



Spring 4-1-1990

WHERE DO WE GO FROM HERE? - POST-CONVICTION REVIEW OF DEATH SENTENCES

Juliette A. Falkner

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlucdj>



Part of the [Criminal Procedure Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Juliette A. Falkner, *WHERE DO WE GO FROM HERE? - POST-CONVICTION REVIEW OF DEATH SENTENCES*, 2 Cap. Def. Dig. 25 (1990).

Available at: <https://scholarlycommons.law.wlu.edu/wlucdj/vol2/iss2/10>

This Article is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Capital Defense Journal by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

that he intended to deprive his victim of personal liberty); *Barnett v. Commonwealth*, 216 Va. 200, 202, 217 S.E.2d 828 (1975) (holding the intimidation or force element may be achieved by physical violence or the threat of it: defendant threatened to shoot his victim if she did not get in his car and she got in the car after believing she heard the “click” of a gun); *Brown v. Commonwealth*, 230 Va. 310, 314, 337 S.E.2d 711 (1985) (holding that the initial detention, through assaults and threats of violence, was different in time and place, and in “quantity and quality the acts of force and intimidation employed in the abduction were separate and apart from the restraint inherent in the commission of rape”); *Cf., Johnson v. Commonwealth*, 221 Va. 872, 879, 275 S.E.2d 592 (1981) (holding a conviction for abduction not supported by evidence that defendant broke into victim’s apartment and grabbed her and then fled, because he did this in furtherance of sexual advances and he did not intend to deprive his victim of her personal liberty, “although such a deprivation did occur momentarily”).

Like robbery in the capital context, § 18.2-47 abduction is subject to broad judicial interpretation. As noted above, practically any detention, no matter how slight, may constitute an abduction, even without the element of asportation. *Scott* at 524. The legislature, however, has provided that only a much narrower range of abduction is applicable to capital cases.

A willful, deliberate and premeditated killing of “any person in the commission of abduction, as defined in §18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit” is an offense of capital murder under Virginia Code § 18.2-31(1). Also, § 18.2-31(8) states that the

... willful, deliberate and premeditated killing of a child under the age of twelve years in the commission of abduction as defined in § 18.2-48 when such abduction was committed with the intent to extort money or a pecuniary benefit, or with the intent to defile the victim of such abduction.

Section 18.2-48 abduction includes four aggravating elements that elevate § 18.2-47 abduction to § 18.2-48 abduction: intent to extort money, or pecuniary benefit, intent to defile, and female under sixteen years of age for the purpose of concubinage or prostitution.

To elevate a homicide to capital murder under § 18.2-31(1) and §18.2-31(8), there must have been a § 18.2-48 abduction. Thus though basic abduction is broadly construed, the legislature has identified only two situations where certain types of abduction will support a capital charge under § 18.2-31(1) and three situations to support a capital charge under § 18.2-31(8). In other words, the statutory language of § 18.2-31 permits a capital murder charge only when a willful, deliberate and premeditated killing has occurred in the commission of *some* of the particular types of abduction set out in § 18.2-48.

Section 18.2-31(1) makes reference to extortion (for money or a pecuniary benefit) as the only type of abduction that may support a capital murder charge for the killing of “any person.” The defendant need not successfully extort, but he must at least intend to extort. Section 18.2-31(8) includes all of the aggravators, except abduction of a minor female for immoral purposes, to support a capital murder charge for the killing of a child under twelve. Abduction, therefore, is broadly construed in the non-capital context and the court typically will find a force or intimidation element, no matter how slight, and a detention, no matter how brief. When abduction is used as a capital aggravator, abduction is defined more narrowly as the legislature has mandated that only particular types of abduction will support capital charges (the financial types under § 18.2-31(1) and the financial types plus intent to defile under § 18.2-31(8)).

There have been to date no capital murder prosecutions under either § 18.2-31(1) or § 18.2-31(8). Consequently, it is unknown whether the Supreme Court of Virginia, as it has done with robbery, will place a different gloss on the construction of the non-capital offense when it is used to elevate murder to capital murder.

WHERE DO WE GO FROM HERE? - POST-CONVICTION REVIEW OF DEATH SENTENCES

By: Juliette A. Falkner

The trial of capital cases should be undertaken with the knowledge that there are eight further steps possible for judicial review of a conviction and sentence of death. However, the protections offered by such extensive review may become virtually nonexistent if trial attorneys do not keep in mind the law governing these further proceedings. Likewise, mistakes in representation of capital defendants at appellate and collateral stages in the state system may become fatal to further efforts to secure meaningful review in the federal system. This article is but a primer, designed only to introduce counsel to some of the issues important at each step of the post-conviction process.¹

DIRECT APPEAL:

In Virginia after the trial court enters a final judgment sentencing an individual to death, that decision is automatically appealed to the Supreme Court of Virginia.² On direct appeal, the Supreme Court of Virginia must 1) review the assignments of errors, 2) determine if the trier of fact imposed the death sentence in an arbitrary or capricious manner and 3) decide if the death sentence is “excessive or disproportionate” compared to the penalty in similar cases.³

The severe and irreversible nature of the death penalty requires “a greater degree of reliability when it is imposed.”⁴ However, the safeguards which promote this greater degree of reliability only apply during the trial and direct appeal.⁵ The U.S. Supreme Court has made this clear: . . . [I]t must be remembered that the direct appeal is the primary avenue of review of a conviction or sentence, and death penalty cases are no exception.⁶

Virginia has a contemporaneous objection rule⁷ applicable to trials and appeals.⁸ Under this rule an appellate court will not consider any assignment of error unless:

1. The objection was made with reasonable certainty at the time of the ruling;⁹

2. The grounds for the objection were stated at the time of the ruling.¹⁰

The purpose of the rule is to allow the trial court the first opportunity to decide questions of evidence and procedure.¹¹ Objections not made in conformity with this rule will not be considered, “unless for good cause shown”¹² or “in the interest of justice.”¹³ Good cause includes no previous opportunity to object.¹⁴ “In the interest of justice” means

that there was a miscarriage of justice apparent on the record.¹⁵ For example, a defendant sentenced for a crime different from that which he was convicted.¹⁶

Application of the contemporaneous objection rule is a matter of state law.¹⁷ Therefore if an attorney fails to raise claims of error at trial or on direct appeal, procedural default¹⁸ may bar consideration of the claim in a subsequent habeas petition. *Wainwright v. Sykes*.¹⁹ The Fourth Circuit explained *Wainwright* in *Cole v. Stevenson*:²⁰

As we construe *Wainwright v. Sykes* . . . we are of the opinion that the prisoner is barred from litigating his claim on federal habeas corpus because in his direct appeal he (1) failed to except to the alleged error [which occurred at the trial level] . . . in his assignments of error on appeal as required by [state procedural rules] and (2) failed to otherwise raise the issue in his appeal. These two failures foreclosed both direct and collateral attack of the conviction in [state] courts and are an adequate and separate State ground for denying relief.²¹

Hence, the direct appeal is a critical stage for the presentation and preservation of all state and federal claims which arose during the trial and may be the basis for a collateral attack. Further, capital practice requires that *all* errors be preserved on appeal, *not* just those thought to be most likely to persuade the Supreme Court of Virginia.

WRIT OF CERTIORARI TO SUPREME COURT OF THE UNITED STATES:

The main purpose of the writ of certiorari is to persuade the Court that defendant's case raises unresolved issues or involves conflicting lower court opinions respecting important federal rights.²² Thus, the petition is not simply an appeal or claim of error on the merits of the case.²³ In *Williams v. Missouri*²⁴ the Supreme Court of the United States recognized the importance of petitioning the High Court after the direct appeal.²⁵ "The defendant must have at least one opportunity to present to the Court his full claims that his death-sentence has been imposed unconstitutionally."²⁶ Thus, when the Supreme Court of Virginia affirms the death sentence and denies a petition for rehearing, a petition for writ of certiorari should be filed with the United States Supreme Court.

Occasionally, a defendant sentenced to death decides not to appeal his or her sentence.²⁷ In these instances, other individuals may attempt to continue the appellate process as defendant's "next of friend" or "best friend."²⁸ However, the Court has been reluctant to hear such cases, particularly when defendant made a "knowing and intelligent waiver of any and all federal rights he might have." *Gilmore v. Utah*.²⁹ Consequently, the Court generally dismisses these suits for lack of standing.³⁰

The United States Supreme Court requires a criminal defendant to file a petition for writ of certiorari within ninety days after the petition for rehearing is denied by the highest state court of competent jurisdiction.³¹ When filing the writ, an attorney should also file for a stay of execution. In *Williams* the Court seems to make the stay of an execution a constitutional requirement pending the disposition of the first writ of certiorari. ". . . [I]f a state schedules an execution to take place before the filing and disposition of a petition for certiorari, it must stay that execution pending completion of the direct review as a matter of course."³² During the initial petition for cert., the attorney must first request the stay from the appropriate state court. If the state court refuses the stay, the Supreme Court will grant it.³³

Three documents should be filed with the cert. petition: 1) an application for a stay of execution pending the resolution of the cert.

petition; 2) a motion to proceed in forma pauperis; 3) a notarized affidavit in support of the motion to proceed in forma pauperis.

STATE HABEAS CORPUS PROCEEDINGS

In Virginia, a capital criminal defendant may petition for a writ of habeas corpus to the circuit which entered the original (judgment order of conviction) sentence. Upon denial of the writ by the appropriate circuit court, the defendant may appeal to the Virginia Court of Appeals or the Supreme Court of Virginia.³⁴ However, only the Supreme Court of Virginia has the authority to hear habeas appeals concerning a capital murder conviction.³⁵ The Court of Appeals' habeas corpus jurisdiction is limited to those "cases over which" it has jurisdiction on direct appeal.³⁶ Consequently, the Court of Appeals lacks jurisdiction to hear habeas appeals from a circuit court which imposed the death penalty.³⁷ The right to appellate review is a statutory right and is "not a necessary element of due process; thus, no due process violation occurs if an appeal to a state court is barred."³⁸

Habeas corpus petitions must allege sufficient facts, which if proven, support the legal claims made in the petition.³⁹ Unless the habeas attorney shows that the factual findings of the trial court are "plainly wrong or unsupported by credible evidence," the habeas court will uphold such factual determinations.⁴⁰ Therefore the proper presentation of these claims requires a factual re-investigation of the defendant's case which includes interviewing the defense and Commonwealth's attorneys, the trial judge, the jury and all the witnesses. An evidentiary hearing is often sought and granted on these claims.⁴¹

The claims brought in state habeas should be claims defendant also wants to raise in federal habeas corpus but have not yet been exhausted.⁴² Every possible claim should be raised in state habeas. The response of the Attorney General will typically seek to avoid a decision on the merits of the claim in one of two ways. First, by asserting that the claim is procedurally barred. Second, by claiming that the Supreme Court has decided the claim adversely to the defendant and the Circuit Court is without power to grant relief.⁴³ Federal review may be barred only if the assertion of procedural bar prevails. Claims typically available for the first time at state habeas include ineffective assistance of counsel or the due process discovery obligations under *Brady v. Maryland*.⁴⁴

In *Fitzgerald*⁴⁵ the Virginia Court of Appeals adopted the Fifth Circuit's characterization of a *Brady* violation:

The basic import of *Brady* is . . . that there is an obligation on the part of the prosecution to produce certain evidence actually or constructively in its possession or accessible to it in the interests of inherent fairness. If disclosures were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States Government.

United States v. Auten.⁴⁶ Thus, a prosecutor's office cannot get around *Brady* by keeping itself in ignorance. In order to uncover any potential *Brady* violations the habeas attorney must re-investigate the case against the defendant to determine what evidence the Commonwealth attorney had and gave to the defense attorney.

A prima facie showing of evidence, which if true, shows defendant is being illegally detained, entitles the defendant to a hearing on his petition.

In order to allege the facts necessary for a prima facie showing of ineffective assistance of counsel⁴⁷ a convicted defendant must indicate two things:

First, defendant must show that his counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington.⁴⁸ There is a strong presumption that a defendant's counsel is effective under the Sixth Amendment.⁴⁹ Therefore, in order to satisfy this two-part test, the habeas attorney needs to make a full review of the trial attorney's efforts regarding the criminal investigation, development of a case in mitigation, pretrial motions/hearings and trial advocacy (failures to make appropriate objections). It is important to determine what the trial attorney knew at the time tactical decisions were made.

The habeas attorney also needs to make a statement of principles and law relating to each claim for ineffective assistance of counsel raised on behalf of the defendant.⁵⁰ A generalized statement referring to ineffective assistance of counsel claims which are not briefed constitute a waiver of such claims.⁵¹

As discussed below state habeas is critical to preserving some issues for federal review. Hence, the re-investigation of defendant's case ensures that all potential issues are fairly presented to the state courts.⁵² Direct appeal to the Supreme Court of Virginia, followed by petition for Writ of Certiorari to the United States Supreme Court is also available following denial of state habeas relief.

FEDERAL HABEAS CORPUS:

Federal courts have jurisdiction to hear federal claims presented by state prisoners under 28 U.S.C § 2254. A state prisoner should file his petition in the district court in which the prisoner is incarcerated or in the district court in which his sentencing court is located.⁵³ In order for a federal court of appeals to review a district court's denial of a habeas petition, the district court must grant a certificate of probable cause to appeal.⁵⁴ The district court may consider the nature of the death penalty; however, standing alone, this issue is insufficient for granting the certificate.⁵⁵

The federal habeas petitioner must show a violation of a federally protected right.⁵⁶ Unless a claim violates the "Constitution, laws or treaties of the United States"⁵⁷ it is not cognizable in federal habeas proceedings.⁵⁸ The following is a short list of cognizable issues for federal habeas corpus: 1) jury composition and selection processes;⁵⁹ 2) trial court's refusal to allow defendant to present mitigation evidence during sentencing phase of trial;⁶⁰ 3) jurors told that they were not responsible for determining the appropriateness of the death sentence in a particular case;⁶¹ 4) claims for ineffective assistance of counsel;⁶² 5) contradictory and confusing jury instructions on defendant's claim of self-defense.⁶³

Before a claim can be raised in federal habeas corpus, the petitioner must "exhaust" all state remedies.⁶⁴ Petitioner satisfies the exhaustion requirement after his federal claim has been "fairly presented" to the state courts.⁶⁵ A claim has been fairly presented when the substantial factual and legal equivalent of petitioner's federal claim was presented in the state proceedings.⁶⁶ In short, petitioner exhausts his claim when the "controlling legal principles" and "the facts bearing upon that constitutional claim" were raised in

state court.⁶⁷ If the Supreme Court of Virginia considers petitioner's claim on direct appeal, it probably is not necessary for petitioner to exhaust other state remedies.⁶⁸ The federal court may hear facts presented for the first time on federal review where the petitioner had not withheld such evidence to expedite federal review.⁶⁹

A federal court must dismiss a habeas petition containing exhausted and unexhausted claims, a "mixed petition."⁷⁰ If petitioner files a "mixed petition" he may return to the state courts to exhaust all his claims or amend his petition to include only his exhausted claims.⁷¹

The federal courts may waive the exhaustion requirement if appealing to the state courts is futile,⁷² out of judicial efficiency and fairness or if the parties agree to the waiver.⁷³ Appealing to a state court is futile when a state remedy is unavailable to petitioner for some reason other than the petitioner's deliberate choice or default. Thus, if the federal court determines there was a state remedy available to petitioner, even if futile, the failure to raise the claim in the state's available proceeding will result in a procedural default. Thus, raising all potential federal claims during pre-trial, trial and direct appeal and all post-conviction proceedings preserves any potential claim(s) from waiver or procedural default on an adequate and independent state ground.⁷⁴ Such procedural default forfeits an otherwise valid claim because petitioner failed to follow a state procedural rule. Generally, this occurs when petitioner, through his counsel, fails to make a timely objection at trial or raise an issue on direct appeal according to a state contemporaneous objection rule.⁷⁵ As a result, state law procedurally bars a state court from deciding the merits of the issue.⁷⁶

The novelty of a claim, however, may excuse default. The issue is whether the claim was available at the time of the default.⁷⁷ If the claim was "percolating in lower courts for years" at the time of petitioner's default, the claim is not so novel as to excuse procedural default.⁷⁸ In addition to a default on an independent and adequate state ground, failure to raise a potentially meritorious claim based on the federal constitution may insulate that issue from federal review. Therefore, during the trial and direct appeal issues must be raised and preserved on federal grounds.⁷⁹

In order to find a procedural default, the federal court must examine six factors⁸⁰:

1. Whether petitioner actually violated a state procedural rule.⁸¹
2. Whether the state procedural rule serves a legitimate state interest and is an independent and adequate ground for denying federal relief.⁸²
3. Whether the state rule is firmly established and regularly followed by the state courts.⁸³
4. Whether the state courts forgave the default by considering the claim on its merits.⁸⁴
5. Whether the state forgave the default by failing to timely argue procedural default.⁸⁵
6. Whether petitioner overcomes the default by a "deliberate bypass" or "good cause and actual prejudice."

In considering the sixth factor, justices generally apply the "good cause and actual prejudice" standard articulated in *Wainwright v. Sykes* for decisions ordinarily made by counsel.⁸⁶ However, the "deliberate bypass" standard articulated in *Faye v. Noia*⁸⁷ should be urged when the decision was one not ordinarily made by counsel.

Such decisions include: whether to waive counsel, whether to plead guilty and whether to waive a trial by jury.

If the court determines that the cause and prejudice standard applies, both prongs of the cause and prejudice standard must be met by the petitioner. Cause can be shown when: (1) counsel was responsible for the default and was therefore ineffective;⁸⁸ (2) counsel did not reasonably have the legal claim available because the claim is so "novel";⁸⁹ (3) counsel was prevented from constructing or raising the claim;⁹⁰ (4) counsel was acting against the known desire of petitioner.⁹¹

Actual prejudice is met when petitioner shows the errors at trial created an actual and substantial disadvantage infecting his entire trial with error of constitutional dimensions.⁹²

Furthermore, in "extraordinary cases, relief may be granted although the default is not overcome through the traditional test." The principles of comity and finality will yield where a constitutional violation has probably resulted in the conviction of one who is actually innocent.⁹³ Upon the securing of a Certificate of Probable Cause, denials of habeas relief by the federal district court may be appealed to the United States Court of Appeals for the Fourth Circuit and thereafter, by certiorari, to the United States Supreme Court.

¹Materials available from the Virginia Capital Case Clearinghouse can provide more detailed assistance to counsel in negotiating the perilous post-conviction review process. In addition, the program is able to serve the true clearinghouse function of putting attorneys, unaccustomed with collateral review procedures, in touch with experts in the capital defense community who are willing to provide assistance and mentoring.

²Va. Code Ann. § 17-110.1(A) (1983) ("A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.")

³See Va. Code Ann. § 17-110.1(C)(1-2) (Supp. 1983).

⁴*Lockett v. Ohio*, 438 U.S. 586, 603, 98 S. Ct. 2594, 2614, 57 L. Ed. 2d 973, 988 (1978).

⁵*Murray v. Giarratano*, 109 S. Ct. 2765, 2770, 106 L. Ed. 2d 1 (1990) (generally discussing the Court's refusal to apply stricter standards of due process in state and federal proceedings); *Smith v. Murray*, 477 U.S. 527, 537, 106 S. Ct. 2661, 91 L. Ed. 2d 454 (1986) ("We reject the suggestion that the principles [standard of review for federal habeas corpus] apply differently depending on the nature of the penalty a state imposes for the violation of its criminal laws.")

⁶*Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S. Ct. 3383, 3391, 77 L. Ed. 2d 1090, 1100 (1983).

⁷Va. Sup.Ct. Rule 5:25.

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹*Gardner v. Commonwealth*, 3 Va. App. 418, 350 S.E.2d 229 (1986).

¹²Va. Sup.Ct. Rules 5:25.

¹³*Id.*

¹⁴*Mason v. Commonwealth*, 7 Va. App. 339, 373 S.E.2d 603 (1988).

¹⁵*Johnson v. Commonwealth*, 5 Va. App. 529, 365 S.E.2d 237 (1988); *Mounce v. Commonwealth*, 4 Va. App. 433, 357 S.E.2d 742 (1987).

¹⁶*Brown v. Commonwealth*, 8 Va. App. 126, 380 S.E.2d 8 (1989).

¹⁷*Graves v. Garraghty*, 618 F. Supp. 1348 (E.D. Va. 1985).

¹⁸*infra*.

¹⁹*Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594; *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert.*

denied sub nom. Parrigan v. Paderick, 419 U.S. 1108 (1975); *see also Whitley v. Bair*, 802 F.2d 1487 (4th Cir. 1985).

²⁰620 F.2d 1055, 1056-57 (4th Cir. 19) *cert. denied*. 449 U.S. 1004 (1980).

²¹*Id.*

²²E. GRESSMAN, R. STERN, S. SHAPIRO, SUPREME COURT PRACTICE (6th Ed. 1986).

²³*Id.*

²⁴463 U.S. 1301, 103 S. Ct. 3521, 77 L. Ed. 2d 1282 (1983).

²⁵"If a federal question is involved, the process of direct review includes the right to petition this Court for a writ of certiorari." *Id.*, at 1283.

²⁶*Barefoot*, 463 U.S. at 888 (1983).

²⁷Gressman, at 704.

²⁸*Id.*

²⁹429 U.S. 1012 (1976)

³⁰Gressman, at 705. Recently, the United States Supreme Court granted certiorari and heard oral argument on precisely this issue in *Simmmons v. Arkansas*, 298 Ark. 193, 766 S.W.2d 422, *cert. granted*, *Whitmore v. Arkansas*, 109 S. Ct. 3240, 106 L. Ed. 2d 588 (1989).

³¹Rules of the Supreme Court of the United States 58 U.S.L.W. 4042 (Jan. 1, 1990) (describing revisions to Rules of the Supreme Court).

³²*Williams*, 463 U.S. at 1301.

³³Sup.Ct. Rule 44; Gressman, at § 17.2.

³⁴Va. Code Ann. § 8.01-654, § 17-110.1.

³⁵*Id.*

³⁶Va. Code Ann. § 17-116.04; *Peterson v. Bass*, 2 Va. App. 314, 318, 343 S.E.2d 475, 478 *aff'd en banc*, 2 Va. App. 314, 349 S.E.2d 409 (1986).

³⁷*Id.* at 478. In *Peterson*, the defendant was convicted of capital murder for a killing in the commission of a robbery. After the Supreme Court of Virginia affirmed his conviction, defendant initiated a writ of habeas corpus in the circuit court challenging his detention for capital murder, robbery, and use of a firearm in the commission of a felony. The circuit court denied defendant the writ and he appealed to the Virginia Court of Appeals. The Court of Appeals held that because it lacked jurisdiction to hear death penalty cases on direct appeal, the defendant was also prohibited from appealing his habeas petition to the Virginia Court of Appeals. Consequently, the court only had jurisdiction to hear the non-capital challenges of his detention (robbery and the use of a firearm in the commission of a felony). While these challenges were related to defendant's capital murder conviction, they were not direct challenges to the imposition of the death penalty. *Id.* However, the Court of Appeals will hear a habeas appeal from a circuit court on the non-capital convictions. *Fitzgerald v. Bass*, 6 Va. App. 38, 366 S.E.2d 615 (1988) (dismissing capital defendant's appeal dealing with his capital murder conviction).

³⁸*Payne v. Commonwealth*, 233 Va. 460, 357 S.E.2d 500 (1987).

³⁹*Fitzgerald v. Bass*, 6 Va. App. 38, 366 S.E.2d 615 (1988).

⁴⁰*Lee v. Neff*, No.0120-85 (Va. App. Ct. Nov. 8, 1985).

⁴¹Va. Code Ann. § 8.01-654; *see also, Collison v. Underwood*, 1 Va. App. 443, 339 S.E.2d 897 (1986).

⁴²*See Cartera v. Mitchell*, 553 F. Supp. 866 (E.D. Va. 1982) (holding constitutional issues may be raised on habeas corpus unless prisoner has had full and fair opportunity to raise his constitutional claims at trial).

⁴³The first assertion, that the claim is procedurally barred is discussed in *Slayton*, 215 Va. 27, 205 S.E.2d 680 (1974). For a discussion of the second claim, that the Supreme Court has decided the claim adversely to the defendant, *see Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970).

⁴⁴373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

⁴⁵*Fitzgerald, supra* at n.39.

⁴⁶632 F.2d 478 (5th Cir. 1980).

⁴⁷"... [W]hether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692-93 (1984).

⁴⁸466 U.S. at 687.

⁴⁹*Id.*

⁵⁰Va. Sup.Ct. Rules 5:25.

⁵¹*Id.*; see also, *Quintana v. Commonwealth*, 224 Va. 127, 134, n.1, 295 S.E.2d 643, 645-46, n.1 (1982), cert. denied, 460 U.S. 1029 (1983).

⁵²*Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971); see also, *infra* federal habeas corpus.

⁵³28 U.S.C. § 2241(d).

⁵⁴463 U.S. at 892-93.

⁵⁵*Id.* at 893.

⁵⁶*Id.*; 28 U.S.C. § 2254(a)(1982).

⁵⁷28 U.S.C. § 2254(a) (1982). The Court excludes Fourth Amendment search and seizure claims from federal habeas review where the state provides an opportunity for full and fair litigation of the issue. *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). However, a federal court has authority to hear a claim stating ineffective assistance of counsel for failure to raise the Fourth Amendment issue in the appropriate state court. *Kimmelman v. Morrison*, 477 U.S. 365, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1986).

⁵⁸28 U.S.C. 2254(a) (1982).

⁵⁹See *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984) (unless a constitutional violation occurs at trial, state law governs and there is no constitutional violation).

⁶⁰*Amadeo v. Zant*, 486 U.S. 214, 108 S. Ct. 1771, 1775, 100 L. Ed. 2d 249 (1988).

⁶¹*Hitchcock v. Dugger*, 481 U.S. 393, 395-99, 107 S. Ct. 1821, 1824 95 L. Ed. 2d 347, 351-53 (1987).

⁶²*Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).

⁶³*Strickland*, 466 U.S. at 687.

⁶⁴28 U.S.C. § 2254(b) (1982).

⁶⁵*Picard*, 404 U.S. at 275.

⁶⁶*Id.*

⁶⁷*Id.* at 276-77.

⁶⁸*Brown v. Allen*, 344 U.S. 443, 447, 73 S. Ct. 397, 402, 97 L. Ed. 469, 483-84 (1953); see also, *Castille v. Peoples*, 109 S. Ct. 1056, 1059, 103 L. Ed. 2d 192 (1989) (dictum, holding that forcing a petitioner to exhaust other state remedies is "to mandate recourse to state collateral review whose results have effectively been predetermined, or permanently to bar from federal habeas prisoners in States whose post-conviction procedures are technically inexhaustible").

⁶⁹See also, *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (federal district court could hear claim where evidence was presented for the first time on federal review and petitioner had not withheld such evidence to expedite federal review); *Renzi v. Virginia*, 794 F.2d 155, 158 (4th Cir. 1986).

⁷⁰*Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982); *Stamper v. Baskerville*, 724 F.2d 1106, 1108 (4th Cir.

1984) (dismissing both exhausted and unexhausted claims without prejudice).

⁷¹*Rose*, 455 U.S. at 510.

⁷²28 U.S.C. § 2254; *Wilwording v. Swenson*, 404 U.S. 249, 92 S. Ct. 407, 30 L. Ed. 2d 418 (1971) (holding petitioner satisfied exhaustion requirement where he demonstrated that appeal would be "manifestly unsuccessful" where State's highest court repeatedly and uninterruptedly decided a constitutional issue in a manner adverse to petitioner's claim).

⁷³*Granberry v. Greer*, 481 U.S. 129, 107 S. Ct. 1671, 95 L. Ed. 2d 119 (1987) (failure to pursue state remedies is not an absolute bar to federal review of prisoner's claims).

⁷⁴*Dugger v. Adams*, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989); *Smith v. Murray*, 477 U.S. 527, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986); *Wainwright v. Sykes*, 433 U.S. at 72.

⁷⁵*Supra* under direct appeal.

⁷⁶77 Geo.L.J. 1314, n.3632 (1989).

⁷⁷*Murray*, 477 U.S. at 527.

⁷⁸*Id.* at 537; see also *Engle v. Isaac*, 456 U.S. 107, 130-34, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982) (petitioner's ignorance of constitutional claim was inexcusable when there were numerous cases available to use as constitutional "tools" and other prisoners relied on these precedents).

⁷⁹See discussion of Motion for Continuance in Plimpton and Lee, PRETRIAL MOTIONS, this issue.

⁸⁰Adapted from Koosed, M., Federal Habeas Corpus Relief Avoiding [A] Comity [Of] Errors, *The Champion*, Jan./Feb. 1987, p. 28, 31-33.

⁸¹See *Ulster County Court v. Allen*, 442 U.S. 140, 150-157, n.8-10, 99 S. Ct. 2213, 60 L. Ed. 2d 777, 787-92, n. 8-10 (1979) (breach must be a clear procedural rule that applies on the facts).

⁸²See *Wainwright, supra*.

⁸³See, *Jackson v. Amaral*, 729 F.2d 41, 44 (1st Cir. 1984) (federal habeas review not precluded by failure to raise voir dire objection on direct appeal as required by Massachusetts procedural law when state court disregarded procedural default and ruled on merits of claim); *Rice v. Marshall*, 816 F.2d 1126, 1129 (6th Cir. 1987) (habeas review not precluded when state courts chose not to enforce procedural rule and ruled on merits of petitioner's claim).

⁸⁴See *Ulster County Court*, 442 U.S. at 152; see also, *Caldwell*, 472 U.S. at 320.

⁸⁵See *Engle v. Isaac*, 456 U.S. 107, 125, n.26 (1982). *Castaneda v. Partida*, 430 U.S. 482, 486, n.4, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977).

⁸⁶Koosed, at p. 32.

⁸⁷372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

⁸⁸*Strickland*, 466 U.S. at 687.

⁸⁹*Reed v. Ross*, 468 U.S. 1, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984).

⁹⁰*Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

⁹¹*Jones v. Barnes*, 463 U.S. 745, 755, 103 S. Ct. 3308, 3314, 77 L. Ed. 2d 987, 993 (1983) (Blackmun, J. concurring in the judgment).

⁹²*Frandy*, 456 U.S. 152.

⁹³*Carrier*, 477 U.S. at 478.

