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Capital Defense Digest Articles Index

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Capital Defense Digest
Articles Index
Volumes 1 - 4

Vol. 1, No. 1 (1988)

Death is Different

Sandra L. Fischer

This article provides a cursory look at the constitutionality of the death penalty.

Meaningful Access Under Bounds

Joseph M. Giarratano

Joseph Giarratano, then a prisoner on Virginia's death row for a capital murder conviction in 1979, discusses the constitutional mandate of adequate and meaningful access to the courts as required by *Bounds v. Smith*, 430 U.S. 817 (1977). Mr. Giarratano stresses the importance of knowledgeable, effective trial counsel and their preservation of issues in order to avoid procedural default on appeal.

Capital Jury Selection in Virginia

William S. Geimer, Director,
 Virginia Capital Case Clearinghouse

The selection of an impartial jury is critical. Mr. Geimer raises some of the major issues in jury selection, discusses the law about qualifying juries, and suggests techniques useful in selecting such a jury.

Vol. 1, No. 2 (1989)

Virginia's Definition of Capital Murder

James David Nave

This article provides a first look at each subsection of Virginia's capital murder statute and discusses challenges to the sufficiency of the Commonwealth's charges against defendants.

Imposing Death Under Virginia's Statutory Scheme

Sandra L. Fischer

The death sentence is not to be imposed under the Virginia statutory scheme unless the defendant has been convicted of capital murder as defined in Va. Code § 18.2-31, and the Commonwealth has proven one or more of the two aggravating factors of vileness or future dangerousness.

Mitigation in Virginia Capital Cases

Helen J. Bishop

Ms. Bishop discusses federal constitutional issues surrounding mitigation in the sentencing phase of the bifurcated capital murder trial in Virginia, the relevant Virginia statutes, and Virginia Supreme Court opinions up to 1989 dealing with the presentation and consideration of mitigation evidence.

Mitigation: The Use of a

Mental Health Expert in Capital Trials

Elizabeth P. Murtagh

The U.S. Supreme Court decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985) and Virginia statute § 19.2-264.3:1 address the mental expert issue. This article discusses the advantages and disadvantages that both provide for the capital defendant.

Preparing Mitigation Prior to Guilt Phase

Alan Chipperfield

The author, Mr. Chipperfield, a Washington & Lee Law School alumnus assigned to the homicide division of the Office of the Public Defender for the County of Duval in Jacksonville, Florida, stresses the advantages of preparing penalty phase mitigation evidence before the guilt/innocence trial. Advance preparation may even help avoid a penalty trial altogether.

Vol. 2, No. 1 (1989)

Constitutional Deficiencies of

Virginia's "Vileness" Aggravating Factor

Juliette A. Falkner

Ms. Falkner asserts that whether Virginia's vileness factors are a federal requirement or a matter of state legislative choice, these factors are unconstitutional as applied in Virginia.

Restrictions on the State's Use of

Mental Health Experts in Capital Trials

W. Lawrence Fitch, Director,
 Forensic Evaluation Training and Research,
 University of Virginia School of Law

The use of a mental health expert by the defense is often essential and often hazardous.

Is Preclusion Under Va. Code Ann. § 19.2-264.3:1

Unconstitutional?

Elizabeth A. Bennett

This article addresses Virginia Code § 19.2-264.3:1, which requires defendants either to face possible preclusion of mental mitigation evidence or to cooperate with a state psychiatrist, who can later testify against the defendant.

Vol. 2, No. 2 (1990)

Critical Points in the Progress of a Capital Case

Elizabeth A. Bennett

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. Ms. Bennett identifies some of these issues, including mental mitigation assistance, the *Ake* motion, motion for appointment of an expert investigator or forensic specialist, the jury selection process, the discovery and development of mitigation evidence, publicity exposure, the penalty trial, jury instructions, and closing arguments.

Capital Pretrial Motions: Added Dimensions

Thomas W. Plimpton

Kerry D. Lee

This article discusses pretrial motions unique to capital cases, the timely filing requirements, and some of the reasons for filing them.

Robbery, Rape and Abduction: Alone and as Predicate Offenses to Capital Murder

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. This article is a discussion of the elements of robbery, rape and abduction and their use as predicate offenses to a capital murder charge in Virginia.

Post-Conviction Review of Death Sentences

Juliette A. Falkner

There are eight steps possible for judicial review of a capital murder conviction and sentence of death. This article raises some of the important issues at each level of review.

Vol. 3, No. 1 (1990)

State Habeas in Virginia: A Critical Transition

Catherine M. Hobart

The right to habeas review in Virginia is statutory and is not a necessary element of constitutional due process. Because habeas probably presents the last opportunity to raise claims regarding the trial process, and is the transition stage to federal review, all claims must be grounded in federal law as well as applicable state law.

Perfecting the Record of a Capital Case in Virginia

Robert L. Powley

Proper preservation of the record in a capital case for direct appeal to the Virginia Supreme Court and in a manner that will also permit later review by federal courts is crucial.

Ineffective Assistance of Counsel

Thomas J. Marlowe

The United States Supreme Court has held that the right

to counsel is the right to effective assistance of counsel. This article provides an overview of ineffective assistance of counsel claims (IAC) asserted by defendants and a comparison of rationales employed by the reviewing Courts of Appeal for the Fourth, Fifth, and Eleventh Circuits. IAC claims are an important tool for the defendant on appeal and do not necessarily subject counsel to personal or professional attack.

Vol. 3, No. 2 (1991)

Drafting Petitions for the Writ of Certiorari to the United States Supreme Court

Matthew B. Crum

Capital defense counsel are called upon to petition for the writ of certiorari in two circumstances. First, after the Virginia Supreme Court affirms the circuit court's decision and second, after the Fourth Circuit Court of Appeals affirms the denial of habeas corpus relief. This article briefly discusses certain aspects of the writ that may be helpful to defense counsel. It also explores the Court's reasoning for granting the writ.

Federal Due Process and Virginia's Arbitrary Abrogation of Capital Defendant's State-Created Rights

Otto W. Konrad

How can capital defense attorneys find federal issues in what appears to be purely state law? Fourteenth amendment due process, in addition to protecting interests derived from federal law, safeguards property and liberty rights that state law has created. This article describes these state-created rights and attempts to ascertain what procedural due process is required. Following is a discussion of the abrogation of many of these rights pertaining to Virginia appellate review of death sentences and an overview of how Virginia capital defense attorneys can use the state-created rights doctrine to refederalize death penalty issues.

Status of Supreme Court Case Law Helpful to Capital Defendants

Steven K. Herndon

Ginger M. Jonas

Mr. Herndon and Ms. Jonas identify and assess the current status of United States Supreme Court cases that have been particularly helpful to capital defendants in this article. They also evaluate recent decisions that suggest a retreat by the Court.

Vol. 4, No. 1 (1991)

Litigating the "Vileness" Factor

Victor A. Lago

The constitutionality of the vileness aggravating factor

of the Virginia death penalty sentencing scheme can be litigated pretrial to generate claims for appeal and to insure that Virginia courts and the Commonwealth apply the factor in a constitutional manner. The vileness factor suffers from vagueness, and the Virginia courts have failed to provide defendants with proper notice of the constitutionally required narrowing constructions which the courts intend to apply.

*Thirteen Years of Death Sentence Review
by the Virginia Supreme Court*

Anne E. McInerney

The Virginia Supreme Court has reviewed on automatic review and on appeal of right over eighty death penalty cases since 1978, the year in which Virginia revived the death penalty following *Furman v. Georgia*, 408 U.S. 238 (1972). This article offers a look at the development of the law in the last thirteen years, the interpretation of the statutes, the definition of and range of relevant evidence going to aggravating factors and mitigation evidence, and the capital jury selection process over the years. There is a brief look at the Texas statute, on which the Virginia statute is modeled, and a comparison between the Texas Criminal Court of Appeals and the Virginia Supreme Court. Finally, the article addresses the present status of capital penalty law in Virginia and offers some remedial tactics for Virginia capital defense counsel.

Vol. 4, No. 2 (1992)

The Current State of DNA Evidence

Christopher J. Lonsbury

This article summarizes the prevailing DNA testing technique with the purpose of identifying possible sources of

human error, examines the validity of the probability calculations that are often given along with the test, surveys the law, particularly as it stands in Virginia, and provides tactical advice for defense counsel.

Drug Felony Capital Murder in Virginia

Sharron Lamoreaux

Ms. Lamoreaux explores the structure and scope of § 18.2-31(9), a 1990 amendment to Virginia's capital murder statute which makes a killing during and for the purposes of furthering a drug transaction punishable by death or life imprisonment.

Opposing Peremptory Challenges Under Batson

Marcus E. Garcia

James W. Miller

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court reaffirmed that discrimination based on race in the selection of jurors violates the Equal Protection Clause of the Constitution. This article looks at the application of *Batson* in Virginia and the Fourth Circuit, and in four of the states which use the death penalty most frequently. Following this is a look at recent Supreme Court guidance and some suggestions for raising objections to prosecution's juror challenges possibly based on race.

Mitigation: An Outline of Law, Method and Strategy

Peter T. Hansen

Mr. Hansen presents a synopsis of penalty phase law as applied in the federal and Virginia courts. This is followed by material relating to the investigation, preparation, and presentation of mitigation evidence.

A WORD OF THANKS
AND
A CONTINUED APPEAL

The Digest is intended to serve the Commonwealth. Its purpose is to assist capital defense counsel by increasing the fund of knowledge available to the entire legal community, including judges and prosecutors. We ask that those who believe that the Digest is helpful and should continue in widest possible distribution consider defraying a portion of the cost. Individual contributions do not represent a major percentage of the publication cost but do constitute a clear endorsement of the continuing need for the Digest. To date, the response has been gratifying.

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