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Robert L. Powley

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

BY: ROBERT L. POWLEY

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.

There are several permissive pretrial motions that are governed by Virginia Supreme Court Rule 3A:9(b)(2). They include any defense or objection that is capable of determination without a trial of the general issue. However, even though these matters may be raised before trial, if defense counsel fails to raise a claim before the jury returns a verdict or the court finds the defendant guilty, the claim is waived.

A motion in limine should be raised before trial. However, the trial court has discretion to withhold a ruling on an evidentiary issue until the issue actually arises.[11] If the motion in limine is denied on a provisional basis, the motion should be renewed at the start of the trial, and when the evidence is about to be adduced, or the motion is considered waived.[12]

A pretrial motion, if properly submitted before the trial court, will become a part of the record. To ensure preservation for review, however, the defense should demand a ruling on every pretrial motion, and the ruling of the trial judge should always be on the record. Furthermore, all pretrial motions should be renewed at the beginning of the trial to guarantee inclusion in the record.

All potential errors pertaining to jury selection must also be properly preserved on the record for appellate review. Objections to the qualifications of any juror or to irregularities in the selection of the jury, including matters pertaining to the death qualification of the jurors,[13] pretrial publicity,[14] the racial composition of the jury panel,[15] and the prosecutor's use of peremptory challenges,[16] must be made at the time the issue arises, and renewed before the jury is sworn.[17] Evidence should be introduced in support of an objection, and is allowed under Va. Code Ann. Section 8.01-358. If a defense voir dire question is disallowed, counsel must proffer the question's relevance in order to preserve the issue on appeal.[18] Jury issues must also be federalized under the sixth, eighth, and fourteenth amendments.

TRIAL CONSIDERATIONS

The opening statement of the prosecutor must be interrupted, and objected to, if improper. An objection offered after the argument may be deemed waived.[19] The prosecutor's closing argument should also be interrupted, contrary to Virginia custom. Prosecutor's closing argument is subject to objection if it focuses on the nature and character of the victim,[20] or if the argument diminishes the jury's sense of responsibility for its decision.[21] In such a case, defense counsel should move for a mistrial, or for the court to instruct the jury to disregard the improper argument. In the event counsel finds grounds for a mistrial, the defense must move for a mistrial before the jury leaves for deliberation, or the objection is waived.[22]

The submission of jury instructions by counsel is governed by Virginia Supreme Court Rule 3A:16(b). The trial court is required under Rule 3A:16(c) to advise counsel of instructions before reading them to the jury, and give counsel opportunity to object. Defense counsel should require all proceedings pertaining to jury instructions, and all objections be made part of the record. This essential step is contrary to common Virginia practice in many areas, but must be followed to preserve the record.

The verdict form, as prescribed by Virginia Code § 19.2-264.4(d), does not require the jury to indicate which aggravating factor it found beyond a reasonable doubt in sentencing the defendant to death. Therefore, the issue remains open as to whether the jury voted unanimously on any one aggravating factor, or split between both factors. Although the jury is not required by law to specify which aggravating factor it selected under *Clark v. Commonwealth*,[23] the issue should be preserved by submitting an objection to the form. The verdict form should also be objected to on three other grounds. First, the verdict form provides the jury with no meaningful method to consider mitigation, in violation of *Lockett v. Ohio*.[24] Second, the verdict form fails to provide a constitutional limiting construction to the aggravating circumstance in violation of *Godfrey v. Georgia*.[25] Finally, the sentencing procedure and the verdict form imply a mandatory sentence of death to a reasonable juror if the jury finds an aggravating circumstance, and further misleads by failing to inform the jury that it can select life even though it finds an aggravating circumstance beyond a reasonable doubt. Consequently, the jury form impairs the jury's proper function as sentencer.

POST TRIAL CONSIDERATIONS

No ruling in a criminal case is final until after twenty-one (21) days after sentencing under Virginia Supreme Court Rule 1:1 allowing for the filing of post trial motions. The defense counsel is responsible for the timely filing of the transcript.[26]

Under Virginia Supreme Court Rule 5:22, appeal of a death sentence is automatically granted. When the clerk receives the record, the clerk will notify the defendant, and file the appeal pursuant to Rule 5:23. The defense counsel has ten (10) days to file with the clerk assignments of error, and the relevant parts of the record that correspond to each error. The entire record is usually needed in a capital case. Every issue raised at trial must be assigned as error and briefed on federal grounds. The appellate strategy in non-capital cases of leaving out some issues in order to concentrate attention and persuasive efforts on possible "winners" is absolutely the wrong way to perfect a capital appeal. Not only must claims that are probably not going to win be raised before the Supreme Court of Virginia, but also issues that are virtually guaranteed to lose. Many errors that the Supreme Court of Virginia has most consistently refused to recognize actually have the best chance of success on federal review. For example, the Supreme Court of Virginia was reversed in *Turner v. Murray*[27] for refusing the petitioner's request to question the prospective jurors on racial prejudice during voir dire, and the United States Supreme Court has recently granted a writ of certiorari to review refusal to allow voir dire questions on content of pretrial publicity.[28] The issues that won relief in *Skipper v. South Carolina*,[29] and *Hitchcok v. Dugger*[30] were consistently rejected by the state Supreme Courts of South Carolina and Florida respectively, for years before the United States Supreme Court ruled in favor of the defendant.

Any assignments of error not briefed, are considered waived. The defense should not only brief the assignments of error, but argue the error orally before the Virginia Supreme Court to ensure avoiding procedural default.[31] Attention to the details of the rules must be followed at this point, because even if issues were properly preserved on the record at trial, issues not raised before the Supreme Court of Virginia will not be considered by the federal courts.[32]

SUMMARY

The principles described in this article are of the highest importance in every capital trial. Making and preserving the record in a capital case is essential for effective and successful appeal in Virginia and the federal court system. The decisions of the Supreme Court of Virginia alone are replete with examples of issues that might have saved the life of a capital defendant on later review, but fell by the wayside because of what the court held to be a failure by the trial counsel to adhere strictly to the Virginia requirements for preserving the issue for appellate review.[33]

The steps that ensure complete "federalization" of the record are rigorous, and require constant attention. In the heat of trial, it is difficult to recall every requirement for making and preserving the record on federal grounds, especially where capital appellate practice diverges from non-capital strategy. The uncompromising application of procedural rules in Virginia, however, and the disastrous consequences for federal review resulting from waiver and default, demand that every effort at compliance be made.

1. See *Wainwright v. Sykes,* 433 U.S. 72 (1977).

2. *See Woodson v. North Carolina,* 428 U.S. 280, 305 (1976).

3. *See Chambers v. Mississippi,* 410 U.S. 284 (1973).

4. 442 U.S. 95 (1979).

5. Virginia Supreme Court Rule 5:25.

6. *See Woodson v. Commonwealth,* 211 Va. 285, 176 S.E.2d 818 (1970), *cert. denied,* 401 U.S. 959 (1971).

7. *See Whittaker v. Commonwealth,* 217 Va. 966, 969, 234 S.E.2d 79, 81 (1977).

8. Virginia Supreme Court Rule 3A:9(b)(3).

9. Virginia Supreme Court Rules 3A:9(b)(1) and 3A:9(c).

10. Virginia Code Section 19.2-399.

11. *See Facchina v. Richardson,* 213 Va. 440, 442, 192 S.E.2d 791, 793 (1972).

12. *See Harward v. Commonwealth,* 5 Va. App. 468, 364 S.E.2d 511 (1988).

13. *See Witherspoon v. Illinois,* 391 U.S. 510 (1986); *Wainwright* v. *Witt,* 469 U.S. 810 (1985); *Mackall* v. *Commonwealth,* 236 Va. 240, 372 S.E.2d 759 (1988).

14. *See Buchanan v. Commonwealth,* 238 Va. 389, 384 S.E.2d 757 (1989); *Mu'min* v. *Commonwealth,* 239 Va. 433, 389 S.E.2d 886 (1990), *cert. granted,* 59 U.S.L.W. 3275 (U.S. Oct. 9, 1990) (No. 90-5193).

15. *See Turner v. Murray,* 476 U.S. 28 (1986); *Watkins* v. *Commonwealth,* 238 Va. 341, 385 S.E.2d 50 (1989).

16. *See Batson v. Kentucky,* 476 U.S. 79 (1986).

17. *See Mu'min v. Commonwealth, supra.*

18. *See Tuggle v. Commonwealth,* 228 Va. 493, 505, 323 S.E.2d 539 (1984); *vacated and remanded on other grounds sub nom. Tuggle v. Commonwealth,* 471 U.S. 1096 (1985); *reaffirmed Tuggle v. Commonwealth,* 230 Va. 99, 334 S.E.2d 838 (1985).

19. *See Bloxom v. McCoy,* 178 Va. 343, 17 S.E.2d 401 (1941).

20. *See South Carolina v. Gathers,* 109 S. Ct. 2207 (1989).

21. *See Caldwell v. Mississippi,* 472 U.S. 320 (1985).

22. *See Cheng v. Commonwealth,* 240 Va. 26, 393 S.E.2d 599 (1990).

23. 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied,* 444 U.S. 1049 (1980).

24. 438 U.S. 586 (1978).

25. 446 U.S. 420 (1980) *(See* case summaries of *Walton v. Arizona* and *Lewis v. Jeffers,* Capital Defense Digest, this issue, and Falkner, *The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor,* Capital Defense Digest, Vol. 2, No. 2, p. 19 (1990).

26. See *Towler* v. *Commonwealth,* 216 Va. 533, 221 S.E.2d 119 (1976).

27. 476 U.S. 28 (1986).

28. *See Mu'min v. Commonwealth,* 239 Va. 433, 389 S.E.2d 886 (1990), *cert. granted, 59 U.S.*L.W. 3275 (U.S. Oct. 9, 1990) (No. 90-5193).

29. 476 U.S. 1 (1986).

30. 481 U.S. 393 (1987).

31. *See Cheng v. Commonwealth,* 240 Va. 26, 393 S.E.2d 599 (1990).

32. *See Smith v. Murray,* 477 U.S. 527 (1986).

33. *See Eaton v. Commonwealth,* Rec. No. 900238, 900239 (Va. Sept. 21, 1990) (LEXIS, States library, Va. file) (Assigned error to issues, but waived because failed to argue assigned errors on brief.); *Cheng* v. *Commonwealth,* 240 Va. 26, 393 S.E.2d 599 (1990) (Error concerning testimony of three prospective witnesses procedurally barred because never attempted to call the witnesses nor proffer the contents of their testimony.); *Mu'min v. Commonwealth,* 239 Va. 433, 389 S.E.2d 886 (1990) (Objected to the ruling during voir dire of a prospective juror, but procedurally barred from consideration because failed to subsequently object to the seating of that juror.); *Spencer v. Commonwealth,* 238 Va. 563, 385 S.E.2d 850 (1989) (Error not considered because failed to argue on brief.); *Spencer* v. *Commonwealth,* 238 Va. 295, 384 S.E.2d 785 (1989) (Failed to object to the seating of a juror, therefore, waived voir dire objection.); *Hoke v. Commonwealth,* 237 Va. 303, 377 S.E.2d 595 (1989) (There was no proffer of evidence to support defendant's contention that the court abused its discretion in failing to grant a change of venue, and defendant waived this contention by failing to renew the motion after jury voir dire.); *Barnes v. Commonwealth,* 234 Va. 130, 360 S.E.2d 196 (1987) (The court recessed in order to read a transcript without objection, therefore defense waived any later objection to the admission of the transcript in evidence.); *Payne v. Commonwealth,* 233 Va. 460, 357 S.E.2d 500 (1987) (Error not sustained to any ruling of the trial court unless the objection was stated with reasonable certainty at the time of the ruling.); *Stockton v. Commonwealth,* 227 Va. 124, 314 S.E.2d 371 (1984) (Defendant raised two assignments of error respecting the admissibility of evidence. Twice, defense counsel moved for mistrial on the ground that certain testimony presented the previous day was inadmissible. The motions were untimely; therefore the challenged testimony was waived.); *Quintanna v. Commonwealth, 224 Va. 127,* 295 S.E.2d 643 (1982) (Errors never addressed on brief or in oral argument, were taken as waived. Also, error not properly preserved or raised by assignment of error was considered waived.); *Fitzgerald v. Commonwealth,* 223 Va. 615, 292 S.E.2d 798 (1982) (Errors not pursued on brief or in oral argument were treated as waived.); *Coppola v. Warden,* 222 Va. 369, 282 S.E.2d 10 (1981) (Failure to timely object to an instruction at trial, and failure to raise on direct appeal precludes raising the issue in habeas corpus proceeding.)