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STATE HABEAS IN VIRGINIA: A CRITICAL TRANSITION

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a life sentence would mean life without parole, defense counsel should continue to make the record on this issue through voir dire and proposed jury instructions.

The Virginia Supreme Court has consistently rejected constitutional objections to the application of the capital statute. Defense counsel must continue to raise meritorious constitutional challenges, because there will be further appellate review and well constructed arguments may eventually succeed in Federal court. *See, e.g., Hitchcock v. Dugger*, 481 U.S. 393 (1987), *Skipper v. South Carolina*, 476 U.S. 104 (1982).

Summary and analysis by:
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STATE HABEAS IN VIRGINIA: A CRITICAL TRANSITION

BY: CATHERINE M. HOBART

A defendant convicted of capital murder has a statutory right to post-conviction review of his judgment and sentence.[1] This statute allows the defendant to petition for a writ of habeas corpus to the circuit court which entered the original judgment order of conviction.[2] An evidentiary hearing may be granted in response to the petition and can be held at any circuit court within the circuit in which the petition was filed.[3] If the circuit court denies petitioner's writ of habeas corpus, the defendant may appeal to the Supreme Court of Virginia.[4] The right to habeas review at both the circuit court level and the Virginia Supreme Court is a statutory right and is "not a necessary element of due process. Thus, no due process violation occurs if an appeal is barred."[5]

In Virginia, as the law stands today, there is no constitutional right to counsel at the state habeas level.[6] However, there is a statutory entitlement in Virginia which permits the appointment of counsel at state habeas proceedings.[7] The Attorney General's Office does not oppose these appointments and they are routinely made if a *pro se* inmate can raise at least one non-frivolous claim in the habeas petition.

Preparing for state habeas review of a capital conviction is not simply a paper exercise. Because this is probably the last opportunity to raise claims regarding the trial process, it is essential for the habeas attorney to reinvestigate all of the facts regarding the defendant's case. Upon completion of the reinvestigation, each and every claim of error that can be found to have existed at trial or on direct review must be included in the state habeas petition. It is also critically important that these claims be grounded in federal law as well as applicable state law.[8]

The Virginia Supreme Court has a restrictive policy regarding the scope of state habeas review, especially where procedural requirements have not been met. Habeas courts will almost always refuse to hear claims that are procedurally defaulted or which have already been decided on their merits. For this and other reasons, state habeas relief is almost never granted. Yet, it is a critical transition stage to federal review. Therefore, regardless of their potential for success, all claims must be raised in the state habeas petition.

Reinvestigation is also important because it may uncover facts which could ultimately merit relief and overturn a conviction or sentence. Further, there are circumstances and exceptions under federal law that may allow claims to be heard on their merits despite the fact that they are defaulted under state law. There are many reasons supporting the same conclusion: *All* claims must be included in the state habeas petition.

In addition to raising all state claims, any claims which the defendant wishes to raise at federal habeas must also be raised in the state habeas petition. This is necessary for two reasons. First, 28 U.S.C. § 2254(b) requires that all state remedies be exhausted before a federal habeas corpus petition can be granted. "The doctrine of exhaustion of state remedies is satisfied if the same claim raised in a federal habeas proceeding has been presented previously before the highest state court, either on direct appeal or in a post-conviction proceeding."[9] Second, a federal claim which is not properly raised in the state system will be procedurally defaulted. A finding of procedural default at the state habeas level will usually bar review at the federal habeas level. In *Wainwright v. Sykes*,[10] the Supreme Court held that a state finding of procedural default would bar federal habeas review unless both 'cause' excusing the default and 'prejudice' resulting from non-review could be shown. *Smith v. Baker*,[11] stated that the procedural bar would be upheld on federal habeas if, "the State procedural rule serves an adequate State interest . . . and the rule has been reasonably applied."[12]

State habeas claims can be said to fall into three categories. Those which have been procedurally defaulted, those which have already been decided on direct review and those new claims which could only have been brought before the court at the state habeas level. A brief explanation of case law in each of these categories will facilitate an understanding of why so few claims actually receive state habeas consideration on their merits.

A. Claims Which Were Not Raised at the State Trial Level

In *Slayton v. Parrigan*,[13] a prisoner convicted of robbery claimed in his state habeas petition that his in-court identification by the victim "was tainted by an impermissibly suggestive pretrial identification."[14] The petitioner had failed to raise this claim during trial and on direct appeal. The Virginia Supreme Court held that "[a] prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction."[15] Therefore, it is extremely important to object to all potential constitutional violations during trial[16] and further, to raise those issues on direct appeal.[17] Failure to do so may bar the claims from ever receiving habeas review.

B. Claims Decided On Their Merits On Direct Review

In *Hawks v. Cox*,[18] a prisoner attempted to raise claims in a state habeas petition which were the subject of previous adverse judicial rulings. The Virginia Supreme Court held that a "previous determination of the issues by either state or federal courts will be conclusive."[19] Thus, whenever claims have been decided on their merits by the Virginia Supreme Court on direct appeal, the Attorney General will argue that *Hawks* controls and that the claims should be dismissed. It may frequently be argued in response, however, that the Virginia Supreme Court's denial of the claims was based only on a determination that the trial court did not abuse its discretion in making the ruling, rather than a determination that the trial court made the proper ruling. If that is the case, the state habeas court will not violate *Hawks* by reviewing the claims. In any event, claims dismissed on *Hawks* grounds are properly exhausted and preserved for federal habeas review.

C. Claims Which Could Only Be Raised At State Habeas

Because of the holdings in *Hawks* and *Parrigan*, the only claims likely to be decided at state habeas are those which could not be raised until after the trial and direct appeal stages were completed. The most common of these claims are those arising from the ineffective assistance of counsel, *Brady* [20] violations, and prosecutorial, judicial or law en-

forcement misconduct. By their nature, these claims could not have been raised prior to habeas review. Consequently, they are not subject to procedural default at the state habeas level.

In order to be successful on habeas review, each of these claims must be fully supported with facts. Therefore, the habeas attorney must reinvestigate the entire case to discover and develop a factual basis for each claim.

1. Ineffective Assistance of Counsel

The sixth amendment guarantees all criminal defendants the effective assistance of counsel.[21] In order to prove a claim of ineffective assistance of counsel:

> [T]he defendant must [first] show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[22]

Because ineffective assistance of counsel claims are based on the trial counsel's deficient performance and the prejudicial effect that performance had on the defendant's case, a full investigation must be made in order to reveal the reasons why the trial attorney "employed or did not employ a particular trial tactic."[23] This includes finding out what counsel knew, when she knew it and what she would have known if a proper investigation had been completed.[24] "The ordinary trial record is not developed adequately to permit on direct appeal a fair resolution of questions involving ineffective assistance."[25] Rather, a record reflecting the theory behind counsel's actions must be developed for the habeas court's review. Thus, an ineffective assistance of counsel claim could not have properly been raised on direct appeal.

Common errors of counsel in capital cases include a failure to investigate and present a case in mitigation and a failure to follow state procedural rules. Properly investigating a defendant's character, background and the circumstances of the particular offense, is necessary to the presentation of a case in mitigation.[26] In *Lockett v. Ohio*[27] the Supreme Court held that the eighth and fourteenth amendments require individualized consideration of any and all mitigating factors the defendant wishes to present to the jury. *Lockett* and subsequent cases establish that a defendant has the opportunity to develop a theory of mitigation and present evidence which may help the sentencer understand the defendant's actions. There are vitually no limits on the type of evidence the defendant can present to the sentencer. Therefore, a trial attorney can make a full investigation into the defendant's background and history, develop a theory of mitigation, and support that theory with facts from his investigation. If the trial attorney does not adequately investigate a case and fails to uncover facts in a defendant's background which would have a mitigating effect on his sentence, then counsel has not been effective in his representation of the defendant. Tactical decisions by trial counsel are not constitutionally deficient, even if wrong. However, the decisions must be made on adequate information regarding the defendant's case. Only an investigation by habeas counsel will reveal what information the trial counsel was aware of at the time he made his tactical decisions. If a decision was not supported by adequate information, under *Strickland*, a claim can be made that counsel's performance was not only deficient, but that his errors prejudiced the defense.

If counsel fails to follow state procedural rules, a claim of ineffective assistance of counsel can be offered under *Wainwright v. Sykes*, *supra*, as the reason for the failure. *Sykes* held that a finding of procedural default at the state level will bar federal habeas review unless both "cause" excusing the default and "prejudice" resulting from non-review could be shown. In *Justus v. Murray*,[28] the petitioner failed to raise certain claims on direct appeal. In his state habeas petition, petitioner claimed that his failure to appeal the claims was due to ineffective assistance of counsel. The ineffective assistance of counsel claim was rejected and the claims were found to be procedurally barred. Petitioner appealed the state habeas court's decision to the Virginia Supreme Court, but failed to separately raise the ineffective assistance of counsel claims. When a second petition was filed raising these claims, the Virginia Supreme Court found them to be procedurally defaulted. Consequently, the petitioner was found to have "procedurally defaulted on both the substance of his remaining claims as well as the ineffective assistance of counsel claims he offered in state court as cause to excuse the substantive defaults."[29] The Fourth Circuit termed this a double default.[30] On federal habeas review, the Fourth Circuit held that reviewing "the merits of appellant's ineffective assistance of counsel claims as cause for the defaults on direct appeal . . . would, contrary to *Sykes* and our prior precedents, circumvent the state procedural bar.[31]

Despite the contrary holding in *Justus*, counsel's failure to comply with state rules should always constitute "cause" under *Sykes* because a defendant should not be penalized for his counsel's deficient performance.[32] This is not always true, however, because failure to raise a claim does not alone render counsel's performance deficient enough to meet the ineffective assistance of counsel standard set forth in *Strickland*. It is arguable that the "*Strickland*/*Sykes*" gap should narrow as the Virginia Supreme Court decisions make it clear that following procedural rules is a basic part of lawyering at the trial level.[33] There is an abundance of cases which clearly set forth state procedural requirements and there should be no excuse for counsel's failure to comply with state rules. In addition, prejudice will have occurred because a claim which may have had the potential to overturn a death sentence or a conviction will not be allowed to be heard at federal habeas. Therefore, habeas counsel should continue to claim that trial counsel's deficient performance constitutes "cause" under *Sykes*.

2. *Brady* Violations

According to *Brady v. Maryland*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."[34] The prosecutor does not have to have actual knowledge of the existence of *Brady* materials before his obligation is triggered.[35] As long as the exculpatory evidence is in the possession of the police, the prosecutor has constructive knowledge of the *Brady* materials and must give the information to the defendant.[36]

In *Giglio v. United States*,[37] the Supreme Court held that *Brady* requires any evidence that would impeach the credibility of a government witness to be disclosed to the defense. Thus, if a defendant can find exculpatory or impeachment information that was in the constructive possession of the police, and can show that the information may have effected the outcome at either the guilt or penalty phase of the trial, he will have grounds for a new trial, or a new sentencing hearing. Further, in light of the expanded scope of information relevant to a case in mitigation, it is very likely that *Brady* violations will occur in a capital trial. For example, there are bound to be statements, favorable to the case in mitigation, resulting from the many interviews which occur between the police and witnesses who have known the defendant. Consequently, it is essential that the habeas attorney reinvestigate the case to determine what evidence was in the possession of the Commonwealth and what evidence was turned over to the defendant.

3. Prosecutorial, Judicial and Police Misconduct

Government misconduct occurring throughout the trial can be so fundamentally unfair as to violate constitutional rights. Therefore, all the

actors involved in the process leading up to a criminal conviction must be reinvestigated in order to uncover evidence of misconduct that may have the potential to overturn a conviction or sentence. Some examples of due process violations resulting from government misconduct are found in cases relating to discovery, entrapment and the right to a speedy trial.

During the early development of discovery law, courts gave relief to defendants based on the conduct of the prosecutors. In *Mooney v. Holohan*,[38] the Supreme Court held that deliberate deception of a court and jurors by the presentation of known false evidence constitutes a due process violation. Later, in *Napue v. Illinois*,[39] the Court held that a due process violation would also occur "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."[40]

In the area of entrapment, although a defendant's "predisposition to commit a crime will bar application of an entrapment defense, fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct was outrageous."[41] Therefore, a due process violation will occur when the nature and extent of police involvement in a crime "is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."[42]

Similarly, the sixth amendment guarantee of a speedy trial does not apply to preindictment delay, however,

> [T]he Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay . . . caused substantial prejudice to . . . [the defendant's] rights to a fair trial and that the delay was an intentional device to gain a tactical advantage over the accused.[43]

Courts have also found that a prosecutor's misconduct can constitute "cause" under *Sykes* so as to excuse counsel's procedural default. In the recent case of *Amadeo v. Zant*,[44] the District Attorney's Office concealed a memorandum designed to intentionally cause underrepresentation of blacks and women on juries. The concealment of the memorandum was uncovered during habeas reinvestigation. The Supreme Court held, if the "memorandum was not reasonably discoverable because it was concealed by . . . officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse his procedural default."[45]

Habeas courts will sometimes review state and federal claims that were technically procedurally defaulted, if the default was brought about by misconduct. Further, real prosecutorial misconduct that rises to the level of a due process violation entitles a defendant to relief without a showing of prejudice under *Sykes*. For this reason, reinvestigating prosecutorial, judicial and law enforcement conduct is a necessity.

Thus, when claims could not have been raised prior to the state habeas level and non-review would constitute an injustice upon the defendant, the habeas courts may still decide to review those claims.

Upon denial of a state habeas petition by the circuit court, every single claim that was denied under the three categories of habeas claims must be separately appealed back to the Virginia Supreme Court or they may not be considered at federal habeas review. If this procedure is not followed, any claims which up to this point were properly preserved for federal habeas review may be denied review due to procedural default. Further, a federal habeas court has the discretion to hear a state claim if the state court has not unambiguously rejected the claims on adequate and independent state grounds. Thus, the defendant may still have the chance to overturn his conviction or sentence on state or federal grounds if he has separately appealed those claims to the Virginia Supreme Court.

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1. Va. Code Ann. § 8.01-654 (1984).
2. *Id.*
3. *Id.*
4. Va. Code Ann. §§ 8.01-654, 17-110.1 (1988).
5. *Payne v. Commonwealth*, 233 Va. 460, 357 S.E.2d 500 (1987), *cert. denied*, 484 U.S. 933 (1987).
6. *Murray v. Giarratano*, 109 S. Ct. 2765 (1989), *cert. denied*, 1990 WL 59769 (1990).
7. Va. Code Ann. § 14.1-183 (1989).
8. *See* Powley, *Perfecting the Record of a Capital Case in Virginia*, Capital Defense Digest, this issue.
9. *Cartera v. Mitchell*, 553 F. Supp. 866, 869 (E.D. Va. 1982).
10. 433 U.S. 72 (1977).
11. 624 F. Supp. 1075 (E.D. Va. 1985).
12. *Id.* at 1077, 1078.
13. 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975).
14. *Id.* at 29, 205 S.E.2d at 682.
15. *Id.* at 30, 205 S.E.2d at 682.
16. Rule 5:25 of the Supreme Court of Virginia requires that objections be stated with reasonable certainty at the time of ruling.
17. Rule 5:27(e) of the Supreme Court of Virginia requires that all assignments of error be briefed on appeal.
18. 211 Va. 91, 175 S.E.2d 271 (1970)
19. *Id.* at 95, 175 S.E.2d at 274.
20. *Brady v. Maryland*, 373 U.S. 83 (1963).
21. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).
22. *Id.*
23. *Id.*
24. Habeas counsel should seek appointment of expert witnesses to show the habeas court what the trial attorney could have done, especially in regard to mitigating evidence. For further discussion of the legal and operational aspects of these claims, *see* Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 Stan L. Rev. 461 (1987); Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299 (1983).
25. *Walker* v. *Mitchell*, 224 Va. 568, 570-571, 299 S.E.2d 698, 699 (1983).
26. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982).
27. 438 U.S. 586 (1978).
28. 897 F.2d 709 (4th Cir. 1990).
29. *Id.* at 712.
30. *Id.*
31. *Id.* at 713. For further discussion on *Justus v. Murray*, please refer to case summary of *Justus v. Murray*, Capital Defense Digest, this issue.
32. In *Stephens v. Kemp*, 846 F.2d 642 (11th Cir. 1988), the Court found that Stephens' ineffective assistance of counsel claim as excuse for default satisfied both the cause and prejudice prong of *Sykes* and, therefore, federal habeas review was not barred.
33. *See Whitley v. Bair*, 802 F.2d 1487 (4th Cir. 1986), *cert. denied*, 483 U.S. 1034 (1989), where Fourth Circuit upheld district court's determination that fifteen of petitioner's claims made in the various appeals and habeas proceedings had been procedurally defaulted. Petitioner made a total of seventy-one claims of error, however, he did not appeal all of them to the Fourth Circuit. *See also*, Powley, *Perfecting the Record of a Capital Case in Virginia*, Capital Defense Digest, this issue, at note 29, for further examples.
34. 373 U.S. at 87.
35. *See Fitzgerald v. Bass*, 6 Va. App. 38, 366 S.E.2d 615 (Va. App. 1988), *cert. denied*, 110 S. Ct. 354 (1989).
36. *Id.*
37. 405 U.S. 150 (1972).
38. 294 U.S. 103 (1935).
39. 360 U.S. 264 (1959).
40. *Id.* at 269.

41. *United States v. Twiggs*, 588 F.2d 373, 378-79 (1978).
42. *Id.* at 377 (citing *United States v. Russell*, 411 U.S. 423, 431-32 (1973)).
43. *United States v. Marion*, 404 U.S. 307, 324 (1971).
44. 486 U.S. 214 (1988).
45. *Id.* at 222.

PERFECTING THE RECORD OF A CAPITAL CASE IN VIRGINIA

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In a capital case, the record must reflect all legal positions at issue pretrial and during trial in order to allow later reviewing courts to consider possible errors. The Virginia Supreme Court will not consider any legal issue not preserved on the record, and will consider the claim waived. Virginia Supreme Court Rule 5:25 states, "Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Furthermore, federal courts will ordinarily not consider any issues that were waived on state procedural grounds.[1] In accordance with United States Supreme Court Rule 21(h), on Petition for Writ of Certiorari, the Court will only consider those federal claims which were timely and properly raised in state court. Therefore, making and preserving all legal issues on the record is essential for any appeal. The attorney for the defendant must object to every error on the record, and state the grounds for that objection. This article will serve as a guide for successfully making and preserving the record in a capital case for direct appeal to the Virginia Supreme Court in a manner that will also permit later review by federal courts.

GENERAL PRINCIPLES FOR PRESERVING THE RECORD IN VIRGINIA

In a capital case, all motions and objections must be made on federal constitutional grounds, specifically the sixth, eighth and fourteenth amendments in addition to any state law grounds. Unlike a non-capital case, a capital case resulting in a death sentence will almost certainly be offered for federal review. The reviewing federal court will consider only those issues which are preserved on the record on federal grounds. The United States 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.[2] The Court has, on occasion, been faithful to this principle. It is not possible to determine whether this requirement of "super due process" will be recognized in any given trial. It is therefore arguable that any state law, procedure, or ruling at trial that undermines the increased procedural reliability required in a capital case is violative of federal law. More specific federal issues arise from sixth amendment rights to effective assistance of counsel, a fair and impartial jury, and the right to put on evidence.

The need for heightened reliability in a capital case can give rise to many issues that would not ordinarily be recognized as federal in a non-capital case, especially during pretrial and the penalty phase. For example, the denial of a continuance may unlawfully burden the sixth amendment right to counsel and compulsory process. Likewise, the jury selection procedures of the Circuit Court, including denial of motions for change of venue and restrictions on voir dire, implicate the sixth amendment guarantee of a fair and impartial jury, and the record must reflect this. Any restrictions on the presentation of evidence and on cross examination should be objected to on due process grounds.[3] In *Green v. Georgia*,[4] the exclusion of evidence at the sentencing phase based upon Georgia's hearsay rule was held unconstitutional under the heightened eighth amendment due process rationale.

There are many other aspects of this discreet capital jurisprudence that it is necessary to learn in order to recognize and present issues on federal grounds. Consequently, in preparation for a capital case it becomes necessary as a minimum to read all United States Supreme Court capital decisions since 1976, and all Fourth Circuit Court of Appeals capital decisions. In addition, all Supreme Court of Virginia capital decisions should be read both in order to understand state law, and to learn of those areas in which the court's rulings may not comport with federal requirements. At the Virginia Capital Case Clearing House, we call the process of grounding every motion, objection, proposed instruction, proffer, etc. in the sixth, eighth and fourteenth amendments "federalization". Federalization is absolutely essential to obtain meaningful federal review of trial errors.

Objections should not be made without stating the legal position in the trial court "with reasonable certainty."[5] The objection should be supported on specific legal grounds, yet inclusive of as many grounds as possible, especially federal grounds. This is very important for the purposes of Rule 5:25 because the trial court must be given every opportunity to rule intelligently on objections in order to avoid unnecessary appeals, reversals and mistrials.[6] Furthermore, this will ensure that on appeal the reviewing court will have as many grounds as possible to rule favorably.

In an effort to state legal positions "with reasonable certainty," evidence should be presented in support of the position whenever possible. This is especially true when there is an adverse ruling that disallows a defense question or defense evidence. The defense should proffer the answer to the question or the evidence. The proffer of evidence or testimony preserves the issues on the record for review on appeal. The information can be proffered in three ways. First, by an unchallenged unilateral avowal of counsel. Second, by stipulation of what the rejected evidence would be, or third, the testimony or evidence could be put on the record in the absence of the jury.[7]

PRETRIAL CONSIDERATIONS

All pretrial motions must be in writing and must state with particularity the grounds upon which they are based.[8] The grounds for the motions must always contain federal constitutional claims, as well as any state law claims. Again, "federalization" of all motions is crucial to preserving the legal position for appeal.

The following motions must be made pretrial. Discovery is regulated under Virginia Supreme Court Rule 3A:11, and under Rule 3A:11(d), and the motion must be made at least ten (10) days before trial. Any defenses and objections based on defects in the institution of the prosecution, or in the indictment(s) must be made before the plea is entered and at least seven (7) days before the trial.[9] Examples of defenses and objections based on defects include eighth amendment objections to the death penalty in general and the Virginia capital statute, double jeopardy issues, vindictive or selective prosecution issues, a motion for a bill of particulars, speedy trial issues, and challenges to the selection of the grand jury. Finally, motions to suppress must be made at least seven (7) days before trial.[10] Failure to present any such defense or objection will be considered an effective waiver. Jurisdictional issues and failure of the written charge to state an offense can be made to the court any time during the pendency of the proceeding.