Capital Defense Journal

Volume 12 | Issue 2 Article 3

Spring 3-1-2000

Bridging the Procedural Default Chasm

Matthew K. Mahoney

Bridging the Procedural Default Chasm

Matthew K. Mahoney*

I. Introduction[1]

The utilization of procedural default by reviewing courts has placed an immense burden on Virginia capital defense attorneys to recognize trial errors and correctly preserve the record in preparation for appellate review and habeas corpus proceedings. Making the record and preserving issues are second nature for most trial lawyers. Even so, in a capital case more than in any other case, it is imperative that defense counsel perform this duty in a comprehensive and effective manner. Loss of any appealable issue can mean the difference between a client living or dying.

This article will provide defense counsel the fundamentals for making the record and preserving appellate and habeas issues. In addition, creative ideas for making the record and preserving error will be presented. The article will begin by addressing the methodology, designed by the Virginia legislature and judiciary and implemented by the Supreme Court of Virginia and the federal courts, which frequently results in the default or waiver of colorable claims in Virginia capital cases.

---

* J.D. Candidate, May 2000, Washington and Lee University School of Law; B.A., Skidmore College.

1. This is the fifth article dealing with the preservation of an appellate-friendly record and valid claims to be published in the twelve year history of the Virginia Capital Case Clearinghouse journal. The Reader may fairly ask why such a topic, seemingly so straight forward, appreciated, and followed by practitioners across the state receives such repeated treatment? The answer is simply that Virginia capital defendants are still being executed at an alarming rate due to the application of a two-word phrase: procedural default. This article is an attempt to provide capital defense counsel a foundation with which they may proceed effectively in defending their clients during trial while still enabling a client who receives a death sentence to attack the sentence with valid, bona fide appellate and habeas claims. *See* Carey L. Cooper, *The Never Ending Story: Combating Procedural Bars in Capital Cases*, CAP. DEF. J., Spring 1997, at 38; Kristopher E. Ahrend, *Beating a Potential Deathtrap: How to Preserve the Appellate Record for Federal Review and Avoid Virginia's Procedural Default*, CAP. DEF. DIG., Spring 1995, at 34; Michael A. Groot, *To Attain the Ends of Justice: Confronting Virginia's Default Rules in Capital Cases*, CAP. DEF. DIG., Spring 1994, at 44; Robert L. Powley, *Perfecting the Record of a Capital Case in Virginia*, CAP. DEF. DIG., Fall 1990, at 26.

In order to understand how to best "make the record" and preserve issues, an understanding of what barriers the capital defense attorney faces will be instructive. Some of the procedural requirements with which an attorney must comply are defined by the Rules of the Virginia Supreme Court. In addition, case law from the United States Supreme Court, the United States Court of Appeals for the Fourth Circuit, the Supreme Court of Virginia and the Virginia Court of Appeals have added nuances and further hurdles which allow these and other courts to avoid entertaining valid claims of error through the mechanisms of default and waiver. In order to know what must be done during trial and in preparation for appeal and habeas proceedings, a defense attorney must fully understand the procedural bars now in effect.

II. Virginia and Federal Court Default Methodology

Rule 5:25 of the Rules of the Virginia Supreme Court[2] is the basis most commonly relied upon by the Supreme Court of Virginia to hold that an issue has been procedurally defaulted. Rule 5:25 reads:

> Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty *at the time of the ruling*, except for good cause shown or to enable this Court to attain the ends of justice.[3]

In *Kercher's Administrator v. Richmond, Fredericksburg & Potomac Railroad Co.*[4] the Supreme Court of Appeals, now the Supreme Court of Virginia, stated that Rule XXII, the predecessor to Rule 5:25, was adopted not to obstruct petitioners, "but to make more certain the attainment of the ends of justice."[5] Instead, the reality is that this rule, also known as the "contemporaneous objection rule," has been used to prevent valid claims and trial errors from being heard on appeal in state and federal courts, even in capital cases.[6]

In *Wainwright v. Sykes*[7] the United States Supreme Court held that a claim of error which a state court ruled procedurally defaulted in accordance with a state rule, such as the contemporaneous objection rule, will also be considered procedurally defaulted in federal habeas proceedings.[8] Rule 5:25

---

2. VA. S. CT. R. 5:25. Rule 5A:18 of the Rules of the Virginia Court of Appeals is essentially identical to Rule 5:25 in application.

3. *Id.* (emphasis added).

4. 142 S.E. 393 (Va. 1928).

5. Kercher's Adm'r v. Richmond, Fredericksburg & Potomac R.R., 142 S.E. 393, 395 (Va. 1928).

6. *See* Briley v. Bass, 584 F. Supp. 807, 815 (E.D. Va. 1984).

7. 433 U.S. 72 (1977).

8. Wainwright v. Sykes, 433 U.S. 72, 85 (1977). According to *Wainwright*, a state court finding that the issue is procedurally defaulted will bar federal review of the claim

sets the foundation for procedural default in Virginia capital cases. What follows are some of the specific ways in which the Supreme Court of Virginia and federal courts use this rule to hold that an issue raised by a convicted capital defendant is defaulted in post-conviction proceedings.

A. Failure to Object in a Contemporaneous Manner at Trial

The Supreme Court of Virginia will hold a claim defaulted if defense counsel failed to object to the error at the time that the error occurred at trial.[9] This is the "contemporaneous objection rule" cited above.[10] The Supreme Court of Virginia has stated that timely objection is imperative in order for "the trial judge [to] be informed of the precise points of objection in the minds of counsel so that he may rule intelligently, thereby avoiding delay and the expense incident to appeal[ ] . . .."[11] It is important to note that trial counsel must require the judge to rule on any objection brought before the court at the time of the objection or motion hearing.[12]

Beavers v. Commonwealth,[13] an often cited Virginia case, demonstrates the strict requirements of timely objection. In *Beavers* defense counsel moved, after the jury was seated, to strike the jury panel based on the dismissal for cause of three venire members who expressed opposition to the death penalty.[14] The Supreme Court of Virginia ruled that the error would have been reviewable had counsel correctly preserved it.[15] Preservation of the error would have required two objections per juror, one objection at the

---

"absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation." *Id.* at 84. For an analysis of a proper cause and prejudice showing, which is difficult to prove, see Groot, *supra* note 1, at 46.

9. *See Briley*, 584 F. Supp. at 815.

10. *See supra* note 2 and accompanying text.

11. Williamson v. Commonwealth, 175 S.E.2d 285, 288 (Va. 1970) (quoting Harlow v. Commonwealth, 77 S.E.2d 851, 854 (Va. 1953)).

12. *See* Stephen B. Bright, *Preserving Error at Capital Trials*, CHAMPION, Apr. 1997, at 43. This article takes much of its direction and owes much of its credit to Mr. Bright's article. Stephen B. Bright is Director of the Southern Center for Human Rights in Atlanta, Georgia.

Several Virginia cases state that the purpose of Rule 5:25 is to provide the trial judge the ability to rule intelligently on an objection. *See* Reil v. Commonwealth, 171 S.E.2d 162, 164 (Va. 1969) (citing to then Rule 1:8 requiring that the trial judge be informed of the precise points of objection in the minds of counsel so that he may rule intelligently on such objection); Williamson v. Commonwealth, 175 S.E.2d 285, 288 (Va. 1970) (same). An un-ruled upon objection suggests failure to comply with Rule 5:25, and may lead to a finding of procedural default. Therefore, when a trial judge fails to rule on an objection, either due to that judge's attempt to attain acquiescence, compromise, or simply to deny future appellate review, such failure will likely deny appellate review for that error. *See* Bright, *supra* this note, at 46; *see also* Slayton v. Parrigan, 205 S.E.2d 680, 682 (Va. 1974); *infra* notes 105-10 and accompanying text.

13. 427 S.E.2d 411 (Va. 1993).

14. Beavers v. Commonwealth, 427 S.E.2d 411, 418-19 (Va. 1993).

15. *Id.*; *see also* Spencer v. Commonwealth, 384 S.E.2d 785, 793 (Va. 1989).

time of the dismissal of each juror, and a second objection before the jury was seated.[16] Holdings of this kind require that capital defense counsel pay close attention to detail in order to object effectively at trial.

Yarbrough v. Commonwealth,[17] which resulted in a new sentencing proceeding for the defendant, demonstrates the correct method, through timely and numerous objections, of making the record and preserving an issue for appeal.[18] Yarbrough was the first person sentenced to death based solely on the statutory aggravating factor of vileness since Virginia instituted parole ineligibility for convicted capital murderers.[19] Defense counsel requested a "life means life" instruction at four different points during trial and post-trial: first when proffering jury instructions, next at the end of the Commonwealth's closing, again when the jury sent a question to the trial court during its deliberations, specifically asking for a definition of life in prison, and finally at the post-trial sentencing when the judge imposed the jury's death recommendation.[20] Because of defense counsel's diligence in proffering the instruction at *each relevant step* of the proceedings and objecting to the court's failure to provide the instruction, the reviewing court was unable to declare the issue procedurally defaulted.[21] Yarbrough's death sentence was vacated and his case was remanded for a new sentencing proceeding.[22] Had defense counsel failed at any of the four points to raise the issue, the Commonwealth could have been able to argue, and the reviewing court to rule, that the issue had been procedurally defaulted.

Due to the hectic and fast paced nature of trials, certain objectionable occurrences may slip by counsel undetected. When this situation occurs, and counsel realizes too late that an objection should have been raised, an objection may still be entertained by the court and should be raised as early

---

16. *Beavers*, 427 S.E.2d at 418-19 (citing *Spencer*, 384 S.E.2d at 793).

17. 519 S.E.2d 602 (Va. 1999).

18. Yarbrough v. Commonwealth, 519 S.E.2d 602, 606-07, 616-17 (Va. 1999).

19. *Id.* at 611; *see* VA. CODE ANN. §§ 18.2-10 (providing the punishment for conviction of a felony), 18.2-31 (defining capital murder and the class of felony if convicted); 53.1-165.1 (mandating parole ineligibility for persons convicted of a felony offense occurring on or after January 1, 1995), 53.1-40.01 (stating that geriatric parole is not available to those convicted of a class 1 felony committed on or after January 1, 1995) (Michie 1999).

20. *Yarbrough*, 519 S.E.2d at 606-07.

21. The Supreme Court of Virginia did not mention procedural default regarding Yarbrough's argument surrounding the "life means life" jury instruction. A *very careful* reading of Yarbrough's Supreme Court of Virginia brief and the record might have led the Supreme Court of Virginia to rule that Yarbrough's "life means life" instruction was procedurally defaulted because counsel's stated grounds for objection were not identical to the grounds which the court ultimately relied upon to vacate Yarbrough's sentence. Brief for Appellant at 15-16, *Yarbrough*, 519 S.E.2d 602 (Nos. 990261, 990262); Record at 1212-13, 1253, 1262-63, 1282-83, *Yarbrough*, 519 S.E.2d 602 (Nos. 990261, 990262).

22. *Yarbrough*, 519 S.E.2d at 617.

as possible.[23] Accordingly, counsel should request to approach the bench and register the objection when the objectionable behavior is realized.[24] If the court rules on counsel's objection at that time, the court has in essence validated counsel's objection by implying that it was fully informed as to the objection and was able to make an intelligent ruling.[25] In that event, the trial has not been obstructed, both parties have had an opportunity to register an argument at side bar, and all the bases of the contemporaneous objection rule have been satisfied; there should be no default.

B. Properly Preserved Issue Not Raised on Direct Appeal

All properly preserved issues must be raised on direct appeal in order to preserve them for later review during both state and federal post-conviction proceedings.[26] At the federal level, defendants will be limited to arguments which were made at the state level.[27] Virginia attorneys face an additional problem when contemplating appellate issues in capital cases: the fifty-page limit on appeal briefs imposed by Rule 5:26 of the Rules of Virginia Supreme Court.[28] This may not sound like an imposing limitation,

---

23. *See generally* Natman Schaye, *Winning at Trial by Preparing to Lose: Creating the Record on Appeal*, CHAMPION, Mar. 1997, at 10, 57. It is important to stress that many of the cases which provide for procedural default when an issue has not been objected to and raised at the trial level focus on the fact that the issue was raised for the first time at the appellate level. *See* Varner's Ex'rs v. White, 140 S.E. 128, 131 (Va. 1927); Southern Ry. v. Cohen Weenen & Co., 157 S.E. 563, 565 (Va. 1931); Bunch v. Commonwealth, 304 S.E.2d 271, 278 (Va. 1983). Therefore, if counsel can object in a "timely" manner by bringing the issue to the court's attention as early as possible after the offending occurrence transpired, *and* the court gives counsel a ruling on the objection, it will be difficult for a reviewing court to claim that the matter was not raised and ruled on at the trial level, even if the objection did not immediately follow the perceived error. When bringing a tardy objection, counsel may also rely on *Simmons v. Commonwealth*, which held that counsel may object to the presentation of evidence at a time after it is first introduced if the inadmissability and objectionable nature of the evidence was not readily apparent at the time it was first offered. 371 S.E.2d 7, 10 (Va. Ct. App. 1988).

24. Schaye, *supra* note 23, at 57.

25. *See* Woodson v. Commonwealth, 176 S.E.2d 818 (Va. 1970) (holding that failure to provide reason for original objection and subsequent *lack of ruling thereon* by the trial court resulted in failure to comply with the contemporaneous objection rule).

26. *See* Smith v Murray, 477 U.S. 527 (1986); Slayton v. Parrigan, 205 S.E.2d 680 (Va. 1974). Certain issues may be raised for the first time during state post-conviction proceedings. Habeas counsel must raise these issues in accordance with state post-conviction procedural rules.

27. *See* Whitely v. Bair, 802 F.2d 1487, 1499-1505 (4th Cir. 1986).

28. VA. S. CT. R. 5:26. Upon request, permission may be granted by a Supreme Court of Virginia Justice to file a longer brief. *Id.* The reality is that the granting of permission to extend a brief beyond fifty pages has never been noted in a published decision. In *Weeks v. Angelone* counsel for Weeks submitted a ninety-page brief to the Supreme Court of Virginia and moved that body to make exception to the page limit as provided under Rule 5:26. 176 F.3d 249, 270 (4th Cir. 1999). The request was denied by the Supreme Court of Virginia. *Id.*

but it frequently forces counsel to pick and choose among appellate issues, causing assignments of error to be abandoned.[29] Obviously, such decisions can have deadly ramifications.

C. Relying on a Different Legal Basis When Asserting Properly Preserved Issues on Appeal

When counsel objects to an error or files a motion during pre-trial or trial, counsel must object on *all* possible grounds. When assigning errors for post-trial review, counsel must rely on the same reason(s) for which counsel originally made the objection. If a new legal basis is used when arguing an assigned error, regardless of the propriety of that legal basis, a reviewing court has the discretion to determine the error procedurally defaulted or waived. In *Goins v. Commonwealth*,[30] defense counsel made an objection at trial based on an inability effectively to cross-examine a witness.[31] On appeal counsel switched grounds for the error, arguing that the testimony proffered was irrelevant and prejudicial.[32] The Supreme Court of Virginia refused to consider the error.[33]

The United States Supreme Court has held that if a defendant did not cite federal grounds when assigning error at the state level, a federal court will not review the claim.[34] If the defendant only assigned one of many possible federal grounds for a particular error at state proceedings, he will only be allowed to argue that particular ground in federal court.[35] There-

---

at 270-71. The Fourth Circuit found that counsel's failure to brief all forty-seven claims of error due to Rule 5:26 required all issues not addressed properly below to be procedurally defaulted. *Id.* at 270-72. Weeks was executed March 16, 2000. Frank Green, *Weeks Dies By Injection Final Words Are Apology to Victim's Family, Others*, RICHMOND TIMES-DISPATCH, Mar. 17, 2000, at B1.

29. *Weeks*, 176 F.3d at 270-71. Weeks abandoned ten claims of federal constitutional error, thereby causing them to be defaulted. *Id.* at 271. Due to the ever changing face of capital law in the United States, it is impossible to determine what issues will be successful, even if they have been determined to be without merit at the state and lower federal court levels. *See infra* notes 42-50 and accompanying text.

30. 470 S.E.2d 114 (Va. 1996).

31. Goins v. Commonwealth, 470 S.E.2d 114, 128 (Va. 1996).

32. *Id.* at 128.

33. *Id.*

34. *See* Anderson v. Harless, 459 U.S. 4, 7-8 (1982). In *Anderson* the defendant cited a case decided on state constitutional grounds when assigning error during the appellate process. A federal court of appeals, affirming a writ of habeas corpus, based its decision on the federal due process aspects of that case. The United States Supreme Court held that no federal argument had been presented or relied on by petitioner at the state proceedings, and therefore, the federal court should not have reviewed the claim. *Id.* at 7-8; *see also* Gray v. Netherland, 99 F.3d 158, 162 (4th Cir. 1996).

35. *See* Washington v. Downes, 475 F. Supp. 573, 576-77 (E.D. Va. 1979); Carrier v. Hutto, 724 F.2d 396, 399 (4th Cir. 1983).

fore, it is imperative that defense counsel assert all possible legal claims at the time of the objection and in any motion and accompanying memorandum. Counsel should assign error based on the United States Constitution, the Virginia Constitution, and Virginia state law, including statutes, rules and case law.[36]

D. Relying on a Different Factual Basis When Asserting a Properly Preserved Claim

A reviewing court, be it state or federal, may determine that a claim is procedurally defaulted if counsel relies on a different set of facts when raising an issue on appeal than was used as the basis of his objection or motion at the trial stage. All of the facts upon which counsel intends to rely on appeal must be presented and argued at the trial level. To provide an example, when assigning error to a prosecutor's opening argument, counsel may only assign error to the portion of the argument that counsel actually objected to, even if, upon reflection, other parts of the opening also constituted error.[37]

Additionally, even though all facts are in the record, counsel must ground his appellate issues on the same facts which were the basis of trial objections. Moreover, counsel's brief must actually present the factual grounds relied upon in order to avoid procedural default. Counsel may not "incorporate" the record into his appellate brief by referring to the record, in order to save space, when assigning and briefing errors.[38]

E. Failure to Assign Error to Claims Which Have Not Yet Been Successful

United States Supreme Court precedent requires counsel to raise a constitutional issue in order to preserve that issue. This is so even if the issue has been decided in a manner unfavorable to the defendant in state or federal courts other than the United States Supreme Court.[39] The Court has held that "[w]here the basis of a constitutional claim is available, and other

---

36. Bright, *supra* note 12, at 45.

37. *Id.* Historically counsel would not interrupt opening or closing arguments, but instead voice any objections to those arguments when opposing counsel had finished the entire argument. Today, waiting until the end of opposing counsel's opening or closing argument to object to a statement made during the argument will trigger the contemporaneous objection rule found in Rule 5:25 and the objection will fail. *See* Russo v. Commonwealth, 148 S.E.2d 820, 825 (Va. 1966). For an analysis of the lack of civility in modern day Virginia courtrooms, see Ashley Flynn, *Procedural Default: A De Facto Exception to Civility?*, 12 CAP. DEF. J., 289 (2000).

38. *See* Jenkins v. Commonwealth, 423 S.E.2d 360, 370 (Va. 1992) (holding that brief's citation to fifteen pages of trial transcript referring to argument that counsel made regarding an objection at trial was insufficient for purposes of preserving the error on appeal); *see also supra* note 28 and accompanying text.

39. *See* Engle v. Isaac, 456 U.S. 107 (1982).

defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default."[40] Therefore, when a federal constitutional claim is in the process of being litigated by other attorneys, even in other states, "counsel is charged with knowledge that the 'tools to construct a constitutional claim' exist and [counsel] is expected to raise the issue no matter how futile it may be in the court considering the defendant's case."[41]

This form of procedural default has occurred multiple times in Virginia. In *Smith v. Murray*,[42] counsel failed to raise a constitutional claim because the Supreme Court of Virginia had previously ruled that the claim was without merit.[43] However, the same claim, presented in Texas, was held to have merit by the United States Supreme Court.[44] The United States Supreme Court held Smith's claim to have been procedurally defaulted because of his failure to present the claim for review to the Supreme Court of Virginia.[45] Smith was executed.[46]

An example in which defense counsel acted properly, preserving an issue that had not been treated favorably at either the state or federal level, occurred in *Yarbrough v. Commonwealth*. In *Yarbrough*, defense counsel proffered a parole ineligibility instruction and then objected when the trial court failed to instruct the jury regarding defendant's parole ineligibility.[47] This objection, briefed for appeal to the Supreme Court of Virginia, was recorded and preserved even though adverse Virginia case law existed and a fair reading of United States Supreme Court case law also suggested that the claim was without merit.[48] Instead of relying on the cases cited by each side,[49] the Supreme Court of Virginia ruled the issue had merit based on

40. *Id.* at 134.

41. Bright, *supra* note 12, at 44 (quoting Engle v. Issacs, 456 U.S. 107, 133 (1982)).

42. 477 U.S. 527 (1986).

43. Smith v. Murray, 477 U.S. 527, 531 (1986). When determining what errors to brief for appeal, counsel commonly abandons those errors which the Supreme Court of Virginia has previously considered and denied due to the fifty-page limitation placed on appellate briefs by Rule 5:26. *See supra* note 28 and 29 and accompanying text.

44. *See* Estelle v. Smith, 451 U.S. 454 (1981).

45. *Smith*, 477 U.S. at 533-38.

46. *Vietnam Vet is Executed in Virginia*, ATL. J., Aug. 1, 1986, at A4.

47. Yarbrough v. Commonwealth, 519 S.E.2d 602, 606 (Va. 1999).

48. *See* Simmons v. South Carolina, 512 U.S. 154 (1994) (holding where future dangerousness is at issue and state law prohibits parole if defendant is sentenced to life in prison, due process requires that the jury be informed that the only alternative to death sentence is life imprisonment without parole); Roach v. Commonwealth, 468 S.E.2d 98, 111 (Va. 1996) (holding that a defendant is only eligible for a "life means life" instruction when the defendant's future dangerousness is at issue *and* the defendant is ineligible for parole at the time he is sentenced on the capital murder charge).

49. Both the Commonwealth and Yarbrough relied on *Simmons v. South Carolina*, 512

Virginia case law and vacated Yarbrough's sentence.[50] Defense counsel in *Yarbrough* masterfully identified a questionable claim, preserved the claim and required the Supreme Court of Virginia to review and rule on the claim.

Counsel are urged to object, preserve and brief *all* colorable claims, regardless of current adverse Virginia precedent and questionable United States Supreme Court precedent. Only in the case where an issue has been clearly resolved by the United States Supreme Court should counsel not object, preserve and brief that issue.[51]

III. Making the Record and Preserving Errors for Review

While it is imperative for defense counsel to have a comprehensive understanding of the procedural requirements involved in making the record and correctly preserving all possible objections for appeal and habeas proceedings, it is equally important that counsel have a complete understanding of the legal basis for an appeal. It is imperative that counsel rely heavily on federal constitutional grounds when making all objections and motions at trial and assigning errors at appellate and habeas proceedings. This is especially true in Virginia, where state court relief at the direct appeal level and during habeas proceedings is rare for a convicted capital murderer. Familiarity with United States Supreme Court capital case law is a must for capital defense counsel.[52] It is also important for counsel to be aware of "any arguably applicable provisions of the United States Constitution, as interpreted by the decisions of the . . . lower courts, the state constitution, state statutes, state rules and state case law."[53]

A court, state or federal, reviewing a habeas petition will only review issues which were raised at trial and on direct appeal.[54] In addition, federal

---

U.S. 154 (1994), which held that, under certain circumstances, a convicted capital murderer was entitled to a "life means life" instruction. Appellant's brief cited *Jones v. Commonwealth*, 72 S.E.2d 693 (Va. 1952), one of the three Virginia cases that the Supreme Court of Virginia relied upon in vacating Yarbrough's sentence. Brief for Appellant at 16, *Yarbrough*, 519 S.E.2d 602 (Nos. 990261, 990262). In addition to *Simmons*, the Commonwealth relied on *Roach v. Commonwealth*, 468 S.E.2d 98 (Va. 1996), a Virginia case which followed *Simmons*, limiting its application to those trials which were circumstantially similar. *Yarbrough*, 519 S.E.2d at 611-12.

50. *Yarbrough*, 519 S.E.2d at 613-18.

51. Bright, *supra* note 12, at 44. This is true unless counsel believes a new argument or court majority might yield a positive result.

52. A listing of all significant United States capital cases with a brief description of their importance to defending a capital charge has been compiled by the Southern Center for Human Rights. The compilation can be viewed and printed from the Southern Center for Human Rights web page. The URL is http://www.schr.org/death-penalty-info/index.html.

53. Bright, *supra* note 12, at 44.

54. *See* Slayton v. Parrigan, 205 S.E.2d 680, 682 (Va. 1974). *Slayton* has been cited by both state and federal courts for the proposition that a claim will not be reviewed if it was not first raised at trial and again on direct appeal. *See* Mu'min v. Pruett, 125 F.3d 192, 194 (4th

courts will only review federal constitutional claims which have first been presented to and rejected by Virginia state courts.[55] Presenting only state law as the basis of one's arguments will bar federal constitutional claims from review in the federal courts.[56] Counsel should always utilize the United States Constitution and cases interpreting the Constitution when formulating arguments in support of counsel's position at trial and on direct appeal.[57]

Having been warned that the Supreme Court of Virginia rarely provides relief to capital petitioners, counsel should still preserve all issues on every applicable state law ground. An error which occurred pre-trial or at trial may be correctable only through state law means.[58] In addition, the Supreme Court of Virginia may interpret the Virginia Constitution more broadly then its federal counterpart.[59]

A recent example of the Supreme Court of Virginia applying Virginia case law in a more expansive fashion than required by the federal constitution occurred in *Yarbrough v. Commonwealth*. In *Yarbrough* the Commonwealth argued that the defendant was not eligible for a "life means life" instruction because the Commonwealth was not seeking a death sentence based on the future dangerousness aggravating factor, but only on the vileness aggravating factor.[60] The Commonwealth relied on *Simmons v. South Carolina*, a United States Supreme Court case which held that a capital defendant was entitled to a "life means life" instruction when convicted of capital murder and a death sentence based on the aggravating factor of future dangerousness was sought.[61] The Supreme Court of Virginia rejected the Commonwealth's argument and based its decision to grant Yarbrough a new sentencing proceeding on Virginia case law dating back as far as 1935.[62]

Cir. 1997); Strickler v. Murray, 452 S.E.2d 648, 651 (Va. 1995).

55. *See* Carrier v. Hutto, 724 F.2d 396 (4th Cir. 1983).

56. *See* Anderson v. Harless, 459 U.S. 4, 7-8 (1982).

57. Bright, *supra* note 12, at 44.

58. *Id.*; *see also* Schaye, supra note 23, at 14.

59. Bright, *supra* note 12, at 44; *see also* Schaye, *supra* note 23, at 14 ("As the federal courts have become more Draconian, state appellate judges have shown a willingness to find relief under state constitutions.").

60. Yarbrough v. Commonwealth, 519 S.E.2d 602, 611 (Va. 1999).

61. *Id.* at 611; *see also* Simmons v. South Carolina, 512 U.S. 154, 178 (1994).

62. *Yarbrough*, 519 S.E.2d at 613-16. It is important to note that the Supreme Court of Virginia did not base its ruling in *Yarbrough* upon the defendant's exact grounds for appealing the trial court's failure to proffer the "life means life" instruction to the jury. *Id.*; *see supra* note 21. To say this is odd or rare is an understatement. How many otherwise valid claims have been rejected or ignored based on a faulty or incomplete legal basis is impossible to determine. Counsel should take from this example the need for diligence, creativity and research in preparing for a capital case, as well as note the lengths required to make the record and preserve error in order to provide a defendant with the opportunity for relief at a post-trial proceeding.

A. Object

In preparation for trial, counsel should attempt to predict what standard and particular objections may be required in the specific case being tried.[63] Having thus predicted, counsel should prepare complete objections, including all state and federal grounds for each objection. Since it is impossible to predict every move that a prosecutor will make during trial, counsel should be prepared to object when instinct prompts such a reflex, even before precise grounds for the objection are apparent. As the reason for objecting crystalizes it should be stated, along with all possible state and federal grounds which could support the objection.[64]

The case of Benjamin Lee Lilly, recently reversed and remanded by the United States Supreme Court, provides an excellent example of an objection made and supported on both state and federal grounds.[65] During Lilly's trial the Commonwealth called Mark Lilly, the brother and co-defendant of Benjamin Lilly, as a witness.[66] Mark Lilly, invoking the Fifth Amendment, refused to testify.[67] The Commonwealth then offered a statement made by Mark Lilly during initial post-arrest questioning, in which he admitted to participation in the crime and stated that Benjamin Lilly committed the

---

Virginia state law is more expansive than federal constitutional law requires in at least two other areas pertinent to Virginia death penalty law. First, section 18.2-18 of the Virginia Code prohibits all but the actual perpetrator of the killing from receiving the death penalty. VA. CODE ANN. § 18.2-18 (Michie 1999) (excepting murder for hire or by direction). In contrast, the United States Supreme Court has held that an accomplice who intends for a killing to occur or for deadly force to be used during the commission of a crime, who participates in a major way in a felony that results in a murder, or whose mental state is one of reckless indifference may receive the death penalty. *See* Enmund v. Florida, 458 U.S. 782, 799-800 (1982); Tison v. Arizona, 481 U.S. 137, 157 (1987). Therefore, the Virginia legislature has limited the number of death penalty eligible defendants compared to the Eighth Amendment as interpreted by the United States Supreme Court.

Second, Virginia's death penalty scheme provides those convicted of capital murder and sentenced to death with a mandatory proportionality review conducted by the Supreme Court of Virginia. VA. CODE ANN. § 17.1-313 (Michie 1999). This proportionality review, while conducted in a questionable manner due to the Supreme Court of Virginia's failure in most cases to review a capital conviction resulting in a death sentence with capital convictions which did *not* result in a death sentence, is not required by the United States Constitution. Pulley v. Harris, 465 U.S. 37, 44-51 (1984) (holding that proportionality review is not constitutionally required where state death penalty scheme does not provide for such review); *see also*, Kelly E. P. Bennett, *Proportionality Review: The Historical Application and Deficiencies*, 12 CAP. DEF. J. 103 (1999). Therefore, the Virginia proportionality review requirement also exceeds the rights provided by the federal constitution.

63. *See generally* Schaye, *supra* note 23, at 57.

64. *Id.*

65. *See* Lilly v. Virginia, 119 S. Ct. 1887, 1901 (1999).

66. *Id.* at 1892.

67. *Id.* at 1892-93.

murder.[68] Defense counsel initially attempted to suppress Mark Lilly's statement pre-trial and at trial repeated the objection to this evidence when it was proffered by the Commonwealth.[69] In both the pre-trial suppression motion and when objecting to the statement at trial, Lilly's counsel relied on both state and federal grounds: (1) Mark Lilly's statement did not fall within accepted state hearsay exceptions and (2) the admission of the co-defendant's statements violated Benjamin Lilly's Sixth Amendment Right to Confrontation.[70] By stating both state and federal grounds, defense counsel provided the Supreme Court of Virginia the opportunity to reverse the trial court's ruling without having to rely on federal constitutional grounds, while at the same time providing the United States Supreme Court with the means to reverse the state trial court should Virginia's highest court fail to reverse clear error.

B. Raise All Issues

Defending a capital charge requires defense counsel to be on the cutting edge of the law, informed and knowledgeable of both well settled case law and new developments in capital practice.[71] Allowing an objectionable circumstance or occurrence to slip by and failing to anticipate new developments regarding capital law have resulted in the loss of meritorious claims and the premature death of multiple Virginia capital defendants.[72] In trying to anticipate new developments in capital law, counsel should be prepared to object to anything that seems unfair or unjust.[73] Objections of this nature will often rely on constitutional principles recognized by the United States Supreme Court or the Supreme Court of Virginia which have not been applied to the particular circumstance confronted by defense counsel.[74]

To return to a familiar example, defense counsel in *Yarbrough v. Commonwealth* objected to the trial court's failure to provide the jury with an instruction that "life means life."[75] In doing this, counsel relied on the federal constitutional due process holding in *Simmons v. South Carolina*, which requires the instruction to be given when (1) the prosecution bases its request for the death penalty on the aggravating factor of future dangerous-

---

68. *Id.*

69. Lilly v. Commonwealth, 499 S.E.2d 522, 527, 533-34 (Va. 1998).

70. *Id.*

71. Bright, *supra* note 12, at 44; *see also supra* note 52.

72. *See* Smith v Murray, 477 U.S. 527, 536-37 (1986) (holding that if a claim was available to a defendant prior to affirmance of his conviction and sentence on direct appeal and defendant failed to raise the claim until habeas proceedings, that claim will be procedurally defaulted); *see also supra* notes 43-45 and accompanying text.

73. Bright, *supra* note 12, at 44.

74. *Id.*

75. Yarbrough v. Commonwealth, 519 S.E.2d 602, 606-07 (Va. 1999).

ness and (2) there is no possibility for parole should the defendant receive a life sentence.[76] Yarbrough was sentenced to death under the aggravating factor of vileness alone.[77] Still, defense counsel based its objection on the constitutional principles found in *Simmons*.[78] The Supreme Court of Virginia vacated Yarbrough's death sentence.[79] While the court did not utilize defense counsel's specific argument in vacating Yarbrough's death sentence, it did state that its holding would be consistent with a fair trial for both sides.[80] Yarbrough's counsel laid the groundwork enabling Yarbrough's death sentence to be vacated by objecting and briefing the issue on the grounds of a recognized constitutional principle not yet applied to the particular facts which counsel was presented with at trial.[81]

C. Assert All State and Federal Grounds

It is imperative that trial counsel state all appropriate grounds, both state and federal, in support of all objections and motions made during the pre-trial and trial phases. Should counsel make a bona fide objection at trial, stating certain grounds upon which the objection is based, the objection will not be preserved on other unstated grounds.[82] In addition, federal courts will not review assignments of error that relied exclusively on state grounds.[83]

During the course of a trial counsel may realize that additional grounds should have been assigned to an earlier objection. When this occurs, counsel should make a point of assigning the extra grounds to that objection. This can be done by renewing the objection and stating for the record the additional grounds for the objection.[84] As long as the trial court has an opportunity to take corrective action (for example, the renewed objection is made before the case has been sent to the jury), counsel should be permitted to clarify and enrich a prior objection, which was overruled, by utilizing this process.[85]

---

76. Simmons v. South Carolina, 512 U.S. 154, 169 (1994).

77. *Yarbrough*, 519 S.E.2d at 606.

78. *Id.* at 611.

79. *Id.* at 617.

80. *Id.* at 616.

81. *Id.* at 611. Not only had the constitutional due process principle not been applied to the circumstances Yarbrough encountered, but in fact existing precedent suggested that the constitutional principle defense counsel relied upon had been rejected by the Supreme Court of Virginia. *See supra* note 48 and accompanying text.

82. *See* Washington v. Downes, 475 F. Supp. 573, 576-77 (E.D. Va. 1979). *But see supra* note 21.

83. *See* Anderson v. Harless, 459 U.S. 4, 7 (1982).

84. *See* Reid v. Baumgardner, 232 S.E.2d 778, 781 (Va. 1977).

85. *Id.*

In the heat of trial counsel may not always identify all plausible grounds when making objections. One creative method for avoiding failure to preserve all legal grounds when making objections at trial is to prepare a trial memorandum which incorporates a long list of constitutional provisions and cases and states that all objections made during trial are based on the grounds found within the trial memorandum.[86] Having filed the memorandum, counsel can simply refer to the trial memorandum when making an objection at trial and ask that the objection be based on all grounds found within the memorandum.[87] In addition, trial counsel may cite particular federal and state grounds, but the trial memorandum will cover all grounds which may be common or alternatively not readily apparent.

D. Create a Factual Basis for Relief in the Record

The record must demonstrate clearly the occurrence and facts which counsel cites and relies upon when assigning error for appellate review.[88] This is especially pertinent when there may be more then one legitimate ground on which to base an objection. In such a circumstance, counsel will be provided with certain facts upon which to object, but there may also be alternate reasons for the objection of which counsel is aware but which have not yet been established and recorded. At this point counsel must present the alternate facts and record a second objection based on those facts, providing another legitimate ground for the objection.[89]

In *Myers v. Commonwealth*,[90] defense counsel contested the validity of one entry on a certified transcript of conviction.[91] On appeal, counsel argued that there was insufficient evidence to support the adjudication.[92] The Virginia Court of Appeals refused to consider the appellant's claim "because the abstract was not received into evidence."[93] Myers's claim was procedurally defaulted because defense counsel failed to establish a proper record by having the transcript of conviction entered into evidence.[94]

E. Make the Record Reflect All Objections

---

86. Bright, *supra* note 12, at 45.
87. *Id.*
88. *Id.*
89. *Id.*
90. No. 0778-87-4, 1989 WL 641940 (Va. Ct. App. Jan. 24, 1989).
91. Myers v. Commonwealth, No. 0778-87-4, 1989 WL 641940, at *1 (Va. Ct. App. Jan. 24, 1989).
92. *Id.*
93. *Id.*
94. *Id.*

Depending on the presiding judge, counsel will either have a relatively easy time establishing a record of the proceedings or will have to make a very deliberate and conscious effort to make the best record possible. It is imperative that counsel make all objections on the record and file all motions, proposed jury instructions, and other relevant material so that these materials will be part of the record.[95] Counsel should also keep in mind that the record needs to be clear with respect to both critical facts and the bases for all objections, motions and denied requests.[96]

Special consideration should be given to court proceedings which are commonly left out of the record. Such proceedings include those in chambers, bench conferences, and arguments between counsel.[97] Court reporters frequently do not record bench conferences or proceedings in chambers. Defense counsel has the right, under most circumstances, to have a court reporter present during in camera proceedings.[98] If these proceedings are not recorded by the court reporter, they will not be in the record and, consequently, will be unavailable for review at a post-trial proceeding.

During trial, counsel should make objections and motions at side-bar, "out of the presence of the jury."[99] Should the judge refuse to hear all objections at side-bar, counsel should object to this ruling on Sixth Amendment fair trial and effective assistance of counsel grounds.[100] Judges may be unwilling to alter their trial habits even though counsel is defending a capital case and the United States Supreme Court has stated that capital cases require a heightened standard of reliability.[101] Still, counsel should make every effort to have the right to object out of the jury's hearing.

---

95. Bright, *supra* note 12, at 46.

96. *Id.* A good imagination may be necessary in determining what might be a relevant fact necessary for preservation. In addition to the substantive matters of a capital trial, counsel should also consider any collateral circumstances associated with the trial, such as the presence of uniformed officers, the emotional reactions of the audience, or improper juror behavior. *See* Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991) (holding that pictures, included in the record at request of defense counsel, of an overwhelming number of uniformed prison guards in the courtroom evidenced prejudice requiring death sentence to be overturned). These and other objectionable actions during trial should be memorialized in the record via photographs, affidavits, testimony of witnesses called for such purpose, or any other means available to counsel for making the record. *See generally* Bright, *supra* note 12, at 46. While there may be tactical reasons not to enter certain exhibits into the record, counsel should balance these concerns with that of providing reviewing courts with as complete a record as possible in the hopes of securing reversal on appeal. *See* Schaye, *supra* note 23, at 57.

97. Bright, *supra* note 12, at 46.

98. *See* Brittingham v. Commonwealth, 394 S.E.2d 336 (Va. Ct. App. 1990).

99. Bright, *supra* note 12, at 46.

100. *Id.*; *see also* U.S. CONST. amend. VI.

101. *See* Woodson v. North Carolina, 428 U.S. 280 (1976) (holding that the penalty of death is qualitatively different from a term of imprisonment and requires a corresponding need of reliability when determining that death is the appropriate penalty in a specific case).

Regardless of a judge's reluctance to allow counsel to make the record, counsel must ensure that the record is as complete, accurate and clear as possible. Objections and motions for a mistrial must be made contemporaneously with all prejudicial conduct.[102] When required to make legal arguments in the presence of the jury, counsel should supplement the objection or motion the next time the jury is excused, "pointing out the impossibility of curing the objectionable matter because of the court's unwillingness to hear the argument in a timely manner."[103] If a judge goes even further, refusing to allow counsel to state an objection or the grounds for an objection, counsel must make sure the record reflects this denial, by requesting to be heard on the objection.[104] Again, at the first opportunity, after the jury has been excused, counsel should supplement the argument, asking for a mistrial or reconsideration.[105] If this fails, counsel should make all objections to the court reporter at the end of the session, stating when and how counsel attempted to make the record earlier in the day, what the judge did to prevent such recording, the nature of the objection or motion, what remedy was sought, and how the defendant was consequently prejudiced.[106] Finally, when counsel is denied access to the court reporter at the end of the day, counsel should address all concerns in writing, stating all possible grounds, and file such document with the clerk of the court.[107]

F. Ask for All Potential Remedies

Counsel are required to ask for a remedy when making an objection during trial; if counsel fails to request a remedy, the claim will be procedurally defaulted.[108] Asking for a remedy goes beyond simply requesting for the record what defense counsel deems an appropriate recourse for a particular infraction. Counsel should be prepared to request a remedy and offer support for the need for that specific remedy. Generally, counsel should ask for a mistrial when an error has occurred during a capital

---

102. *See* Sheppard v. Commonwealth, 464 S.E.2d 131, 140-41 (Va. 1995); Cheng v. Commonwealth, 393 S.E.2d 599, 605-06 (Va. 1990); Slayton v. Parrigan, 205 S.E.2d 680, 682 (Va. 1974).

103. Bright, *supra* note 12, at 46.

104. *Id.*

105. *Id.*

106. *See generally* Schaye, *supra* note 23, at 12.

107. *Id.*; *see also* Bright, *supra* note 12, at 46.

108. *See* Moore v. Commonwealth, 414 S.E.2d 859 (Va. Ct. App. 1992) (holding that where defense counsel fails to ask for a cautionary instruction or mistrial, prosecutor's improper comments or conduct will not be considered on appeal). *But see* Martinez v. Commonwealth, 395 S.E.2d 467 (Va. Ct. App. 1990) (holding that defense counsel was not required to request cautionary instruction or mistrial after the trial judge overruled an objection to the Commonwealth Attorney's closing argument).

trial.[109] Further, counsel should be prepared to argue why anything less than a mistrial would be inadequate.[110] In *Breard v. Commonwealth*,[111] defense counsel requested a mistrial in regard to a witness's testimony, but the motion for a mistrial came after four other witnesses had subsequently testified.[112] The Supreme Court of Virginia deemed the claim and any possible remedy waived by counsel's failure to raise an objection and request a remedy in a timely manner, pursuant to Rule 5:25 of the Rules of the Virginia Supreme Court.[113] Angel Breard was executed on April 14, 1998.[114]

While asking for a mistrial should be the standard remedy sought when making objections at a capital trial, counsel must also ask for additional remedies in the alternative. Failure to ask for all possible remedies has been held to constitute a waiver of the issue.

Gray v. Netherland[115] provides an example of a reviewing court holding an issue procedurally defaulted because counsel failed to ask for the proper remedy, thereby prohibiting a proper disposition of the issue at trial.[116] The prosecutor in *Gray* informed the defense before trial that, should Gray be found guilty of capital murder, the Commonwealth would introduce evidence at the sentencing phase regarding Gray's participation in an unsolved murder, but that this evidence would be limited to statements made by Gray.[117] Upon Gray's conviction, the prosecutor informed defense counsel that the Commonwealth intended to introduce evidence, in addition to Gray's statements, connecting Gray to the unsolved murder.[118] Defense counsel objected on due process grounds, stating that the new evidence took him by surprise and that he was not provided with sufficient notice, and asked that the newly revealed evidence be excluded.[119] While stating that counsel was not prepared at this time to rebut the additional evidence,

---

109. Bright, *supra* note 12, at 46.

110. *Id.* Judges will deny most mistrial requests and instead offer a curative instruction requesting the jury to disregard the offensive conduct. This remedy is often inadequate in addressing the objection. Counsel must renew the objection and mistrial request, citing the inadequacy of the court's remedial action. *Id.*

111. 445 S.E.2d 670 (Va. 1994).

112. Breard v. Commonwealth, 445 S.E.2d 670, 678 (Va. 1994).

113. *Id.*; *see also supra* note 3 and accompanying text.

114. *Virginia Executes Paraguayan for Murder Amid Controversy, Debate*, CHIG. TRIB., Apr. 15, 1998, at 13.

115. 518 U.S. 152 (1996).

116. Gray v. Netherland, 518 U.S. 152, 170 (1996).

117. *Id.* at 156-57.

118. *Id.* at 157. This additional evidence included photographs of the crime scene and testimony by police investigators and the state medical examiner that was intended to illustrate that the manner in which the victims of the unsolved murder were killed was similar to that of the victim for whose murder Gray had just been convicted. *Id.*

119. *Id.* at 157, 161-62.

defense counsel failed specifically to ask for a continuance.[120] This failure was noted by the United States Supreme Court.[121] The Court stated that exclusion of evidence was not the only possible remedy, and that counsel's failure affirmatively to ask for a continuance could have been interpreted by the trial court as a tactical decision.[122] In the end, the United States Supreme Court ruled that part of Gray's claim was procedurally defaulted and remanded what remained for a determination by the Fourth Circuit.[123] The Fourth Circuit held that Gray had procedurally defaulted what remained of the claim.[124] Had defense counsel requested a continuance in the alternative to exclusion of the evidence, and the trial court still denied counsel's motion, Gray's death sentence may have been vacated due to the prosecutor's failure to provide proper notice regarding sentencing phase evidence. Gray was executed on February 26, 1997.[125]

G. Require the Court to Make a Ruling

An important function of the contemporaneous objection rule is to allow the trial court to rule on any objections presented by counsel in an intelligent and informed manner at the time of the objectionable conduct.[126] Without a ruling, a reviewing court may assume that counsel either failed to raise an objection at trial regarding the claim brought before the reviewing court, failed to state the proper grounds for the objection at trial, or failed to ask for a proper remedy at the time of the objection. If the trial court did not rule on an objection, for the reasons listed above or any other reason, the objection will not be preserved for appellate review.[127]

There are several reasons why a judge may not provide a ruling when defense counsel makes an objection. Often a judge will attempt to reach consensus among opposing parties on an issue instead of dealing with an

---

120. *Id.* at 157.

121. *Id.* at 169.

122. *Id.*

123. *Id.* at 170-71.

124. Gray v. Netherland, 99 F.3d 158, 166 (4th Cir. 1996). For a more comprehensive analysis of Gray's appellate holdings, see Flynn, *supra* note 37.

125. *See* Laura Lafay & Robert Little, *Coleman Gray Put to Death by Injection*, VIRGINIAN-PILOT, Feb. 27, 1997, at A1.

126. *See* Woodson v. Commonwealth, 176 S.E.2d 818, 820 (Va. 1970); Simmons v. Commonwealth, 371 S.E.2d 7, 10 (Va. Ct. App. 1988); *see also supra* note 11 and accompanying text.

127. *See Woodson*, 176 S.E.2d at 820-21; Snyder-Falkinham v. Stockburger, 457 S.E.2d 36, 38-39 (Va. 1995) (holding that when trial court was never afforded the opportunity to address and rule on an issue the reviewing court will not hear that issue on appeal). *But see* Robinson v. Commonwealth, 413 S.E.2d 885 (Va. Ct. App. 1992) (holding that counsel who raised objection three times and did all that was required to preserve issue did not waive the claim by failing to insist that the trial judge rule on the motion).

objection in a standard fashion.[128] Sometimes a judge may attempt to coerce counsel into acquiescing with the judge's interpretation of the proper resolution regarding objectionable conduct.[129] Occasionally a judge might fail to provide a ruling in an attempt to deny appellate review of a legitimate error.[130] Whatever the reason for a judge's reluctance to issue a ruling when counsel objects at trial, counsel must insist on a ruling and make objections and exceptions to all adverse rulings on the record.

IV. Conclusion

Defending a capital murder charge in Virginia requires counsel to be both a trial advocate, effectively preparing for and conducting a capital trial, and an appellate lawyer, mindful of the objection and record preservation requirements necessitated by the Supreme Court of Virginia's and federal courts' exacting procedural default rules. A Virginia capital trial, complete with a death qualified jury, is often not the most favorable venue for a capital defendant. Ensuring that a capital defendant has the advantage of presenting all possible errors that occur during the defendant's trial in post-conviction proceedings is an important role of capital trial counsel.

128. Bright, *supra* note 12, at 46.
129. *Id.*
130. *Id.*