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

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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*,<sup>113</sup> which would require the court to apply the exception in cases involving the deprivation of constitutional rights, as well as claims of actual innocence.<sup>114</sup> This approach is arguably consistent with the *Brown-Campbell-Jiminez*<sup>115</sup> 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.

<sup>113</sup>205 Va. 883, 140 S.E.2d 688 (1965).

<sup>114</sup>*Campbell*, 205 Va. at 892, 140 S.E.2d at 694.

<sup>115</sup>*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."<sup>1</sup>

-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.<sup>2</sup> 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.<sup>3</sup> Defendants' reasons for wanting to abandon their case and receive a speedy execution include wanting to avoid the physical conditions of death row,<sup>4</sup> bravado,<sup>5</sup> and the desire to spare his or her family from further agony.<sup>6</sup> Perhaps the most notable voluntary execution case was *Gilmore v. Utah*.<sup>7</sup> Gilmore killed and robbed a service station attendant and a motel night clerk in July 1976.<sup>8</sup> On

<sup>1</sup>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).

<sup>2</sup>Welsh S. White, *Defendant's Who Elect Execution*, 48 U. PITT. L. REV. 853, 854 (1987).

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

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

<sup>5</sup>See White, *supra* note 2, at 872, referring to, *Gilmore v. Utah*, 429 U.S. 1012 (1976).

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

<sup>7</sup>429 U.S. 1012 (1976).

<sup>8</sup>White, *supra* note 2, at 853 n.2, *citing*, Goldman, *Death Wish*, NEWSWEEK, Nov. 29, 1976, at 26.

October 7, 1976, Gilmore was convicted of murder and sentenced to death by a jury in a Utah court.<sup>9</sup> After his sentence of death was handed down, Gilmore expressed that he was willing to accept the death penalty and he resisted both his mother's<sup>10</sup> and his attorney's efforts to oppose his sentence.<sup>11</sup> Gilmore fired his attorneys for appealing his case and he hired attorneys to resist his mother's attempt to intervene on his behalf.<sup>12</sup> In a 5-4 decision the Supreme Court rejected Bessie Gilmore's application for a stay and Gary Gilmore became the first person to be executed in the United States in almost ten years.<sup>13</sup> Only three and one-half months after his conviction, Gilmore was shot by a firing squad on January 17, 1977.<sup>14</sup>

The second volunteer to be executed was Jesse Bishop.<sup>15</sup> Bishop resisted a defense even earlier than Gilmore. Bishop represented himself at trial, refused court-appointed standby counsel to introduce mitigating evidence at the penalty phase, and resisted all other defense efforts.<sup>16</sup> Steven Judy was third in line to volunteer for execution.<sup>17</sup> Judy was so interested in his own execution that he instructed his attorneys not to present mitigating evidence or argue against the death penalty. He testified to the jury that he might kill in the future and that some of his victims might be members of the jury.<sup>18</sup>

Needless to say, dealing with a client who wishes to waive appeals and face execution or a client who wishes to plead guilty to capital murder without an agreement that guarantees a life sentence, creates a difficult moral and legal quandary for capital defense counsel. The legal aspects of this dilemma are painfully clear. If a defendant "volunteers" for execution, the judicial system will accommodate the capital defendant in his or her desires.<sup>19</sup> Therefore, it is imperative that defense attorneys are aware of the laws which permit counsel to resist or withdraw from representation of a client who will not oppose his or her own death sentence. The remainder of this article will discuss areas of law which can help defense attorneys counsel a defendant who wants to die.

<sup>9</sup>*Gilmore*, 429 U.S. at 1012-13.

<sup>10</sup>On December 2, 1976, Bessie Gilmore filed with the Supreme Court of the United States for a stay of execution as "next friend" on behalf of her son, who was scheduled to be executed on December 6, 1976. Since only a limited record was before then before the Court, a temporary stay of execution was granted on December 3, 1976. The Court held that Gary Mark Gilmore had made a knowing and intelligent waiver of any and all federal rights he might have asserted after Utah's trial courts had imposed sentence and accordingly, the stay of execution was terminated on December 13, 1976. *Id.* at 1013-1014.

<sup>11</sup>*White*, *supra* note 2, at 854.

<sup>12</sup>*Gilmore*, 429 U.S. at 1014.

<sup>13</sup>*White*, *supra* note 2, at 853-54.

<sup>14</sup>*Dieter*, *supra* note 4, at 802 n.23.

<sup>15</sup>*Dieter*, *supra* note 4, at 802 n.25.

<sup>16</sup>*Id.* at 802 n.25.

<sup>17</sup>*Id.* at 803 n. 26.

<sup>18</sup>*Judy v. State*, 275 Ind. 145, 151, 416 N.E.2d 95, 98 (Ind. 1981). See also, *White*, *supra* note 2, at 853-54.

<sup>19</sup>See discussion *infra* III(C).

## II. Basic Background of Capital Punishment: Society's Interest

The constitutional background of the death penalty demonstrates that the adversarial system was intentionally chosen to protect the societal interest in a non-arbitrary application of the death penalty. In 1972, the United States Supreme Court ruled that the death penalty, as it was being imposed at that time, constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.<sup>20</sup> In nine separate opinions, the majority view was that death penalty laws allowed the administration of death to be arbitrary and capricious.<sup>21</sup> In 1976, the Supreme Court upheld the constitutionality of revised death penalty statutes.<sup>22</sup> The Court upheld new death penalty laws as long as the states provided procedures that reasonably assured that those selected for the death penalty would be those whose crime and past history contained aggravating circumstances which would serve to distinguish them from those not given the death penalty.<sup>23</sup>

The Supreme Court has repeatedly stated that punishment by death is different from all other punishments.<sup>24</sup> One important difference is that there are many competing state interests in addition to the individual's interests in autonomy, privacy, and dignity including: avoidance of cruel and unusual punishment, the preservation of life, and the prevention of suicide.<sup>25</sup> Society certainly has an interest in assuring that death sentences are not imposed arbitrarily, especially in light of the Court's concerns in *Furman v. Georgia*.<sup>26</sup> Society's ability to parse out the most heinous murderers for execution is necessarily thwarted if defendants are allowed to select death over life imprisonment on their own terms. The major problem with voluntary executions is that both the defendant and the prosecution are seeking the same goal, namely death of the defendant. Absent an adversarial process, innocent people will likely be executed,<sup>27</sup> and this is contrary to society's interest in using the death penalty for the most heinous murderers. In order to avoid this result, it is helpful to examine the different stages at which a capital defendant may choose certain death at the hands of the state over representation.

<sup>20</sup>*Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>21</sup>*Dieter*, *supra* note 4, at 803 n.31.

<sup>22</sup>See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

<sup>23</sup>*Dieter*, *supra* note 4, at 803 n.33.

<sup>24</sup>See *Gregg*, 428 U.S. at 187 (plurality opinion of Stewart, Powell, and Stevens, J.J.: "There is no question that death as a punishment is unique in its severity and irrevocability").

<sup>25</sup>*Dieter*, *supra* note 4, at 818 n.137-39.

<sup>26</sup>408 U.S. 238 (1972).

<sup>27</sup>*Dieter*, *supra* note 4, at 818.

### III. How Can I Legally Keep My Client From Volunteering to Die?

#### A. Pre-Trial

An attorney may become aware of the likelihood that a client will choose the death penalty over life imprisonment long before the client expresses this sentiment in words. It is important for the attorney to look for these signs and attempt to identify these tendencies as soon as possible. One way to deter a defendant from choosing death is to develop a good rapport with the defendant. This rapport may prevent future conflicts between attorneys and clients who want to die.<sup>28</sup> The difficult question to answer is what to do when the conflict does arise. The following sections will offer some advice on how to proceed if a conflict between the attorney and the client arises.

#### 1. Ethical Considerations

Defense attorneys who have chosen to represent capital defendants in part because of their opposition to the death penalty face particularly perplexing ethical problems when the client wants to die. During the representation of this client, counsel may have to choose between his or her own personal beliefs and the obligation to pursue what the client wants. Many different professional responsibility authorities offer some guidance for resolving these ethical dilemmas.

The Commonwealth of Virginia has adopted the American Bar Association's Model Code of Professional Responsibility with some modifications.<sup>29</sup> Overall, the attorney's ethical obligations, regarding what to do if your client wants to be executed, are still very unclear.<sup>30</sup> However, it is known that counsel's duty to his or her client is very broad in nature.<sup>31</sup> In general, Canon 7 of the Rules of the Supreme Court of Virginia directs counsel to zealously represent his

<sup>28</sup>White, *supra* note 2, at 856-58. In White's research on defense attorneys attitudes toward this issue, he reports that they are generally able to change the defendant's mind in the course of their representation by developing a close relationship with their clients. This kind of working relationship not only causes the defendant to "listen to the attorney's advice. . ." but the defendant "... may be loath to take any action that will eliminate his relationship with the attorney" *Id.* at 857.

<sup>29</sup>See Henderson, "Presenting Mitigation Against the Client's Wishes: A Moral or Professional Imperative?," *Cap. Def. J.*, Vol. 6, No. 1, p. 35.

<sup>30</sup>White, *supra* note 2, at 856.

<sup>31</sup>See Rules of Supreme Court of Virginia Pt. 6, § II, EC 7-3 (Michie 1997), "Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as advisor primarily assists his client in determining the course of future conduct and relationships. While

or her client within the bounds of the law and DR 7-101, further directs that:

DR 7-107. Representing a Client Zealously-

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by 7-101(B)

(B) In his representation of a client, a lawyer may:

(1) With the express or implied consent<sup>32</sup> of his client, exercise his professional judgment to limit or vary his client's objectives and waive or fail to assert a right or a position of his client.

(2) Refuse to aid or participate in conduct or pursue an objective which he believes to be unlawful or which is repugnant or imprudent and, if the clients insists, withdraw pursuant to the provisions of DR 2-108.

Although criminal defense attorneys must show a great deal of respect for the client's autonomy, an attorney is not "required to slavishly follow all the beliefs and goals of her client."<sup>33</sup> The Ethical Considerations of the Model Code state more specifically the lawyer's obligation to carry out the client's objectives. Model Code EC 7-8 provides that "the lawyer should always remember that the decision whether to forgo legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself." Even though this rule provides for the decision of non-legal factors to be for the client, the Model Code does not specifically allocate the decision to oppose the death penalty as a decision over which the defendant has control.

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serving as advocate, a lawyer should resolve favor of his clients doubts as to the bounds of the law. In serving as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law." See John R. Mitchell, *Comment, Attorneys Representing Death Row Clients: Client Autonomy Over Personal Opinions*, 25 *CAP. U. L. REV.* 643, 645 n.7 (1996), *citing*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-5 (1981); and *Nix v. Whiteside*, 475 U.S. 157, 166 (1985).

<sup>32</sup>"The Virginia Code gives no guidance as to the meaning of 'implied authority'." Without guidance on this language, defense counsel could argue that the totality of the circumstances based on counsel's observations of the defendant may be used to invoke the "implied authority" exception. Henderson, *supra* note 27, at 35. Defense counsel can argue that the mere fact that the defendant has not fired him leads counsel to believe that he or she has the implied authority to act as defense counsel, i.e. resist the state's charges.

<sup>33</sup>Dieter, *supra* note 4, at 811.

The American Bar Association Standards for Criminal Justice offer another perspective on where the control and direction of the criminal case should rest.<sup>34</sup>

Standard 4-5.2. Control and Direction of the Case

(A) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;
- (iii) whether to waive jury trial;
- (iv) whether to testify in his or her own behalf;
- (v) whether to appeal.

(B) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

During pre-trial litigation, the first conflict between the client who wants to die and defense counsel may be over whether or not to accept a plea offer for life. Pre-trial negotiations may ultimately determine whether the defendant lives or dies and failure to respond or act on plea bargains may result in a hasty withdrawal of the offer. The question becomes: Can the defense attorney negotiate a life sentence when his or her client wants to plead guilty to the death penalty without a written agreement to life in prison? In light of the aforementioned rules and standards, defense attorneys must continually negotiate with the prosecution for a life sentence even if the client wants to plead guilty. Although the Model Code gives the client the responsibility for the objectives of the litigation and the Standards for Criminal Justice give the client ultimate authority over whether to accept plea agreements, initiating and negotiating with the prosecutor are not the same as deciding to take an offer. The lawyer's role during this stage of pre-trial litigation is to keep the defendant informed about all of his or her legal options.<sup>35</sup> Criminal Justice Standards do not require the client's consent before entering into negotiations with the prosecutor in a capital case.<sup>36</sup> However, clearly, the ultimate decision to accept a pleas rests with the client.

Finally, an attorney should never forgo reminding the

<sup>34</sup>See the Virginia corollary in the Rules of Supreme Court of Virginia Pt. 6, § II, EC 7-7 (Michie 1997).

<sup>35</sup>Dieter, *supra* note 4, at 805.

<sup>36</sup>Dieter, *supra* note 4, at 805 n.45.

client that a plea-bargain for life is a way to avoid a lengthy and degrading trial. A defense attorney in Pennsylvania<sup>37</sup> reported that nearly every client that he has represented has, at some point, expressed a desire not to oppose the death penalty. The same attorney further explained that clients are most adamant about this before trial and before he has had the opportunity to establish a relationship with the client. The client's opposition to life in prison inevitably interferes with the critical stages of plea bargaining. Nonetheless, the attorney must continue to negotiate with the prosecution for a life sentence even when the client is leaning toward pleading guilty to the death penalty. In any case, defense counsel has a continuing obligation to advise against pleading guilty in capital cases without obtaining an agreement in writing for a non-capital disposition, otherwise, the defense may be agreeing to execution.<sup>38</sup>

Although the defendant's understanding of a plea will be reviewed by the court, defense counsel should intervene if he or she believes that there are reasonable grounds for doubting the competency of the client. In certain circumstances an attorney's duty to follow instructions of the client can be relaxed. The Model Code states that "any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer . . . [who] may be compelled in court proceedings to make decisions on behalf of the client."<sup>39</sup> The client is given ultimate authority over the decision to plea and the overall direction of the litigation, however, the client may not be competent to make those decisions. The ethical guidelines of the Model Code recognize that an attorney may assume greater responsibility when a client's mental capabilities are impaired. In the Virginia Code, EC 7-11 and 7-12 are relevant:

EC 7-11.-The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent. . .

EC 7-12.-Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon the lawyer . . .

<sup>37</sup>White, *supra* note 2, at 859-60.

<sup>38</sup>There are many Virginia cases where guilty pleas have resulted in death sentences, see *Dubois v. Commonwealth*, 246 Va. 260, 435 S.E.2d 636 (1993), *cert. denied*, 511 U.S. 1012 (1994); *Davidson v. Commonwealth*, 244 Va. 129, 419 S.E.2d 656 (1992), *cert. denied*, 506 U.S. 959 (1992); *Savino v. Commonwealth*, 239 Va. 534, 391 S.E.2d 276 (1990), *cert. denied*, 498 U.S. 882 (1990); *Stout v. Commonwealth*, 237 Va. 126, 376 S.E.2d (1989), *cert. denied*, 492 U.S. 925 (1989) .

<sup>39</sup>Dieter, *supra* note 4, at 806 n.49.

Each of these sections indicates that there is, in fact, a point at which defense attorneys are ethically obligated to assess his or her client's competency to forgo plea agreements for a life sentence. The issue of competency will be discussed more fully in the section entitled "Appeals".

## B. Penalty Phase

The central problem that defense counsel may encounter in the penalty phase is the defendant's refusal to allow counsel to present mitigating evidence.<sup>40</sup> The penalty phase of capital trial is unique and quite distinct from most areas of criminal law. The first statutes that were upheld by the Supreme Court provided for separate guilt and sentencing proceedings which allow the sentencer to make **individualized** determinations about who should get death.<sup>41</sup> In 1978, the Supreme Court held that the nature of mitigating evidence in the penalty phase of a capital trial could not be limited.<sup>42</sup> Yet, the Supreme Court has not ruled directly on whether mitigation evidence is essential to a capital trial and whether a defendant may choose to withhold all mitigating evidence from a sentencer.<sup>43</sup>

Although there is neither the statutory nor constitutional requirement for defense counsel to present mitigating evidence in the capital trial, the United States Supreme Court has continually emphasized the importance of mitigation in a system which permits the death penalty.<sup>44</sup> Justice Marshall, in his dissent in *Lenhard v. Wolff*,<sup>45</sup> makes a compelling argument that mitigation evidence is a procedural requirement before imposing the death penalty.<sup>46</sup>

This Court's toleration of the death penalty has depended on its assumption that the penalty will be imposed only after a painstaking review of aggravating and mitigating fac-

tors. In this case, that assumption has proved demonstrably false. Instead, the Court has permitted the State's mechanism of execution to be triggered by an entirely arbitrary factor: the defendant's decision to acquiesce in his own death. In my view, the procedure the Court approves today amounts to nothing less than state-administered suicide.<sup>47</sup>

Both Justice Marshall's argument in *Lenhard* and the Supreme Court's basic pronouncement that "the penalty of death is qualitatively different . . . 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,"<sup>48</sup> present a strong argument that the presentation of mitigating evidence is constitutionally required. These approaches lend weight to the argument that the penalty phase cannot go forward unless mitigating evidence is presented. Therefore, if the attorney is concerned that offering mitigating evidence would violate the duty to abide by the client's instructions, he or she has a legal basis for doing so.<sup>49</sup> The Model Code requires that attorneys must be "within the bounds of the law or is supportable by a good faith argument for an extension, modification, or reversal of the law."<sup>50</sup> With this in mind, the attorney can justifiably argue that mitigating evidence is constitutionally required and cannot be waived by the defendant.<sup>51</sup>

In addition to the suggested constitutional arguments for the presentation of mitigation, there are a number of standards of professional responsibility which may also assist defense counsel. These sections include Virginia Code of Professional Responsibility Canon 7, DR 7-101, EC 7-7, EC 7-11 and EC 7-12;<sup>52</sup> American Bar Association Standards for Criminal Justice, 4-4.1, 4-4.52, 4-8.1 and 18-6.3;<sup>53</sup> American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 11.4.1, 11.8.1, 11.8.2, 11.8.3 and 11.8.6.<sup>54</sup>

<sup>40</sup>There are several Virginia Cases in which capital defendant's have opposed presentation of mitigation. See e.g., *Dubois*, 246 Va. 260; *Murphy v. Commonwealth*, 246 Va. 136, 431 S.E.2d 48 (1993), cert. denied, 510 U.S. 928 (1993); *Chabrol v. Commonwealth*, 245 Va. 327, 427 S.E.2d 374 (1993); *Davidson*, 244 Va. 129, 419 S.E.2d 656.

<sup>41</sup>It is important to note that when the Texas and Florida statutes were approved, the Supreme Court also struck down mandatory death sentences. Dieter, *supra* note 4, at 806 n.53.

<sup>42</sup>*Lockett v. Ohio*, 438 U.S. 586 (1978). Lockett was specifically reaffirmed in *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

<sup>43</sup>See Henderson, *supra* note 27, at 35 n.11-12, citing, Laura A. Rosenwald, *Death Wish: What Washington Courts Should Do When a Capital Defendant Wants To Die*, 68 WASH. L.REV. 735 (1993).

<sup>44</sup>*Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

<sup>45</sup>444 U.S. 807, *reh'g denied*, 444 U.S. 1301 (1979).

<sup>46</sup>*Id.* at 813-14.

<sup>47</sup>*Id.* at 814.

<sup>48</sup>*Woodson*, 428 U.S. at 305.

<sup>49</sup>Dieter, *supra* note 4, at 807.

<sup>50</sup>Dieter, *supra* note 4, at 807 n.57. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4.

<sup>51</sup>*Id.* at 807. For treatment of this particular argument in other jurisdictions see *People v. Deere*, 710 P.2d 925 (Cal. 1985) (attorney who acquiesced to his client's request not to present mitigating evidence failed to effectively represent the client); *People v. Bloom*, 782 P.2d 698 (Cal. 1989) (defendant acting pro se could not claim ineffective assistance of counsel when his own mitigating evidence was not presented); *People v. Lang*, 782 P.2d 627 (Cal. 1989) (although some mitigating evidence was presented, the court rejected defendant's claim that his attorney was ineffective for failing to present mitigating evidence over his objections).

<sup>52</sup>These sections pertain to zealous representation of the client and the client's autonomy in making certain decisions.

<sup>53</sup>These sections pertain to the duty to investigate and the control and direction of the case.

## C. Appeals

The length and complexity of death penalty appeals, along with numerous stages of rejection can cause the client to be hopeless.<sup>55</sup> Many different psychological factors<sup>56</sup> can contribute to the defendant's desire to waive appeals and avoid life imprisonment by yielding to the state's power to execute. While the decision to appeal is explicitly reserved to the client under the ABA Standards of Criminal Justice 4-5.2 (v), what does defense counsel do if the client wants to waive appeals after a sentence of death has been handed down? The following section will offer some alternatives and possibilities for defense counsel facing this dilemma.

### 1. "Next Friend" Arguments

If the client wants to forgo appeals after being advised not to, then it may be necessary to question whether or not the defendant has the capacity to understand the choice between life and death. As it was stated earlier, if a defendant "volunteers" for execution, the judicial system will accommodate the capital defendant in his or her desires. This fact is demonstrated by the Supreme Court of the United States in *Whitmore v. Arkansas*.<sup>57</sup> In *Whitmore*, Ronald Simmons was sentenced to death for multiple homicides by an Arkansas court. After his conviction, Simmons requested permission to waive appeals and to receive the death penalty as soon as possible. Arkansas has no rule requiring mandatory direct appeal of capital convictions and subsequently, the Arkansas Supreme Court granted the defendant's request to die.

In order to continue appeals without the support of the defendant it may be necessary to intervene as "next friend" on his or her behalf. *Whitmore* was fundamental in explaining the different methods for intervening on behalf of a defendant. *Whitmore* attempted to intervene on behalf of Ronald Simmons with a two-part argument. Since *Whitmore* was also sentenced to death, he claimed both a direct interest in the outcome and "next friend" status to assert the claims of Simmons. As to *Whitmore's* claim of direct interest, the Supreme Court held that *Whitmore* lacked standing to invoke federal jurisdiction of the court. The portion of the *Whitmore* case which may assist defense attorneys is the "next friend" issue. On the "next friend" claim advanced by *Whitmore*, the Court held that he did not meet Arkansas' two-part standard which requires the "next friend" to: (1) provide adequate explanation as to why the real party in interest cannot appear; and (2) be "truly dedicated to the best interests of the person on whose behalf he seeks to lit-

igate."<sup>58</sup> The Court held that *Whitmore* did not meet either of these standards and upheld Simmons' request to be executed. In the Court's opinion, Simmons had passed a psychiatric examination with regard to his decision to voluntarily be executed and was competent.

The holding in *Whitmore* allowed the Supreme Court to avoid deciding whether the Constitution requires mandatory review of capital cases. Virginia law is different than Arkansas law in that Virginia does have a statutory provision which requires the Virginia Supreme Court to "review" all capital cases and sentences.<sup>59</sup> While, the language in the statute is not "appeal," the word "review" has been interpreted to require review in all capital cases.<sup>60</sup> The Supreme Court of Virginia has held that a capital defendant is prohibited from waiving mandatory review of the death sentence.<sup>61</sup> As a matter of policy, the legislature enacted a statute which requires unwaivable review of death sentences. This is indicative of the existence of a public policy which suggests that the death penalty deserves review not otherwise required in criminal cases. Furthermore, when a client waives the stages of trial which put the defendant's individual circumstances on the record, mandatory review policy is thwarted. After all, if there are no individualized determinations put on the record, then nothing is left to review and the statute loses meaning.

As defense attorneys who do not want their clients to die, it is possible to intervene as a "next friend" in Virginia. Virginia's "next friend" standard does not require the next friend to obtain consent of the person for whom he or she seeks to intervene.<sup>62</sup> Virginia death penalty law is also different than Arkansas in that the Virginia Code only requires that the "next friend" diligently press the cause once he or she takes it, and does not make threshold demands on who can enter as "next friend" on the litigant's behalf.<sup>63</sup> In *Whitmore*, the Court noted that despite Simmons' desire to waive appeal, his attorney still appeared before the court and outlined the issues that were open for appeal.<sup>64</sup> In light of this, it can still be argued that the attorney with a client like Simmons, must still research and argue the issues for appeal in spite of the defendant's desire to be executed.

One good reason for counsel's continued representation is that the defendant may ultimately change his or her mind about whether to appeal. An example of this can be found in *Savino v. Commonwealth*.<sup>65</sup> In *Savino*, the defendant pled guilty and then volunteered for execution. However, *Savino* ultimately changed his mind and decided to go for-

<sup>54</sup>Each of these sections is explored in depth on the issue of mitigation in: Henderson, *supra* note 27, at 32.

<sup>55</sup>Dieter, *supra* note 4, at 811 n. 87.

<sup>56</sup>See White, *supra* note 2 at 871-875.

<sup>57</sup>495 U.S. 149 (1990).

<sup>58</sup>*Whitmore*, 495 U.S. at 161-65.

<sup>59</sup>Va. Code Ann. §17-110.1 (Michie 1990).

<sup>60</sup>*Briley v. Bass*, 584 F.Supp. 807 (E.D. Va. 1984), *cert. denied*, 469 U.S. 893 (1984).

<sup>61</sup>*Davidson*, 244 Va. 129, 419 S.E.2d 656.

<sup>62</sup>*Kirby v. Gilliam*, 182 Va. 111, 28 S.E.2d 40 (1943); Va. Code Ann. § 8.01-8 (Michie 1990).

<sup>63</sup>Va. Code Ann. § 8.01-8 (Michie 1990).

<sup>64</sup>*Whitmore*, 495 U.S. at 153.

<sup>65</sup>239 Va. 534, 391 S.E.2d 276 (1990).

ward with the appeals process. In response, the Virginia Supreme Court refused to recognize Savino's constitutional challenges because the defendant knowingly and voluntarily pled guilty to the charges and waived his right to trial on them.<sup>66</sup> This case alone illustrates the gravity of the problems that can be created by a defendant who, at some point in the process, will not oppose execution but then changes his or her mind. The legal consequences of a defendant who vacillates between life and death can be monumental and in many cases, irreversible.

## 2. Competency to Waive Appeals

Although the next friend arguments are available, arguing that the defendant is incompetent to waive appeals may prove more successful. The reason for this largely stems from an analysis of *Gilmore v. Utah*. In *Gilmore*, Justice White wrote in his dissent that "the consent of a criminal defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment."<sup>67</sup> The Court attempted to sidestep this question.<sup>68</sup> Chief Justice Burger, in his concurring opinion wrote in reference to Justice White's point,

[w]hatever may be said to the merits of this suggestion, the question is simply not before us. *Gilmore*, duly found to be competent by Utah courts, has had available meaningful access to this Court and has declined expressly to assert any claim here other than his explicit repudiation of Bessie *Gilmore's* effort to speak for him as next friend.<sup>69</sup>

The position that "the question is simply not before us" suggests that the Supreme Court could not decide whether or not *Gilmore* should be permitted to waive state appellate review. This, in turn, illustrates that as far as the United States Supreme Court is concerned, no one has standing to appeal for the defendant who waives state appellate review as long as the defendant is competent.<sup>70</sup>

The *Gilmore* decision suggests that a hearing to evaluate a defendant's competency will not be available unless evidence, besides the fact that the defendant wants to die, indicates incompetency. In other words, an additional hearing on competency will not necessarily be available simply because the defendant expresses the desire to accept execution. If this analysis is correct, then the next issue of importance is how to make a showing of incompetency.

An important case to consult in order to understand the standard for incompetency is *Rees v. Peyton*.<sup>71</sup> In *Rees*,

the standard that the Supreme Court set out for determining competency of a capital defendant to waive his rights is "roughly equivalent" to the standard used to determine competency to stand trial.<sup>72</sup> Thus, the defendant will be deemed competent unless the defendant lacks sufficient "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation."<sup>73</sup> In other words, capital defendants will be held competent to waive their rights as long as it seems that they can sufficiently understand the choice that confronts them.

The similarity between the standard for competency to stand trial and the test for whether to allow the execution of a defendant seems counterintuitive since the two situations have such gravely different consequences. In determining the competency to stand trial the court determines whether the defendant understands the charges and has the capacity to communicate with the attorney in an effective manner. On the other hand, the competency decision that must be made when deciding whether to let a capital defendant elect execution concerns the capacity to choose between life or death.<sup>74</sup> A defendant may be perfectly able to understand the charges and to cooperate with counsel and still be completely emotionally unable to make a life or death decision. Given the gravity and irrevocability of death, it seems that the standard for competency should be much higher for the defendant who elects death.<sup>75</sup>

The idea that the defendant should have to meet a higher competency standard before electing death, raises concerns about usurping the defendant's autonomy. One of the major reasons that the defendant's autonomy may have to be usurped is the fact that defendants do change their minds about whether they want to die. Defendants like Savino may change their minds late in the process and find that they have lost issues for appeal due to a previous but mistaken desire to die. It is this kind of mistaken desire that our system of capital punishment cannot make itself vulnerable to in an effort to respect the autonomy of the defendant.

Although the argument for more defendant autonomy is legitimate and carries a great deal of legal foundation, the defendant's autonomy is not the only interest hanging in the balance. It is imperative to remember that the state has no interest in illegally executing citizens. Allowing defendants to choose certain death does not adequately protect society from a system which imposes death on its citizens without exploring the individuality of every defendant charged with capital murder.

<sup>66</sup>*Id.* at 538-39, 391 S.E.2d at 278. Savino was found to have waived all defenses except a jurisdictional challenge.

<sup>67</sup>*Gilmore*, 429 U.S. at 1018.

<sup>68</sup>*White, supra* note 2, at 861.

<sup>69</sup>*Gilmore*, 429 U.S. at 1017.

<sup>70</sup>*White, supra* note 2, at 861.

<sup>71</sup>384 U.S. 312 (1966).

<sup>72</sup>*White, supra* note 2, at 863.

<sup>73</sup>*Rees*, 384 U.S. 312, 314.

<sup>74</sup>*White, supra* note 2, at 867.

<sup>75</sup>Many different authorities have suggested this as an alternative to *Rees v. Peyton*: see *Franz v. Arkansas*, 296 Ark. 181, 188, 754 S.W.2d 839, 843 (1988), involving the same defendant in *Whitmore*; *White, supra* note 2 at 867-868 n.57.



## VI. Conclusion

The circumstances surrounding a client's election of execution is certainly complex and troubling for both the defendant and the attorney who is trying to present a case on his or her behalf. Consider the following statement that was made in *Lenhard v. Wolff*: "Bishop [the defendant] is an individual who, for reasons I can fathom only slightly, has chosen to forego his federal remedies. Assuming his competence . . . he should be free to choose. To deny him that would be to incarcerate his spirit—the one thing that remains free and which the state need not and should not imprison."<sup>6</sup> The very suggestion that "we", as a society, should preserve a defendant's "spirit" by allowing him or her to die at the hands of the state is deeply troubling. This type of suggestion highlighting a move away from protecting society's interest in non-arbitrary application of the death penalty must be resisted. Several areas of the law permit, if not demand, defense attorneys to persist in representation throughout a capital trial. Each stage of death penalty litigation carries with it ethical considerations which present defense attorneys with the difficult dilemma of choosing between a client's desire to die and the attorney's personal and legal beliefs. It is valid to argue that the decision to die is not specifically allocated to the defendant and

<sup>6</sup>Mitchell, *supra* note 29 at 670, n.204, citing *Lenhard v. Wolff*, 603 F.2d 91, 94 (9th Cir. 1979) (Sneed, J., *concurring*).

therefore, counsel has an ethical obligation to pursue legally available channels in opposition to death. Admittedly, the ultimate decision to plea, to appeal, or to fire the attorney rests with the client. However, short of a definitive, explicit decision, the attorney should proceed and preserve the issues that may save the life of the defendant.

Even when the defendant does explicitly waive his or her rights in a capital case, it is important for counsel to continually assess the defendant's competency level. Due to the finality and severity of a decision to die, the defense attorney may have an obligation to question and ask for a hearing to determine the defendant's current level of competency. Finally, it is essential that the defense attorney remind the court in any argument that he or she makes that "death is different" and there is much more than the defendant's preference at stake. Society, as a whole, including those who will face the death penalty in the future, has an interest in the non-arbitrary imposition of the death penalty. Once a defendant knows that he or she may face death, many psychological factors play into the decision to die. Some even suggest that defendants intentionally used the death penalty to complete a suicide that he or she is unable to do alone.<sup>7</sup> When these kinds of virtually unknowable mental issues are at stake, it is best to err on the side of process.

<sup>7</sup>White, *supra* note 2, at 874.

## VIRGINIA'S "21 DAY RULE" AND ILLINOIS' DEATH ROW DEBACLE: A COMPARATIVE STUDY IN CAPITAL JUSTICE AND THE RELEVANCE OF INNOCENCE

BY: ANNE E. DUPREY

### I. The 21 Day Rule

#### A. Its Contours

In Virginia, compelling evidence of the innocence of a death row inmate usually generates a newspaper headline, but it virtually never results in a court's consideration of the evidence or exoneration and release of the inmate. Under Rule 1.1 of the Supreme Court of Virginia (hereinafter "the 21 Day rule"), the Commonwealth grants capital defendants who have been sentenced to death a period of only 21 days from the date of the entry of final judgment to present new evidence, including evidence of innocence.<sup>1</sup> This Rule pro-

<sup>1</sup>Rule 1.1 of the Supreme Court of Virginia, commonly referred to as the "21 Day Rule," is entitled, "Finality of Judgments, Orders and Decrees." This Rule provides, in pertinent part, that "[a]ll final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." The Rule applies to civil and criminal cases, alike, and makes no special provision for capital cases.

scribes the courts' consideration of newly discovered evidence, which includes evidence borne of the application of new forensic testing methods (such as DNA analysis) to previously considered evidence. Under this Rule, evidence that was wrongfully and unlawfully suppressed by the prosecution constitutes "new evidence."<sup>2</sup> The Rule applies regardless of the magnitude or potential import of a particular piece of evidence. In essence, once the initial 21 day period has passed, the existence of definitive, unassailable evidence of a death row inmate's innocence is trumped by the premium that Virginia has placed upon the finality of its judgments. In Virginia, clear and persuasive evidence of a death row inmate's innocence does not merit an evidentiary hearing or a new trial. Instead, the 21 Day Rule

<sup>2</sup>Joe Jackson & June Arney, *Sentenced to Die Without Fair Trials Series: Dead End on Death Row?*, VIRGINIAN-PILOT & LEDGER-STAR, June 26, 1994, at 2, available in 1994 WL 6610599.