


Spring 4-1-1991

## DRAFTING PETITIONS FOR THE WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Matthew B. Crum

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

Matthew B. Crum, *DRAFTING PETITIONS FOR THE WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT*, 3 *Cap. Def. Dig.* 12 (1991).

Available at: <https://scholarlycommons.law.wlu.edu/wlucdj/vol3/iss2/10>

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

## DRAFTING PETITIONS FOR THE WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BY: MATTHEW B. CRUM

This article will briefly discuss certain aspects of the writ of certiorari that may be helpful to defense counsel in a capital case. It will explore the reasoning behind the Court's granting the writ and will pass on suggestions for a successful petition. The Clearinghouse does not presume to offer expert advice on this complex topic. Rather, its intention is to arouse interest and convey some sense of the task at hand.<sup>1</sup>

Capital defense counsel are called upon to petition for the writ of certiorari in two circumstances. First, after the Virginia Supreme Court affirms the circuit court's decision and second, after the Fourth Circuit Court of Appeals affirms the denial of habeas corpus relief. The Virginia Supreme Court rarely grants relief, and new developments in federal law drastically have reduced the scope of habeas review. Even though the chances that certiorari will be granted are slim, the petition is worth maximizing counsel's efforts.<sup>2</sup> Furthermore, there is no right to appointed, compensated counsel for certiorari, so counsel may be called on to volunteer when there are less than 90 days available.<sup>3</sup>

### Factors and Reasons for Granting the Writ

Each year the Supreme Court hears and decides approximately 160 cases on the merits.<sup>4</sup> This number has changed very little over the past forty years, while the number of petitions filed with the Court continues to escalate to over 4,000 per year.<sup>5</sup> With such a vast number of petitions to choose from, the Court can operate upon the unique premise of finding flaws in apparently certworthy petitions, rather than unearthing worthy petitions concealed by weak draftsmanship.<sup>6</sup> Should a petition of profound importance slip through the Court's necessarily cursory screening process, it is considered no great loss by the Justices, for if it is indeed 'certworthy,' it will soon be seen again, and again.<sup>7</sup> Therefore, it is of paramount importance for defense counsel to scrupulously review all factors that may be weighed by the Court in its cert-granting process in order to draft the strongest petition possible.

The Court reveals its criteria for granting certiorari in two ways. It lays out general considerations for granting the writ in Rule 10 of the Rules of the Supreme Court, and it occasionally mentions in its opinions why it chose to hear a case. Rule 10 outlines factors that the Court may consider. It does not provide any strict guidelines.<sup>8</sup> Rule 10 states:

"A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

- (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
- (b) When a state court of last resort has decided a federal question on a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
- (c) When a state court or a United States court of appeals has decided an important question of federal law which has not

been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.<sup>9</sup>

Despite the admonition that the factors set forth in Rule 10 are not decisive, time and caselaw have revealed some generalities that make Rule 10 more significant and potentially fruitful in its application.

### A. Conflicts between courts

A well-recognized reason for granting the petition is a conflict between the final decision upon which review is sought and that of the Supreme Court or other court whose decision is final.<sup>10</sup> Such decisions should present an intolerable conflict on the same issue of law or fact and not simply a discrepancy in dicta or the application of general principles.<sup>11</sup> If the dispute is minor or technical, the conflict may be considered insufficient to warrant the Court's attention.<sup>12</sup> Furthermore, the Court may not deem the petition certworthy if the decision with which the case in issue purportedly conflicts has lost authority or has been discredited through intervening decisions of other lower courts and/or the Supreme Court.<sup>13</sup> Although most petitioners characterize their lower court losses as the result of decisions that conflict with Supreme Court decisions, such conflicts often are arguable misinterpretation or misapplication of law rather than a clear conflict of law.<sup>14</sup> The Court interprets Rule 10(c) as demanding a clear and direct conflict, which is readily apparent from the lower court's decision.<sup>15</sup> Conflicts often treated as tolerable include: (1) A dispute between two panels within the same federal circuit, which can be resolved en banc; or (2) A state court decision differing from a federal circuit court ruling that reflects simple error in application and not an intolerable ambiguity in federal law.<sup>16</sup> Conflicts based upon general principle may be deemed certworthy, but each should be clearly stated and not confused with a conflict in the application of rules of law.<sup>17</sup> The Court is likely to review conflicts between two federal courts of appeals where the case sought to be reviewed is in direct conflict with a decision of another court of appeals on the same matter of federal law or on the same matter of general law as to which federal courts can exercise independent judgment.<sup>18</sup> The purpose of such review is to ensure uniformity among the circuits. Petitioner should be able to state with confidence that another circuit would decide the case differently if presented with identical facts.<sup>19</sup> However, the Supreme Court may deny certiorari if it feels that such conflict will be cleared up by future cases in those circuits, or where the conflict will have slight bearing upon future cases.<sup>20</sup> Furthermore, respondent to a petition for certiorari might successfully distinguish the cases in conflict on their facts, and may allude to distinctions not mentioned in the lower court opinions.<sup>21</sup> Respondent also might successfully argue that the conflict is not yet defined enough to warrant review and the Court should delay consideration until the issue has 'percolated' through the lower courts.<sup>22</sup> This line of reasoning has been very successful in the past.<sup>23</sup> As stated by Justice Brennan, "... there is already in place, and has been ever since I joined the Court, a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question."<sup>24</sup>

Petitioner should bear in mind that a conflict among circuits as to state law is not a reason for granting certiorari. As the Court stated in *Ruhlin v. New York Life Insurance Co.*, "The conflict may be merely corollary to a permissible difference of opinion in the state courts."<sup>25</sup>

One situation the Court has historically found certworthy is a conflict between the decision of a federal court of appeals sought to be reviewed and a decision of the Supreme Court.<sup>26</sup> If the decision of

the court of appeals clearly failed to apply Supreme Court precedent, the Court will usually grant the petition. It may even reverse the judgment without hearing oral argument, or, if the Court heard oral argument, it may reverse without written opinion.<sup>27</sup> It is of paramount importance that, if petitioner is arguing that the appellate court is in error and flatly warrants reversal, he should still include an argument on the merits of the question(s) presented.<sup>28</sup>

Certiorari may be granted where the court of appeals clearly has misapplied or misinterpreted a Supreme Court precedent.<sup>29</sup> In such cases, the Court grants the petition to clarify its position as well as reverse the lower court's decision.<sup>30</sup>

It must be pointed out that the proportion of state supreme court cases granted certiorari review is substantially less than federal cases. State supreme courts often are faced with issues that have no business in the Supreme Court, while virtually all matters handled by federal courts may be decided by the Supreme Court.<sup>31</sup> However, one established reason for granting certiorari is a direct conflict between the decision of a court of appeals and the highest state court when such conflict concerns an important federal question.<sup>32</sup> The Court will typically review either one of the decisions as it is the final arbiter of federal questions.<sup>33</sup> According to Stern and Gressman, "... a conflict between such courts concerning the construction and application of the federal Constitution, or the validity, construction, or application of federal statutes or treaties, or any right, title, privilege, or immunity thereunder, will support a petition for a writ of certiorari."<sup>34</sup> For capital cases granted certiorari under such conditions, See *Sawyer v. Smith*, 110 S. Ct. 2822 (1990); *Mckoy v. North Carolina*, 110 S. Ct. 1227 (1990); *Stanford v. Kentucky/Wilkins v. Missouri*, 109 S.Ct. 2969 (1989); *South Carolina v. Gathers*, 109 S. Ct. 2207 (1989); *Mills v. Maryland*, 108 S. Ct. 1860 (1988); *Satterwhite v. Texas*, 108 S.Ct. 1792 (1988); *Johnson v. Mississippi*, 108 S. Ct. 1981 (1988); *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988).

Petitioner should bear in mind that although there are several reasons why the Court may deny a petition based upon a conflict, this avenue may still be the best bet. As Justice Clark once said, "Conflicts still remain the safest vehicle for a grant."<sup>35</sup>

## B. Importance

Regardless of whether a conflict is defined in a petition, the drafter must prudently marshal and present all of the reasons why the court should grant the petition. Importance of a case and consequently its certworthiness hinges foremost upon how many other parties, aside from the actual litigants, will be affected by the questions presented.<sup>36</sup> The drafter must persuade the Court that his case does not turn merely upon its facts or that the question only affects the individual parties.<sup>37</sup> As stated by Chief Justice Vinson:

Lawyers might be well advised, in preparing petitions for certiorari to spend a little less time discussing the merits of their cases and a little more time demonstrating why it is important that the Court should hear them. . . . What the Court is interested in is the actual, practical effect of the disputed decision - its consequences for other litigants and in other situations. . . . If it succeeds in demonstrating [only] that the decision below may be erroneous, it has not fulfilled its purpose.<sup>38</sup>

Although a case's importance may simply turn on the workload of the Court that term, the petition should persuasively assert that the issues raised are badly in need of the Supreme Court's guidance and that the question presented has a national impact.<sup>39</sup> Furthermore, it should show the decision in question not only is inconsistent with lower court and Supreme Court decisions, but also common sense and public policy. Some authors of successful petitions believe that the single worst mistake petitioners make is to "overestimate the im-

portance of case law and underestimate the importance of policy considerations."<sup>40</sup>

The writ may be granted based on its importance to decide a point of law expressly reserved or avoided by the court. It may be granted to clear up inconsistent decisions or when the case at bar contains a unique issue currently debated in the legal community or one which the Court has been trying to reach but has been thwarted by threshold dispositions.<sup>41</sup> The writ may also be granted when the Court has granted certiorari to another case which has an issue similar or identical to one contained in the case at issue. Finally, the Court will almost always grant the writ when a court of appeals deliberately refuses to follow Supreme Court precedent in anticipation of personnel change on the Court.<sup>42</sup>

When a state statute has been held valid or invalid under the federal constitution, the Supreme Court will grant certiorari depending upon the novelty of the issues and the impact of the ruling on other states.<sup>43</sup> This category includes such instances where there is no conflict per se with a Supreme Court decision but where a state's application of its statute or procedure is called into question on federal grounds. For capital granted certiorari under such conditions, See *Butler v. McKellar*, 110 S. Ct. 1212 (1990); *Saffle v. Parks*, 110 S.Ct. 1257 (1990); *Walton v. Arizona*, 110 S. Ct. 3047 (1990); *Whitmore v. Arkansas*, 110 S.Ct. 1717 (1990); *Lewis v. Jeffers*, 110 S. Ct. 3092 (1990).

## C. Error

The Supreme Court's primary role is to resolve conflicts among the lower courts so that they can apply the high Court's rulings. Generally, the Court does not saddle itself with correcting every mistake the lower courts make in applying its principles.<sup>44</sup> However, the Court occasionally does grant a petition for certiorari for no apparent reason other than error in the lower court's ruling.<sup>45</sup> In such cases there may be no conflict present, and no issue of importance facing the Court. But, in granting the petition, the Court may be motivated by an apparent miscarriage of justice; an unduly harsh impact of an erroneous decision; the erosion of a legal principle; or the Court's role as federal judiciary supervisor.<sup>46</sup> For examples in capital cases, see *Mckoy v. North Carolina*, 110 S. Ct. 1227 (1990) and *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990).

## Need for Raising a Federal Question

In order for the Supreme Court to have jurisdiction over a question presented in a petition for certiorari, the question must be framed in federalized terms, and according to 28 U.S.C. §1257, a state court proceeding must have raised a substantial federal question. If a trial attorney fails to raise and preserve claims on federal grounds, he effectively waives or defaults such claims. This fact becomes painfully apparent when, during the years that a death penalty case is on appellate review, a helpful decision is handed down that could benefit a client, but cannot be applied on any of his federal appeals because that particular issue was not raised on federal grounds at trial. Of course it is impossible to anticipate what might be coming down the pike, but it is imperative to secure every foreseeable federal issue for appeal.

To preserve an issue for certiorari or other federal review, it is essential to make a constitutional claim to the state court with at least fair precision.<sup>47</sup> Although the Supreme Court has not provided specific guidelines, general references to "the Constitution of the United States" or "due process" usually will not suffice.<sup>48</sup> However, the Court did hold in *Eddings v. Oklahoma* that the defendant properly raised an eighth amendment question in a death penalty case although presented in general terms.<sup>49</sup> The Court stated that "Our jurisdiction does not depend on citation to book and verse."<sup>50</sup>

The present rule, for our purposes, is that a federal claim cannot be heard by the Supreme Court unless raised or considered and resolved by the state supreme court.<sup>51</sup> The two elements are closely related in that failure to raise the issue usually precludes the state supreme court from considering and deciding it.<sup>52</sup> Therefore, when the state supreme court has not addressed a federal issue, this places the burden on the petitioner to prove that the federal issue was properly raised, and failure to consider it was not for lack of presentation. The Court stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."<sup>53</sup> Supreme Court Rule 14(1)(c) states that a petitioner seeking review of a state court decision shall "specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed upon by those courts."<sup>54</sup> Should the petitioner neglect to preserve or raise the federal issue with particularity, but nevertheless the state supreme court addresses the issue in a federal light, the Supreme Court considers such issue raised and addressed and therefore preserved for further federal appeals and cert.<sup>55</sup>

Generally, the petitioner must follow the state procedures in raising the federal issue. The Supreme Court has held "[a] state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power."<sup>56</sup> However, the ultimate question of the sufficiency of a federal question raised in the state courts is a federal question itself, although the Supreme Court's authority in this respect is not crystal clear.<sup>57</sup> Furthermore, petitioner may be blocked from federal review of the claim if the state supreme court decides the issue on "adequate and independent state grounds."<sup>58</sup> Therefore, the federal question must be one of substance and real conflict. Otherwise, the Court will simply rely upon the state supreme court to adjudicate the issue.<sup>59</sup>

The Virginia Capital Case Clearinghouse advocates that every issue that comes up in a capital case can be preserved on federal grounds. Ever since *Gregg v. Georgia* and *Woodson v. North Carolina*, the Court has focused on the process of choosing which murderers are to be sentenced to die.<sup>60</sup> It has held, and repeatedly affirmed, that death is qualitatively different from any other punishment. Therefore, in determining that death is the appropriate sentence, there should be a corresponding difference in the need for reliability.<sup>61</sup> This requirement has been labelled "Super Due Process." Although the Court has not always held that more is required in every aspect of a capital proceeding, it has done so often enough to make quite arguable the proposition that whatever state rule or procedure might suffice in an ordinary felony case is insufficient in a capital case because it undermines the increased procedural reliability requirement. Therefore, all of the sixth amendment rights with respect to juries, assistance of counsel, right to put on evidence, etc. may be restricted by the way a state court usually does things. The heightened sixth amendment entitlement is, of course incorporated into fourteenth amendment due process, as is the eighth amendment. The eighth amendment can also be asserted in that it forbids cruel and unusual punishment. This protection is to be assessed generally and in a given case, by "evolving standards of decency that mark the progress of a maturing society."<sup>62</sup> Therefore, state rulings and practices, as well as these matters in the aggregate, implicate federal law in capital cases. Accordingly, the trial must clearly reflect that every request, motion, objection, and claim was made in the name of the sixth, eighth and fourteenth amendment, as well as appropriate state grounds or other applicable federal grounds.

## Rule of Four

The Supreme Court consistently has followed the practice of granting certiorari if a minimum of four Justices vote in favor of granting the petition.<sup>63</sup> This practice is called the Rule of Four. When all nine Justices participate in consideration of the petition, there have been no exceptions that four votes will suffice to grant the writ. Subsequently, all nine Justices will consider the case on its merits. If only six or seven Justices participate, the minimum number of votes to grant certiorari may be reduced to three.<sup>64</sup> Often, when two or three Justices have an interest in granting the petition, other Justices will cast certiorari granting votes as a courtesy.<sup>65</sup>

As of today there have been no exceptions to this rule when nine Justices participate, although the procedure is not codified in the United States Code or the Supreme Court Rules.<sup>66</sup>

## Significance of Denial of Petition

A denial of a petition for certiorari is not precedent for, or an affirmation of, any proposition of law set forth by the lower court.<sup>67</sup> A denial simply demonstrates the Court's discretion to hear the matter and makes absolutely no comment upon the merits of the case.<sup>68</sup> As previously stated, there are a variety of factors that play into the decision to grant a petition for certiorari. Anyone outside the Court would be hard pressed to identify which factors ultimately were decisive in denying a petition. Therefore, a petitioner should not interpret a denial as an implication that, were his case to be heard, it would be decided against him. As Justice Frankfurter stated in *Darr v. Burford*:

To attach significance to a denial of a certiorari petition regarding the merits of the issues raised by the petition would be to transform a mechanism for keeping cases out of this Court into a means of bringing them in. It would contradict all that led to the adoption of certiorari jurisdiction and would reject the whole course of the Court's treatment of such petitions, both in practice and profession. For if denial does import an expression of opinion upon the merits of the case, then we must deal with the merits of the case.<sup>69</sup>

Despite Justice Frankfurter's assurances, there is an undercurrent of belief among attorneys that denial of certiorari does have some significance.<sup>70</sup> However, the overwhelming amount of authority supports the contention that denial has no precedential value.<sup>71</sup>

## Stay of Execution

Defense counsel for a capital defendant is faced with the unique predicament of literally pleading for his client's life while he explores and exhausts every avenue of review. Fortunately, the Supreme Court has recognized that stays of execution call for separate consideration from other stays due to the nature of capital punishment and the ever accumulating number of applications for stays of execution, many of which are shortly to expire.<sup>72</sup>

In seeking a stay of execution pending Supreme Court review petitioner must first submit an application to the Supreme Court Justice of his circuit. That Justice can grant the stay, deny it or not pass upon it at all. Either way, the application then goes before the full court to uphold or overrule the Justice or make the initial determination. Paradoxically, it takes five Justices to uphold a grant of a stay while it takes only four to grant certiorari.<sup>73</sup>

The Court has held that a defendant is entitled to a stay of execution pending timely filing and disposition of a petition for

certiorari seeking direct review of his conviction in the state courts.<sup>74</sup> However, the Court is not so accommodating on habeas review. According to the Court in *Barefoot v. Estelle*:

Stays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari from this Court to the court of appeals that has denied a writ of habeas corpus. It is well-established that there 'must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.' . . . A stay of execution should first be sought from the court of appeals, and this Court generally places considerable weight on the decision reached by the court of appeals in these circumstances.<sup>75</sup>

The Court refuses to establish a rule that a stay will be automatically granted where the defendant is seeking review of denial of his first habeas corpus petition. However, a stay is likely granted on the first or second application if petitioner raises new and different questions that merit determination in the case at issue or another pending case.<sup>76</sup> *Barefoot* also held that a defendant is entitled to a stay of execution when a federal court of appeals considers his habeas petition on its merits if it determines that the contentions are not frivolous.<sup>77</sup> However, the Court has also asserted that the petition for habeas corpus should not be abused. That is, petitioner should not repeatedly file the same petition and appeal as a delaying tactic.<sup>78</sup> Accordingly, successive petitions and stays of execution may be dismissed if the petition fails to raise a new and different question.

#### Procedural Issues

Briefly, the petition for certiorari must be filed with the clerk's office no later than ninety days from the date of: (1) the lower court's entry of judgment; (2) the date of the lower court's denial of a petition for rehearing;<sup>79</sup> or (3) a revised judgment that modifies an issue intended for cert. A proper filing includes 40 copies of the petition and a two hundred dollar filing fee.<sup>80</sup>

In the face of an impending deadline, an attorney can request a 30 day extension for "good cause shown," provided he submits his request 10 days before the filing deadline. Good cause includes: death or illness of counsel, printing difficulties or imminence of a decision of another case in another proceeding that may affect an issue in the case or render an issue moot. Should a petitioner request an extension subsequent to 10 days prior to the deadline, only extraordinary circumstances will suffice, such as attorney death.

It is important to note that the Court feels compelled to give capital cases a very thorough examination when deciding whether to grant cert, and, therefore, insists on having the entire certified record before it as part of that examination. The petitioner need not supply a copy of the record but should be aware that the clerk will take the necessary steps to secure it if petitioner does not.<sup>81</sup>

Although truly pro se petitions for cert are a distinct minority, almost 50% of all petitions are filed in forma pauperis.<sup>82</sup> They are usually prepared by counsel assigned through various federal legal assistance programs, or by an individual other than the party seeking review.<sup>83</sup> In forma pauperis status allows the petitioner to waive fees and printing requirements and provides appointed counsel after the Court grants certiorari.

Supreme Court Rule 39 requires that only three documents be submitted to the Court to establish in forma pauperis status. Briefly,

- petitioner must file a short motion for leave to proceed in forma pauperis and include the party's sworn affidavit of

indigency or poverty (affidavit not necessary where a lower federal court has appointed counsel for defendant) as well as the petition for writ of certiorari

- each of the foregoing documents must be prepared in typewritten form, double-spaced on legal sized paper; only one copy need be filed with the clerk although nine additional copies would be preferred
- upon timely presentation, the clerk will file the documents without any payment of fees
- should the writ be granted, the Court will appoint counsel to prepare briefs and oral argument.

For the most part, the in forma pauperis petitioner must adhere to all the requirements placed on his paying counterpart. Either way, the Court must still give equal treatment and consideration to both petitions. Unfortunately, the Court rarely grants more than 1% of the petitions filed in forma pauperis, while the success rate of paid cases hovers around 8% and 12%, including cases summarily disposed of at the time the writ is granted.<sup>84</sup>

#### Conclusion

The chances of having any one petition for certiorari granted are indeed slim. However, the odds can be improved exponentially by paying close attention to past practices of the Court and Supreme Court cases similar in issue to one's own. As always, petitioner should remember that regardless of the effort expended, the return on 'investment' is immeasurable.

<sup>1</sup>The reader will notice numerous references to *Supreme Court Practice* (Sixth Ed.), authored by Stern, Gressman and Shapiro. This treatise is the essential authority on certiorari and no petitioner should be without it. For stylistic suggestions for the petition of certiorari, please see Baker, "A Practical Guide to Certiorari," 33 Cath. U. L. Rev. 611 (1984) [Hereinafter Baker].

<sup>2</sup>See Capital Defense Digest Vol. 3 No. 1, pp. 1-15.

<sup>3</sup>See accompanying text at 17-19.

<sup>4</sup>Baker, *supra* note 1, at 612.

<sup>5</sup>*Id.*

<sup>6</sup>*Id.* at 612.

<sup>7</sup>*Id.*

<sup>8</sup>R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* 194 (1986). [Hereinafter Stern and Gressman.]

<sup>9</sup>Sup. Ct. R. 10 (1990).

<sup>10</sup>Stern and Gressman, *supra* note 5, at 196.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 200.

<sup>13</sup>*Id.* at 201.

<sup>14</sup>*Id.* at 203.

<sup>15</sup>*Id.* at 203.

<sup>16</sup>Baker, *supra* note 1, at 617.

<sup>17</sup>Stern and Gressman, *supra* note 5, at 374.

<sup>18</sup>*Id.* at 197.

<sup>19</sup>*Id.* at 374.

<sup>20</sup>*Id.* at 198.

<sup>21</sup>Baker, *supra* note 1, at 618.

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>Stern and Gressman, *supra* note 5, at 200.

<sup>25</sup>*Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938).

<sup>26</sup>Stern and Gressman, *supra* note 5, at 202.

<sup>27</sup>*Id.* at 203.

<sup>28</sup>*Id.*

<sup>29</sup>See *Murray v. Giarratano*, 109 S. Ct. 2765 (1989).

<sup>30</sup>*Id.*  
<sup>31</sup>*Id.* at 193.  
<sup>32</sup>*Andresen v. Maryland*, 427 U.S. 463, 470 n.5 (1976).  
<sup>33</sup>Stern and Gressman, *supra* note 5, at 209.  
<sup>34</sup>*Id.* at 209.  
<sup>35</sup>*Id.* at 202.  
<sup>36</sup>*Id.* at 375.  
<sup>37</sup>*Id.* at 373.  
<sup>38</sup>*Id.*  
<sup>39</sup>Baker, *supra* note 1, at 613.  
<sup>40</sup>*Id.* at 620.  
<sup>41</sup>*Id.* at 204.  
<sup>42</sup>*Id.* at 203.  
<sup>43</sup>*Id.* at 214.  
<sup>44</sup>*Id.* at 221.  
<sup>45</sup>*Id.* at 222.  
<sup>46</sup>*Id.*  
<sup>47</sup>*Id.* at 146.  
<sup>48</sup>*Id.*  
<sup>49</sup>*Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n. 9 (1982).  
<sup>50</sup>*Id.* The Court's perception of the importance of the *Eddings* case may have allowed for an exception to the general rule.  
<sup>51</sup>*Hill v. California*, 401 U.S. 797, 805 (1971).  
<sup>52</sup>Stern and Gressman, *supra* note 5, at 150.  
<sup>53</sup>*Street v. New York*, 394 U.S. 576, 582 (1969).  
<sup>54</sup>Sup. Ct. R. 14(1)(c).  
<sup>55</sup>*Charleston Federal Savings and Loan Association v. Alderson*, 324 U.S. 182, 185-86 (1945).  
<sup>56</sup>*Williams v. Georgia*, 349 U.S. 375, 382-83 (1955).  
<sup>57</sup>Stern and Gressman, *supra* note 5, at 151.  
<sup>58</sup>*Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); *see also*, *Illinois v. Gates*, 462 U.S. 213, 218-20 (1983).  
<sup>59</sup>Stern and Gressman, *supra* note 5, at 145. It should be noted that, unlike the Virginia Supreme Court, issues not raised on petition for certiorari are not waived or defaulted.  
<sup>60</sup>*Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978 (1976).  
<sup>61</sup>*Woodson*, 428 U.S. at 305.  
<sup>62</sup>*See e.g., Coker v. Georgia*, 433 U.S. 584; *Enmund v. Florida*, 458 U.S. 782 (1982); *Thompson v. Oklahoma*, 487 U.S. 815 (1988).  
<sup>63</sup>Stern and Gressman, *supra* note 5, at 261.  
<sup>64</sup>*Id.* at 262.  
<sup>65</sup>*Id.*

<sup>66</sup>*Id.*  
<sup>67</sup>*Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-20 (1950).  
<sup>68</sup>*United States v. Carver*, 260 U.S. 482, 490 (1923).  
<sup>69</sup>*Darr v. Burford*, 339 U.S. 200, 226-228 (1950).  
<sup>70</sup>Stern and Gressman, *supra* note 5, at 271.  
<sup>71</sup>*Id.*  
<sup>72</sup>*Id.* at 698.  
<sup>73</sup>Consequently, the Court may decide to hear a case, but is foreclosed when the prisoner is executed. Such a case of ultimate mootness occurred only last year when James Edward Smith was executed in the state of Texas. Hours before the scheduled execution, Justices Brennan, Marshall, Blackmun and Stevens voted to grant certiorari. However, no fifth Justice stepped forward to grant the stay and the execution proceeded. In past years, a fifth Justice would step forward as a courtesy to the cert-granting justices. That Justice was usually Lewis Powell. In Smith's case, however, no fifth vote was forthcoming and the prisoner suffered the consequences. Only time will tell whether such occurrences will become more frequent. *Legal Times*, November 19, 1990, at 10.  
In Virginia, the circuit court often does not set an execution date after the Virginia Supreme Court has completed its review and affirmed the conviction. The Commonwealth usually waits until the Fourth Circuit has denied federal habeas review before setting an execution date.  
<sup>74</sup>*Williams v. Missouri*, 463 U.S. 1301 (1983).  
<sup>75</sup>*Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983) (quoting *White v. Florida*, 458 U.S. 1301 (1982)).  
<sup>76</sup>Stern and Gressman, *supra* note 5, at 701.  
<sup>77</sup>*Id.* at 702.  
<sup>78</sup>*Barefoot*, 403 U.S. at 895.  
<sup>79</sup>In light of *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, it is imperative for defense counsel to petition for a rehearing so as to extend the period until direct appeal becomes final so that advantage may be taken of new caselaw announced during the period. Please see Capital Defense Digest Vol. 3, No. 1, pages 1-5.  
<sup>80</sup>Sup. Ct. R. 29, 14, and 38.  
<sup>81</sup>Stern and Gressman, *supra* note 5, at 445.  
<sup>82</sup>*Id.* at 425.  
<sup>83</sup>*Id.*  
<sup>84</sup>*Id.* at 426.

### How to Look the Virginia Gift Horse in The Mouth: Federal Due Process and Virginia's Arbitrary Abrogation of Capital Defendant's State-Created Rights

BY: OTTO W. KONRAD

Once a capital defendant has been convicted and sentenced to death, the Virginia Supreme Court is the last word on any questions of state law arising out of the trial.<sup>1</sup> Therefore, because the Virginia Supreme Court historically has afforded capital defendants very little relief,<sup>2</sup> a trial record devoid of federal issues puts very few judicial obstacles between the defendant and the electric chair.<sup>3</sup> Previous articles in the Capital Defense Digest have discussed a variety of federal issues that arise in virtually every capital trial.<sup>4</sup> Further, previous Digest articles have discussed the importance of properly preserving federal issues for state and federal appellate review.<sup>5</sup> This article takes the concern with federal issues in a new direction by addressing the following question — How can capital defense attorneys find federal issues in what appears to be purely state law? The short answer to this question is “fourteenth amendment due process.”

Fourteenth amendment due process encompasses two distinct groups of interests.<sup>6</sup> The first is derived from federal law and includes those rights protected in the provisions of the Bill of Rights that have been “incorporated” into the fourteenth amendment.<sup>7</sup> The second group of interests include property and liberty rights that state law has created.<sup>8</sup> Of these two groups of fourteenth amendment interests, state-created liberty rights are the key to developing new federal issues out of state capital murder law. This article first will attempt to define these state-created liberty rights. Second, this article will distill a methodology from the case law that both identifies these rights and permits one to ascertain what procedural due process these rights require. Third, this article will discuss the abrogation of a number of state-created rights pertaining to Virginia appellate review of death sentences. Finally, this article will touch on how capital