evidence to establish this predicate. Use of this conduct without any requirement that the conduct be established by any standard of proof violates the Eighth and Fourteenth Amendments. Moreover, use of this evidence also violates *Godfrey* and *Cartwright* by giving the jury open ended discretion in deciding when the proof has risen to a level necessary to establish the prior criminal conduct. Once this determination is made, the jury is given "guidance" that it must determine the *probability* of the future dangerousness *beyond a reasonable doubt*[42], thereby allowing the jury to impose the punishment of death in an arbitrary and capricious manner.

IV. Penalty Trial

Obviously, the penalty trial is no more important than trial on guilt or innocence of capital murder. A greater number of issues unique to capital cases appear, of course, because penalty trials themselves are not part of Virginia criminal practice (*see generally*, Va. Code Ann. § 19.2-295).

A. Relevance of Evidence

Only evidence tending to show a greater degree of individual moral culpability in the defendant than that demonstrated by the commission of capital murder itself is properly admissible in support of aggravating factors.

In *Booth v. Maryland*,[43] the United States Supreme Court held that the use of a victim impact statement during the penalty phase of a capital trial was improper for two reasons. First, it focused on the victim, and second, on "factors about which the defendant was unaware, and that were irrelevant to the decision to kill."[44] The Court held that the admission of irrelevant evidence "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."[45] Moreover, in reaching this conclusion the Court reasoned that the admission of such evidence could promote arbitrary findings by: (1) "divert[ing] the jury's attention away from the defendant's background . . . and the circumstances of the crime"; and (2) by the random variations of each family's communicative abilities "in expressing their grief."[46]

In *South Carolina v. Gathers*,[47] the *Booth* type of error occurred during the prosecution's closing argument. The prosecutor focused on positive aspects of the victim's character by reference to a laminated prayer and voter registration card. The Court held that this evidence was irrelevant to the sentencing decision. Adding that "the content of the various papers . . . was purely fortuitous, and cannot provide any information relevant to the defendant's moral culpability . . . [and] their content cannot be said to relate directly to the circumstances of the crime."[48] In Virginia, two questions must be considered. What is relevant to show the "vileness" predicate and what is relevant to the issue of "future dangerousness". The United States Supreme Court has determined that on their face, both questions are relevant to ultimate life or death verdict but left unanswered is the question of what evidence is relevant to show these factors. As to what evidence is relevant to show future dangerousness, two Virginia statutes are in direct conflict. Section 19.2-264.2 limits the evidence to the defendant's past criminal record, stating:

> a sentence of death shall not be imposed unless . . . the jury shall (1) after consideration of the past criminal record of convictions the defendant . . .

While § 19.2-264.4(C) allows consideration of:

> . . . evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense . . .

The 4th Circuit, in *Giarratano v. Procunier*,[49] recently held that the use of different language in these sections is insignificant.

B. Objections to Standard Jury Instructions and Forms

1. Failure to give adequate instructions on mitigation, use of model jury instructions, and jury verdict form inhibit the jury from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation, in violation of *Lockett* and *Mills*.

a. The Virginia Courts' practice of failing adequately to instruct on mitigation, and the use of incomplete and misleading forms and instructions violates *Lockett*.

The issue at this point in the penalty trial is whether Virginia's use of model jury instructions and forms, and practice of failing to do more than barely mention mitigation underinforms, misleads, or otherwise inhibits consideration of mitigation evidence in a manner required by law. The Court must focus on the combined effect of these practices from the perspective of a reasonable juror, not a reviewing court.[50] Therefore, the failure adequately to instruct on mitigation and the use of jury instructions and forms combines to create a *Lockett* violation of the sentencing process.[51]

b. The courts use of jury forms and model jury instructions result in an impermissible barrier to the sentencer's consideration of all mitigation evidence in violation of *Lockett*, *Hitchcock v. Dugger*[52] *Eddings v. Oklahoma*[53] and *Skipper v. South Carolina*[54].

The Court has repeatedly held that it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by *statute*,[55] *by the sentencing court*,[56] or *by an evidentiary ruling*.[57] Whatever the cause, the conclusion is the same "because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence in plain violation of *Lockett*, it is our duty to remand this case for resentencing."[58] Accordingly, Virginia's practice and the use of model jury instructions and forms erects the same impermissible barrier to consideration of mitigating evidence as that condemned in *Mills*.

C. Proposed Jury Instructions.

The following discussion of three proposed jury instructions on the subject of evidence in mitigation, consideration of evidence in aggravation and mitigation, and parole law are examples of issues that should be litigated on federal grounds, in Virginia penalty trials. It is also important for counsel to realize that proposed instructions should be accompanied by an objection to the use of Virginia's standard jury instructions.

1. Evidence in Mitigation

First, the jurors should be informed that they are required to consider any evidence that has been presented in mitigation.[59] Furthermore, that mitigation evidence is not offered as an excuse for the crime of which the defendant has already been found guilty. Rather it is any evidence which in fairness may serve as a basis for a sentence less than death. The instruction should inform the jury that the law requires consideration of more than the bare facts of the crime. A recitation of the statutory mitigating factors should be included for exemplary purposes, as well as a charge that the juror must consider a mitigating circumstance if evidence is found to support it, whether expressly mentioned in the statute or not. Finally, the instruction should include language explaining that the weight accorded a particular circumstance is within the judgment of the jurors, but that they may not refuse to consider any evidence presented in mitigation. Counsel will find support for this jury instruction in the Eighth and Fourteenth Amendments, *Lockett v. Ohio, supra, Eddings v. Oklahoma, supra, Skipper v. South Carolina*[60], *Hitchcock v. Dugger*[61], and *Penry v. Lynaugh*[62].

2. Consideration of Evidence in Aggravation and Mitigation.

The jurors are instructed that before they may fix the punishment at death, they must find, unanimously and beyond a reasonable doubt, the existence of at least one of the statutory the aggravating circumstances. Here, the key fact for the jurors to understand is that they are **not required** to reach a unanimous decision, nor find beyond a reasonable doubt the existence of any particular fact in mitigation. The jurors should be instructed that under the law, they are permitted to fix the punishment of the defendant at life if they find that to be the appropriate sentence, even if they find unanimously and beyond a reasonable doubt the existence of the aggravating circumstance. The Eighth and Fourteenth Amendments, *Smith v. Commonwealth*[63], *Mills v. Maryland*[64], and *Penry v. Lynaugh*[65] provide support for this instruction.

3. Parole Eligibility Jury Instruction.

Despite the Virginia Supreme Court's current prohibition against parole eligibility jury instructions,[66] the Eighth and Fourteenth Amendments support an allowance for such instructions. The Virginia Court has based its prohibition on two rationales. The first is a fear that juries will "handicap" the sentence rather than imposing a just punishment for defendant's crime.[67] Simply put, the Court fears that the jury will lengthen the sentence to compensate for a defendant's possible "good time" or parole consideration.[68] The second rationale is a separation of powers theory first discussed in *Hinton v. Commonwealth*.[69]

In *Hinton*, the Supreme Court of Virginia determined it is the executive's role to mete out punishment via the correctional system while it is the judiciary's role (via the jury) to fix the penalty. Allowing the jury in *Hinton* to consider matters pertaining to the course of punishment rather than focusing their consideration to determining the appropriate punishment violated the separation of powers.[70] The first rationale is obviously inapplicable in capital cases since the jurors determine life or death and cannot "handicap".

Despite this view, the Eighth and Fourteenth Amendments entitle a capital defendant to these jury instructions for two reasons. The first function of a parole eligibility instruction is to provide the jury with criteria for a sentence less than death.[71] It has already been shown that due process requirements dictate that a capital defendant may not be precluded from presenting any evidence in mitigation of his crime(s). Accurate information about the severity of the life imprisonment penalty is part of such mitigatory evidence, and necessary to rational consideration of whether that punishment is appropriate in a given case.

The second function of accurate parole information is to provide rebuttal to the Commonwealth's future dangerousness case.[72] Since a life sentence permanently separates the defendant from all but prison society, he cannot pose a future threat to society as a whole. Additionally, due process and the prohibition against the arbitrary imposition of the death penalty require that the judicial system afford a defendant the opportunity effectively to rebut any aggravating factors upon which the Commonwealth relies. Accurate parole information is part of rebuttal of the Commonwealth's future dangerousness case. The following eligibility provisions should be made part of proposed jury instructions as applicable in a particular case:

> As you deliberate whether life in prison or death is the appropriate punishment for the defendant's crime(s), you may consider as a possible mitigating factor that a sentence of life in prison means the defendant will:

1. not be eligible for parole.
2. not be eligible for parole consideration for twenty-years.
3. not be eligible for parole consideration for thirty years.

When you assess the evidence presented by the Commonwealth in support of its contention of [future dangerousness], you may consider the fact that if you set defendant's punishment at life imprisonment, he will:

[Insert eligibility provision applicable to your case]
1. not be eligible for parole.
2. not be eligible for parole consideration for twenty-years.
3. not be eligible for parole consideration for thirty years.

D. Investigation and Presentation of Mitigation

Since the time of the penalty trial is to commence "as soon as practicable"[73] after the guilt phase, investigation of mitigation evidence must begin pre-trial. From the beginning, counsel should be aware that this phase involves a comprehensive and time-consuming process. While it is comprehensive in terms of the hours spent in investigation, more importantly, as the investigation progresses, counsel must develop a theory of mitigation. Although each case presents a unique "paper trail" of documents, the following represents portions of a checklist[74] designed to provide a starting point to investigation of the defendant's life.

Pre-natal, birth, post-partem medical records

Obtain mother's notarized release for all medical records. Look for: medications taken during pregnancy, illnesses, medical complications or trauma.

Other medical records

All hospital, physician records and social service records. Look for: physical trauma, abuse or neglect complaints, disease, or accident.

Siblings, immediate and extended family

Birth, death, school records, criminal or military records. Look for: a history of mental, emotional or physical problems as well as substance abuse.

School records, juvenile and military records

Psychological, achievement testing, names of teachers, counselors, IQ scores or other test results and disciplinary reports.

Employment records

Look for job description and work history.

Criminal record, prison records

Review the complete file of any prior arrests, convictions as well as psychiatric evaluation, probation and parole reports.

Once names are obtained, counsel should interview friends, relatives, employers, co-workers, school personnel, and clergy to obtain information to develop a theory in mitigation. Although also unique to a particular defendant, the theory may involve a history of abuse or neglect, mental retardation, or control or domination of the defendant at an early age. Counsel may be able to trace defendant's life back to a critical or turning point from which defendant never recovered. In all, counsel should provide as thorough an investigation as possible and be receptive to the development of a theory of mitigation as the case progresses.

E. Closing Arguments.

In *Zant v. Stephens*,[75] the Court suggested certain aggravating factors which prosecutors could not make out by evidence or argument. The first involves the area of constitutionally protected conduct. If the prosecutor alludes to "the defendant's fair trial, while the victim had none" or a failure to testify or cooperate with the police, an objection must be made. Second, objection should be made where an attempt is made to argue that a family background deprivation or mental illness bears on the defendant's "future dangerousness". Third, no direct or indirect reference to race, religious or political affiliation should ever be permitted. Fourth, while the Court has insisted that all evidence proffered in mitigation be considered by the jury, equally true is the determination that death sentences be based upon factors relating to the individual culpability of the offender.[76] And finally, the prosecutor may not diminish in any way the jury's ultimate responsibility for the imposition of the death sentence.[77] Although Virginia counsel are reluctant to interrupt the argument of opposing counsel, if the prosecutor goes beyond permissible bounds, an objection must be made.

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[1]470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

[2]*See 2 Capital Defense Digest* 24, (Nov. 1989) for a more detailed discussion of the preclusion elements of this statute.

[3]*Caldwell v. Mississippi,* 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).

[4]874 F.2d 243 (5th Cir. 1989).

[5]835 F.2d 1240 (8th Cir. 1987).

[6]831 F.2d 946 (11th Cir. 1987).

[7]809 F.2d 702 (11th Cir. 1987).

[8]831 F.2d at 964.

[9]809 F.2d at 718.

[10]*Id.*

[11]Most notably, the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

[12]*See Ake v. Oklahoma,* 470 U.S. 68, 78, 105 S. Ct. 1087, 1093, 84 L. Ed. 2d 53, 63 (1985).

[13]*Ake*, 470 U.S. at 83.

[14]*Id.* at 81.

[15]466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

[16]*Woodson*, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d. 944, (1976); *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

[17]*Smith v. Murray*, 477 U.S. 527, 106 S. Ct. 2661, 91 L. Ed. 2d. 434 (1986).

[18]*See, e.g., Thomas v. Kemp*, 796 F.2d 1322 (11th Cir. 1986), *cert. denied*, 93 L. Ed. 2d 601 (1986) (attorney ineffective for failing to investigate and present evidence in mitigation just because 19-year old schizophrenic client said he did not want anyone to "cry for him" at trial).

[19]*Adams v. Texas*, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980).

[20]484 U.S. 975, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988).
[21]455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d. 1 (1982).
[22]*supra*, at n.15.
[23]*Witherspoon v. Illinois*, 391 U.S. 510, 520-521, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).
[24]469 U. S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).
[25]*supra*, at n.18.
[26]238 Va. 389, 384 S.E.2d 757 (1989)
[27]238 Va. at 393, (emphasis added).
[28]222 Va. 653, 283 S.E.2d 212 (1981)
[29]236 Va. 240, 372 S.E.2d 759 (1988).
[30]U.S. Const. amend VI.
[31]*See Irvin v. Dowd*, 366 U.S. 717, 722-23, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).
[32]*supra*, at n.31.
[33]*Washington v. Commonwealth*, 228 Va. 535, 544, 323 S.E.2d 577, 584 (1984) citing, *Irvin*, 366 U.S. at 722-23.
[34]*Murphy v. Florida*, 421 U.S. 794, 803, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).
[35]408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).
[36]446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).
[37]486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988).
[38]*Johnson v. Mississippi*, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d. 575 (1988); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).
[39]479 U.S. at 545.
[40]446 U.S. at 429.
[41]428 U.S. 153 (1976).
[42]Va. Code Ann. § 19.2-264.4(C).
[43]482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987).
[44]*Id.* at 505.
[45]*Id.* at 503.
[46]*Id.* at 505.
[47]109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989).
[48]109 S. Ct. at 2211.
[49]891 F.2d 483 (4th Cir. 1989).
[50]*See Francis v. Franklin*, 471 U.S. 307, 315-316 (1985) ("The question . . . is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning.") citing, *Sandstrom v. Montana*, 442 U.S. 510, 516-517 (1979).
[51]*See* discussion of *Lockett, supra.*
[52]481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987).
[53]*supra*, at n.21.
[54]474 U.S. 900, 106 S. Ct. 270, 88 L. Ed. 2d 225 (1985).
[55]*see Lockett v. Ohio.*
[56]*see Eddings v. Oklahoma.*
[57]*see Skipper v. South Carolina.*
[58]*Mills*, citing *Eddings* at 455 U.S. 104, 117 n*, 102 S. Ct. 878, n*.
[59]*See Mills, supra*, at n.19.
[60]476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986).
[61]481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987)
[62]492 U.S. ___, 109 S. Ct. 2934 (1989).
[63]219 Va. 455, 248 S.E.2d 135 (1978).
[64]*supra*, at n.19.
[65]*supra*, at n.61.
[66]The Virginia Supreme Court has clearly prohibited any jury instructions which concern the defendant's eligibility for parole. *Watkins v. Commonwealth*, 238 Va. 341, 385 S.E. 50 (1989); *O'Dell v. Commonwealth*, 234 Va. 672, 701, 364 S.E.2d 491, 507 (1988); *Williams v. Commonwealth*, 234 Va. 168, 178-180, 360 S.E.2d 361, 367-69 (1987); *Poyner v. Commonwealth*, 229 Va. 401, 432, 329 S.E.2d 815, 836-37 (1985).
[67]*Coward v. Commonwealth*, 164 Va. 639, 178 S.E. 797, 799-80 (1935).
[68]*See Coward*, 178 S.E. at 799-780.
[69]219 Va. 492, 247 S.E.2d 704 (1978).
[70]*Hinton*, 247 S.E.2d at 706.
[71]*King v. Lynaugh*, 828 F.2d 257, 264 (5th Cir. 1987) (Dicta expressing an intent to overrule the court's earlier prohibition against such instructions); *see also McClesky v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d. 262 (1987); *Lockett v. Ohio, supra*, at n.20.
[72]*King*, 828 F.2d at 264; *Gardner v. Florida*, 430 U.S. 349, 351, 97 S. Ct. 1197, 51 L. Ed. 2d. 393 (1977); *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986).
[73]Va. Code Ann. §19.2-264.3(C).
[74]Developed by Sharlette Holdman of the South Carolina Death Penalty Resource Center.
[75]462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).
[76]*See Booth v. Maryland, supra* at n.43 and *South Carolina v. Gathers, supra* at n.47.
[77]*Caldwell v. Mississippi, supra*, at n.3. *But compare Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986).

CAPITAL PRETRIAL MOTIONS: ADDED DIMENSIONS

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Capital cases require some pretrial motions not heard of in other trials. Also, some pretrial motions found in non-capital cases take on added importance in capital cases (e.g., motion for change of venue). Virtually every aspect of a capital trial implicates federal law. Pretrial motions practice is not the only way to raise federal issues in a capital trial. However, it is a systematic way whereby defense counsel may plan with deliberate care to preserve all possibly meritorious issues on the record should appeal prove necessary. This article deals with pretrial motions unique to capital cases as well as motions more generally used but of heightened importance in a capital case. The article also discusses the timing for filing pretrial motions and the reasons for filing them.

Pretrial motions in capital cases may serve at least three distinct functions. First, and most important, granting of the motion could make the trial fairer. Motions for additional time or resources, such as requests for experts or investigators, address the tremendous imbalance in resources between the Commonwealth and appointed counsel and enhance the opportunity for effective representation of capital defendants. Second, a meritorious pretrial motion may preserve an issue on the record for appeal. (Conversely, claims may be lost if not asserted pretrial). Third, pretrial motions may create currency for negotiation of a non-capital disposition.

Pretrial motions should be founded upon a good faith basis for filing. A good faith basis may exist, however, even when it appears unlikely that the motion will be granted. On the other hand, frivolous motions or voluminous motions made for effect rather than for the purpose of obtaining a fairer trial undermine the credibility of counsel. Credibility is not undermined when voluminous motions reflect legitimate issues, viably supported and argued.