Capital Defense Journal

Volume 2 | Issue 2 Article 8

Spring 4-1-1990

CAPITAL PRETRIAL MOTIONS: ADDED DIMENSIONS

Thomas W. Plimpton

Kerry D. Lee

[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

By: Thomas W. Plimpton
Kerry D. Lee

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.

Benefits may accrue to the defendant even from denial of pretrial motions. The pretrial motion becomes part of the official record. Issues addressed by pretrial motions may be raised by the defendant on appeal. If the trial judge has erroneously denied the motion, the conviction or sentence may be overturned. For example, in *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), a capital case, defense counsel filed a pretrial motion requesting a psychiatric expert. At that time such assistance had not been held to be required under the Constitution. Ultimately, the United States Supreme Court found that the trial judge had erred in denying the motion and ordered a new trial. 470 U.S. at 74. Ake was convicted again, but this time sentenced to life in prison and not death.

Other benefits may flow from filing as many legitimate pretrial motions as possible. Each motion requires a ruling. Only one non-harmless error in denying a motion is required for post-conviction relief. Therefore judges may focus their attention more carefully upon the merits of a pretrial motion (even an unusual motion) when the motion is well argued and supported, and stands as one of a sequence of well argued pretrial motions. It is important in this regard that pretrial motions, wherever possible, not be paper filings. Whenever appropriate, a hearing should be requested at which evidence is presented.

Preservation of issues through pretrial motions may yield benefits to the defendant even if the legal argument in support of the motion runs counter to prevailing law. Absent preservation of the issue on the record, the issue may not be raised later in the event of a favorable shift in the law. So long as issues are raised and preserved, defendants are entitled to the benefit of later constitutional pronouncements (even those like *Ake* placing new obligations on the state) in cases decided before the defendant reaches the collateral proceeding stage. Even at habeas, defendants are entitled to favorable law which is found to be only an extension of principles announced in earlier cases. *Teague v. Lane,* 489 U.S. ___, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). *See e.g., Penry v. Lynaugh*, 492 U.S. ___, 109 S.Ct. 2934, 106 L. Ed. 2d 256 (1989) (state scheme must provide means for sentencer to give effect to mental retardation evidence, and this is but an extension of principles in *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)).

Pretrial motions should federalize each issue. To federalize an issue in a capital case means to ground the claim for relief in rights guaranteed by the United States Constitution in addition to all applicable state law grounds. Unless federalized and successfully preserved, an issue may not survive the leap from the state courts to the federal judiciary upon appeal.

Even if the pretrial motion is ultimately denied at trial and relief does not come on appeal, the motion may have facilitated negotiation. Pretrial motions and other trial events, may provide currency for negotiation sufficient to persuade the prosecution to negotiate a non-capital disposition.

The Commonwealth must balance several different considerations while prosecuting its case, not least of which is uncertainty. Obtaining a conviction of capital murder is never certain. Even if the defendant is convicted it is not certain that a death sentence will result. Further, a death sentence it may not survive appeal.

The lack of finality associated with appeal raises other considerations for the prosecution. In any event, it takes years to finalize a capital case through the appeals process. This lack of finality is very hard on the victim's family. Also the lack of finality results in loss of any possible deterrent value of the conviction and sentence.

The prosecution must also consider the expense of a capital case. The necessary investment of court time both at trial and on appeal speak for negotiating a non-capital disposition. Pretrial motions for the extra resources needed in capital cases heighten the concern regarding wise allocation of resources.

Trial of a capital case may destroy harmony by disrupting the community. Whether or not the community at large is disrupted, trying a capital case certainly disrupts harmony in the legal community. Such a trial must become a hard-ball adversarial proceeding with everyone on the record at which indulging the usual courtesies and cooperation cannot be risked.

Finally, pretrial motions may produce evidentiary hearings that demonstrate mitigating factors. The Commonwealth possesses complete discretion as to whether to pursue the death penalty. Responsible prosecutors, who have seen a variety of homicide cases, may be more heavily influenced by mitigating evidence than would a jury. If a case is seen as not substantially more aggravated than other homicides in light of all circumstances, including mitigation evidence, it may not merit a capital prosecution.

Each of these types of currency for negotiation may be generated in part by pretrial motions practice. The more currency for negotiation defense counsel accumulates the more likely the prosecution will decide for the certainty, finality, economy, and harmony of a non-capital disposition.

Motions must be timely filed in order to be considered by the court. Some motions must be made pretrial. Other motions may be made pretrial. Virginia Supreme Court Rule 3A:9 sets forth the timing for filing motions. Section (b)(1) describes the motions which must be made pretrial. Section (b)(2) describes the motions which may be made pretrial. If a motion must be filed pretrial, section (c) establishes the time frame for filing.

Motions required to be filed pretrial must be filed prior to entering a plea and at least seven days before the trial date. Failure to meet these requirements constitutes a waiver of the right to file the motion. Motions which must be filed pretrial include motions encompassing defenses and objections based upon defects in the institution of the prosecution or in the written charge upon which the accused is to be tried. The only exceptions are objections to jurisdiction or a defense that the written charge fails to charge an offense. These motions shall be noticed by the court at any point during the proceeding.

Examples of motions common to capital trials which must be made pretrial include a motion for a bill of particulars and a motion to dismiss based upon the unconstitutionality of the statute under which the accused is charged. For good cause shown, the court, at its discretion, may allow untimely filing of these or any other motions.

Motions which may be filed pretrial include any defense or objection which is capable of determination without the trial of the general issue of guilt or innocence. Even though the rule does not require filing certain motions pretrial, as a practical matter they should be filed pretrial. Obviously, motions for discovery and for additional resources should be filed pretrial in almost every instance so that there is time for incorporating the benefits of the granted motion into the defense strategy.

Strategic considerations encompass more than mere timing of pretrial motions. Exhaustive motions force the prosecution to use some of its resources on legal research, thereby diverting it from its planned course of preparation to one dealing with important constitutional and procedural issues. Exhaustive pretrial motions may further force the prosecution to reveal more and more of its theory of the case and both favorable and unfavorable evidence which can be used in negotiations, cross-examination, impeachment, etc. Another important strategy consideration of pretrial motions is that they

provide time to explore all defense possibilities. Since capital cases require the attorney to perform numerous and unfamiliar duties in order to render effective assistance, it is important to obtain as much extra time as possible.

Strategic considerations require that pretrial motions be filed even when it is unlikely that the motion will be granted. This is true for four reasons. First, an unsuccessful motion can be the reason another motion succeeds. A motion for a change of venue that is denied may very well convince the trial judge that individual sequestered voir dire is necessary, or that more peremptory challenges are needed. Second, it is not possible to look into the future to know the course of the law. What is clearly unavailable to defendant in the mind of a trial judge today may become a routine right in the future. Third, unless the attorney raises and preserves all claims on the appropriate state and federal grounds, these rights will be considered to have been waived by the client. Fourth, claims which are lost raise the possibility that the attorney will later face an Ineffective Assistance of Counsel claim. It is necessary, therefore, for attorneys be aware of issues percolating through the lower courts in other jurisdictions which, several years down the road could turn into helpful precedent. If applicable, motions should be filed raising these issues so that any future favorable decision will be available to the client. However, as discussed above, even if issues are preserved, not all future decisions will be able to aid the defendant.

The pretrial stage is one of the most important phases of a death penalty case. Used effectively, pretrial motions may be the most significant factor in securing a non-capital disposition. As has been noted, matters unique to the capital aspect of a case mean that a proper defense will and should result in a significant expenditure of time, money and human resources by the Commonwealth. This very drain on resources can be a factor in securing a non-capital disposition. It should be remembered that the responsibility for these extra requirements rests with the Commonwealth, which can exercise its discretion to eliminate the capital aspect at any time. Pretrial motions which are heard and argued in half-a-day or less only aid the prosecution.

What follows is a brief discussion of some pretrial motions that are particularly important in capital cases. Obviously, the list is illustrative and not exhaustive. The motions discussed are included in part to show that both the need for the relief sought and the authority for granting them may differ from that present in non-capital cases.

MOTION FOR A BILL OF PARTICULARS

In Virginia, courts have generally ruled that a criminal defendant is entitled to a bill of particulars "to gain information on the nature of the charge against him so as to enable him to prepare for trial, avoid or minimize the danger of surprise at time of trial, and enable him to plead his acquittal or conviction in bar of another prosecution for the same offense." *United States v. Dalin*, 410 F.2d 363, 364 (4th Cir. 1969). *See also Pine v. Commonwealth*, 121 Va. 812, 93 S.E. 652 (1917) (Authority to direct a bill of particulars is "inherent in the trial court in the orderly administration of justice.")

In Virginia a motion for a bill of particulars must be filed pretrial. Therefore it must be filed prior to entering a plea and at least seven days before trial. The motion should specifically request clarification of what makes this alleged offense capital murder under Va. Code Ann. § 18.2-31. The motion should seek to learn the prosecution's theory of the case relating to each element of every charge brought against the defendant.

In theory a bill of particulars is not a discovery device. In reality, it is the defense's first opportunity to discover the nature of the evidence against the accused and to learn the prosecution's theory of the case. The request for a bill of particulars may seek more than a mere clarification of the indictment or charge. The motion for a bill of particulars may request identification of all evidence supporting the prosecution's theory of the case. If the trial judge grants a motion for a bill of particulars which requests identification of evidence, the state is obliged to reveal all requested information.

With Virginia's system of bifurcated capital trials, a bill of particulars may inquire into the prosecution's specific theory of the case-in-chief and also inquire into the prosecution's theory regarding aggravating factors necessary to imposition of the death penalty. The bill of particulars should specifically request disclosure of the aggravating factor(s) the Commonwealth will assert and the evidence supporting that assertion. Since the aggravating factors may involve a theory of future dangerousness or vileness it is important to the defense to know how to prepare the case in mitigation should the defendant be convicted. If the aggravating factor is vileness, the complicating factor of three definitions of vileness (torture, depravity of mind, or aggravated battery) make the information from a bill of particulars especially valuable in preparing for the sentencing phase of the trial.

Clarification of what the prosecution intends to prove against the defendant, revealed in reply to the motion for a bill of particulars, may result in further pretrial motions by the defense. For example, if the prosecution intends to seek the death penalty, but all the evidence shows that the defendant was not the triggerman in a capital murder case, the defense may make a motion to dismiss the capital indictment or to prohibit the imposition of the death penalty under Va. Code Ann. § 18.2-18. *Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 267 (1986). Granting of such motions early not only removes the capital threat to the defendant, but also conserves the fiscal resources of the Commonwealth.

MOTION FOR CONTINUANCE

In a capital trial, time is the one resource absolutely necessary for the effective assistance of counsel. The complexity of defending a capital murder case and the extensive investigation made necessary by the prospect of a penalty trial require substantial periods of time beyond that necessary to prepare a non-capital defense. Thus, a motion for continuance may be the most important pretrial motion filed by defense counsel.

The United States Supreme Court has observed that heightened requirements of due process apply in capital cases. *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). Part of due process applicable to states is effective assistance of counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Denial of sufficient time to prepare a defense with deliberate care thus implicates federal rights. The continuance motion should be made on these federal grounds, supported by proffers of what will be done if the continuance is granted. Denial of a motion for continuance for this purpose may violate the sixth amendment's guarantee of effective assistance of counsel. *See Smith v. Murray*, 477 U.S. 527, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1985).

MOTION FOR CHANGE OF VENUE

The right to a fair trial and impartial jury is both constitutionally and statutorily guaranteed. *Murray v. Giarratano*, 109 S. Ct. 2765, 106 L. Ed. 2d 713 (1989). A presumption exists however, that a defendant can receive a fair trial in the city or county in which the offense occurred. U.S. Const. amend. VI. If there is a "reasonable likelihood" that the defendant would receive a prejudicial jury, the defendant has a constitutional right to a change of venue. *Stockton v.*

Commonwealth, 227 Va. 124, 137, 314 S.E.2d 371, 379 (1984), *cert. denied* 469 U.S. 873, 105 S. Ct. 224, 83 L. Ed. 2d 154 (1988). Virginia courts grant a change of venue if there is widespread prejudice reasonably certain to prevent a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S. Ct. 1507, 1522, 16 L. Ed. 2d 600, 612 (1976). The trial court is empowered with broad discretion to decide a motion for a change of venue, and reversal occurs only if there is a finding of an abuse of discretion. *Coppola v. Commonwealth*, 220 Va. 243, 247, 257 S.E.2d 797, 801 (1983), *cert. denied*, 444 U.S. 1103, 100 S. Ct. 1069, 62 L. Ed. 2d 788 (1980). Since change of venue issues involve the right to an impartial jury, although not a jury completely ignorant of the case, alternate means of insuring that right are often employed by the court. It is not uncommon for the court to defer ruling on the change of venue motion until the commencement of trial. Then, the court has the option to grant individual sequestered voir dire, or grant the change of venue motion if voir dire reveals sufficient prejudice.

Although the evidence presented on this motion will vary according to the particular case, several types of publicity influence the determination that the motion would be granted. One ground for a change of venue is the publication of a confession. *Id.* References to arrests or prior convictions, reports of prior conviction for the same crime, and reports of attempted escape while awaiting trial have also been found prejudicial. *Rideau v. Louisiana*, 373 U.S. 723, 726, 83 S. Ct. 1417, 1419, 10 L. Ed. 2d 663, 665 (1963). Moreover, in *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), an atmosphere of bitter prejudice was created by pretrial publicity characterizing the defendant as remorseless and without conscience.

While motions supported solely by newspaper clippings rarely succeed, counsel may present testimony of witnesses, television tapes, or informal opinion polls (either conducted by counsel or through local newspapers).

MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE

Va. Code Ann. § 8.01-357 provides for jury selection by collective voir dire in panels. The advantages of individual and sequestered voir dire compared to Virginia's system are obvious, particularly in capital cases where juror attitudes about life or death must be probed with potentially sensitive questions. Individual sequestered voir dire encourages candor, which, even on points seemingly unrelated to knowledge of the case or attitudes toward race and death, greatly enhances the ability of defense counsel to make informed decisions about prospective jurors.

Psychological studies have been conducted examining the impact on jurors of particular questions and particular questioners. The findings suggest that the jurors questioned in a group quickly learn which responses will disqualify them versus those responses that will allow them to serve. Bush, *The Case For Expansive Voir Dire*, 2 Law and Psychology Review 9 (jurors subjected to group voir dire learned what response would disqualify them and withheld that information). Similarly, jurors learn which responses will disqualify them and use that information to be disqualified. *Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045, 95 L. Ed. 2d 622 (1987). Based on these concerns and the serious nature of the proceedings against the defendant, the procedure of individual sequestered voir dire is specifically appropriate for three reasons. First, the defendant has a right to a fair and impartial jury. Veniremen may be excluded if it is shown that they are unable to follow the trial judge's directions and the law regarding imposition of the death sentence. The case of *Wainwright v. Witt* requires that the voir dire method used ensure that no venireman's excluded unless his attitude toward the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985). Individual sequestered voir dire could eliminate the contamination of the venire demonstrated by the psychological studies and provide for efficient and effective compliance with the requirements of *Witt*. Second, the Supreme Court has held that death is qualitatively different from any other penalty and that difference calls for a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a particular case. *See generally, Woodson v. North Carolina,* 428 U.S. 280, 305 (1976). The additional procedural safeguards applicable at the trial level in capital cases, *see Murray v. Giarratano*, 109 S. Ct. 2765, 106 L. Ed. 2d 713 (1989) (additional due process only required at trial and direct appeal), are particularly important to jury selection procedures because the jury determines both guilt or innocence and sentence. Thus Sixth Amendment right to effective assistance of counsel and an impartial jury mean more must be done by the counsel for both parties to meet this need for heightened reliability. Defense counsel is therefor required to make informed decisions about potential jury members. Collective voir dire of jurors in panels will preclude the candor and honesty on the part of the jurors which is necessary for counsel to make these informed decisions.

The heightened reliability standard applicable in capital cases is not the only authority for granting this or any pretrial motion. The trial court has inherent authority over the conduct of a trial. *Cunningham v. Commonwealth*, 2 Va. App. 358, 344 S.E.2d 389 (1986); *Justus v. Commonwealth*, 222 Va. 667, 283 S.E.2d 905 (1981). Beyond the federal argument of the need for additional procedural safeguards, defense counsel should call on the inherent authority of the trial court to ensure a fair trial.

Third, individual sequestered voir dire is invaluable to defense counsel's ability to open a conversation between counsel and each potential juror. The give and take of a conversation will reveal more about the juror than answers to a prepared list of questions. There is a need to question each juror as thoroughly as possible in order to be able to make the most intelligent choices about each and every jury member and secure the most qualified jury.

MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES

Section 19.2-262 of the Code of Virginia allows the defendant only four peremptory challenges. The motion for additional peremptory challenges takes on particular importance since so few are specifically authorized by Virginia law. Along with the motions for change of venue and individual sequestered voir dire, additional peremptory challenges provide an opportunity for counsel to prevent bias from affecting the outcome of the trial. The legal rationale for a motion for additional peremptory challenges is similar to that underlying other motions in a capital case. *See supra, Woodson* and *Giarratano*. Due to the unique nature of a capital trial, and the impossibility of revealing all prejudgment and predisposition of potential jurors during voir dire, defendant should be entitled to additional peremptory challenges not only under the inherent authority of state trial courts but also to ensure rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

Furthermore, because the state seeks the death penalty, there is greater need for additional peremptory challenges to screen out any bias and prejudice in the selection of the defendant's jury to ensure that the sentencing decision is not the result of arbitrary factors or prejudice. *See Woodson, supra; Gardner v. Florida*, 430 U.S. 349, 357-358 (1977).

Additionally, in the federal courts and in twenty states, including Alabama, Arkansas, Georgia, Kentucky, North Carolina, South Carolina and Tennessee, defendants are entitled to more than

four peremptory challenges and are entitled to a greater number of peremptory challenges than is the state, even in non-capital cases. J. Van Dyke, *Jury Selection Procedures,* 282-3 (Ballinger 1977). Thus, a request that the court grant additional challenges is not a novel idea, but is merely a request to employ a practice already recognized in many courts as necessary to protect the right of a defendant to a fair trial, even in non-capital cases.

MOTION TO PROHIBIT THE IMPOSITION OF THE DEATH PENALTY

The motion to prohibit the imposition of the death penalty, and its supporting memorandum of authority drafted by Virginia Capital Case Clearinghouse, includes five sections. These five sections point out flaws in the application of Virginia's death penalty statute and together make the argument that Virginia's statute is unconstitutional.

The first section argues that both the "future dangerousness" and "vileness" aggravating factors fail to guide the jury's discretion as required by *Furman v. Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); *Godfrey v. Georgia,* 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980); *Maynard v. Cartwright,* 486 U. S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). The vileness predicate must be sufficiently narrowed to guide the jury's discretion in order to be constitutional. Virginia's vileness predicate on its face and as applied fails to guide the jury's discretion to prevent the arbitrary and capricious infliction of the death penalty.

Section two argues that the imposition of the death penalty based on the aggravating factor of "future dangerousness" is unconstitutional because the use of prior conviction evidence violates the defendant's 5th and 14th Amendments right not to be placed twice in jeopardy. It urges that, by allowing the jury to use the evidence of prior convictions to impose the sentencing of death, the defendant has been given multiple punishments for the same offense.

The third section states that the execution of a sentence of death constitutes cruel and unusual punishment in contravention of the Eighth Amendment. This argument is based on the contention that society's standards of decency have evolved to the point that execution can no longer be tolerated. Thirteen states have declined to reinstate the death penalty. Other states have death penalty statutes but no death sentences. Still other states have death sentences but no executions. It is argued that these facts demonstrate a national consensus that executions are not necessary or acceptable to serve the retributive interests of society.

Section four first argues that Virginia courts practice of failing adequately to instruct on mitigation, and the use of incomplete and misleading instructions and forms violates constitutional commands in a long line of cases starting with *Lockett v. Ohio,* 438 U.S. 586 (1978), by creating an impermissible risk that a death sentence will be imposed despite mitigating factors justifying a sentence less than death.

Section five argues that Virginia's lack of meaningful appellate review of death sentence cases violates Fourteenth Amendment due process. Virginia provides for review of death sentences by the Virginia Supreme Court. Va. Code Ann § 17-110.1 (1988). The Virginia statutory scheme does not, however, provide for meaningful appellate review.

The Virginia statutory scheme does not require the trial judge or jury to specify the findings that justified an imposition of a death sentence. Without documentation of the reasons supporting a sentence of death, the Virginia Supreme Court cannot conduct a meaningful appellate review of the imposition of the death penalty. Further, there is no review of life sentences where there is no appeal. A statutory scheme that fails to provide for meaningful appellate review violates a defendant's Eighth Amendment right against cruel and unusual punishment. *Pulley v. Harris,* 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).

This motion should be filed pretrial, as it raises systemic constitutional issues about the application of Virginia's death penalty. However, whether a questionable procedure will actually be employed in a given trial will not be known until the appropriate time in the trial. For example, one cannot be sure that the objectional standard jury instruction will be given or the improper evidence offered to support future dangerousness until witnesses are proffered and instructions given at the penalty phase. Consequently, the motion should be renewed at the time the violation allegedly occurs. *See Hoke v. Commonwealth,* 237 Va. 303, 377 S.E.2d 595 (1989) (defense counsel determined to have waived objection to venue by failing to renew motion).

ROBBERY, RAPE AND ABDUCTION: ALONE AND AS PREDICATE OFFENSES TO CAPITAL MURDER

By: Cary P. Mosely
Carolyn M. Richardson

In Virginia, the capital statutory scheme purports to narrow the class of death eligible persons by enumerating certain circumstances under which a homicide becomes capital murder. In order to sustain a capital conviction under § 18.2-31, the Commonwealth must prove beyond a reasonable doubt (1) a willful, deliberate, premeditated killing *in addition to* one of the four enumerated first degree felonies (abduction with intent to extort money or pecuniary benefit, abduction with intent to defile, robbery and rape), or (2) a willful, deliberate, premeditated murder in one of four other contexts (killing for hire, killing by a prisoner, killing of a law enforcement officer, killing of more than one person as part of the same transaction). Va. Code Ann. § 18.31 (1-8).

Unlike the statutory schemes in other states, the Virginia statute does not require the Commonwealth to prove beyond a reasonable doubt one particularly aggravated murder. The North Carolina capital murder statute, for example, requires the prosecution prove only first degree murder to sustain a capital conviction. By contrast, in prosecutions under one of the four felony sections, the Virginia statute requires the Commonwealth to prove beyond a reasonable doubt *two* felonious activities, each with independent elements. Each of the felonies that can "elevate" premeditated first degree murder to capital murder is a separate crime that may be prosecuted where there is no homicide. Consequently, Virginia courts have the opportunity to construe the elements of robbery, rape, and abduction in both capital and non-capital contexts. This article analyzes the variations in construction of the reach of these enumerated offenses. The capital statute now includes as predicate offenses the felonies of attempted robbery and attempted rape. At present, no capital convictions have been based on attempt. Analysis of possible capital versus non-capital construction of attempt is beyond the scope of this article.

(a) Robbery as a predicate offense:

The offense of robbery has a definition which is more broadly construed by the Supreme Court of Virginia when robbery is used as