



Spring 3-1-1994

Capital Defense Digest Articles Index

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Recommended Citation

Capital Defense Digest Articles Index, 6 Cap. Def. Dig. 53 (1994).

Available at: <https://scholarlycommons.law.wlu.edu/wlucdj/vol6/iss2/17>

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Capital Defense Digest
Articles Index
Volumes 1 - 6

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 Virginia 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 Supreme Court of Virginia 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 United States Supreme Court decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), and Virginia Code § 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

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 Supreme Court of Virginia 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 Supreme Court of Virginia 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 Defendants' 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. The article also discusses the abrogation of many of these rights pertaining to Virginia appellate review of death sentences and gives 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. 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 Supreme Court of Virginia 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 definitions 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 Supreme Court of Virginia. 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 is a look at recent Supreme Court guidance and some suggestions for raising objections to prosecutors' 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.

Vol. 5, No. 1 (1992)

The Capital Defendant and Parole Eligibility

Crystal S. Straube

This article looks at the defendant's right to introduce evidence of parole in the capital murder trial from five different aspects: (1) Virginia law and policy on the introduction of parole evidence; (2) the defendant's right to question or educate jurors on parole during voir dire; (3) the defendant's right to present evidence concerning parole eligibility as a potential mitigating factor; (4) the right to introduce parole evidence in relation to Eighth Amendment and due process reliability; and (5) the right to present jury instructions on parole eligibility to rebut the Commonwealth's arguments based on future dangerousness. The article concludes by suggesting various trial strategies to implement the legal arguments that have been developed.

Subtle Influences: The Constitutionality of Jailhouse Informant Testimony in Capital Cases

Wendy Freeman Miles

No one constitutional provision directly governs the use of jailhouse informant testimony in a capital murder trial. Because capital defense counsel must be well-versed in the available legal challenges to informant testimony in various situations, Ms. Miles' article acts as a primer on the different types of challenges by presenting constitutional arguments against the use of such testimony at the pretrial, guilt and sentencing stages of capital murder trials. The article also discusses the few Virginia cases dealing with the issue. In addition, Ms. Miles provides practical suggestions on how to raise such arguments at the pretrial, trial and appellate levels.

Vol. 5, No. 2 (1993)

Litigating the Death Penalty and Race Discrimination in a Post-McClesky World

G. Douglas Kilday

In *McClesky v. Kemp*, 481 U.S. 279 (1987), an African-American man unsuccessfully challenged the constitutionality of the Georgia capital sentencing scheme by alleging that the death penalty was applied in a racially discriminatory manner. In light of this heavily criticized opinion, this article guides attorneys through the making of a racial discrimination claim and stresses three elements: strong statistics, case-specific evidence, and assignments of error under the Virginia and federal constitutions.

Anything Someone Else Says Can And Will Be Used Against You In A Court Of Law: The Use Of Unadjudicated Acts In Capital Sentencing

Laura J. Fenn

The use of unadjudicated acts for proof of future dangerousness violates the defendant's Sixth, Eighth, and Fourteenth Amendment rights. Such admissions deprive the defendant of the notice, process, and effective assistance of counsel to which he is entitled during the penalty phase. The article instructs attorneys on how to challenge each unadjudicated act and defeat the overall effect such information could have on a sentencing jury.

The "Two-Edged" Sword: Mitigation Evidence Used In Aggravation

Charles F. Castner

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), Justice O'Connor referred to the admission by a capital defendant of evidence in mitigation as serving as a "two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Id.* at 324. Castner stresses that it is the respon-

sibility of the defense attorney to keep mitigating evidence mitigating. He describes two methods of fulfilling this responsibility: the motion in limine and the proactive jury instruction.

Applying The Virginia Capital Statute To Juveniles

Kevin Andrew Clunis

Nicholas VanBuskirk

This article explores ways in which the Virginia death penalty statute may be challenged when it is applied against juvenile offenders.

Narrowing The Scope Of Capital Murder During The Commission Of A Robbery: When Must The Intent To Rob Arise?

Roberta F. Green

The Supreme Court of Virginia has stated that the intent to rob must exist before or at the time of the killing, regardless of when the robbery actually occurs. The article outlines two statutory arguments — plain meaning and purpose — as well as United States Supreme Court jurisprudence that distinguishes capital murder from a general killing.

Vol. 6, No. 1 (1993)

Presenting Mitigation Against the Client's Wishes: A Moral or Professional Imperative?

Susan F. Henderson

No express constitutional or statutory mandate exists which requires defense counsel to present mitigation evidence on a capital defendant's behalf. Ms. Henderson's article examines whether there are, however, implied constitutional or statutory requirements for presenting mitigating evidence. In addition, the article considers whether defense counsel has a separate professional and ethical obligation to present such evidence despite a defendant's instructions to the contrary. Ms. Henderson explores the various standards of professional responsibility which authorize, permit, and encourage defense counsel to present mitigation evidence in these situations. The issue for attorneys is one of personal and professional integrity. In addition, the article focuses on the consequences of failing to present mitigating evidence.

What Every Virginia Capital Defense Attorney Should Know About The Federal Drug Kingpin Statute

Paul M. O'Grady

United States Code, Title 21, section 848(e), exposes to death persons involved in a "continuing criminal enterprise" who either commit murders or cause them to be committed. The law also provides a possible sanction of death in cases involving the drug-related killing of a law enforcement officer. This article explains how this statute, commonly referred to as the Federal Drug Kingpin statute, extends far beyond the reach of drug kingpins.

Vol. 6, No. 2 (1994)

To Attain the Ends of Justice: Confronting Virginia's Default Rules in Capital Cases

Michael A. Groot

This article examines the possibility of attacking Virginia's default scheme on its face on the grounds that the state default rules are applied in an inequitable manner by the Virginia courts and, therefore, the federal courts should not defer to their findings. Mr. Groot examines the doctrine of federal review and its constitutional underpinnings, with a special emphasis on the denial of review to unfavored litigants. The analysis concludes with a comparison of how the Virginia courts apply the default rules in the non-capital context suggesting that capital defendants in Virginia are an unfavored class of litigants.

Overlooked Victories: Techniques for Negotiating Non-Capital Outcomes

Lesley Meredith James

Ms. James's article lays out a strategy for the successful negotiation of a non-capital disposition. The article discusses a two-tiered negotiation strategy relying on the method developed in Roger Fischer and William Ury's book, *Getting to Yes: Negotiating an Agreement Without Giving In* (Penguin Books 1981). In addition the article offers practical advice on the realities of negotiating such a plea for a capital defendant in Virginia, negotiating with the capital defendant, and the limits on pursuing a non-capital plea agreement.

Confessions and the Mentally Retarded Capital Defendant: Cheating to Lose

Silvia Linda Simpson

The defense of mentally retarded clients presents unique challenges to both defense attorneys and the criminal justice system. The impact of mental retardation is particularly crucial in dealing with the law of confessions. This article seeks to assist practitioners in several ways: (1) the article suggests indicators of mental retardation that should be uncovered in the initial investigation and alert attorneys that mental retardation may be a factor; (2) the article discusses the number and type of experts necessary to verify mental retardation and aid in presenting evidence about it; and (3) the article outlines the importance of many characteristics of the mentally retarded to the law of confessions and discusses how these characteristics interact with the interrogation context to produce unjust results.