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CHRONOLOGICAL OUTLINE OF A CAPITAL MURDER TRIAL

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Beyond the facts of the case at hand and the Virginia case law, counsel will want to argue that the plain meaning and the purposes of Section 18.2-31 (4) support a finding that the intent to rob must arise either before or during the killing. Moreover, such a reading of the statute is mandated by the U.S. Supreme Court's narrowing construction expressed in *Gregg* and *Godfrey*. In order to clearly distinguish capital murder from a general killing, the intent to rob must be in place at the time of the killing and not after.

CHRONOLOGICAL OUTLINE OF A CAPITAL MURDER TRIAL

BY: RHONDA L. OVERSTREET

The text outline included in this issue of the Capital Defense Digest designates in chronological order a general guide of steps to follow in litigating a capital trial. At each step there is a detailed set of points which counsel should evaluate when preparing for trial or appellate review. These points are provided as an attempt to inform counsel of the various issues which often arise during trial. Many of these issues address motions and actions which are mandatory on the part of counsel, and others simply suggest trial strategy. The reader will also take note that under several of the stages, an annotation section is provided. These annotations refer to cases which have come out of the Virginia Court of Appeals. Although specific death penalty issues are treated mainly by the Supreme Court of Virginia, these annotations include cases in which lower courts address issues generally applicable to most criminal trials, including capital cases. The purpose behind listing the court of appeals cases is to provide counsel with an additional resource for formulating arguments. As is often the case, the language in Virginia Supreme Court decisions may not be favorable, and therefore these cases give counsel another source for mounting arguments and challenges to certain criminal issues. Specifically, annotations have been developed on jury matters, including voir dire and *Batson* issues, discovery, state habeas and procedural default.

The flow chart which follows sets out nine potential stages which occur in a capital murder case. Designated below each particular stage is a listing of critical points which should be considered and addressed during the applicable time period. This list, however, is not comprehensive and does not suggest every issue that may have importance during a certain stage in the case.

I. ARREST

II. BAIL

A. § 19.2-126 - the bail section referring to capital murder. However the statute directs the capital defendant to § 19.2-123(A), the second paragraph.

B. Although the defendant technically possesses right to bail at pre-trial, there is little chance in reality of getting out on bail.

III. PRELIMINARY HEARING

A. Arrest before Indictment- § 19.2-218
An accused arrested upon a warrant charging Capital Murder is statutorily entitled to a Preliminary Hearing before he can be indicted.

B. The requirement for a Preliminary Hearing is **procedural,** not jurisdictional, and therefore, any defect in connection with it (including failure to hold it) **must** be raised before trial or be deemed **waived.**

C. When the case begins with an indictment, §19.2-218 is not implicated. Once indictment is returned, the usual procedure is issuance of a capias.

IV. INDICTMENT

A. If there is any defect or any variance between the allegations therein and the evidence offered in proof, the court may permit amendment before jury returns verdict.

B. Various pre-trial motions concerning the indictment, including a defect in the charge **must** be made pre-trial. **Please *see* the Pre-trial section for further details.**

V. PRE-TRIAL PROCEDURE

A. Under Virginia law, several types of issues **must** be raised pretrial. Virginia courts are extremely strict in applying these procedural rules. An issue that is not timely raised is almost certainly defaulted. If waived under state law, it cannot be federally reviewed.

B. Since additional federal review is almost certain in a capital case, it is important to preserve all federal issues for appellate review. Therefore **federalize** all claims at this stage.

C. Virginia Supreme Court Rule 3A:9 governs pre-trial practice

1. Pre-trial is defined as the period before the plea is entered and at least **seven** days before the date fixed for trial. **3A:9(c).**
2. This Rule categorizes pre-trial motions: (1) those that **must** be raised pre-trial and (2) those motions that **may** be made pre-trial.

D. Pre-trial motions that **MUST** be made - 3A:9(b)(1)

1. Defenses and objections based on defects in the institution of the prosecution or in the written charge. **EXAMPLES:**
   a. **matters which truly imply a defect in the process, for example:**
      i. motion to dismiss the indictment on the ground that the grand jury was improperly selected or impaneled;
      ii. motion to dismiss alleging lack of qualification of an individual grand juror;
      iii. motions to dismiss alleging that the indictment was returned before defendant had a preliminary hearing;
      iv. Prosecutorial misconduct;
   b. **immunity defense, for example:**
      i. former jeopardy;
      ii. violation of speedy trial rights;
   c. **objections to the written charge, including:**
      i. variance in indictment between statutory citation and factual allegations; and
      ii. fails to charge an offense.
      iii. Note: non-constitutional, post verdict objections to the indictment are doomed by the Statute of Jeofails §19.2-227.

Annotations:

1. *Hairston v. Commonwealth*, 2 Va. App. 211 (1986) — Variance between allegations of indictment and proof of crime may be fatal. Variance is fatal only when proof is different from and irrelevant to crime defined in indictment and is insufficient to prove commission of crime charged.
2. Motion for Bill of Particulars - 19.2-399
   (*see* manual for copy of VC3 motion).
3. Motion for dismissal of the prosecution based on the unconstitutionality of the death penalty statute **(*see* the manual for motion and memorandum in support).**
4. Motions to suppress physical evidence on constitutional or admissions grounds, including:
   a. §19.2-398 permits the Commonwealth to appeal suppression orders that were obtained in violation of the Fourth and Sixth amendments.
   b. §19.2-399 motions

E. Motions that **MAY** be made Pre-trial - 3A:9(b)(2).

1. Any defense or objection that is capable of determination without the trial of the general issue may be raised by pre-trial motions.
2. Motion in limine - directed to obtaining a definitive ruling pre-trial. Especially used for evidentiary matters, including admissability and self-authentication.
   a. A lost motion in limine preserves the issues for appellate review.
   b. If motion is won, but opposing party introduces evidence in violation of ruling, wining party must object to preserve the record.

Annotations:

1. *Doan v. Commonwealth*, 422 S.E.2d 398 (Va. App. 1992)—Court did not give a ruling on a motion in limine hearing on the evidence admissability, so defendant is obligated to object.

2. *Simmons v. Commonwealth*, 6 Va. App. 445 (1988)—Rule is permissive and does not preclude raising a defense and objection anytime before jury returns verdict or trial court finds defendant guilty. Although no waiver of rights occurs if objection is made up to time jury returns verdict party does not have absolute right to object at any time.

F. Motions to Appoint Experts and or Investigators

1. ***Ake v. Oklahoma***, 470 U.S. 68 (1985) - Where defendant's mental condition is going to be an issue at trial, defendant is entitled to a state funded psychiatrist to conduct an examination and assist in evaluation and presentation of defense. In a capital murder case where mental condition is important to sentencing, the psychiatrist is also required to rebut an aggravating factor.

   a. What defendant **must** show:

      i. mental condition significant factor at trial;

      ii. expert necessary for defense; and

      iii. not a fair trial without expert.

   b. Attempt to present ex parte

      Annotations:

      (1) *Snurkowski v. Commonwealth*, 2 Va. App. 532 (1986) - Since *Ake* was a clear break with past precedent and practice, the requirement did not apply retroactively to defendant who was convicted prior to date of decision, even though the appeal was pending.

2. **§19.2-264.3:1** - Statutory entitlement to expert

   a. Showing required:

      i. defendant charged with Capital Murder; and

      ii. defendant is indigent.

   b. What the statute gives:

      i. mental health expert to evaluate and assist in preparation of information concerning whether the defendant acted under extreme emotional distress, whether he was legally insane or whether there are any other factors in mitigation; and

      ii. report from expert sent only to defendant's attorney.

   c. What the defendant loses:

      i. If defendant gives notice of an intent to present psychiatric testimony in mitigation, the Commonwealth must be provided the report and all records obtained during the course of an evaluation. The notice is required if intend to present expert testimony in sentencing phase. **If notice is not given, judge may allow Commonwealth a continuance or bar defendant from presenting this evidence.**

      ii. Upon notice the Commonwealth may force defendant to submit to an examination of one of its experts. Refusal to cooperate may result in a bar to defendant's presentation of the expert or in the jury being made aware of his refusal to cooperate.

      iii. Statements made to the Commonwealth's expert may only be used in the sentencing phase as rebuttal evidence in mitigation presented by the defendant. **There is no explicit restriction in the statute about the Commonwealth's use of this material in the guilt/innocence phase.**

   d. Defense counsel should make a motion in limine to exclude anything said out this scope. Defense counsel should ask to be present, yet no case authority for this request.

   e. Defendant should argue the statute in effect forces the defendant to choose between two constitutional rights, the right not to self- incriminate and the right to call witnesses, which violates the principles of ***Chambers v. Mississippi***, 410 U.S. 284 (1973).

G. Discovery - pre-trial procedure

1. Rule 3A:11 - pretrial discovery in criminal cases

a. Court may order discovery of statements or confessions of defendant and reports of a physical or mental exam of the defendant. **Defendant need only file a written motion to request these things.**

b. Court may order discovery of books, papers or documents. **Defendant must file a written motion requesting discovery and show the materials sought may be material to preparation of the defense.**

c. Reciprocal Right - court may on motion by Commonwealth, require defendant to permit discovery by the Commonwealth.

d. Defense motions must be written, file at least 10 days before day fixed for trial and must include all discovery under the rule.

2. Constitutional Discovery - when defendant makes a request all exculpatory matter must be disclosed.

a. Defendant must object to Commonwealth's refusal, when the Commonwealth erroneously refuses. Failure to object **waives defendant's right to disclosure.**

Annotations:

(1) *Snyder v. Commonwealth*, 10 Va. App. 67 (1990) - When trial court admits relevant and material evidence at trial which was not disclosed as required by discovery order, there is no reversible error in absence of showing of prejudice.

(2) *Naulty v. Commonwealth*, 2 Va. App. 523 (1986) - Rule 3A:11(b)(1)(i) is not limited to confessions or other post- arrest written or recorded statements.

(3) *Carter v. Commonwealth*, 10 Va. App. 507 (1990) - For new trial to be granted on basis of failure to disclose exculpatory evidence, non-disclosed evidence must be material so as to create reasonable probability that had evidence been disclosed to defense, result of proceeding would be different.

(4) *Mackenzie v. Commonwealth*, 8 Va. App. 236 (1989) - Suppression of exculpatory evidence upon request violates due process where evidence is material either to guilt of punishment irrespective of good faith or bad faith of prosecution.

(5) *Conway v. Commonwealth*, 11 Va. App. 103 (1990)—Violation of a discovery order to not turn over a recorded statement pursuant to judicial order. This violated 3A:11. Admission of not previously disclosed evidence is not reversible error unless show prejudice.

(6) *Moreno v. Commonwealth*, 10 Va. App. 408 (1990) - Defendant failed to prove the late disclosure of exculpatory Brady information was prejudicial, thus no violation. So long as exculpatory evidence is received in time that it can be used effectively by defendant and there is no showing of prejudice, there is no due process violation.

H. Change of Venue

1. Statute - §19.2-251

2. Presumption exists that defendant can receive fair trial in city or county of the offense.

3. Trial court can change venue when there is prejudice reasonably certain to prevent a fair trial and impartial jury.

4. Can be done on motion of either prosecution or defense.

5. §8.01-363 allows a different jury to be brought to you.

6. To demonstrate prejudice and discover it, defense requires extensive voir dire.

7. Remember, in Virginia the same judge travels with the case.

8. Making the Change of Venue Motion:

a. Defer ruling on change of venue motion until the commencement of trial. Then the court could grant individual sequestered voir dire or grant the change of venue motion if sufficient prejudice is shown.

b. If granted, use as a basis for individual sequestered voir dire and additional peremptory challenges.

Annotations:

(1) *Wilmoth v. Commonwealth*, 10 Va. App. 169 (1990) - Defendant failed to show that publicity created widespread prejudice reasonably certain to prevent fair and impartial trial. Constitutional guarantee of impartial jury does not contemplate excluding those who have read or heard news accounts but testimony is whether juror is capable of laying aside preconceived opinion and render verdict on evidence.

VI. TRIAL

A. Common Jury Issues

1. Right to a jury trial in a court of record

2. Selection - Venire

a. Jury commissioners are selected by the judges of each court prior to October 1. The list contains the number of eligible persons. The names of these persons are written on separate allots and put in the jury box. §8.01-352.

b. Selection of the petit jury is governed by §8.01-358, §19.2-262 and Rule 3A:14.

3. *Voir Dire*

a. The judge has the first chance to question the jury. There are 7 statutory questions to be asked. Va S.Ct Rule 3A:14.

b. Thereafter, the court and counsel as of right, may examine on oath any prospective juror and ask any questions relevant to his qualifications as an impartial juror. A party objecting to a juror may introduce competent evidence in support of the objection.

c. As to right of either court or counsel to conduct voir dire, *see* §8.01-358.

i. §8.01-358 allows the court or counsel to ask additional questions; how many is the crucial issue.

ii. It is important to request sequestered voir dire or at least to get voir dire broken down into groups of 2 or 3.

Annotations:

(1) *Barrette v. Commonwealth*, 11 Va. App. 357 (1990) - Party has no right, statutory or otherwise, to propound any question he wishes, or to extend voir dire questioning without limitation. Court must only afford party full and fair opportunity to ascertain whether prospective juror stands indifferent in case.

(2) *Stamper v. Commonwealth*, 4 Va. App. 101 (1987) - Excluding prospective capital sentencing jurors because of their opposition to capital punishment is no different from excluding juror for innumerable reasons. Trial Counsel was not ineffective for failure to individually voir dire prospective jurors or for failure to inquire about prospective juror's exposure to pre- trial publicity.

(3) *McGill v. Commonwealth*, 10 Va. App. 237 (1990) - Using or permitting use of leading questions, those which suggest desired answer, in voir dire of prospective juror may taint reliability of juror's response. Trial judge did not abuse discretion in not striking prospective juror for cause.

d. Challenging for cause

i. Party objecting introduce evidence

ii. Example: belief that accused must prove innocence, prejudice, bias for or against death penalty

iii. Any doubt as to whether a juror is impartial must be resolved in favor of defendant. *Mullis v. Commonwealth*, 3 Va. App. 564 (1987).

iv. Failure of the court to exclude a venireman who should be excluded for cause is reversible error even when the venireman is excluded by the defendant's use of a peremptory challenge. *Scott v. Commonwealth*, 1 Va. App. 447 (1986).

e. Peremptory challenges

i. Each party is entitled to 4 strikes

ii. Striking is done alternatively, the Commonwealth beginning. After all strikes are exercised the proper number of jurors will remain, 12. *See* §19.2-262.

4. Challenges to the Composition of the Petit Jury

a. Sixth Amendment, fair cross section

i. Defendant has a constitutional right to a jury drawn from a group that represents a cross section of the community.

ii. Right to have no cognizable group excluded.

iii. ***Test***:

a) Excluded group is distinct group in community;

b) Representation of this group in jury venire is not fair and reasonable in relation to number of such persons in the community; and

c) Under-representation due to systematic exclusion.

iv. Proper evidence base in the record is to include number of members of allegedly excluded group on venire and number of members in the community.

v. **Challenges must be made prior to impaneling of the petit jury or they are waived.**

b. Equal Protection Challenge

i. Standing requirement, defendant must be a member of the excluded group.

ii. ***Test***:

a) group is recognizably distinct class which is

b) singled out for a different treatment under the law as written or applied;

c) substantial underrepresentation of the group has occurred over a significant period of time, and

d) selection procedure is susceptible of abuse or is not neutral

c. ***Batson v. Kentucky***, 476 U.S. 79 (1986) - prohibits exclusion of jurors by prosecution using peremptory challenges on juror's based on race alone.

i. Defendant does not have to show history of exclusion

ii. Remedy is to grant new trial or reinstate excluded jurors.

iii. Challenge must be made prior to impaneling of petit jury or waived.

Annotations:

(1) *Winfield v. Commonwealth*, 421 S.E.2d 468 (1992)- In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence and the best evidence will be attorney demeanor. Once defendant makes prima facie case, burden shifts to state to come forward with neutral explanation for challenging jurors. Prosecution cannot merely argue he challenged the juror based on the assumption that would be partial to defendant because of shared race. Neutral reasons include age, reside near defendant, near scene of crime or in high crime areas. See *Jackson v. Commonwealth*, 8 Va. App. 176 (1989); *Chambliss v. Commonwealth*, 9 Va. App. 267 (1989).

(2) *Williams v. Commonwealth*, 14 Va. App. 208 (1992) - erroneous failure of court to exclude for cause jurors who were closely associated with either defendant or victim was not cured by defense counsel's subsequent exercise of peremptory against the jurors. Prejudicial error for trial court to force a defendant to use the peremptory strikes afforded by 19.2-262 to exclude a venireman who is not free from exception.

(3) *Buck v. Commonwealth*, 14 Va. App. 10 (1992) - For defendant to establish prima facie case that people were purposely excluded because of race based solely on

prosecution's use of peremptory challenges defendant must show that defendant is a member of a cognizable racial group, prosecution used peremptory to remove member of defendant's race from jury and that those and other relevant facts and circumstances raise inference that prosecution acted to exclude based on race.

(4) *Chambliss v. Commonwealth*, 9 Va. App. 267 (1989) - Nothing in *Batson* mandates complete exclusion of racial group in order to prove discrimination.

(5) *Jackson v. Commonwealth*, 8 Va. App. 176 (1989) - Defendant may establish prima facie case of purposeful discrimination in selection of jury solely on evidence concerning prosecutor's exercise of peremptory challenges.

(6) *Reynolds v. Commonwealth*, 6 Va. App. 157 - Mere fact that accused is black and victim is white does not automatically mandate right to pose voir dire questions to jury designed to identify racial prejudice.

5. Death Qualification Issue

   a. ***Wainwright v. Witt***, 469 U.S. 412 (1985) - Juror is excusable for cause if his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. This includes jurors who would automatically vote **in favor of** the death penalty. ***Morgan v. Illinois***, 112 S.Ct. 222 (1992).

   b. ***Witherspoon v. Illinois***, 391 U.S. 510 (1968) - Can't exclude juror just because he has scruples against the death penalty but would consider any penalty.

   c. Rule 3A:14 allows death qualification examination

B. Closing Argument, an important incident of trial

1. Do not hesitate to object during Commonwealth's closing, if argument exceeds permissible bounds.

2. Examples of when defense counsel should object:

   a. If prosecution alludes to defendant had fair trial, which is more than victim got

   b. reference to constitutionally impermissible factors;

   c. suggests evidence is irrelevant to sentencing process; or

   d. if prosecution insulates jury from responsibility

Annotation:

(1) *Martinez v. Commonwealth*, 10 Va. App. 664 (1990) - When trial court overrules objection to closing argument, defense counsel is not required to request cautionary instruction or mistrial in order to preserve objection for appellate review.

C. Making the Record - Federalize all issues at trial

1. The record must reflect that every objection and claim was made in the name of the Sixth, Eighth and Fourteenth Amendments, as well as appropriate state grounds or other applicable federal grounds.

2. Objections should be supported on specific legal grounds, yet inclusive of as many grounds as possible, especially the federal grounds.

3. When an adverse ruling is handed down that disallows a defense question or evidence, defense should proffer the answer or the evidence, to preserve the issue on the record for review on appeal.

D. Jury Instructions

1. Governed by Va S. Ct Rule 3A:16(b).

2. 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.

3. Require that all proceedings pertaining to jury instructions and all objections be made part of the record.

Annotation:

(1) *Jimenez v. Commonwealth*, 10 Va. App. 277 (1990)—Party's objection to jury instructions will be waived by his failure to object when instructions are offered.

E. Verdict Form - §19.2-264.4(d)

1. Form does not require the jury to indicate which aggravating factor it found beyond a reasonable doubt.
2. Therefore, defense counsel should preserve the issue by objecting to the form on the record.

VII. PENALTY TRIAL

A. §19.2-264.4 (A) - Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment.

B. §19.2-264.4(C) - Refers to the jury's finding beyond a reasonable doubt of either an aggravating factor or vileness.

1. **Jury does not have to indicate which aggravating factor it found beyond a reasonable doubt.**

C. Va S. Ct Rule 3A:18—The separate proceeding provided for in §19.2-264.3(C) shall commence as if it were a continuation of the original trial and continue from day to day until concluded.

D. Aggravating Factors—unanimity as to aggravating factors not required

1. **FUTURE DANGEROUSNESS**

a. The Virginia Supreme Court has approved admission of evidence of prior criminal convictions, details of prior offenses and unadjudicated misconduct before and after the capital offense.

i. In a motion for a Bill of Particulars, defense counsel argued for the Commonwealth to give a narrowing construction to future dangerousness. Defense should also argue that if the prosecution intends to rely on unadjudicated conduct, prosecution at a minimum should tell defense counsel what misconduct it will rely on, what witnesses will be called and evidence of proof. The argument can be based on "super due process" and per se ineffective assistance of counsel because time has to be devoted to investigation of this misconduct rather than on other valid pursuits.

ii. Argue it is unconstitutional because the evidence is prejudicial and only on minimal relevance.

b. Examples of evidence showing future dangerousness;

i. Lack of remorse;

ii. Escape plan; or

iii. Testimony of victim of prior crime

2. **VILENESS**

a. Argue statutory terms are unconstitutional.

b. Make an argument for a "narrowing instruction" based on the authority of *Smith v. Commonwealth* 219 Va. 455, 248 S.E. 2d 135 (1978).

c. Argue that the defendant is denied due process narrowing construction because the Commonwealth might apply another construction which the defendant is unprepared to litigate. Without the narrowing construction, the defendant has no meaningful notice.

E. Mitigating Evidence

1. §19.2-264.4(B) lists some statutory mitigating factors, yet is not all-inclusive.
2. The defense is permitted to introduce any evidence relevant to the penalty decision.
3. Constitutional Requirements:

a. Sentencer must be able to consider all evidence in mitigation that is relevant. ***Lockett v. Ohio*** 438 U.S. 586 (1978).

b. Sentencer may not refuse to consider any relevant mitigating evidence. ***Eddings v. Oklahoma*** 455 U.S. 104 (1982).

c. Sentencer must be able to give effect to any mitigating evidence. ***Penry v. Lynaugh*** 492 U.S. 392 (1989).

4. Procedural Matters:

a. Mitigation evidence cannot be limited by a vague statute. A statute which requires unanimity on the existence of mitigation violates the Eighth and Fourteenth Amendments. ***Mills v. Maryland*** 486 U.S. 367 (1988).

b. Unanimity requirement as to whether mitigation evidence outweighs aggravating evidence impermissibly limits consideration and giving effect to mitigation. ***McKoy v. North Carolina*** 494 U.S. 433 (1990).

5. In Virginia:

a. Argue that the constitutional and procedural requirements are meaningless in Virginia because the statute does not require a mitigation jury instruction.

b. Defense counsel should ask for a jury instruction to explain mitigation.

6. Limitations/Barriers to putting on mitigation:

a. Exclusion based on relevance §19.2-264.4(B);

b. Exclusion based on evidentiary rules;

c. §19.2-264.3:1;

d. Parole eligibility - defense should attempt to argue that the jury in a capital case cannot adjust or handicap its sentence to allow for parole eligibility, so there is no need to adhere to the fear that parole information may cause a jury to adjust its sentence higher to take the parole issue into account.

e. Barriers to independent weight to be given mitigation

7. Theories of Mitigation:

a. No fault evidence - absence of control over actions;

b. Shared responsibility;

i. Community shares

ii. Racial discrimination, poor education, unhealthy living conditions;

c. Good things about defendant, and

d. Struggle - defendant tried to become good.

e. **Note: start mitigation investigation early on in the case**

F. Jury return sentence

1. §19.2-264.5 - post sentence reports

2. After consideration of report and upon good cause shown, the court may set aside the sentence of death and impose life imprisonment.

3. No ruling in a criminal case is official until 21 days after sentencing under Va S.Ct. Rule 1:1.

G. Parole eligibility evidence in the penalty phase

1. Such evidence is consistently denied

2. Argue it goes to rebutt future dangerousness and also is a relevant mitigating factor under *Lockett*.

3. If jury interrupts deliberations to ask about parole, defense counsel must object if the judge responds to the question with "I can't tell you" or "it is of no concern."

4. *See* Straube, The Capital Defendant and Parole Eligibility, Capital Defense Digest, vol. 5, no. 1, p. 45 (1992), for an in- depth discussion on the parole issue and suggested trial strategy for defense counsel.

Annotations:

(1) *Harris v. Commonwealth*, 13 Va. App. 47 (1991) - Explanation of why the jury should not be concerned with parole issue. Evidence on parole was brought to the jury, evidence aliunde, was not mere expression of juror opinion, a likelihood of high prejudice. Should have allowed defense motion to summon jury to be questioned as to nature and influence of the parole information.

VIII. DIRECT APPEAL

A. §17-110.1 - Review of death sentence by Supreme Court is mandatory. Review is independent of any default by the accused.

B. Procedure

1. The proceeding in the circuit court is transcribed as expeditiously as practicable and filed with the clerk of the circuit court pursuant to Va Code §17- 110.1(B). The clerk of the circuit court must compile the record and transmit it to the Supreme Court **within ten days** of receipt of the transcript. §17-110.1(B).

2. **Notice Rule 5:22**
Upon receipt of the record, the Clerk of the Supreme Court shall notify in writing the counsel for the accused, the Attorney General, and the Director of the Department of Corrections of the date of its receipt **(the filing date).** Va. Sup. Ct. R. 5:22(a).

   a. This notification issued by the clerk of the Supreme Court is deemed to be he certificate of the clerk that the appeal has been awarded. Rule 5:23. (Perfection of Appeal; Docketing).

3. **Assignments of Error. Rule 5:22.**
Within 10 days of the filing date, counsel for the appellant shall file with the Clerk of the Supreme Court assignments of error upon which he intends to rely for reversal of the conviction or review of the sentence of death. Rule 5:22(b).

   a. Appellee: Counsel for appellee has **no more than 10 days after** the filing of the assignments of error to file a designation of the additional parts of the record that he wished included as germane to the review of any assignments of error.Rule 5:22(b).

   b. The Supreme Court may, on motion in a particular case, vary the procedure prescribed by Rule 5:22 in order to attain the ends of justice and the purpose of §17-110.1. (e).

4. **Perfection of Appeal - Certificate of Appeal.**
The clerk of the Supreme Court certifies the action to counsel and tribunal promptly after a petition of appeal has been granted. Rule 5:23(a). In a case in which the sentence of death has been imposed, the notice issued by the clerk when he receives the record from the circuit court is the certificate of the clerk. This date of receipt is to be used as the date of the certificate of appeal. Rule 5:22.

5. **Briefs - Filing Time. Rule 5:26.**

   a. **Appellant:**
   The brief of the appellant shall be filed **within 40 days after** the date of the certificate of appeal issued by the clerk of the Court. Rule 5:26(b)(1).

   b. **Appellee:**
   The brief of the appellee shall be filed **within 25 days after** the filing of the brief of the appellant's brief. Rule 5:26(b)(2).

   c. **Appellant:**
   A reply brief may be filed within 14 days after the filing of the brief of the appellee.

   d. **Note:**
   An extension of time for the filing of any brief may be granted by agreement of all counsel and with permission of a justice of the court. Rule 5:26(c).

IX. STATE HABEAS

A. §8.01-654 - Habeas Corpus

B. This is a civil proceeding, not criminal

1. Petition tests the legality of the incarceration not the guilt or innocence of the prisoner.
2. No constitutional right to counsel exists at this stage, but the statute allows for appointment. §14.1-183.

C. Procedure under the statute:

1. Circuit court which entered judgement of conviction must issue the writ.
2. Petition must contain all allegations the facts of which are known to the petitioner.
   a. No writ will be granted based on facts which the petitioner had knowledge of at time of filing previous petitions. **Default Provision.**
   b. Where issue could have been raised at trial but was not, it cannot be raised for the first time on habeas. Petitioner is said to lack standing.
3. Every petition must be filed on the statutory form contained in §8.01-655(B). Failure to do so forces the court to return the petition until petitioner complies.
4. When petition is completed, the original and 2 copies should be mailed to the clerk of the court.
5. Writ shall be directed to the person whose custody the petitioner is detained and shall be made returnable as soon as may be before the court ordering the same.

D. Burden of Proof - preponderance of the evidence

E. Appeal of Circuit Court Decision:

1. Court of Appeals is without jurisdiction to hear habeas corpus appeals arising from convictions where death penalty has been imposed. ***Stamper v. Townley***, 4 Va. App. 101 (1987).
2. Must appeal to the Virginia Supreme Court; Court of Appeals has no jurisdiction

F. Rules of Court

1. Habeas Corpus petitioners must follow the rules of court just as all other parties desiring an appeal.
2. Rule 5:9 Notice of Appeal
   a. Within 30 days of the entry of the final judgement, counsel must file a notice of appeal with clerk of trial court and mail one to counsel for opposing party.
3. Rule 5:17 Petition for Appeal
   a. Must contain assignments of error.
   b. Form and contents shall conform to the requirements of the opening brief of appellant Rule 5:27.
   c. Rule 5:25 shall apply to limit the questions upon which this Court will rule on appeal.
   d. Required Certificate (e)
4. Rule 5:18 Brief in Opposition to granting Appeal
5. Rule 5:19 Reply Brief to brief in opposition
   a. within 7 days after opposition brief filed
   b. in lieu of oral argument
6. Rule 5:20 Denial of Appeal; Petition for Rehearing
7. Rule 5:23, if petition for appeal has been granted

G. General Concerns:

1. All state claims and all claims which defendant wishes to raise at federal habeas must be raised in the state habeas petition.
2. Habeas claims fall into 3 categories:

a. Procedurally defaulted claims - usually barred;

b. Claims decided on their merits on Direct Review;

i. yet claims dismissed on this ground are properly exhausted and preserved for federal habeas review; and

c. Claims which only could be raised at State Habeas:

i. Ineffective Assistance of Counsel Claims;

ii. *Brady* violations; and

iii. Prosecutorial violations

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

4. Each of the claims under these categories which was denied must be separately appealed back to the Virginia Supreme Court. If this procedure is not followed, any claims which up to this point were properly preserved for federal habeas may be denied review due to procedural default.

Annotations:

(1) *Williams v. Landon*, 1 Va. App. 206 (1985) - Habeas Corpus petitioners must follow rules of court just as all other parties desiring appeal. Appeal was dismissed because of appellant's failure to timely file his notice of appeal.

(2) *Fitzgerald v. Bass*, 4 Va. App. 371 (1987) - Only issue which it presents is whether or not prisoner is restrained of his liberty by due process of law. It is well settled that habeas corpus cannot be used to perform function of appeal or writ of error, to review error or to modify or revise judgement of conviction .

(3) *Crank v. Rogers*, 1 Va. App. 491 (1986) - where issue could have been raised at trial but was not, habeas proceeding may not be used to entertain issue for first time.

X. ADDITIONAL ANNOTATIONS

A. Proper Objections - Preservation

1. *Smith v. Commonwealth*, 10 Va. App. 592 (1990). Grounds of objection must be stated with specificity and objection timely made in order for issue to considered on appeal.

2. *Jimenez v Commonwealth*, 10 Va. App. 277 (1990). Rule 5A:18 does not permit issue not raised at trial to be raised for first time on appeal, unless necessary to attain ends of justice.

3. *Johnson v. Commonwealth*, 5 Va. App. 529 (1988). "Ends of Justice" provision may be used when record affirmatively shows the miscarriage of justice has occurred, not when it merely shows that miscarriage might have occurred.

4. *Snurkowski v. Commonwealth*, 2 Va. App. 532 (1986). Futility of presenting objection to state courts cannot alone constitute cause for failure to object at trial.

B. Predicate Offenses for Capital Punishment

1. Robbery

a. *Harris v. Commonwealth*, 3 Va. App. 519 (1986)
Act of violence or intimidation must precede or be concomitant with taking. Threats of violence or bodily harm are not indispensable ingredient of intimidation.

b. *Curtis v. Commonwealth*, 12 Va. App. 527 (1991)
General Assembly clearly intended to authorize separate and cumulative punishments for capital murder and underlying felonies of robbery and rape when such convictions are obtained in single trial. Defendant's prior conviction for one of two rapes that served as basis for attempted capital murder prosecution barred prosecution.