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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

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[30]*Id.*
[31]*Id.* at 193.
[32]*Andresen v. Maryland*, 427 U.S. 463, 470 n.5 (1976).
[33]Stern and Gressman, *supra* note 5, at 209.
[34]*Id.* at 209.
[35]*Id.* at 202.
[36]*Id.* at 375.
[37]*Id.* at 373.
[38]*Id.*
[39]Baker, *supra* note 1, at 613.
[40]*Id.* at 620.
[41]*Id.* at 204.
[42]*Id.* at 203.
[43]*Id.* at 214.
[44]*Id.* at 221.
[45]*Id.* at 222.
[46]*Id.*
[47]*Id.* at 146.
[48]*Id.*
[49]*Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n. 9 (1982).
[50]*Id.* The Court's perception of the importance of the *Eddings* case may have allowed for an exception to the general rule.
[51]*Hill v. California*, 401 U.S. 797, 805 (1971).
[52]Stern and Gressman, *supra* note 5, at 150.
[53]*Street v. New York*, 394 U.S. 576, 582 (1969).
[54]Sup. Ct. R. 14(1)(c).
[55]*Charleston Federal Savings and Loan Association v. Alderson*, 324 U.S. 182, 185-86 (1945).
[56]*Williams v. Georgia*, 349 U.S. 375, 382-83 (1955).
[57]Stern and Gressman, *supra* note 5, at 151.
[58]*Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); *see also, Illinois v. Gates*, 462 U.S. 213, 218-20 (1983).
[59]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.
[60]*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).
[61]*Woodson*, 428 U.S. at 305.
[62]*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).
[63]Stern and Gressman, *supra* note 5, at 261.
[64]*Id.* at 262.
[65]*Id.*
[66]*Id.*
[67]*Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-20 (1950).
[68]*United States v. Carver*, 260 U.S. 482, 490 (1923).
[69]*Darr v. Burford*, 339 U.S. 200, 226-228 (1950).
[70]Stern and Gressman, *supra* note 5, at 271.
[71]*Id.*
[72]*Id.* at 698.
[73]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.

[74]*Williams v. Misouri*, 463 U.S. 1301 (1983).
[75]*Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983) (quoting *White v. Florida*, 458 U.S. 1301 (1982)).
[76]Stern and Gressman, *supra* note 5, at 701.
[77]*Id.* at 702.
[78]*Barefoot*, 403 U.S. at 895.
[79]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.
[80]Sup. Ct. R. 29, 14, and 38.
[81]Stern and Gressman, *supra* note 5, at 445.
[82]*Id.* at 425.
[83]*Id.*
[84]*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.[1] Therefore, because the Virginia Supreme Court historically has afforded capital defendants very little relief,[2] a trial record devoid of federal issues puts very few judicial obstacles between the defendant and the electric chair.[3] Previous articles in the Capital Defense Digest have discussed a variety of federal issues that arise in virtually every capital trial.[4] Further, previous Digest articles have discussed the importance of properly preserving federal issues for state and federal appellate review.[5] 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.[6] 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.[7] The second group of interests include property and liberty rights that state law has created.[8] 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

defense attorneys can use the state-created rights doctrine to "refederalize" death penalty issues that the federal courts currently are "defederalizing."[9]

Defining State-Created Rights

The United States Supreme Court repeatedly has recognized that a number of state-created rights or interests exist that, while difficult to define, "nevertheless are comprehended within the meaning of 'liberty'" as defined in the due process clause.[10] These rights derive their constitutional status from two factors. They attach to the individual,[11] and they find their origins in state law.[12] Once the State has created such a liberty right, the procedural guarantees of the fourteenth amendment apply whenever the State seeks to alter or extinguish the right.[13]

Wolff v. McDonnel[14] is an excellent illustration of such a state-created right. In *Wolff*, an inmate claimed that his constitutional rights were violated when prison authorities deprived him of his good time credit without notice or hearing.[15] The Court determined that Nebraska's statutory law afforded all inmates the right to good time credit unless they were found guilty of serious misconduct.[16] The Court termed this statutory right a 'liberty' interest and held that the fourteenth amendment sufficiently embraced the right such that the petitioner was entitled to "those minimum procedures appropriate under the circumstances and required by the due process clause as to ensure that [the prisoner's right to good time] is not arbitrarily abrogated."[17]

Hicks v. Oklahoma[18] affords another example of state-created rights in the criminal context. Oklahoma statutory law accorded criminal defendants the right to jury sentencing.[19] Recognizing this statutory right as a liberty interest, the United States Supreme Court held in *Hicks* that Oklahoma abrogated this state-created right when the Oklahoma Criminal Court of Appeals affirmed a criminal defendant's invalid sentence on the basis that a jury could have awarded the same sentence in a valid manner.[20] The Court stated:

> Where... a State has provided for the imposition of criminal punishment in the discretion of the trial jury . . . [t]he defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State . . . . In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law . . . . Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.[21]

Identifying State-Created Rights and Necessary Procedures

In analyzing questions of state-created rights, federal courts have developed a two-tiered framework.[22] The first stage of the analysis focuses on determining whether the claimant has a liberty interest that the fourteenth amendment encompasses.[23] To make this determination, courts typically look to the text of state law.[24] However, regulations implementing a state statute and official policies or practices also can establish state-created rights embodying a liberty interest.[25] Identifying these liberty interests can sometimes be a simple task in that the state law, regulation or practice elucidates the interest in a direct manner. The *Hicks* case is an excellent case in point. Oklahoma in no uncertain terms afforded all criminal defendants the right to have the trial jury set their sentences.[26] When the Court examined this statutory language, it summarily concluded that the language afforded criminal defendants a liberty interest.[27]

In contrast to Oklahoma's straightforward law affording criminal defendants the right to jury sentencing, states can be more indirect when they create a liberty interest. For instance, quite often state law will establish a liberty interest by conferring a right on an individual and conditioning alteration or removal of the right on either occurrence of certain events or the State making certain findings.[28] *Greenholtz v. Nebraska Penal Inmates*[29] illustrates this form of a liberty interest.[30] The Court considered whether the following statutory language created a liberty interest:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) His release would have a substantial effect on institutional discipline; or
>
> (d) His continued correctional treatment, medical care or vocational or other training in the facility will substantially enhance his capacity to lead a law abiding life when released at a later date.[31]

Focusing on the "shall order his release" language followed by the four conditions, the Court held that the statutory provision conferred on the Nebraska prisoners an "expectancy" of release that accorded prisoners some measure of due process protection.[32]

In *Meachum v. Fano*,[33] the Court considered Massachusetts law authorizing the transfer of prisoners from one correctional institution to another.[34] Unlike the Nebraska parole statute of *Greenholtz*, the Court held that the Massachusetts law did not afford prisoners a liberty interest whose abrogation was conditioned only on specific findings or occurrences.[35] "On the contrary, transfer in a wide variety of circumstances is vested in prison officials."[36] Taken in concert, *Meachum* and *Greenholtz* suggest that a court will find a liberty interest that implicates due process where administration of a statutory right is not completely discretionary.[37]

Once the courts have found a state-created right that constitutes a liberty interest, the courts proceed to the next level of the two-tiered due process analysis: Identification of those procedures necessary to protect that liberty interest.[38] In some cases, making this identification is no more involved than according a particular liberty right to its intended recipient.[39] For instance, in *Hicks v. Oklahoma*, having determined that Oklahoma accorded criminal defendants the right to be sentenced by a jury, the Court simply remanded the petitioner's case to the Oklahoma courts for such a jury sentencing proceeding.[40]

However, more often than not, ascertaining the necessary amount of procedure is more complicated than just directly according the recipient his liberty interest. Probably the single most famous piece of guidance on the subject comes from the United States Supreme Court case, *Wolff v. McDonnel*.[41] Therein the Court stated that, having found a liberty interest, the law must accord the liberty interest's recipient "those minimum procedures appropriate under the circumstances and required by the Due Process Clause to ensure that the state-created right is not arbitrarily abrogated."[42] The Court's directive has limited usefulness, however, because it begs the question it seeks to answer, how much procedure is necessary?

The Court provides much more direct guidance in *Goss v. Lopez*.[43] The *Goss* Court observed that ascertaining how much procedure a

liberty interest requires often involves balancing the state's interests against the liberty interest holder's need for error free determinations.[44] In *Greenholtz v. Nebraska Penal Inmates*, the Court elaborated on this linkage of due process procedure to the need for error-free decisions: "[T]he quantum and quality of the process due in a particular situation depends upon the need to serve the purpose of minimizing the risk of error."[45]

The *Goss v. Lopez* opinion provides an excellent illustration of the Court's balancing approach. In *Goss*, a student claimed that school administrators violated his due process rights when they suspended the student without affording him a hearing.[46] After determining that the student had a liberty interest in attending school,[47] the Court elucidated the amount of procedure school administrators must afford a student before revoking the liberty interest.[48] After recognizing that notice and hearing were the minimum requirements of due process,[49] the Court balanced the student's need for error-free suspension determinations against the school's need to discipline, educate and conserve administrative resources.[50] The Court observed that affording the student notice and a limited hearing before suspension was due process that served both the student's and the school's interests in error-free determinations.[51] However, the Court limited the student's due process entitlement to notice and a hearing, deferring to the school's interests in educating students, maintaining discipline and conserving administrative resources.[52] The Court reasoned that extending the student's due process entitlement to include the right to confront and cross-examine witnesses and obtain counsel would overwhelm administrative facilities and resources and destroy the effectiveness of suspension as a disciplinary and teaching device.[53] The *Goss* opinion clearly illustrates that determining the amount of process due a particular liberty interest is an intensely practical and very fact specific process.[54]

Abrogation of State-Created Rights Pertaining to Appellate Review of Death Sentences

The Virginia legislature has accorded capital defendants a number of state-created rights pertaining to the direct review of their death sentences. In many instances these rights arbitrarily are being abrogated in violation of the defendant's fourteenth amendment right to due process. These state-created rights are contained in section 17-110.1 of the Virginia Code, which governs the procedure for direct review of Virginia death sentences.[55] Among its provisions, section 17-110.1 dictates that the Virginia Supreme Court "shall consider and determine . . . [w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor."[56] Section 17.110.1 review for passion and prejudice in the sentencing is not mandated by the federal Constitution.[57] Rather the duty originates from the Virginia legislature.[58] Because of the precatory "shall" language, this legislative command constitutes a state-created right affording capital defendants liberty interests.[59] Thus, the Virginia Supreme Court must conduct its review for passion and prejudice in a manner that is consonant with the requirements of due process, something the court consistently has failed to do.[60]

For example, when conducting section 17-110.1 passion/prejudice review, the Virginia Supreme Court often finds an absence of sentencer passion or prejudice on the basis that the record contains evidence of aggravating factors that justified a sentence of death.[61] The following portion of the *Peterson v. Commonwealth*[62] opinion is illustrative:

> As the record shows, Peterson was in constant difficulty with the juvenile authorities from an early age . . . . [A]s an adult he was convicted of breaking and entering and grand larceny . . . . All this evidence, which the jury and the trial judge obviously accepted, showed Peterson to be a dangerous man who would probably commit other acts of violence if given any opportunity to do so. *Accordingly, we hold that the death sentence was not influenced by any arbitrary factors.*[63]

In *Peterson*, instead of complying with its statutory duty to affirmatively look for the "influence of passion, prejudice or other arbitrary factors," the Virginia Supreme Court presumed the lack of passion or prejudice after concluding that aggravating factors were present within the trial record.[64] Such a presumption is illogical and erroneous. Even if aggravating factors exist and are presented to the sentencer, passion and prejudice still can influence a sentencer to impose the death penalty. Indeed, although aggravating factors may exist, it is conceivable that passion, prejudice or other arbitrary factors can be the sole impetus causing a sentencer to impose the death penalty. Nonetheless, despite these truths, the Virginia Supreme Court repeatedly has presumed the absence of passion or prejudice from the presence of aggravating factors and thereby has sidestepped its affirmative duties under Section 17-110.1.[65] Thus, the court has abrogated capital defendants' state-created rights and violated the fourteenth amendment.

The Virginia Supreme Court also abrogates capital defendants' rights under section 17-110.1 when the court conducts 17-110.1 passion/prejudice review and considers whether the defendant has raised particular instances of passion or prejudice in his appeal.[66] For example, when the court in *Poyner v. Commonwealth*[67] reviewed Poyner's trial record for sentencer passion or prejudice, the court stated:

> [W]e find no evidence that the death penalty imposed in the Newport News Case was the product of passion or prejudice, or that it was arbitrarily imposed. *Significantly, defendant does not suggest that passion, prejudice, or arbitrariness played any role in the imposition of the death sentence.*[68]

The *Poyner* court obviously found the defendant's failure to raise instances of sentencer passion or prejudice probative of the overall nonarbitrariness of the defendant's death sentence.[69] Such an approach to administering section 17-110.1 passion/prejudice review is in direct contravention to the provision's dictates.

Section 17.110.1 affords the capital defendant a mandatory review for arbitrary sentencing, independent of the appeal process, that is governed by the defendant's assignments of error.[70] Regardless of whether or not the defendant points to instances of prejudice, section 17-110.1 mandates that the Virginia Supreme Court independently ascertain that prejudice did not influence the sentencing process.[71] When the court gives any evidentiary consideration to the defendant's briefing when performing this function, it abrogates the defendant's rights of due process in violation of the fourteenth amendment.[72]

In addition to directing the Virginia Supreme Court to review capital defendants' penalty trials for passion and prejudice, section 17-110.1 of the Virginia Code also provides that the court "shall consider and determine . . . [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[73] Section 17-110.1 further provides that the court is to facilitate this "proportionality" review by accumulating "the records of all capital felony cases . . . . The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive."[74] As in the case of 17-110.1 passion/prejudice review, 17-110.1's proportionality review, though not required by the federal Constitution,[75] is mandatory under state law.[76] As such it affords the capital defendant additional liberty interests that the fourteenth amendment's due process clause protects.[77]

However, as in the case of 17-110.1 passion/prejudice review, the Virginia Supreme Court abrogates capital defendants' liberty interest when it conducts proportionality review. In direct contravention to section 17-110.1(E)'s plain meaning, the court has read language requiring it to accumulate "the records of all capital felony cases" for proportionality review to mean collecting the records of only those capital cases that the court actually reviews.[78] The statute's mandate to collect "the records of all capital felony cases" is clear and unequivocal, and as a result the court's departure from its terms constitutes an abrogation of capital defendants' liberty interests that violates the fourteenth amendment.[79]

The Virginia Supreme Court's abrogation of section 17-101.1 has been extensive. As of August 1990, only ten of the sixty-seven capital cases in which the defendant received a life sentence have been appealed to the Virginia Supreme Court.[80] In the remaining fifty-seven cases, the court has not accepted the appeals, and their records, therefore, are not considered when the court conducts section 17-110.1 proportionality review.[81] The court's failure to include these fifty-seven cases leads to a bias towards the affirmance of death sentences. A proportionality review that excludes from its purview nearly every case in which the sentencing authority opted for life, removes from the court's consideration many cases where the defendant may have committed aggravated capital murders. The exclusion of these cases tends to lower the court's perception of what conduct will merit the death penalty. The court's resulting misperceptions deprive those sentenced to death of their right to the effective proportionality review that the Virginia legislature intended as a meaningful check against the arbitrary imposition of the death penalty.[82]

The Virginia Supreme Court's abrogation of capital defendants' liberty interests, as embodied in the various provisions of section 17-110.1, constitute serious violations of due process. The severity of these due process violations is underscored when one considers the number of reversals that have resulted from the Virginia Supreme Court's passion/prejudice and proportionality review. Since the Virginia Supreme Court began conducting 17-110.1 appellate review, the court has not reversed a single death sentence for passion, prejudice or disproportionality.[83]

Further, if one, pursuant to the Court's methodology in *Goss*, balances the State's interests in continuing the Virginia Supreme Court's present applications of 17-110.1 against the capital defendant's interests in error-free sentencing determinations, the severity of the Virginia Supreme Court's abrogations becomes even more apparent.[84] As the United States Supreme Court recognized in *Murray v. Giarratano*[85] and *Barefoot v. Estelle*,[86] during the direct review of a death sentence, a capital defendant has a significant interest in the reviewing court making error-free determinations.[87] To counter this interest and support the court's misapplication of section 17-110.1, the Commonwealth can assert only the State's interest in judicial economy and efficiency. While in certain contexts such interests can be compelling, with regard to the correct application of section 17-110.1 review, they hardly exist. At most, administering section 17-110.1 review in a manner consistent with the requirements of federal due process would cost the Virginia Supreme Court a minimal increase in time and effort.

Using the State-Created Rights Doctrine to Refederalize Death Penalty Issues

During the past decade, the federal courts have begun defederalizing death penalty law.[88] In other words, the federal courts, including the United States Supreme Court, have begun to back away from closely regulating state death penalty schemes.[89] Instead, the courts are leaving the administration of these schemes to the state trial and appellate courts. Evidence of this movement can be seen in a number of recent United States Supreme Court decisions. For example, in *Wainwright v. Witt*,[90] the Court afforded a presumption of correctness to trial courts' rulings on motions to remove prospective jurors for cause.[91] The *Wainwright* holding effectively curtails federal courts from reviewing whether a trial court has violated a capital defendant's sixth amendment right to an impartial jury by refusing to unseat a prospective juror for cause.[92] In *Cabanna v. Bullock*[93] and *Clemons v. Mississippi*,[94] the Court held that state appellate courts can conduct the fact-finding necessary to impose the death penalty, thereby potentially precluding federal courts from reviewing the correctness of a trial court's imposition of the death sentence.[95] Finally, in *Lewis v. Jeffers*,[96] the Court directed the lower federal courts to apply a mere rationality standard when considering whether the evidence presented at a capital murder trial supported a defendant's conviction and sentence.[97] The Court's holding reduces the degree of scrutiny that federal courts will apply to the state court applications of capital murder schemes.[98]

In the present environment of judicial defederalization of death penalty law, developing new federal issues can be very difficult for the capital defense attorney. In that regard the state-created rights doctrine can be used as a means to identify federal issues in what appears to be purely state law.[99] Further, where the federal courts close down a particular avenue of federal claims, the state-created rights doctrine can be used to reframe those federal claims in an alternate federal form. Virginia's vileness aggravating factor,[100] in concert with the United States Supreme Court case, *Lowenfield v. Phelps*,[101] provides an excellent illustration of this latter use for the state-created rights doctrine.

One of the Clearinghouse's continuing federal claims is that the specific terms of Virginia's "vileness" aggravating factor (which include "depravity of mind," "torture" and "aggravated battery"),[102] are so vague as to afford inadequate guidance to the sentencer in a capital murder trial, thereby violating the eighth amendment's prohibition against the arbitrary imposition of the death penalty.[103] *Lowenfield v. Phelps* suggests the following counter-argument: (1) Where a state's capital murder scheme defines capital murder in a narrow fashion, conditioning the death sentence on the sentencer finding certain aggravating factors is not constitutionally required.[104] (2) Virginia's capital murder scheme narrowly defines capital murder, and thus, its statutory aggravating factors, including vileness, are not constitutionally required.[105] (3) Therefore, even if the specific terms of Virginia's vileness factor are vague, any arbitrary sentencer action resulting from their application is harmless error from the perspective of the federal Constitution.[106]

At first glance, the above described counter-argument appears to nullify a capital defendant's eighth amendment challenge to Virginia's vileness factor, thereby defederalizing the claim.[107] However, even assuming that *Lowenfield* can be interpreted and used in this fashion,[108] the capital defense attorney can use the state-created rights doctrine to reframe the eighth amendment challenge to the vileness factor into a due process claim. Because the Virginia legislature conditioned the imposition of the death penalty on the sentencer finding an aggravating factor such as vileness,[109] capital defendants have liberty interests protected by the fourteenth amendment.[110] As a result, Virginia courts must administer the statutory aggravators in a manner consonant with federal due process.[111] If the aggravating factor is so vague as to permit arbitrary sentencing, then fourteenth amendment due process mandates that the State implement those procedures that will minimize the risk of error[112] — for instance, requiring the courts to communicate effective narrowing constructions to the sentencer.[113]

Conclusion

The state-created rights doctrine is a flexible principle that should have multiple applications within Virginia death penalty law.

This article has concentrated primarily upon those state-created rights encompassed within section 17.110.1 and Virginia's vileness aggravating factor. However, state-created rights applicable to Virginia capital defendants also include the triggerman rule,[114] state habeas[115] and section 19.2-264.3:1's provisions for defense mental health experts.[116] As capital defense attorneys come into contact with these and other state-created rights, they should remain alert for possible due process violations that may arise from the interaction between these state-created rights and the particular facts of their cases. Further, capital defense attorneys should bear in mind that the state-created rights doctrine can afford a means to refederalize claims that the federal courts have defederalized.

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[1]*See* Va. Code. Ann. §§ 8.01-654, 17-110.1 (1988) (discussing direct appeals and state habeas petition appeals to Virginia Supreme Court).

[2]For instance, during the past ten years since the enactment of Virginia's capital murder statute, the Virginia Supreme Court never has vacated a death sentence on the basis of proportionality review.

[3]*See* Powley, *Perfecting the Record of a Capital Case in Virginia*, Capital Defense Digest vol. 3, no. 1, p. 23 (1990) [hereinafter Powley] (stating that federal courts will only consider those issues which capital defense attorney has preserved on record on federal grounds).

[4]*See e.g.*, Falkner, *The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor*, Capital Defense Digest vol. 2, no. 1, p. 19 (1989) [hereinafter Falkner] (discussing constitutional deficiencies of vileness aggravating factor).

[5]*See* Lee & Plimpton, *Capital Pretrial Motions: Added Dimensions*, Capital Defense Digest vol. 3, no. 2, p. 17, 18 (1990) [hereinafter Lee & Plimpton] (discussing importance of bringing claims for relief in terms of constitutional rights); Powley, *supra* note 3, at 26 (discussing importance of bringing claims for relief in terms of constitutional rights).

[6]*See Paul v. Davis*, 424 U.S. 693, 710 n.5 (1975) (stating that fourteenth amendment due process protects interests derived from the bill of rights and state law).

[7]*Id.*

[8]*Id.* at 710.

[9]At the Virginia Capital Case Clearinghouse, we use the term "federalize" to mean the process of grounding every objection, motion, proposed instruction, proffer, etc. in the fifth, sixth eighth and fourteenth amendments of the United States Constitution.

[10]*Paul v. Davis*, 424 U.S. at 710; *see also Hicks v. Oklahoma*, 447 U.S. 343, 346 (1979) (holding that state statutory right to jury sentencing implicates procedural due process); *Wolff v. McDonnel*, 418 U.S. 539, 557 (1973) (holding that state statutory right to good time credit implicates procedural due process).

[11]*See Hicks v. Oklahoma*, 447 U.S. at 346 (holding that where state provides for jury sentencing, defendant has substantial and legitimate expectation that only jury will deprive him of his liberty).

[12]*Paul v. Davis*, 424 U.S. at 710.

[13]*Id.* at 710-11.

[14]*Wolff v. McDonnel*, 418 U.S. 539 (1973).

[15]*Id.* at 554.

[16]*Id.* at 557.

[17]*Id.* at 557.

[18]*Hicks v. Oklahoma*, 447 U.S. 343 (1979).

[19]*Id.* at 345.

[20]*Id.* at 347.

[21]*Id.* at 346.

[22]*Vruno v. Schwarzwalder*, 600 F.2d 124, 129 (8th Cir. 1979).

[23]*Id.*

[24]*See Paul v. Davis*, 424 U.S. at 710 (stating that when liberty interest has been recognized and protected by state law, interest attains constitutional status).

[25]*Winsett v. McGinnes*, 617 F.2d 996, 1005 (3rd Cir. 1980) (*en banc*), *cert denied*, 449 U.S. 1093 (1981); *see also Saunders v. Packel*, 463 F. Supp. 618 (1977) (standing for proposition that practice creating reasonable expectation can establish state right).

[26]*Hicks v. Oklahoma*, 447 U.S. at 345-46 (citing Okla. Stat., Tit. 22, § 926 (1971)).

[27]*Id.* at 346.

[28]*See Meachum v. Fano*, 427 U.S. 215, 227-28 (1976) (stating that because transfer statute did not prohibit transfers absent occurrence of certain events, respondent did not have liberty interest); *Mitchell v. Hicks*, 614 F.2d 1016, 1019-20 (5th Cir. 1980) (citing *Franklin v. Fortner*, 541 F.2d 494, 498 (5th Cir. 1976)).

[29]*Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1978).

[30]*Id.* at 11-12.

[31]*Id.* at 11 (citing Neb. Rev. Stat. § 83-1,114(1) (1976)).

[32]*Id.* at 12.

[33]*Meachum v. Fano*, 427 U.S. 227 (1976).

[34]*Id.* at 226-27.

[35]*Id.*

[36]*Id.* at 227.

[37]*See Mitchell v. Hicks*, 614 F.2d at 1020 (stating that no due process clause liberty interest exists where state has complete statutory discretion to administer statutory right).

[38]*Vruno v. Schwarzwalder*, 600 F.2d at 129; *see also Goss v. Lopez*, 419 U.S. 565, 557 (1975) (stating that once court determines due process is required, next question is how much due process is necessary).

[39]*See Hicks v. Oklahoma*, 447 U.S. at 347 (according petitioner right to jury sentence).

[40]*Id.*

[41]*Wolff v. McDonnel*, 418 U.S. 539 (1973).

[42]*Id.*

[43]*Goss v. Lopez*, 419 U.S. 565 (1975).

[44]*See Id.* at 579 (stating that recipient's interest is to avoid unfair or mistaken abrogation of his rights, but process accorded recipient must not unduly impede state's interests).

[45]*Greenholtz v. Nebraska Penal Inmates*, 442 U.S. at 13.

[46]*Goss v. Lopez*, 419 U.S. at 568-69.

[47]*Id.* at 576.

[48]*Goss v. Lopez*, 419 U.S. at 577.

[49]*Id.* at 579.

[50]*Id.* 579-83.

[51]*Id.* at 583.

[52]*Id.*

[53]*Id.*

[54]*Id.* at 577-80.

[55]Va. Code Ann. § 17-110.1 (1988).

[56]Va. Code. Ann. § 17-110.1(C)(1) (1988) (emphasis added).

[57]*See Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) (stating that while federal Constitution does require meaningful appellate review of death sentences, federal Constitution does not mandate that state appellate courts provide proportionality review); *Peterson v. Murray*, 904 F.2d 882, 887 (4th Cir. 1990) (stating that § 17-110.1(C)(2)'s proportionality review is not mandated under federal Constitution), *cert denied*, 111 S. Ct. 537 (1990); *see also* case summary of *Parker v. Dugger*, Capital Defense Digest vol. 3, no. 2 (1991).

[58]*See* Va. Code. Ann. § 17.110.1(C)(1)&(2) (1988).

[59]*See Hicks v. Oklahoma*, 447 U.S. at 345-46 (holding that because Oklahoma law afforded defendant right to jury sentence, defendant had liberty interest).

[60]*See Coleman v. Thompson*, 895 F.2d 139, 146-47 (4th Cir. 1990) (recognizing unique powers of Virginia Supreme Court to independently assess whether death penalty improperly is imposed and noting that appellate court with such powers must exercise them constitutionally), *cert granted in part*, 111 S. Ct. 340 (1990).

[61]*See, e.g, Poyner v. Commonwealth*, 229 Va. 401, 429, 329 S.E.2d 815, 834 (1985) (holding there was no passion or prejudice because evidence of guilt was sufficient and evidence during penalty phase was ample), *cert denied*, 474 U.S. 865 (1985); *Peterson v. Commonwealth*, 225 Va. 289, 301, 302 S.E.2d 520, 527-28 (1983) (holding presentation of evidence in support of future dangerousness proves that arbitrary factors did not influence sentencer to impose death sentence), *cert denied*, 464 U.S. 865 (1983); *Clanton v. Commonwealth*, 223 Va. 41, 56-57, 286 S.E.2d 172, 180 (1982) (observing that there was ample evidence to support jury verdict based upon findings that Clanton had propensity for violence and that capital murder was offense of exceptional ferocity, court holds that neither passion nor prejudice influenced sentencer to impose death sentence).

[62]*Peterson v. Commonwealth*, 225 Va. 289, 301, 302 S.E.2d 520, 527-28 (1983), *cert denied*, 464 U.S. 865 (1983).

[63]*Id.* (emphasis added).

[64]*See id.* (holding that presentation of evidence in support of future dangerousness proves that arbitrary factors did not influence sentencer to impose death sentence).

[65]*See, e.g, id.* (same); *Clanton v. Commonwealth*, 223 Va. at 56-57, 286 S.E.2d at 180 (observing that there was ample evidence to support jury verdict based upon findings that Clanton had propensity for violence and that capital murder was offense of exceptional ferocity, court holds that neither passion nor prejudice influenced sentencer to impose death sentence).

[66]*See, e.g., Turner v. Commonwealth*, 234 Va. 543, 555, 364 S.E.2d 483, 490 (1988) (in ascertaining the absence of sentencer passion or prejudice, significant that defendant does not point to any passion or prejudice), *cert denied*, 451 U.S. 1011 (1989); *Poyner v. Commonwealth*, 229 Va. at 435, 329 S.E.2d at 837 (1985) (in ascertaining the absence of sentencer passion or prejudice, significant that defendant does not point to any passion or prejudice), *cert denied*, 474 U.S. 865 (1985); *Justus v. Commonwealth*, 222 Va. 667, 681, 283 S.E.2d 905, 913 (1981) (in ascertaining the absence of sentencer passion or prejudice, significant that defendant does not point to any passion or prejudice), *cert denied*, 455 U.S. 983 (1981).

[67]*Poyner v. Commonwealth*, 229 Va. 401, 435, 329 S.E.2d 815, 837 (1985), *cert denied*, 474 U.S. 865 (1985).

[68]*Poyner v. Commonwealth*, 229 Va. at 435, 329 S.E.2d at 837 (emphasis added).

[69]*Id.*

[70]*See* Va. Code. Ann. § 17.110.1(C) (1988) ("In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine . . . [w]hether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor").

[71]*See id.* (same).

[72]*See Hicks v. Oklahoma*, 447 U.S. at 345-46 (holding that because Oklahoma law afforded defendant right to jury sentence, defendant had a liberty interest).

[73]Va. Code. Ann. § 17-110.1(C)(2) (1988) (emphasis added).

[74]Va. Code. Ann. § 17-110.1(E) (1988) (emphasis added).

[75]*See Pulley v. Harris*, 465 U.S. at 50-51 (stating that while federal Constitution does mandate meaningful appellate review of death sentences, state appellate courts are not required to provide proportionality review); *Peterson v. Murray*, 904 F.2d at 887 (stating that § 17-110.1(C)(2)'s proportionality review is not mandated under federal Constitution).

[76]*See* Va. Code. Ann. § 17-110.1(C)(2) (1988) (stating that Virginia Supreme Court "shall consider and determine . . . [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.")

[77]*See Hicks v. Oklahoma*, 447 U.S. at 345-46 (stating that because Oklahoma law afforded defendant right to jury sentence, defendant had liberty interest).

[78]*Boggs v. Commonwealth*, 229 Va. 501, 522, 331 S.E.2d 407, 422(1985), *cert denied*, 475 U.S. 1031 (1986).

[79]*See Clozza v. Murray*, 913 F.2d 1092, 1105 (4th Cir. 1990) (refusing to consider petitioner's challenge to scope of cases included in Virginia Supreme Court's proportionality review because Virginia Supreme Court considered petitioner's case "the worst on record.")

[80]*Fisher v. Murray*, Petition for Writ of Habeas Corpus, Filed in The Circuit Court for the County of Bedford, 191 (Filed August 3, 1990 by the law firm of Arnold & Porter).

[81]*Fisher v. Murray*, Petition for Writ of Habeas Corpus, Filed in The Circuit Court for the County of Bedford, 191 (Filed August 3, 1990 by the law firm of Arnold & Porter).

[82]*See Pulley v. Harris*, 465 U.S. at 54 (Stevens, J., concurring) (discussing importance of meaningful appellate review).

[83]*See Fisher v. Murray*, Petition for Writ of Habeas Corpus, Filed in The Circuit Court for the County of Bedford, 191 (Filed August 3, 1990 by the law firm of Arnold & Porter).

[84]*See Greenholtz*, 442 U.S. at 13 (1978) (stating that "[T]he quantum and quality of the process due in a particular situation depends upon the need to serve the purpose of minimizing the risk of error"); *Goss v. Lopez*, 419 U.S. at 579 (stating that state-created right recipient's interest is to avoid unfair or mistaken abrogation of his rights, but process must not unduly impede state's interests).

[85]*Murray v. Giarratano*, 109 S. Ct. 2765 (1989).

[86]*Barefoot v. Estelle*, 463 U.S. 880 (1983).

[87]*Murray v. Giarratano*, 109 S. Ct. at 2770 (stating that direct appeal is the primary avenue for review of death sentence); *see also Barefoot v. Estelle*, 463 U.S. at 887 (stating that when process of direct review ends, presumption of finality attaches to criminal judgment).

[88]*See generally* Geimer, *Death at any Cost: A Critique of the Supreme Court's Recent Retreat from its Death Penalty Standards*, 12 Fla. St. U.L. Rev. 737 (1985); Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305.

[89]*See* Geimer & Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1 (no. 3) (1987-88) (stating that in last decade, Court has severely curtailed scrutiny of way states administer death penalty).

[90]*Wainwright v. Witt*, 469 U.S. 412 (1984).

[91]*Id.* at 426-28.

[92]*See id.* (trial court's ruling on motion to unseat prospective capital sentencing juror for cause is entitled to presumption of correctness under 28 U.S.C. § 2254(d)).

[93]*Cabana v. Bullock*, 474 U.S. 376 (1986).

[94]*Clemons v. Mississippi*, 110 S. Ct. 1441 (1990).

[95]*See id.* at 1443 (where trial court awards death sentence on basis of improperly applied aggravating circumstance, state appellate court can uphold death sentence if it reweighs aggravating and mitigating circumstances); *Cabana*, 474 U.S. at 387 (where trial court awards death sentence on basis of improper fact-finding, state appellate court can uphold death sentence if it conducts proper fact-finding).

[96]*Lewis v. Jeffers*, 110 S. Ct. 3092 (1990).

[97]*Id.* at 3103.

[98]*See* case summary of *Lewis v. Jeffers*, Capital Defense Digest vol. 3, no. 1, p. 7 (1990) (discussing *Lewis v. Jeffers* and rational fact-finder standard).

[99]*See supra* notes 55-87 and accompanying text (discussing federal issues arising out of the Virginia Supreme Court's application of section 17-110.1 appellate review).

[100]Section 19.2-264.2 of the Virginia Code conditions the imposition of the death penalty on the sentencer finding an aggravating factor, one of them being that the defendant committed his capital offense in a manner that was "*outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.*" Va. Code. Ann. § 19.2-264.2 (1990) (emphasis added).

[101]*Lowenfield v. Phelps*, 484 U.S. 231 (1987).

[102]Va. Code Ann. § 19.2-264.2 (1990).

[103]*See* Falkner, *supra* note 4, at 19 (discussing eighth amendment challenges to Virginia's vileness aggravating factor).

[104]*See Lowenfield v. Phelps*, 484 U.S. at 246 (holding that because Louisiana's capital murder scheme performs constitutionally mandated narrowing in guilt phase, additional statutory requirement to find aggravating factors before sentencing defendant to death has no constitutional significance).

[105]*See* Falkner, *supra* note 4, at 20 (stating that after *Lowenfield* decision, it is unclear whether federal Constitution requires Virginia to have separate list of aggravating factors).

[106]*See id.* (same).

[107]*See id.* (same).

[108]An assumption made only for the purposes of this argument.*See* Falkner, *supra* note 4, at 20-21 (discussing arguments against *Lowenfield* counter-argument).

[109]*See* Va. Code. Ann. § 19.2-264.2 (1990).

[110]*See Wolff v. McDonnel*, 418 U.S. at 557 (holding that state creation of conditional statutory right to good time implicates federal due process).

[111]*See Paul v. Davis*, 424 U.S. at 710 (stating that when state law has recognized and protected liberty interest, interest attains constitutional status); *see also Wolff v. McDonnel*, 418 U.S. at 557 (where state has accorded citizen liberty interest, state must accord minimum procedures appropriate under circumstances and required by due process clause to insure that liberty interest is not arbitrarily abrogated).

[112]*Greenholtz v. Nebraska Penal Inmates*, 442 U.S. at 13.

[113]*See* Falkner, *supra* note 4, at 20 (discussing necessity of communicating adequate narrowing constructions of Virginia's statutory aggravating factors to sentencer).

[114]*See Johnson v. Commonwealth*, 220 Va. 146, 149, 255 S.E.2d 525, 526-27 (1979) (With exception of murder for hire, Commonwealth can only seek death penalty against immediate perpetrator of killing), *cert denied*, 450 U.S. 920 (1981).

[115]*See* Hobart, *supra* note 5, at 23 (discussing Virginia habeas procedure).

[116]*See* Konrad, *Getting the Most and Giving the Least from Virginia's "Mental Mitigation Expert" Statute*, Capital Defense Digest, this issue (1991).

GETTING THE MOST AND GIVING THE LEAST FROM VIRGINIA'S "MENTAL MITIGATION EXPERT" STATUTE

BY: HELEN L. KONRAD

When planning the trial strategy for a capital murder case, a mental health expert's assistance can be invaluable. At the same time, it can create unforeseen problems. This paper initially will present the various methods of obtaining mental health expert assistance and will then compare the advantages and disadvantages of each method. The focus, however, will be to decipher Virginia's statutory provision for providing mental health expert assistance, and to explain how the statute works in practice.

The United States Supreme Court has held that the Due Process Clause requires that indigent defendants be provided the "raw materials" and "basic tools" necessary to marshall their defense. In *Ake v. Oklahoma*, the Court more specifically held that the right to a mental health expert is such a "basic tool" and it attaches once the indigent defendant shows that insanity will be a significant factor in his defense.[1] The rationale of *Ake* has been extended beyond cases where sanity is at issue. In a capital case, use of a mental health expert can be a "basic tool" in the presentation of mitigation evidence at the penalty phase of the trial.

Ake's progeny, however, holds that before the right to the expert attaches, the defendant must make a detailed and persuasive showing that the expert is necessary and that the defendant would not receive a fair trial without the assistance of the expert.[2] At present no court has explicitly formulated a checklist of what must be included in an *Ake* motion to meet this detailed and persuasive showing. Nonetheless, the following is a synopsis of factors that many courts are currently requiring:

1. Type of expert.
2. Type of assistance.
3. Name, qualifications, fees etc. of the expert.
4. Reasonableness of the cost.
5. Objective bases for the request.
6. Subjective bases for the request.
7. Legal necessity.
8. Legal entitlement to defense experts.
9. Inadequacy of available state experts.
10. Supporting information for all of these factors.[3]

The advantages of seeking expert assistance under *Ake* are really twofold: first, that the attorney is forced to develop a theory of mitigation almost as a condition of receiving the appointment of the expert, and second, that once appointed, the expert operates as a "defense consultant," assisting in the preparation and presentation of the defendant's case.

The disadvantages are first, that despite the constitutional basis for the right, no specific showing can ensure appointment of the expert. Second, this amorphous, yet "basic tool" showing, also must be heavily substantiated. Finally, *Ake* does not give the defendant the right to an expert of the defendant's choosing or even to get the funds to hire an expert of the defendant's choosing.

Unlike the detailed showing required to receive expert assistance under *Ake*, Virginia's three statutory entitlements to receive assistance are less stringent. A capital defendant may receive a competency evaluation, but only to ensure that the defendant has the capacity to understand the proceedings against him or to assist his attorney in his own defense.[4] A capital defendant may also receive a sanity evaluation, but that inquiry is limited to the defendant's sanity at the time of the offense, and only as it is relevant to the presentation of an insanity defense.[5]

Virginia's third statutory entitlement (3:1), and the most important one for a capital defendant, is especially attractive because it automatically provides expert assistance to a defendant merely if (1) he is charged with or convicted of capital murder, and (2) he is indigent.[6] This easy access is both enhanced and undermined by many specific provisions of the statute requiring a more detailed inquiry.

As stated above, an indigent defendant charged with or convicted of capital murder necessitates that the "court appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition."[7] This disjunctive language permits a situation where the indigent defendant is charged with capital murder and petitions the court for a mental health expert. Once the defendant is convicted of capital murder, the attorney moves the court again for another mental health expert on a different issue concerning the defendant's history, char-