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*Capital Defense Journal (Capital Defense Digest)*  
Articles Index  
Volumes 1 - 8

**Vol. 1, No. 1 (1988)**

*Death is Different*

Sandra L. Fischer

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

*Meaningful Access Under Bounds*

Joseph M. Giarratano

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

*Capital Jury Selection in Virginia*

William S. Geimer, Director, Virginia Capital Case Clearinghouse

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

**Vol. 1, No. 2 (1989)**

*Virginia's Definition of Capital Murder*

James David Nave

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

*Imposing Death Under Virginia's Statutory Scheme*

Sandra L. Fischer

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

*Mitigation in Virginia Capital Cases*

Helen J. Bishop

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

*Mitigation: The Use of a Mental Health Expert in Capital Trials*

Elizabeth P. Murtagh

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

*Preparing Mitigation Prior to Guilt Phase*

Alan Chipperfield

The author, Mr. Chipperfield, a Washington & Lee Law School alumnus assigned to the homicide division of the Office of the Public Defender for the County of Duval in Jacksonville, Florida, stresses the advantages of preparing penalty phase mitigation evidence before the

guilt/innocence trial. Advance preparation may even help avoid a penalty trial altogether.

**Vol. 2, No. 1 (1989)**

*Constitutional Deficiencies of Virginia's 'Vileness' Aggravating Factor*

Juliette A. Falkner

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

*Restrictions on the State's Use of Mental Health Experts in Capital Trials*

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

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

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

Elizabeth A. Bennett

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

**Vol. 2, No. 2 (1990)**

*Critical Points in the Progress of a Capital Case*

Elizabeth A. Bennett

"In the progress of capital as compared with non-capital trials, there are points at which the capital trial presents unique challenges and responsibilities for defense counsel." Ms. Bennett identifies some of these issues, including mental mitigation assistance, the *Ake* motion, motion for appointment of an expert investigator or forensic specialist, the jury selection process, the discovery and development of mitigation evidence, publicity exposure, the penalty trial, jury instructions, and closing arguments.

*Capital Pretrial Motions: Added Dimensions*

Thomas W. Plimpton

Kerry D. Lee

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

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

Cary P. Mosely

Carolyn M. Richardson

In Virginia, the capital statutory scheme purports to narrow the class of death eligible persons by enumerating certain circumstances under which a homicide becomes capital murder. This article is a discussion of the elements of robbery, rape and abduction and their use as predicate offenses to a capital murder charge in Virginia.

*Post-Conviction Review of Death Sentences*

Juliette A. Falkner

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

## Vol. 3, No. 1 (1990)

*State Habeas in Virginia: A Critical Transition*

Catherine M. Hobart

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

*Perfecting the Record of a Capital Case in Virginia*

Robert L. Powley

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

*Ineffective Assistance of Counsel*

Thomas J. Marlowe

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

## Vol. 3, No. 2 (1991)

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

Matthew B. Crum

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

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

Otto W. Konrad

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

*Status of Supreme Court Case Law Helpful to Capital Defendants*

Steven K. Herndon

Ginger M. Jonas

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

## Vol. 4, No. 1 (1991)

*Litigating the 'Vileness' Factor*

Victor A. Lago

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

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

Anne E. McInerney

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

## Vol. 4, No. 2 (1992)

*The Current State of DNA Evidence*

Christopher J. Lonsbury

This article summarizes DNA testing technique prevailing in 1992 with the purpose of identifying the 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 mitigation 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 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 responsibility of the defense attorney to keep mitigating evidence miti-

gating. 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 mitigation 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 mitigation 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 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' 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, 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 indications 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; (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.

**Vol. 7, No. 1 (1994)***If at First You Don't Succeed: The Real and Potential Impact of Simmons v. South Carolina in Virginia*

Barbra Anna Pohl

Cameron P. Turner

The United States Supreme Court in *Simmons v. South Carolina* held that a jury must be instructed about a capital defendant's parole ineligibility if the prosecution intends to use future dangerousness as an aggravating factor at sentencing. This case has far-reaching implications for many capital defendants. The authors discuss *Simmons'* retroactivity, the case's application in Virginia, and the case's potential application to capital defendants who are eligible for parole.

**Vol. 7, No. 2 (1995)***Beating a Potential Deathtrap: How to Preserve the Appellate Record for Federal Review and Avoid Virginia's Procedural Default*

Kristopher E. Ahrend

This article discusses the potential "deathtrap" facing capital appellants in the Commonwealth and suggests what steps should be taken at direct appeal to be excepted from these procedural requirements and the federal grounds upon which objections should be made in order to successfully preserve those objections for subsequent federal habeas review.

*Leaving No Stone Unturned: Alternative Methods of Discovery in Capital Cases*

Timothy B. Heavner

In addition to Rule 3A:11 of the Rules of the Supreme Court of Virginia and *Brady* motions, there are many other avenues of discovery available to capital defense counsel. This article discusses other tools which may be used in criminal discovery that are often overlooked and under-utilized by defense attorneys.

*Burket v. Commonwealth: Don't Put All Your Defense Eggs in the Suppression Basket*

Jody M. Bieber

In *Burket v. Commonwealth*, a capital defendant pled guilty, reserving only his right to challenge his confession on appeal. Virginia courts can and do construe confession law in favor of the Commonwealth. When planning defense strategy, it should be assumed that confessions essential to the Commonwealth's case will be upheld on appeal. This article briefly examines how Virginia courts generally construe and apply the confession doctrines in capital cases.

*Not Holding the Balance Nice, Clear, and True: The Right to an Impartial Judge*

John M. DelPrete

The vast majority of judges in the Commonwealth of Virginia are competent individuals who impartially and diligently perform the duties of their judicial office. However, as is true of any large group of professionals, one will always encounter some who fail to uphold the standards of their profession. This article examines the federal constitutional right to an impartial judge, the standards for recusal, the administrative remedy available in Virginia, and federal statutory guidelines governing recusal. The article also discusses the various strategies and options available to defense counsel faced with a biased judge.

*The "New and Improved" Federal Death Penalty: A Brief Guide*

Peter F. Morgan

The passage of the Federal Death Penalty Act of 1994 substantially increased the number of federal capital crimes. There is a distinct possibility that the number of federal capital crimes requiring appointed or retained counsel in the Commonwealth will increase in the near future. Accordingly, this article analyzes the current state of federal death penalty law.

**Vol. 8, No. 1 (1995)***Virginia's New State Habeas: What Every Attorney Needs to Know*

Gregory J. Weinig

The Virginia legislature fundamentally changed the state habeas corpus system early in 1995. After an explanation of how the new system works procedurally, this article addresses administrative issues (such as retroactivity, how the new evidentiary hearings function, and what legal standards apply); how the new system affects the task of habeas counsel, particularly the impact on time needed for reinvestigation; and the new system's relation to important federal habeas issues.

**Vol. 8, No. 2 (1996)***Litigating Jury Issues in Capital Trials: Constitutional Law and Virginia Procedures*

Paula Dyan Effle

This article discusses techniques and strategies for challenging Virginia jury selection process. Effective *Batson* challenges and arguments challenging the jury array are explained.

*Maximizing Your Potential: The Effective Use of Co-Counsel in a Capital Case*

Courtney S. Townes

As any attorney who has defended a capital case well knows, defending a capital case is different. The severe and irrevocable nature of the death penalty places a heavy responsibility upon defense counsel. This article discusses why two counsel are needed and how they can work together to ensure maximum effectiveness in defense of their client.

*Taking the Offensive: Proactive Use of the Rules of Evidence*

Angela Dale Fields

This article looks at the concepts behind several federal rules of evidence and suggests how the rules can be creatively used to make criminal defense in Virginia more successful. Ms. Fields has drawn parallels throughout to Virginia evidence law and suggests how the federal rule concepts may be used in Virginia state courts.

*Challenging the Future Dangerousness Aggravating Factor*

Michael H. Spencer

This article dissects the language of section 19.2-264.4(C) of the Virginia Code and reveals the inherent inconsistencies in its framework. Additionally, it shows how to combat the Commonwealth's introduction and use of unadjudicated acts.

*What to Do When You're Ambushed By Undisclosed Evidence of Unadjudicated Acts to Show Future Dangerousness*

Douglas S. Collica

The use of undisclosed evidence of unadjudicated acts to show "future dangerousness" violates capital defendants' constitutional and statutory rights. The admission of such evidence deprives capital

defendants of notice, due process, the right to present rebuttal, effective assistance of counsel, and equal protection. Such admissions also contravene the Code of Virginia. This article explains the grounds upon which attorneys can challenge the admission of such evidence, and the objections attorneys can make in response to such admissions.

*Daubert and the Use of Experts in Virginia Capital Cases*

J. Conrad Garcia

In *Daubert v. Merrell Dow Pharmaceuticals*, the United States Supreme Court set forth a new test for the admissibility of scientific evidence. This article examines *Daubert* and how the decisions of the Supreme Court can be utilized in Virginia capital cases.

*DNA Evidence in Virginia*

Steven M. Johnson

This article serves as an update to Christopher Lonsbury's article, *The Current State of DNA Evidence*, in Volume 4, Number 2, of the *Capital Defense Digest*. It examines the PCR technique of DNA analysis, contains an update of Virginia DNA case law, and provides tactical advice for defense counsel.



**A WORD OF THANKS  
AND  
A CONTINUED APPEAL**

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

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