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BEATING A POTENTIAL DEATHTRAP: HOW TO PRESERVE THE APPELLATE RECORD FOR FEDERAL REVIEW AND AVOID VIRGINIA'S PROCEDURAL DEFAULT

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BEATING A POTENTIAL DEATHTRAP: HOW TO PRESERVE THE APPELLATE RECORD FOR FEDERAL REVIEW AND AVOID VIRGINIA'S PROCEDURAL DEFAULT

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This article discusses the potential "deathtrap" facing capital appellants in the Commonwealth, created by the Supreme Court of Virginia's Rules 5:26[1] and 5:17(c).[2] It suggests what steps should be taken at direct appeal to be excepted from these procedural requirements and the federal grounds upon which objections to their enforcement should be made in order to successfully preserve those objections for subsequent federal habeas review. The purpose of offering these suggestions is to prevent capital appellants from being denied federal review of constitutional claims on the basis of procedural default created by the application of these two Virginia rules.

I. PROCEDURAL DEFAULT AS DEFINED BY VIRGINIA RULES 5:26 AND 5:17(c): THE TWO COMPONENTS OF "THE DEATHTRAP"

The first component of Virginia's "deathtrap" is Supreme Court Rule 5:26, which provides that all briefs submitted to an appellate court must be limited to fifty pages in length, unless the court, in its discretion, permits otherwise.[3] By limiting the amount of space in which a capital appellant may argue assignments of error, the rule effectively limits the number of issues that may be raised, regardless of their merit. Though the court does have discretion to hear additional claims that do not comport with these requirements, it has rarely done so.[4] Therefore, for all practical purposes, any arguments that counsel wishes to raise must be contained within a fifty page brief.

The second component of the "deathtrap" is established by Supreme Court Rule 17(c), which requires that all issues presented to the appellate court must be assigned, fully briefed and argued in the appellate brief.[5] Any issue not assigned or completely briefed may be defaulted. Thus, again, meritorious and potentially life-saving arguments defaulted under this rule may be lost unless counsel adheres to these requirements. Beginning with *Savino v. Commonwealth*,[6] the Supreme Court has strictly enforced the proposition that issues not raised and briefed to the appellate court will be defaulted.[7] Several subsequent capital cases have reaffirmed the court's holding in *Savino*.[8]

Initially, the constraints imposed by these rules would seem to have little effect on the appellate practices of counsel. According to traditional principles of appellate advocacy, when writing an appellate brief, counsel should narrow the scope of issues presented to the court, presenting only those issues that counsel believes have the best chance of being resolved in their favor.[9] By presenting only the strongest issues, counsel can best ensure that those issues will be clearly addressed by the appellate court.[10] Therefore, rules limiting the size of appellate briefs are ordinarily not burdensome since traditional appellate practice already counsels attorneys to limit the size and content of their briefs.

However, while legitimate in other areas of appellate practice, this strategy of winnowing issues is not applicable to a capital appeal. In a capital case, omitting potentially meritorious claims can literally mean the difference between life and death.[11] The practicing bar has recognized that in capital cases, counsel should present any and all arguably

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[1] Va. Sup. Ct. R. 5:26 (1995).

[2] Va. Sup. Ct. R. 5:17(e) (1995).

[3] "Except by permission of a justice of this Court, neither the opening brief of appellant, nor the brief of appellee, nor a brief amicus curiae shall exceed 50 pages typed or 36 printed pages." Va. Sup. Ct. R. 5:26(a) (1995).

[4] It is difficult, if not impossible to know how many times relief from the page limit was granted since discussion of such relief would probably not appear in a reported case. However, it is the belief of at least one member of the Commonwealth bar that such relief is sometimes granted. Telephone Interview with Mr. Daniel Morrisette, Esq., Defense Counsel in *Weeks v. Commonwealth*, by Mr. Greg Weinig, Associate Resource Editor, Virginia Capital Case Clearinghouse.

[5] Rule 17(c) actually presents two dangers to capital appellants. Under section (c), issues of error not assigned in the appellate brief will be defaulted. Additionally, under section (c)(4), issues assigned, but not fully briefed and argued will also be defaulted. While the discussion of the "deathtrap," and the line of cases cited *infra* note 7, deal with situations where issues were not fully briefed, there are technically two ways that the Supreme Court of Virginia can default issues not raised in the appellate brief.

[6] 239 Va. 534, 391 S.E.2d 276 (1990).

[7] In *Savino* the court dismissed two of the defendant's claims on the grounds that they were not raised at trial, violating Supreme Court Rule 5:25, and were not fully argued in the appellant brief, violating Rule 5:27(e). At the time, Rule 5:27(e) required that appellant's opening brief contain "[t]he principles of law, the argument, and the authorities relating to each question presented." Subsequently, Rule 5:27 was rewritten and amended effective January 1, 1993. The provision cited in *Savino*, requiring appellants to fully argue all issues of error in the appellant brief, was relocated to amended Rule 5:17(c)(4). Since these amendments, the Supreme Court of Virginia has not explicitly cited amended Rule 5:17(c) as authority for defaulting claims of error not fully briefed on appeal. Rather, the court has simply cited the most recent case in the line that began with *Savino*.

[8] *See, e.g., Weeks v. Commonwealth*, 248 Va. 460, 450 S.E. 2d 379 (1994); *Jenkins v. Commonwealth*, 244 Va. 445, 451, 423 S.E.2d 360, 364 (1992); *Quesinberry v. Commonwealth*, 241 Va. 364, 370, 402 S.E.2d 218 (1991); *Eaton v. Commonwealth*, 240 Va. 236, 240, 397 S.E.2d 385 (1990); *Cheng v. Commonwealth*, 240 Va. 26, 41, 393 S.E.2d 599 (1990).

[9] *See Jones v. Barnes*, 463 U.S. 745, 751-53 (1983) (explaining that "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most a few key issues"); *accord Turner v. Williams*, 812 F.Supp. 1400, 1416-17 (E.D.Va. 1993) (citing *Jones* for proposition that counsel's failure to raise certain claims upon direct appeal of capital sentence was not ineffective assistance of counsel since counsel **could choose to omit these claims** if they believed doing so was in client's best interest).

[10] *Jones*, 463 U.S. at 751-53.

[11] "Every issue must be raised in a capital case, no matter how hopeless at the time. Winnowing out weaker arguments can have... fatal consequences." Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Trials Due to Inadequate Representation of Incompetent Defendants*, 92 W. Va. L. Rev. 679, 688 n.47 (1990).

meritorious issues when perfecting an appeal.[12] This strategy is essential, not only to ensure the review of all issues on direct appeal, but more importantly, to ensure the preservation of these issues for review in future federal habeas proceedings. The effect of Virginia's "deathtrap" is to prevent counsel from presenting all potentially meritorious issues to the court on direct appeal.[13] Once defaulted at direct appeal, these issues will be precluded from review during federal habeas proceedings as well. Most significantly, because any one of the issues defaulted may have presented valid grounds for relief, the Virginia rules limit the defendant's ability to contest a wrongful conviction or execution. This is Virginia's "deathtrap."

II. THE "DEATHTRAP" AT WORK

Together, then, Rules 5:26 and 5:17(c) force capital appellants to fully argue any issues they wish to preserve within the confines of a fifty page brief. This limits the ability of capital appellants to present and preserve **all** potentially life-saving claims. Forced to adhere to a traditional appellate strategy, defense counsel must choose those arguments that they believe have the best chance of being favorably resolved and default all others not briefed.

It is essentially impossible for an attorney to make such a choice. The law of capital punishment is perhaps the most unpredictable of any modern area of the law. In several instances, the United States Supreme Court has reversed or struck down major components of state capital punishment systems, sometimes invalidating a statutory scheme that it had previously found permissible.[14] In such instances, where defendants effectively preserved seemingly "losing" issues, their death sentences were set aside. For those defendants who failed to preserve these issues, the courts provided no such relief, leaving them to be executed.[15]

Until recently, there appeared to be a way in which defense counsel could avoid default under Rule 17(c) while still adhering to the fifty page limit imposed by Rule 5:26. In every direct appeal from a capital sentence in the Commonwealth, the trial record is admitted into the appellate record so that it may be reviewed by the Supreme Court. That record contains all objections and supporting briefs submitted and fully argued before the trial court. Thus, where counsel intended to reassert the same errors and arguments, it appeared possible to incorporate them into the appellate brief simply by referring to the trial court record. This "incorporation by reference" technique would allow additional claims to be raised at appeal without using up valuable space in the appellate brief. Unfortunately, this strategy has been foreclosed by a second line of recent Supreme Court of Virginia decisions. Beginning with *Spencer v. Commonwealth*[16] and *Jenkins v. Commonwealth*,[17] the court has denied attempts to "incorporate by reference" arguments raised at trial or other prior proceedings.[18] More recent decisions suggest that the court will continue to deny the use of incorporation,[19] interpreting Rule 5:17(c) to require that all appellate arguments to be raised and fully briefed in the appellate brief.

III. WHAT SHOULD ATTORNEYS DO?

These recent holdings by the Supreme Court of Virginia suggest that Virginia's "deathtrap" will continue to threaten capital defendants seeking to appeal their convictions and sentences. However, there are steps that defendants can take in order to avoid this trap and challenge the Court's enforcement of Rules 5:17(c) and 5:26. Foremost, on direct appeal counsel should request relief from the 50 page brief limit if at all necessary. Because the decision to enforce the fifty page limit is within the court's discretion, this requirement may be waived.[20]

Should that motion be denied, counsel should move the court to reconsider the initial motion for relief. At that point, counsel should identify every potential claim she would brief and argue were she not limited by the Virginia Rules. Counsel must identify the **particular constitutional grounds** for each of the claims being raised, as well as any other applicable state authority. If relief from the fifty page limit is denied, but the record reflects the claims affected by the denial, both those specific claims and the challenges to the constitutionality of Rules 17(c) and 26, may be effectively preserved for federal habeas review.

IV. AT THE FEDERAL COURTHOUSE DOOR

Even if an attorney properly preserves all claims as suggested above, the federal court may decide not to review these claims, but also find them to be defaulted. Where the denial of a claim by a state's highest court is based solely on adequate and independent state law grounds the

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[12] "Appellate counsel should seek, when perfecting the [capital] appeal, to present all arguably meritorious issues, including challenges to any overly restrictive appellate rules . . . ." *Standards for the Appointment and Performance of Counsel in Death Penalty Cases*, § 11.9.2(d) (National Legal Aid and Defender Association)(1988). *See* § 11.9.2 (Commentary) (distinguishing this duty from that explicitly described by the Court in *Jones v. Barnes*, 463 U.S. 745, 746 (1983)); *see also Turner v. Williams*, 812 F.Supp. at 1416 (stating that "[f]or judges to second-guess reasonable professional judgements . . . would disserve the very goal of vigorous and effective advocacy . . . .") In permitting counsel to **omit** claims during appellate proceedings, the court stressed the importance of respecting counsel's professional judgment in trying a case. *See supra* note 7. It would follow then, that in the capital context, courts should not enact or uphold procedural rules that prevent counsel from pursuing **additional** issues either if counsel believed that the pursuit of such claims was necessary in order to adequately represent their client.

[13] *See* Bright at 683 (stating "[i]n *Wainwright v. Sykes* [433 U.S. 72, 84-87 (1977)], [the Supreme Court held that] meritorious constitutional claims may be barred from federal review because of an attorney's failure to satisfy state procedural rules").

[14] *See, e.g.*, Pohl & Turner, *If At First You Don't Succeed: The Real and Potential Impact of* Simmons v. South Carolina *in Virginia*, Capital Defense Digest, Vol. 7, No. 1, p. 28 (1994) (noting Supreme Court in *Simmons* overruled previous holding of Virginia Supreme Court regarding admissibility of parole ineligibility information for capital defendants); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (finding the consideration of mitigating evidence in the Texas capital scheme to be constitutionally inadequate despite its earlier approval in *Jurek v. Texas*, 428 U.S. 262 (1976)).

[15] Pohl & Turner, *supra* note 14, at 28 (noting defendant in *Smith v. Murray*, 477 U.S. 527 (1986), failed to raise objection to claim not accepted by Virginia Supreme Court, only to have Supreme Court subsequently decide issue in his favor). *See also* Bright, *supra* note 11, at 685 (describing cases of codefendants, one of whom was spared death because attorney preserved seemingly worthless claim, while other was executed, because his attorney did not preserve that same claim).

[16] 240 Va. 78, 393 S.E.2d 609 (1990).

[17] 244 Va. 445, 423 S.E.2d 360 (1992).

[18] *Jenkins*, 244 Va. at 460, 423 S.E.2d at 370; *Spencer*, 240 Va. at 99, 393 S.E.2d at 622.

[19] *See, e.g., Mickens v. Commonwealth*, 247 Va. 395, 401, 442 S.E.2d 678, 683 (1994); *Williams v. Commonwealth* 248 Va. 528, 537, 450 S.E.2d 365, 372 (1994).

[20] *See supra* note 3 and accompanying text.

concept of federalism instructs that the federal court refuse to review or overturn the denial.[21] However, in order for the federal courts to utilize this federalism doctrine, several conditions must first be satisfied.

The most important condition applicable to the "deathtrap" is that the procedural rule upon which the state court has relied upon must be "adequate,"[22] To be "adequate," the rule relied upon must have been in effect at the time of its reliance,[23] must be clear and regularly followed by the state court,[24] must serve a state interest other than to preclude federal review,[25] and must not violate due process or frustrate the review of a fundamental right that can only be waived by that individual.[26]

Further, because the comity and federalism doctrine is discretionary and not jurisdictional, a federal court may still choose to hear a defaulted claim.[27] Generally, however, this authority will only be exercised if petitioners can show cause for not asserting the claim earlier and prejudice should the claim not be heard.[28] Courts may also overlook such default, absent showings of cause and prejudice, if defendants have made a showing that they are actually innocent of the crime or "innocent of the death penalty."[29] These arguments and exceptions may be tailored to the capital context in order to provide petitioners with specific grounds for receiving relief from Virginia's procedural "deathtrap."

Whether the application of Rules 5:17(c) and 5:26 would satisfy these conditions and provide a sufficient basis for federal courts to reach the merits of claims purportedly defaulted has never been decided. Therefore, in addition to making the effort to preserve substantive claims, as described above, counsel should also challenge the constitutionality of applying these two rules. The arguments presented below are suggested as grounds for making such a challenge.[30]

1. The lower court decisions refusing to grant the defendant relief from Rules 5:17(c) and 5:26 prevent counsel from raising and preserving arguably meritorious claims of error and thus deny the defendant effective assistance of counsel as required by the Sixth Amendment to the United States Constitution.

The United States Supreme Court has held that the Sixth Amendment requires that state courts provide indigent criminal defendants with counsel.[31] This right to counsel has long been interpreted as meaning effective assistance of counsel.[32] This right to effective assistance of counsel is applicable not only to all criminal trials, but also to direct appeals of right that are authorized by the individual states.[33] Counsel is necessary during direct appeals because of the significant personal and state interests at stake in the appellate process.[34]

By comparison, the rights of a capital defendant on appeal should warrant even stricter protections, since it is not merely an infringement upon individual liberty that is at stake in a capital trial, but the loss of life. By limiting the length of an appellate brief, and thus the scope of issues that may be raised on appeal, the Supreme Court of Virginia violates the liberty interests of criminal defendants, preventing them from receiving effective assistance of counsel. Further, where the length of an appellate brief is limited by a court, these procedural rules effectively prevent appellate counsel from fulfilling their professional responsibilities both to their clients and the court.[35]

2. Virginia's procedural rules violate due process of law because they do not provide defendants with a reasonable opportunity to present valid federal claims.

In *Michel v. Louisiana*[36] and *Parker v. Illinois*,[37] the United States Supreme Court discussed the validity of state procedural requirements that were used as grounds for defaulting claims on subsequent federal review. In *Michel*, the Supreme Court held that state courts were required to provide defendants with "a reasonable opportunity to have the issues as to [a] claimed right heard and determined by the state court."[38] In *Parker*, the Court held that because the "channel through which the constitutional questions" were to be raised was "clearly marked," "open and unobstructed," the defendant was not entitled to relief.[39] These decisions suggest that as long as a state's procedural rules provide an avenue through which defendants can pursue all of their claims, failure to pursue those claims in such a fashion will be seen as valid grounds for procedural default.

Contrary to these holdings, Virginia's strict adherence to its procedural rules regarding the briefing of appellate issues can prevent capital defendants from raising all of their constitutional claims. In other words, the rules themselves do not serve as a mechanism to channel federal constitutional claims but rather filter them indiscriminately, by limiting the space in which they may be raised. In doing so, these rules do not provide the defendant with a "reasonable opportunity to have [their

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[21] *Tools for the Ultimate Trial: The Tennessee Death Penalty Defense Manual* (prepared by the Capital Case Resource Center of Tennessee) (3rd Edition 1992), Vol. 3, p. 21.7 (citing *Wainwright v. Sykes*, 433 U.S. at 86-87; *Murray v. Carrier*, 477 U.S. 478, 485(1986)).

[22] *Id.* at p. 21.9.

[23] *Id.* (citing *Reed v. Ross*, 468 U.S. 1, 7 n.4 (1984)).

[24] *Id.* (citing *Johnson v. Mississippi*, 486 U.S. 578, 587-89 (1988); *James v. Kentucky*, 466 U.S. 341, 348-49 (1984); and *County Court of Ulster County v. Allen*, 442 U.S. 40, 150-51 (1979)).

[25] *Id.* (citing *James v. Kentucky*, 466 U.S. 341, 348-49 (1984)).

[26] *Id.* (citing *Wainwright v. Sykes*, 433 U.S. at 92-94 (Burger, C.J., concurring); *Fay v. Noia*, 372 U.S. 391, 438-39 (1963)).

[27] *Id.* at p. 21.7 (citing *Smith v. Murray*, 477 U.S. 527, 533 (1986)).

[28] *Id.* at p. 21.10 (citing *Wainwright v. Sykes*, 433 U.S. at 90-91; *Murray v. Carrier*, 477 U.S. at 485).

[29] *See* case summary of *Schlup v. Delo*, Capital Defense Digest, this issue (discussing standards applicable to various showings of innocence).

[30] These arguments were first presented by the Public Defender for the Fifteenth Judicial Circuit of Florida in a petition for a writ of mandamus to the United States Supreme Court on behalf of the petitioner, William Duane Elledge. *In re Elledge*, Petition for Writ of Mandamus, U.S. Supreme Court, October Term, 1990. While the petition was denied, one of the Court's clerks did recommend that the petition be granted, suggesting that the arguments might be favorably received. *Papers of Justice Marshall* June 13, 1991 Conference List 2, Sheet 5, p. 11 (Reproduced from the Collections of the Manuscript Division, Library of Congress).

[31] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[32] *McMann v. Richardson*, 397 U.S. 759 (1970); *Strickland v. Washington*, 466 U.S. 668 (1984).

[33] *Evitts v. Lucey*, 469 U.S. 387 (1985)

[34] *See Penson v. Ohio*, 488 U.S. 75, 85 (1988) (quoting *evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful.'").

[35] *See supra* note 10 and accompanying text.

[36] 350 U.S. 91 (1955).

[37] 333 U.S. 571 (1948).

[38] *Michel*, 350 U.S. at 93 (quoting *Parker*, 333 U.S. at 574).

[39] *Parker*, 333 U.S. at 575.

constitutional issues] heard and determined by the state court."[40] Therefore, they violate the defendant's right to due process.[41]

The Supreme Court's holding in *Pennsylvania v. Finley*[42] offers additional support for the argument that the procedures governing direct state appeals must allow defendants the opportunity to raise and preserve all meritorious issues. In *Finley* the Court held that the constitutional right to counsel did not extend beyond the first appeal of right.[43] Therefore, Pennsylvania was not obligated to provide counsel for an indigent defendant in a postconviction proceeding.[44] In distinguishing between direct appeal and subsequent appeals, the Court relied on the assumption that during the appeal of right, where counsel was constitutionally mandated, all meritorious issues would be raised and resolved.[45] Thus, during any future challenges, the defendant would not need further assistance of counsel since a complete record was already established during the first appeal.[46]

By effectively limiting the defendant's opportunity to develop such a complete record on an appeal of right, the Virginia rules contradict the implicit assumption of the Court in *Finley*. Thus, in Virginia, appellants are denied meaningful access to the court during direct appeal because they are prevented from litigating all of their claims of error. Further, any subsequent reliance on this record may also prove to be incomplete. To preserve the assumption made by the court in *Finley* when discussing the role and necessity for counsel, Virginia must permit defendants to fully litigate all meritorious issues during direct appeal.

3. Complete appellate review is necessary in order to preserve the reliability of convictions, as required by procedural due process, and to preserve meaningful review as required by the prohibition against cruel and unusual punishment.

The United States Supreme Court has explicitly stated that "direct appeal is the primary avenue for review of a conviction or sentence."[47] When such an appeal "comes to an end, a presumption of finality and legality attaches to the conviction and sentence."[48] By preventing all potential claims from being heard and decided on the merits, Virginia's procedural rules render this presumption false and undermine the reliability of the appellate judgement. Thus, these rules violate the procedural due process rights of defendants in the Commonwealth.

According to the test set out in *Ake v. Oklahoma*,[49] Virginia should not be permitted to adopt any procedural rules that prevent appellate courts from fully reviewing all arguable errors in a capital case. In *Ake*, the Court applied a three-part test to determine whether a state procedure was required by procedural due process in order to protect the rights of a criminal defendant.[50] The Court weighed the interests of the defendant with those of the state in order to determine "the probable value of the additional . . . safeguards . . . and the risk of . . . erroneous deprivation of the affected interest" should those safeguards not be provided.[51]

The Court continued by stating that when a defendant's life or liberty are at stake, the "private interest in the accuracy of a criminal proceeding . . . is almost uniquely compelling."[52] The state also has an interest in ensuring the accuracy of criminal adjudications. While the state may also have an interest in expediency[53] which would justify the adoption of rules limiting the length of appellate briefs, ultimately these interests must yield to those intended to protect the defendant and the accuracy of the appellate adjudication.

In *Ake* the Court balanced the interests of the state and the individual defendant in order to determine whether an **additional** procedure was required in order to safeguard the rights of that defendant.[54] In contrast, in the context of the "deathtrap," the *Ake* test may be applied to determine whether Virginia's existing procedural rules **should be suspended** in order to safeguard the interests of capital defendants. Similar to the state interest identified in *Ake*, the Virginia rules could also be seen as furthering the Commonwealth's desire for the expedient adjudication of capital cases.[55] However, the Virginia rules potentially deprive defendants of the opportunity to raise colorable claims of error which could overturn a capital conviction or sentence and thus save that defendant's life. Noting the holding in *Ake*, it follows that a capital defendant's interest in life and liberty coupled with the Commonwealth's interest in the fair and accurate adjudication of cases should **far outweigh** any interest the Commonwealth might have in maintaining expedient adjudications. Under such an analysis, procedural due process requires that the Commonwealth be barred from applying the Virginia procedural rules in capital cases.

V. CONCLUSION

The recent decisions of the Supreme Court of Virginia clearly indicate that the court will continue to interpret Rules 5:17(c) and 5:26 strictly in order to default claims by capital defendants. To avoid losing

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[40] *Michel*, 350 U.S. at 93 (1955) (quoting *Parker*, 333 U.S. at 574).

[41] The Supreme Court has similarly struck other state procedures that presented "unreasonable obstacles in the way of" defendants attempting to raise valid federal issues. *See Davis v. Wecshler*, 263 U.S. 22 (1923) (holding that defendant did not waive federal rights by appearing at state court to litigate venue and jurisdictional issues, despite state procedures holding to the contrary).

[42] 481 U.S. 551 (1987).

[43] *Id.* at 555.

[44] *Id.* at 554.

[45] *Id.* at 557 (applying the Court's holding in *Ross v. Moffitt*, 417 U.S. 600, 614-15 (1974), to hold that the indigent defendant was provided with meaningful access to the court, on discretionary review through "the defendant's access to the trial record and the appellate briefs and opinions").

[46] *Id.* at 557.

[47] *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

[48] *Id.*

[49] 470 U.S. 68, 77 (1985).

[50] *Id. See also Little v. Streater*, 452 U.S. 1, 6 (1981); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

[51] *Ake*, 470 U.S. at 77.

[52] *Id.* at 78.

[53] Under an appeal of right involving a capital sentence, the Supreme Court of Virginia is required to review the complete trial record to determine whether the jury's decision was arbitrary or prejudicial, and whether it is proportional to the resulting sentences in other similar cases. Va. Code Ann. § 17-110 (1990). By limiting the length of appellate briefs and thus the number of meritorious issues the appellant can identify for the court, the court must be more comprehensive in its review of the trial court's record since arguably meritorious issues may exist that neither party chose to identify. Without these restrictions, the court's independent review should be facilitated since presumably, defense counsel, in the process of identifying all potentially meritorious issues, will also identify many of the issues the court is required to identify. Therefore, abandoning the rules that limit the length of appellate briefs will lead to the *more* efficient adjudication of capital cases.

[54] The indigent defendant in *Ake* asserted a procedural right to have access to a court-appointed psychological expert. *Ake*, 470 U.S. at 73.

[55] The Supreme Court of Virginia has never explicitly identified the purpose of the procedural rules that comprise the "deathtrap" or their reasons for such strict enforcement.

claims to the "deathtrap," defendants should first ask the state court to exercise its discretion and provide relief from the rules of the "deathtrap." Should this relief be denied, defendants must object to the enforcement of these rules and list the particular claims that they will be prevented from raising. Both the challenge to the Virginia rules and the reference to particular claims at risk for default must be properly federalized.

Through these efforts, defendants may be able to preserve both their substantive claims for future federal review and their challenge to the validity of the Virginia rules themselves. When these claims, supported by a clear record, are presented in the federal court system for review, it is hoped that the federal courts will grant capital defendants the relief from the "deathtrap" that the Supreme Court of Virginia refuses to provide.

LEAVING NO STONE UNTURNED: ALTERNATIVE METHODS OF DISCOVERY IN CAPITAL CASES

BY: TIMOTHY B. HEAVNER

The usual method of obtaining discovery in criminal cases in Virginia is by motion under Rule 3A:11 of the Rules of the Supreme Court of Virginia[1] and by motion for all exculpatory evidence in the possession of the Commonwealth, according to the requirements of *Brady v. Maryland*.[2] This article will discuss other tools which may be used in criminal discovery that are often overlooked and under-utilized by defense attorneys.

It is important to start this discussion with two caveats. First, the tools discussed in this article are not a substitute for the normal methods of discovery, but may be used to supplement that discovery and provide certain tactical advantages over these methods. Secondly, the use of all these tools of discovery should not replace, but merely be a component of a very thorough independent investigation by the defense of all of the facts involved in the capital case.

I. SUBPOENA DUCES TECUM

A subpoena duces tecum is available under Rule 3A:12 of the Rules of the Supreme Court of Virginia "for the production of writings or objects" that are "material to the proceedings and are in the possession of a person not a party to the action."[3] It is normally easy to determine what materials fit within the "writings and objects" requirement of this rule, thus there is no case law on this point in Virginia. There also has been little problem determining who is "a party to the action."[4] The most litigated element of this rule is that documents that are sought be "material to the proceedings." The leading case for determining materiality in the context of a subpoena duces tecum is *Cox v. Commonwealth*.[5] In this case the defendant, the Treasurer of the City of Fairfax, was charged with embezzlement and sought a subpoena duces tecum for the production of certain documents from four banks which contained information regarding the accounts of the City of Fairfax. The subpoena was issued but a large percentage of the requested documents were not provided to the defense by the banks. The defense then asked for a continuance, but the trial court determined that the requested documents were not "material."

On appeal Cox claimed that the lack of access to records material to her defense denied her the right "to call for evidence in her favor as guaranteed by the Constitution of Virginia."[6] The Supreme Court of Virginia agreed and stated that this right applied to the procurement of documentary evidence.

In response to the holding by the trial court that the documents sought by the defendant were not material to her case, the court established the standard of materiality to be applied in these situations. The court adopted the standard established by the United States Supreme Court in *United States v. Agurs*[7] and *Bowman Dairy Co. v. United States*,[8] which requires that "a substantial basis for claiming materiality exists" and that the materials in the hands of third parties "could be used at trial." If the records sought meet both of these requirements, they are the proper subject of a subpoena duces tecum. The court in *Cox* found that the trial court had erred, that the records were material, and that "denying the defendant access thereto violated her constitutional right 'to call for evidence in [her] favor.'"[9]

The Virginia Court of Appeals has further defined the limits of this standard. In *Farish v. Commonwealth* the court determined that a subpoena duces tecum "should not be used when it is not intended to produce evidentiary materials but is intended as a 'fishing expedition' in the hope of uncovering information material to the defendant's case."[10] In *Gibbs v. Commonwealth* the court clarified that the documents or objects obtainable by a subpoena duces tecum are not limited to those "that are admissible in evidence but may be issued for any writings or objects that are 'material to the proceedings.'"[11] The court's basis for this decision rests on a person's constitutional right "to call for evidence in his favor"[12] and the fact that this guarantee includes "the right to prepare for trial which, in turn, includes the right to interview material

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1 Va. Sup. Ct. R. 3A:11.

2 373 U.S. 83 (1963).

3 Va. Sup. Ct. R. 3A:12.

4 *See Patterson v. Commonwealth*, 3 Va. App. 1, 348 S.E.2d 285, 290 (1986) (question was raised whether the objects requested by a subpoena duces tecum were within the possession of the Commonwealth or a third party, but it was not necessary to decide this issue).

5 227 Va. 324, 315 S.E.2d 228 (1984).

6 *Cox v. Commonwealth*, 227 Va. 324, 326, 315 S.E.2d 228, 229 (1984). This right is established by Va. Const. art. I, § 8.

7 427 U.S. 97, 106 (1976).

8 341 U.S. 214, 221 (1951).

9 *Cox v. Commonwealth*, 227 Va. at 328-29, 315 S.E.2d at 230-31.

10 2 Va. App. 627, 630, 346 S.E.2d 736, 738 (1986).

11 16 Va. App. 697, 698, 432 S.E.2d 514, 515 (1993).

12 Va. Const. art. I, § 8. It is critically important that objection to a denial of a subpoena duces tecum also be made under the compulsory process clause found in the Sixth Amendment of the United States Constitution.