Capital Defense Journal

Volume 10 | Issue 2 Article 18

Spring 3-1-1998

DISPARATE APPLICATION OF TUE CONTEMPORARY OBJECTION RULE AND TILE "ENDS OF JUSTICE" EXCEPTION IN CAPITAL CASES

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DISPARATE APPLICATION OF THE CONTEMPORARY OBJECTION RULE AND THE "ENDS OF JUSTICE" EXCEPTION IN CAPITAL CASES

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I. Introduction

A fundamental principle of death penalty jurisprudence has been the idea that "death is different" from any other penalty that a state can impose. Because of this difference, courts have held that capital cases warrant the application of more stringent procedural safeguards than noncapital criminal cases. However, some courts seem to be doing just the opposite.[1] Instead of raising the level of procedural protection afforded in capital versus noncapital cases, courts are lowering it. Instead of "super due process,"[2] capital defendants simply get "speedy due process."

This article examines the disparate application of procedural default rules in capital cases in Virginia. Specifically, the article demonstrates that the "ends of justice" exception to the contemporaneous objection rule, which is routinely considered in noncapital cases, is neither applied nor even discussed in cases in which the defendant has been sentenced to death. The result is that Virginia enforces its procedural default rules most rigidly in the very cases in which they can potentially produce the most egregious harm.

II. The Principle that 'Death is Different'

The Supreme Court has repeatedly held that, because a death sentence is qualitatively different from any other penalty, the level of procedural protection required in capital cases is greater than that which is required in noncapital cases.[3] Perhaps the best statement of this rule is the following passage from Justice Stevens' opinion in *Woodson v. North Carolina*[4]:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[5]

In *Beck v. Alabama*,[6] the Court reaffirmed this standard, observing that "[a]s we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments."[7] In 1984, Justice Stevens noted that "every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense."[8]

In order to attain the enhanced level of reliability required in capital cases, procedural protections must be strictly enforced.[9] This enforcement, in turn, depends upon the careful review of capital trials by appellate courts. Because of the irrevocability of the death penalty, no error can be corrected once the sentence has been carried out. Therefore, the requirement of heightened reliability should mean that procedural default rules are enforced less strictly in capital than in noncapital cases.[10]

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[1]Diane Wells, *Federal Habeas Corpus And The Death Penalty: A Need For A Return To The Principles Of Furman.* 80 J. CRIM. L. & CRIMINOLOGY 427, 448-50 (1989). The author concludes that the United States Supreme Court's willingness to retreat from its earlier pronouncements that capital defendants are entitled to greater procedural protections "reflect the impatience, expressed by some members of the Court, with lengthy execution delays attributable to federal habeas corpus proceedings." Wells, at 450.

[2]Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections On Two Decades Of Constitutional Regulation of Capital Punishment,* 109 HARV. L. REV. 355, 360 n.12 (1995).

[3]*Lockett v. Ohio,* 438 U.S. 586 (1978) (holding that jurors must be allowed to consider all mitigating circumstances); *Beck v. Alabama,* 447 U.S. 625 (1980) (holding that the jury must be instructed on lesser included offenses); *Woodson v. North Carolina,* 428 U.S. 280 (1976) (holding mandatory death penalty for first degree murder unconstitutional). Wells, *supra* note 1, at 448, n.172.

[4]428 U.S. 280 (1976).

[5]*Woodson,* at 305.

[6]447 U.S. 625, 637 (1980).

[7]James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies,* 79 MARQ. L. REV. 1, 20, n.50 (1995).

[8]*Spaziano v. Florida,* 468 U.S 447, 468 (Stevens, J. concurring in part and dissenting in part).

[9]*See Eddings v. Oklahoma,* 455 U.S. 104, 118 (1982) ("[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake."); *Proffitt v. Wainwright,* 685 F.2d 1227, 1253 (11th Cir. 1982) (O'Connor, J. concurring) ("the view, once prevalent, that the procedural requirements applicable to capital sentencing are no more rigorous than those governing noncapital sentencing decisions ... is no longer valid.") Wells, *supra* note 1, at 448-49, n.174, 178.

[10]In a related context, one author wrote that "[t]his realization that 'death is different' also applies to the theory that courts should exercise more flexibility in granting federal habeas review when a life is at stake." Wells, *supra* note 1, at 448.

Accordingly any exceptions to the rules should be applied more liberally.[11]

Adherence to this principle by Virginia courts would mean that the contemporaneous objection rule would be less rigidly enforced in capital cases than it is in noncapital cases. One way of accomplishing this would be to relax the standard for applying the ends of justice exception. This would allow the courts to hear potentially meritorious claims that were not raised at trial.

In practice, however, courts in Virginia usually do just the opposite. While the courts routinely consider the ends of justice exception when applying the contemporaneous objection rule in noncapital cases, they routinely ignore the exception in capital cases. The result is that capital defendants get even less procedural protections than noncapital defendants.

III. The Contemporaneous Objection Rules in Virginia

In Virginia, the most common form of procedural default is the so-called contemporaneous objection rule.[12] There are actually two rules which deal with this issue. Rule 5:25 applies when a case comes before the Supreme Court of Virginia. The rule states that "[e]rror will not be sustained to any rulings of the trial court ... unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or **to attain the ends of justice.**"[13] For cases that come before the Virginia Court of Appeals, Rule 5A:18 states that "[n]o ruling of the trial court ... will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown **or to attain the ends of justice.**"[14] Of the two exceptions noted in the rules, the ends of justice exception is by far the most relevant to modern practice. "The 'good cause shown' exception has not been found to apply to any cases and was only once discussed, and that in 1927."[15]

[11]In 1990, the American Bar Association Task Force On Death Penalty Habeas Corpus recommended in its "Report to the House of Delegates" that state appellate courts review all claims of constitutional error not raised at trial under a "knowing, understanding, and voluntary waiver standard ... and have a plain error rule and apply it liberally with respect to errors of state law." Ira P. Robbins, *Toward A More Just And Effective System of Review In State Death Penalty Cases,* 40 AM. U. L. Rev. 1, 10 (1990).

[12]Alan W. Clarke, *Procedural Labyrinths And The Injustice Of Death: A Critique Of Death Penalty Habeas Corpus (Part Two),* 30 U. RICH. L. REV. 303, 363 (1996). In a review of all death-sentence cases in Virginia in which a procedural default rule was invoked, "[t]he contemporaneous objection rule was found to be the largest and most important group of procedurally defaulted issues in the cases reviewed." This author's independent research confirmed that conclusion.

[13]SUP. CT. RULES, Rule 5:25 (West 1997) (emphasis added) (formerly Rule 5:21.)

[14]SUP. CT. RULES, Rule 5A:18 (West 1997) (emphasis added.)

[15]Clarke, *supra* note 12, at 367 (*citation omitted*).

IV. The Ends of Justice Exception in Noncapital Criminal Cases

One of the earliest discussions of the applicability of the ends of justice exception in Virginia is contained in *Cooper v. Commonwealth.*[16] The defendant was convicted of raping a four year-old girl. On appeal, Copper challenged the admission of incriminating statements made during a post-indictment interrogation without the presence of counsel. Cooper was advised of his rights to remain silent and to have counsel present and waived them.[17] He did not object to the admission of this evidence at trial.[18] The question before the court was whether Cooper was procedurally barred from raising this issue on appeal because of the contemporaneous objection rule, or whether the ends of justice exception should be applied to allow the court to consider the claim of error. To resolve this question, the court examined how the ends of justice exception had been interpreted by several prominent authorities in criminal law. The court first quoted the following passage from *American Jurisprudence, Appeal and Error:*

> In the exercise of its power to do so, an appellate court will consider questions not raised or reserved in the trial court when it appears necessary to do so in order to meet the ends of justice or to prevent the invasion or take notice of errors appearing upon may, as a matter of grace, ... take notice of errors appearing upon the record which deprived the accused of substantial means of enjoying a fair and impartial trial, ...[19]

The court then cited *Wharton's Criminal Law and Procedure*:

> An appellate court may, however, take cognizance of errors, though not assigned, when they relate to the jurisdiction of the court over the subject matter, are fundamental, or when such review is essential to avoid grave injustice or prevent the denial of essential rights.[20]

After reviewing the record before it, the court concluded that because "under the facts and circumstances of this case the defendant was deprived of his constitutional right to the assistance of counsel," the ends of justice exception must be applied, and the conviction set aside.[21]

[16]205 Va. 883, 140 S.E.2d 688 (1965).

[17]*Cooper*, 205 Va. at 891, 140 S.E.2d at 694.

[18]*Id.* at 884, 140 S.E.2d at 692.

[19]*Cooper,* 205 Va. at 889, 1405 S.E.2d at 693 (*quoting 3 Am.Jur., Appeal and Error*, § 248, p. 33).

[20]*Id.* at 889, 1405 S.E.2d at 693 (*quoting Wharton's Criminal Law and Procedure,* Vol 5, § 2253, p. 509).

[21]*Id.* at 892, 140 S.E.2d at 694.

A more narrow formulation of the rule was stated in *Mounce v. Commonwealth.*[22] Mounce was convicted of felonious unauthorized use of an automobile.[23] On appeal, Mounce claimed that the Commonwealth had failed to prove that the value of the car exceed $200.[24] The court of appeals held that because defense counsel had not made a motion to strike or a motion to set aside the verdict at trial, the issue was barred under Rule 5A:18.[25] The court considered the application of the ends of justice exception, but decided not to apply it to this case.[26] It was not enough, according to the court, for the defendant to show that the Commonwealth had failed to prove an element of the offense. Citing *Ryan v. Commonwealth*[27] for the proposition that the exception only applied when the defendant could show that a miscarriage of justice had "clearly occurred," the court in *Mounce* ruled that the record must "affirmatively [show] that a miscarriage of justice has occurred, not . . . merely . . . that a miscarriage **might** have occurred."[28]

Similarly, in *Redman v. Commonwealth,*[29] the court held that, in order to successfully invoke the ends of justice exception, the defendant must show either: 1) that he or she was convicted of conduct which was not criminal; or 2) that an element of the offense did not occur.[30] The Commonwealth's failure to present evidence to prove one or more elements of the offense, in this case, "demonstrates only that a miscarriage of justice **may** have occurred, not that a miscarriage of justice did occur."[31]

A broader interpretation of the ends of justice exception was adopted in *Brown v. Commonwealth.*[32] The defendant was convicted of burglary. At the sentencing hearing, the trial court determined Brown's sentence in reliance on a different burglary than the one for which he was convicted. Brown's counsel made no objection at the time of sentencing.[33] In deciding whether or not to consider this issue on appeal, the court first looked to the underlying purposes of the contemporary objection rule.

> The laudatory purpose behind Rule 5A:18, and its equivalent Supreme Court Rule 5:25 . . . is to require that objections be promptly brought to the attention of the trial court with sufficient specificity that the alleged error can be dealt with and timely addressed and corrected when necessary. The rules promote orderly and efficient justice and are to be strictly enforced except where the error has resulted in manifest injustice. . . . Because our function is to review the rulings of the trial court, rather than superintend the proceedings, we will notice error for which there has been no timely objection only when necessary to satisfy the ends of justice.[34]

Significantly, the court implied that consideration of the ends of justice exception was mandatory whenever the contemporaneous objection rule potentially applied. "Whether we apply the bar of Rule 5A:18 or invoke the ends of justice exception, we **must** evaluate the nature and effect of the error to determine whether a clear miscarriage of justice occurred."[35] In reaching this question, the Court of Appeals in *Brown* held that trial courts "must determine whether the error clearly had an effect upon the outcome of the case," and whether the error "involve[d] substantial rights."[36] The court went on to state that "[t]he language in *Mounce* that to avail himself of the rule the defendant had to affirmatively show [that] 'a miscarriage of justice [has] occurred, not . . . that a miscarriage might have occurred' requires that the error be clear, substantial, and material."[37] The result in *Mounce,* according to the court in *Brown,* was justified because, although there was no direct evidence to establish the necessary element (i.e.— the value of the car), there was sufficient circumstantial evidence to support the jury's verdict.[38] Thus, the court "could not say that the finding as to value was clearly erroneous."[39]

The construction of the ends of justice exception announced in *Brown* was reaffirmed in *Campbell v. Commonwealth.*[40] The defendant, a judge, was convicted of forging a public record. The court found that the jury instruction was an "incorrect statement of law" regarding intent.[41] Although the defendant had failed to object to this instruction at trial, the court applied the ends of justice exception and set aside the conviction because the jury could have convicted the defendant for otherwise innocent behavior. The court held that, contrary to the interpretation advanced by the Commonwealth, *Mounce* does not mean that the ends of justice provision applies "only if the error 'invariably works a miscarriage of justice."[42] Instead, the court cited the standard announced in *Brown,* holding that the error must be "clear, substantial, and material."[43] The concurring opinion, written by Judge Barrow, emphasized that the ends of justice exception must be applied in light of the purposes underlying the contemporaneous objection rule itself.[44] Judge Barrow reasoned that when a party already

[22] 4 Va.App. 433, 357 S.E.2d 742 (1987).
[23] *Mounce,* 4 Va.App. at 434, 357 S.E.2d at 743.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 435-37, 357 S.E.2d at 744.
[27] 219 Va. 439, 247 S.E.2d 698 (1978).
[28] *Mounce,* 4 Va.App. at 436, 357 S.E.2d at 744 (*emphasis in original*).
[29] 25 Va.App. 215, 487 S.E.2d 269 (1997).
[30] *Redman,* 25 Va.App. at 221-24, 487 S.E.2d at 272-74.
[31] *Id.* at 223, 487 S.E.2d at 273 (*emphasis in original*).
[32] 8 Va.App. 126, 380 S.E.2d 8 (1989).
[33] *Brown,* 8 Va.App. at 129, 380 S.E.2d at 9.
[34] *Id.* at 131, 380 S.E.2d at 10 (*citation omitted*).
[35] *Id.* (*emphasis added*).
[36] *Id.*
[37] *Brown,* 8 Va.App. at 132, 380 S.E.2d at 11.
[38] *Id.*
[39] *Id.*
[40] 14 Va.App. 988, 421 S.E.2d 652 (1992).
[41] *Campbell,* 14 Va.App. at 990, 421 S.E.2d at 653.
[42] *Id.* at 993, 421 S.E.2d at 655 (*citation omitted*).
[43] *Id.* (*quoting Brown,* 8 Va.App. at 132, 380 S.E.2d at 11.)
[44] *Id.* at 996, 421 S.E.2d at 657.

has a strong incentive to object at the time the ruling is issued, the goals of the rule are already satisfied.[45] Therefore, in those instances, the ends of justice exception should be applied whenever the alleged error is "clear, substantial and material."[46]

Another case which implied that consideration of the ends of justice exception is mandatory whenever the contemporaneous objection rule is potentially triggered was *Johnson v. Commonwealth.*[47] The defendant was convicted of aggravated sexual battery of a fourteen year-old boy. On appeal, Johnson claimed that there was insufficient evidence to show that force was used.[48] Because he had failed to raise this issue at trial, Rule 5A:18 barred consideration of the issue by the court of appeals unless the court applied the ends of justice exception to the rule. After citing the standard announced in *Mounce,* the court stated that "the applicability of this exception cannot be determined on the mere assertion of the general rule, but **necessarily** requires our review of the record."[49] After examining the record in its entirety the court concluded that "the evidence . . . does not support [the] conviction . . . ."[50] Therefore, the court was convinced that "a miscarriage of justice [had] occurred."[51]

The Supreme Court of Virginia followed a similar approach in *Jiminez v. Commonwealth.*[52] The defendant challenged both the sufficiency of the evidence and the jury instructions given at trial. The court noted the lack of a contemporaneous objection, and stated that "consequently, we must" consider whether to invoke Rule 5:25, . . . or to apply the rule's exception, in order 'to attain the ends of justice.'"[53] The court examined the record and found that the Commonwealth had failed to prove all of the elements of the offense and the jury instruction had failed to inform the jury that those elements must be proved.[54] The court stated that the "purpose of Rule 5:25 is 'to protect the trial court from appeals based upon undisclosed grounds, to prevent the setting of traps on appeal, to enable the trial judge to rule intelligently, and to avoid unnecessary reversals and mistrials.'"[55] The rule is meant "to promote, not hinder, the administration of justice."[56] In this case, the statute required the Commonwealth to show that the defendant had received written notice of a request to return an advance of money. The jury instruction omitted this element of the offense, and the Commonwealth did not produce any evidence to establish it. Even though the evidence showed that Jiminez had received actual notice, the court held that the ends of justice required the conviction to be set aside because the defendant was convicted of a "non-offense."[57] Significantly, the court held that, even when the defense makes no objection and proffers no alternative instructions at trial, the trial court has an affirmative duty in every case to instruct the jury on vital principles. Failure to do so can be reversible error, notwithstanding the contemporaneous objection rule.[58]

The Supreme Court of Virginia also applied the ends of justice exception in *Yarborough v. Commonwealth.*[59] The defendant was convicted of the use of a firearm in the commission of a felony. The victim testified that the defendant said, "[t]his is a stickup," and that she saw something protruding from the defendant's pocket and thought it was a gun.[60] No gun was ever found. The court held that evidence which only showed that the defendant "might" have had a gun was insufficient.[61] The Commonwealth must prove that there actually was a gun. Therefore, the court set aside the conviction despite the fact that the defendant had failed to raise this objection at trial or to assign error to the instruction on appeal.[62]

Whether it is ultimately applied or not, it is clear that the ends of justice exception is routinely considered by both the Virginia Court of Appeals and the Supreme Court of Virginia in noncapital criminal cases when the contemporaneous objection rule is invoked.[63] Indeed, several decisions suggest that consideration of the exception is mandatory.

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[45] *Campbell,* 14 Va.App. at 996, 421 S.E.2d at 657.

[46] *Id.* at 997, 421 S.E.2d at 657 (*quoting Brown,* 8 Va.App. at 132 380 S.E.2d at 11). According to Judge Barrow, an error is "clear" if it is "apparent under existing statutory or case law without the necessity of further judicial interpretation and must not have been acquiesced in . . . by the complaining party;" an error is "substantial" if it "affect[s] an essential element of the trial;" and an error is "material" if it is "important enough to affect the outcome of the trial." *Id.* at 997-98, 421 S.E.2d at 657-58.

[47] 5 Va.App. 529, 365 S.E.2d 237 (1988).

[48] *Johnson,* 5 Va.App. at 530, 365 S.E.2d at 238.

[49] *Id.* at 532, 365 S.E.2d at 239 (*emphasis added*).

[50] *Id.* at 534, 365 S.E.2d at 240.

[51] *Id.*

[52] 241 Va. 244, 402 S.E.2d 678 (1991).

[53] *Jiminez,* 241 Va. at 246, 402 S.E.2d at 678.

[54] *Id.* at 247, 402 S.E.2d at 680.

[55] *Id.* at 248-49, 402 S.E.2d at 679 (*quoting Fisher v. Commonwealth,* 236 Va. 403, 414, 374 S.E.2d 46, 52 (1988), *cert. denied,* 490 U.S. 1028 (1989)).

[56] *Jiminez,* 241 Va. at 249, 402 S.E.2d at 680.

[57] *Id.* at 251, 402 S.E.2d at 681.

[58] *Id.* at 250-51, 402 S.E.2d at 681. *See also Wooden v. Commonwealth,* 222 Va. 758, 284 S.E.2d 811 (1981) (also holding that tendering an alternative jury instruction was sufficient to satisfy the rule, even though no specific objection was made to the instruction actually given).

[59] 27 Va. 215, 441 S.E.2d 342 (1994).

[60] *Yarborough,* 27 Va. at 216, 441 S.E.2d at 343.

[61] *Id.* at 218-19, 441 S.E.2d at 344.

[62] *Id.* at 219, 441 S.E.2d at 344.

[63] *See also White v. Commonwealth,* 3 Va.App. 231, 348 SE.2d 866 (1986) (ends of justice exception considered but rejected); *Glasgow v. Peatross,* 201 Va. 43, 109 S.E.2d 135 (1959) (exception applied to review jury instruction which was "hopelessly confusing and meaningless"); *Reed v. Commonwealth,* 6 Va.App. 65, 366 S.E.2d 274 (1988) (Commonwealth failed to negate defendant's good faith claim of bona fide right, therefore there was insufficient evidence of intent to commit criminal trespass).

V. The Ends of Justice Exception in Capital Cases

As the following cases illustrate, the treatment of the ends of justice exception in capital cases stands in marked contrast to the approach outlined above. In fact, when the defendant in a case has been sentenced to death, the ends of justice exception is treated as if it does not even exist.

Quintana v. Commonwealth,[64] for example, is typical of the way in which the contemporaneous objection rule is applied by the Supreme Court of Virginia in capital cases. In a footnote, the court noted that there were 28 assignments of error which were procedurally defaulted.[65] Without any discussion at all, the court simply stated that "[a]pplying Rules 5:20(b) and 5:21 in accord with repeated precedent, we will not notice such matters."[66]

Similar treatment was given to the defendant in *Bunch v. Commonwealth.*[67] Bunch was convicted of capital murder in the commission of a robbery. On appeal, he challenged the validity of a search warrant on the basis that he had not been permitted to inspect the supporting affidavit. The court dismissed his claim in one sentence, citing Rule 21.[68]

This standard is not relaxed when a defendant elects to proceed *pro se*, and thus does not have the benefit of the assistance of counsel at trial. In *Townes v. Commonwealth,*[69] for example, the defendant argued that, because he represented himself at trial, he should be excused from the application of Rule 5:25.[70] The Supreme Court of Virginia disagreed. The court listed ten assignments of error which were waived because of a failure to object at trial. One of the alleged errors was that the trial court had failed to instruct on lesser included offenses, as required by *Beck v. Alabama.*[71] Townes also claimed that the prosecution failed to turn over exculpatory evidence and that the trial court erred in excluding tape recordings of prior inconsistent statements by certain witnesses and in excluding evidence that Townes was ineligible for parole.[72] The court did not consider any of these issues on the merits, nor did it examine the record to determine whether the ends of justice exception should be applied. In fact, the court made no mention of the ends of justice exception whatsoever. It simply stated that it would "not consider those matters to which Townes failed to make proper objection in the trial court."[73] By way of consolation, the court noted that while Townes "may not have preserved every possible point for appeal, his trial performance was surprisingly competent for one lacking formal legal training."[74]

In several cases, the Supreme Court of Virginia has even quoted Rule 5:25 with the portion referring to the ends of justice exception conspicuously left out. In *Chichester v. Commonwealth,*[75] for example, the court stated that "Rule 5:25 provides: Error will not be sustained to any ruling of the trial court . . . before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling."[76] The rest of that sentence is omitted. Predictably, the court went on to hold that "[s]ince Chichester did not object to the trial court's rulings when they were made, we will not consider" his assignments of error.[77] The identical quotation of Rule 5:25 was produced in *Swann v. Commonwealth,*[78] before the court summarily dismissed over ten claims of error with absolutely no consideration of the issues on the merits. Intentionally or not, these opinions give the erroneous impression that there is no such thing as an ends of justice exception to Rule 5:25, at least not one that applies in capital cases.

Another example of the Supreme Court of Virginia's unbending application of the contemporaneous objection rule is *Breard v. Commonwealth.*[79] The defendant moved for a mistrial after highly prejudicial victim impact evidence was admitted at the guilt phase, but because the motion was not timely, the court held that Breard was barred from challenging the trial court's denial of the motion on appeal.[80] Once more, the ends of justice exception was treated as if it did not exist.

The Supreme Court of Virginia's abandonment of the ends of justice exception is perhaps most galling in cases where the defendant's claims of error, at least on their face, make a strong showing of reversible constitutional error. In *Chandler v. Commonwealth,*[81] for instance, the defendant alleged that the trial court erred in responding to a question the jury asked pertaining to parole eligibility. The trial court instructed the jury not to consider the issue.[82] The previous year, in *Simmons v. South Carolina,*[83] the United States Supreme Court held that, when the defendant's future dangerousness was at issue in a capital sentencing proceeding, the jury must be instructed on parole eligibility. In

[64] 224 Va. 127, 295 S.E.2d 643 (1982).

[65] *Quintana,* 224 Va. at 134, 295 S.E.2d at 645, n.1.

[66] *Id.* Rule 5:21 is the former version of Rule 5:25.

[67] 225 Va. 423, 304 S.E.2d 271 (1983).

[68] *Bunch,* 225 Va. at 435, 304 S.E.2d at 278.

[69] 234 Va. 307, 362 S.E.2d 650 (1987).

[70] *Townes,* 234 Va. at 319, 362 S.E.2d at 656. Townes argued that the "good cause" exception to Rule 5:25 should apply. *Id.*

[71] 447 U.S. 625 (1980) (holding that failure to grant instructions on lesser included offenses was reversible error in a capital case).

[72] *Townes,* 234 Va. at 319-20, 362 S.E.2d at 657. *See also Graham v. Commonwealth,* 250 Va. 79, 87-88, 459 S.E.2d 97, 101-102 (1995) (also dismissing a *Brady* claim by summarily citing Rule 5:25).

[73] *Id.* at 319, 362 S.E.2d at 657.

[74] *Id.* at 321, 362 S.E.2d at 658. *See also O'Dell v. Commonwealth,* 234 Va. 672, 678-79, 364 S.E.2d 491, 494-95 (also routinely applying contemporaneous objection rule to a pro se defendant with a conclusory statement and a cite to Rule 5:25).

[75] 248 Va. 311, 448 S.E.2d 638 (1994).

[76] *Swann,* 248 Va. at 320, 448 S.E.2d at 645.

[77] *Id.*

[78] 247 Va. 222, 229, 441 S.E.2d 195, 200 (1994).

[79] 248 Va. 68, 445 S.E.2d 670 (1994).

[80] *Breard,* 248 Va. at 81, 445 S.E.2d at 678.

[81] 249 Va. 270, 445 S.E.2d 219 (1995).

[82] *Chandler,* 249 Va. at 280-81, 455 S.E.2d at 225.

[83] 512 U.S. 154 (1994).

Chandler, the Supreme Court of Virginia held that, because the defendant had failed to object to the trial court's answer at the time it was given, he was barred from raising the issue on appeal.[84] Once again, the court made no mention of the ends of justice exception.

Another potentially serious constitutional error was ignored in *King v. Commonwealth.*[85] The defendant challenged the admission of incriminating statements which had allegedly been elicited after the police denied his request for counsel, in violation of *Edwards v. Arizona.*[86] The court held that, because the defendant had not objected to the admission of the evidence on that ground at trial, the issue was procedurally barred on appeal. The ends of justice exception was neither mentioned nor discussed, despite the fact that substantial rights were at issue.[87]

Substantial rights were also at issue in *Coppola v. Commonwealth.*[88] The defendant alleged that the trial court's instruction unconstitutionally shifted the burden of proof on the element of intent to the defendant. The challenged instruction was similar to one that the United States Supreme Court had ruled unconstitutional in *Sandstrom v. Montana,*[89] which was decided after the defendant's trial but before his appeal. Without considering whether, particularly in light of *Sandstrom*, the ends of justice would be served by allowing the defendant to raise this issue on appeal, the Supreme Court of Virginia simply ruled that, because no objection was made at trial, the issue was barred on appeal.[90]

In *Stamper v. Commonwealth,*[91] the court again upheld a potentially erroneous death sentence without any examination of the record to determine whether the ends of justice required that the defendant's claim be heard on appeal. Stamper alleged that the trial court's answer to a question posed by the jury violated the rule that only the 'triggerman' can receive a death sentence.[92] Without addressing the merits of Stamper's claim, the court simply stated that "[t]he objection on this ground, not asserted in the trial court, comes too late."[93]

The only capital case in which the ends of justice exception has ever been applied is *Ball v. Commonwealth.*[94] The defendant was convicted of capital murder in the commission of a robbery, but received a life sentence.[95] On appeal, he challenged his conviction on the ground that the trial court erred in refusing to grant an instruction he proffered at trial.[96] The court found that, although the defendant had moved to strike the Commonwealth's evidence at trial, he had not raised the proffered jury instruction as a ground for his motion.[97] Therefore, the issue was barred on appeal under then Rule 5:21. However, in this case the court carefully examined the evidence and found that there was "no evidence to support a capital murder instruction" because the evidence showed that the robbery had not been consummated.[98] Since the defendant committed an attempted robbery rather than a completed robbery, the court applied the ends of justice exception and overturned the conviction.[99] The court held that the ends of justice exception was applicable in this case because "Ball has been convicted of a crime which under the evidence he could not properly be found guilty."[100]

The only other capital case in which the ends of justice exception received substantial consideration was *Hairston v. Commonwealth.*[101] Like Ball, Hairston was convicted of capital murder but received a life sentence instead of the death penalty. The contemporaneous objection rule was applied to bar several claims on appeal. Significantly, although the ends of justice exception was not applied, the court did devote two full paragraphs of discussion to its applicability.[102]

VI. Analysis

"Because issues that have been procedurally defaulted are not noticed by Virginia, and are therefore not discussed, it is impossible to be certain of the exact number of meritorious cases that would have warranted reversal but for a procedural-default."[103] What does appear certain, however, is that Virginia courts apply two different standards for determining whether to enforce the contemporaneous objection rule or apply the ends of justice exception. When the defendant has been sentenced to a penalty less than death, courts "must" consider whether the error was clear, material and affected substantial rights.[104] On the other hand, when the defendant has been sentenced to death, Virginia courts have effectively held that the ends of justice exception does not apply, and should not even be considered. In sum, if a defendant has been sentenced to death, any objections which

[84] *Chandler,* 249 Va. at 281, 455 S.E.2d at 226.

[85] 243 Va. 353, 416 S.E.2d 669 (1992)...

[86] 451 U.S. 447 (1981) (holding that police-initiated questioning subsequent to a request for counsel was unconstitutional).

[87] *King,* 243 Va. at 358, 416 S.E.2d at 671.

[88] 222 Va. 369, 282 S.E.2d 10 (1981).

[89] 442 U.S. 510 (1978) (holding that the trial court erred in instructing the jury that the law presumes a person to intend the ordinary consequences of his voluntary acts).

[90] *Coppola,* 222 Va. at 372, 282 S.E.2d at 11.

[91] 220 Va. 260, 257 S.E.2d 808 (1979).

[92] The judge instructed the jury that it was irrelevant whether anyone else was involved, the only issue was whether Stamper "was involved" in the killing. *Stamper,* 220 Va. at 275, 257 S.E.2d at 818.

[93] *Id.* at 275, 257 S.E.2d at 819.

[94] 221 Va. 754, 273 S.E.2d 790 (1981).

[95] *Ball,* 221 Va. at 755-56, 273 S.E.2d at 791.

[96] *Id.* at 756, 273 S.E.2d at 791.

[97] *Id.* at 758, 273 S.E.2d at 792-93.

[98] *Id.* at 757, 273 S.E.2d at 792.

[99] *Ball,* 221 Va. at 758-59, 273 S.E.2d at 793.

[100] *Id.* at 758-59, 273 S.E.2d at 793.

[101] 16 Va.App. 941, 434 S.E.2d 350 (1993).

[102] *Hairston,* 16 Va.App. at 944-45, 434 S.E.2d at 352-53.

[103] Clarke, *supra* note 12, at 374.

[104] *Johnson v. Commonwealth,* 5 Va.App. 529, 365 S.E.2d 237 (1988); *Jiminez v. Commonwealth,* 241 Va. 244, 402 S.E.2d 678 (1991); *Brown v. Commonwealth,* 8 Va.App. 126, 380 S.E.2d 8 (1989).

were not made at trial are procedurally barred on appeal in Virginia, no matter what.

Of course, no court has ever explicitly adopted the foregoing rule. In practice, however, the above paragraph accurately describes how the ends of justice exception is applied in Virginia. In noncapital cases, courts review the record and analyze the case law to determine whether the exception should apply. In capital cases, the general rule is that the ends of justice exception is effectively read out of the statute. It is treated as if it does not exist. Not only has the exception never been applied in a case in which a death sentence was challenged,[105] it has never even been discussed. When the ends of justice exception is mentioned at all, it is only in those rare instances when the defense specifically raises it on appeal.[106] Even in those cases, the court does not proceed with a full, or even cursory, analysis of the rule, its purposes, and its applicability to the record in the case at hand, as it routinely does in noncapital cases. Instead, the court simply states in conclusory language that the exception does not apply.

One explanation for the disparate treatment between capital and noncapital cases might be the fact that most of the appeals in noncapital cases are heard by the Virginia Court of Appeals, which applies Rule 5A:18, whereas all of the appeals in cases in which a death sentence has been imposed are heard by the Supreme Court of Virginia, applying Rule 5:25. However, the disparate treatment of capital cases cannot be satisfactorily explained either as a reflection of a difference in the two versions of the contemporaneous objection rule or as a product of the different personnel on the two courts. In the first place, the relevant language in the two rules is nearly identical. Second, even if the comparison is limited to only those cases decided by the Supreme Court of Virginia, the difference in treatment between capital and noncapital cases remains apparent.

This practice benefits the Commonwealth in two ways. First, it contributes to judicial economy. The burden on the supreme court is reduced because it is relieved from having to consider the merits of every issue raised on appeal. Rigid enforcement of contemporaneous objection rules also lessons the burden placed on trial courts, since some cases that might otherwise have to be retried because of clear, material errors affecting substantial rights will, under the current practice, be affirmed on appeal. Second, strict application of procedural default rules is one way of expediting the capital sentencing process. The fewer issues that are reviewed on the merits by appellate courts, the faster capital defendants will be ushered through the system to their eventual deaths.

These 'benefits', however, do not come without significant costs. Procedural default rules allow constitutional errors to go uncorrected. In some cases, this may result in the execution of the innocent. In others, it will result in an execution carried out after the deprivation of significant rights. Both instances are equally repugnant to our system of justice. In *Brown*, the court of appeals commented that "[t]he state's interest in prevailing at trial and in upholding the verdict on appeal must be tempered by its duty to work for a just, fair and accurate adjudication of criminal cases."[107] For reasons previously noted, this duty is even stronger in capital cases. As the court observed in *Brown*, the "integrity of our judicial system" is undermined when meritorious claims are dismissed with the routine application of the contemporaneous objection rule.[108] Furthermore, the continued erosion of procedural protections in capital cases "runs afoul of society's traditional sense of fairness and justice and ... espouse[s] the notion that a society committed to the sanctity of individual life is willing to sacrifice constitutional values in order to clear the way for death."[109]

The injustice of rigidly applying procedural default rules in capital cases is compounded by the fact that capital defendants are forced to suffer for the mistakes made by the attorneys provided by the state itself for their defense. As one author stated, "[t]he cost to justice of refusing to decide potentially meritorious claims in death-penalty cases is in the execution of persons whose cases might have been decided otherwise but for the ignorance or negligence of their lawyers in failing to properly raise and preserve the appropriate claims."[110] Another commentator observed that "[w]hile the concept of finality is desirable, using procedural defaults to attain this goal ... enables the state to benefit from the commingling of its own constitutional wrongdoing and the defense counsel's failure to raise these issues."[111]

These observations, together with the oft-cited constitutional principle that capital proceedings require heightened reliability and "super due process," strongly support the argument that Virginia courts should apply a more liberal formulation of the ends of justice exception in capital cases.[112] Even if this approach is rejected, however, it is difficult to conceive of a justifiable reason for providing even less procedural protection in capital cases, rather than more. Particularly illuminating are those cases in which the

[105] "[T]he Supreme Court of Virginia has never looked past a procedural-default to reverse a death sentence, ..." Clarke, *supra* note 12, at 367.

[106] This does not mean that the ends of justice exception is mentioned in every case in which the defense requests that it be applied, only that the exception has never been mentioned in a case when the defense has not specifically referred to it.

[107] 8 Va.App. 126, 133, 380 S.E.2d 8, 11 (1989).

[108] *Brown*, 8 Va.App. at 133, 380 S.E.2d at 11, n.3.

[109] Wells, *supra* note 1, at 489, n.58.

[110] Clarke, *supra* note 12, at 372.

[111] Wells, *supra* note 1, at 436-37.

[112] At one time, the Supreme Court of Virginia seemed to accept this view. In 1965, the court approvingly quoted a passage stating that "[t]he fact that questions are insufficiently raised will not preclude their consideration by the appellate court in a capital case ...." *Cooper*, 205 Va. 883, 884, 140 S.E.2d 688, 692 (*quoting 3 Am.Jur., Appeal and Error*, § 248, p. 33). Today, by refusing to even consider the application of the ends of justice exception in capital cases, the court has adopted an approach that is at polar opposites with this view.

court misquotes Rule 5:25 so that the ends of justice provision is conspicuously omitted. Whether this omission is deliberate or subconscious, it clearly reflects the prevailing attitude on the Supreme Court of Virginia today. When reviewing the validity of a death sentence, the only end the court apparently seeks to attain is the dismissal of any and all claims as quickly and easily as possible.

Theoretically, this persistent pattern of disparate application of the contemporaneous objection rule could provide a basis for a constitutional challenge to Virginia's capital sentencing scheme. Realistically, however, it is extremely doubtful that any court would be receptive to such an argument. No matter how persuasive the evidence, no court is likely to rule that the seven justices on the Supreme Court of Virginia are incapable of being objective in capital cases.

VII. Practical Implications

As a result of the Supreme Court of Virginia's current approach to the application of the contemporaneous objection rule in capital cases, capital defense attorneys should make a supreme effort at trial to preserve issues for appeal. However vehemently and persuasively one may argue that the approach followed by the Supreme Court of Virginia is wrong, unfair and unjust, such protestations are of little help to the client sitting on death row.

Nevertheless, even the most zealous, competent and conscientious attorneys will occasionally make mistakes. Therefore, it is important to construct an effective strategy for raising the ends of justice exception on appeal. Defense counsel should try to formulate arguments designed to convince the Supreme Court of Virginia to return to the standard of *Cooper v. Commonwealth,*[113] which would require the court to apply the exception in cases involving the deprivation of constitutional rights, as well as claims of actual innocence.[114] This approach is arguably consistent with the *Brown-Campbell- Jiminez*[115] line of cases, and is certainly consistent with the long-standing principal that capital cases warrant the application of more, rather than less, procedural protections than noncapital cases.

[113]205 Va. 883, 140 S.E.2d 688 (1965).

[114]*Campbell,* 205 Va. at 892, 140 S.E.2d at 694.

[115]*Brown v. Commonwealth,* 8 Va.App. 126, 380 S.E.2d 8 (1989); *Campbell v. Commonwealth,* 14 Va.App. 988, 421 S.E.2d 652 (1992); *Jiminez v. Commonwealth,* 241 Va. 244, 402 S.E.2d 678 (1991).

GUILT AND INNOCENCE ARE MATTERS OF DEGREE, DEATH IS FINAL: WHAT TO DO WHEN YOUR CLIENT PREFERS EXECUTION

". . . commit cruelty on a person long enough and the mind begins to go."[1]

-Sophocles, Antigone

BY: ANDREA L. MOSELEY

I. Introduction

Capital defense attorneys spend an extraordinary amount of energy, resources and time trying to save the lives of their clients. While clients and attorneys may disagree on any number of issues, generally it is assumed that both the capital defendant and his or her attorney share at least one common goal, avoiding the death penalty. However, to the contrary, the phenomenon of the capital defendant electing execution is not uncommon.[2] In considering the current legal and ethical responsibilities of capital defense attorneys, it is important to be informed about what to do when your client elects execution over representation.

Five of the first eight people executed after the reinstatement of capital punishment resisted some part of their defense.[3] Defendants' reasons for wanting to abandon their case and receive a speedy execution include wanting to avoid the physical conditions of death row,[4] bravado,[5] and the desire to spare his or her family from further agony.[6] Perhaps the most notable voluntary execution case was *Gilmore v. Utah.*[7] Gilmore killed and robbed a service station attendant and a motel night clerk in July 1976.[8] On

[1]Ismene: But look, we're both guilty, both condemned to death. Antigone: [No, Justice will never suffer that . . .] Courage! Live your life. I gave myself to death long ago . . . Creon: They're both mad . . . Ismene: True my King, the sense we're born with cannot last forever . . . commit cruelty on a person long enough and the mind begins to go. Sophocles, Antigone, (Robert Fagles trans., Penguin, 1984).

[2]Welsh S. White, *Defendant's Who Elect Execution,* 48 U. PITT. L. REV. 853, 854 (1987).

[3]G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention,* 74 J. CRIM. L. & CRIMINOLOGY 860, 861 (1983).

[4]Richard C. Dieter, Note, *Ethical Choices for Attorneys Whose Clients Elect Execution,* 3 GEO. J. LEGAL ETHICS 799, 801 n.16 (1990).

[5]See White, *supra* note 2, at 872, referring to, *Gilmore v. Utah,* 429 U.S. 1012 (1976).

[6]See *Coppola v. Commonwealth,* 220 Va. 243, 253, 257 S.E.2d 797, 804 (1979), *cert. denied* 444 U.S. 1103 (1980).

[7]429 U.S. 1012 (1976).

[8]White, *supra* note 2, at 853 n.2, *citing,* Goldman, *Death Wish,* NEWSWEEK, Nov. 29, 1976, at 26.