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TO ATTAIN THE ENDS OF JUSTICE: CONFRONTING VIRGINIA'S DEFAULT RULES IN CAPITAL CASES

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BY: MICHAEL A. GROOT

I. SEEKING ONE FAIR HEARING OF FEDERAL CONSTITUTIONAL CLAIMS IN FEDERAL COURT

Given that appellate relief from the Supreme Court of Virginia in capital cases is exceedingly rare,[1] and relief through state habeas is likewise virtually non-existent,[2] it is not surprising that death sentenced prisoners seek at least one fair determination **by a federal court** of their claims of federal constitutional error. There are only two ways to achieve federal review, and the first is almost never completely successful. The first way is to completely avoid Virginia's labyrinthian default rules and properly preserve every claim of error.[3] The second method, the subject of this article, is to convince a federal court to hear a claim in spite of Virginia default rules.

II. THE IDEAL: SIMULTANEOUSLY DEFENDING AND PROTECTING THE RECORD

Ideally, defense counsel at the guilt/innocence trial, while seeking an acquittal or a conviction of a lesser offense, and at the penalty trial, while seeking a life sentence instead of death:

> (1) makes every objection, motion, proffer, and proposed instruction in a timely fashion, and on the record; and
> (2) clearly asserts for the trial court all available grounds, state and federal, applicable to every adverse ruling on objections, motions, proffers, and proposed instructions.

This must be done because the default and waiver rules allow the court to dismiss claims without judgment on the merits for purely procedural error. Known as the contemporaneous objection rule, Rule 5:25, in pertinent part, provides that "[e]rror will not be sustained to any ruling of the trial court . . . before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable [the Supreme Court of Virginia] **to attain the ends of justice.**"[4]

Beavers v. Commonwealth,[5] is quite illustrative of the difficulty facing attorneys attempting to defend while simultaneously protecting the record. In *Beavers*, the trial court ruled that defense counsel's motion to strike the entire jury panel was defaulted. Defense counsel failed to object at the time that each of three venire members were dismissed for cause. The Supreme Court of Virginia affirmed that ruling, stating that the objection was untimely because defense counsel waited until after the jury had been selected, sworn, and preliminarily instructed.[6] To avoid default, said the court, counsel must object twice: first at the time the potential juror is dismissed and again immediately before the jury is seated. Similarly, the court held that the defense defaulted on its motion for a mistrial. During the Commonwealth's attorney's opening statement, several references were made to "recommendations" to be made by the jury regarding defendant's penalty. Defense counsel correctly objected to those statements based on *Caldwell v. Mississippi*.[7] Unfortunately, defense counsel objected at the end of the entire statement. For an objection concerning opposing counsel's statements to be timely, said the court, it is necessary to move for mistrial as soon as the prejudicial words are uttered.

Usually, trial counsel has responsibility also for direct appeal of right to the Supreme Court of Virginia in capital cases.[8] Ideally, appellate counsel:

> (1) without "winnowing" out what she considers weaker claims,[9] assigns as error **all** the non-frivolous claims that have been so carefully preserved at trial; and
> (2) briefs and argues **all** assigned errors before the Supreme Court of Virginia.

This must be done because Rule 5:17(c), amended in 1991, applies the provisions of Rule 5:25 to limit substantially the questions upon which the supreme court will rule. "Only errors assigned in the petition for appeal will be noticed . . . ."[10] Furthermore, the Supreme Court of

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[1] *See* McInerney, *The Virginia Supreme Court and Thirteen Years of Death Sentence Review*, Capital Defense Digest, Vol. 4, No. 1, p. 30 (1991). At the time of the article, the Virginia Supreme Court had reversed only seven of the over 75 cases it had heard. The court now has heard over 95 cases but has only reversed on eight occasions. Perhaps more significant, reversals are becoming increasingly rare. Since 1986, the court has heard over 50 capital cases but reversed only twice, both on state law grounds. Both *Rogers v. Commonwealth*, 242 Va. 307, 410 S.E.2d 621 (1991), and *Cheng v. Commonwealth*, 240 Va. 26, 393 S.E.2d 599 (1990), were reversed based on insufficiency of the evidence because of Virginia's statutory "triggerman" rule, Va. Code Ann. § 18.2-18. The "triggerman" rule provides that only the person who did the actual killing may be convicted of capital murder and subjected to the penalty of execution.

[2] There are only two cases in which the Supreme Court of Virginia has given relief according to Michelle Brace of the Virginia Capital Representation Resource Center.

[3] *See* Powley, *Perfecting The Record of a Capital Case in Virginia*, Capital Defense Digest, Vol. 3, No. 1, p. 26 (1990).

[4] Va. R. Sup. Ct. 5:25 (emphasis added).

[5] 245 Va. 268, 427 S.E.2d 411 (1993); *see also* case summary of *Beavers*, Capital Defense Digest, Vol. 6, No. 1, p. 26 (1993).

[6] *Id.* at 278, 427 S.E.2d at 418-19.

[7] 472 U.S. 320 (1985) (holding that an argument is subject to objection if the prosecutor attempts to diminish the jury's sense of responsibility for its decision).

[8] Va. R. Sup. Ct. 5:22 (providing that an appeal of a death sentence is automatically granted).

[9] *See Smith v. Dixon*, 14 F.3d 956 (1994) (holding, *inter alia*, that although an ineffective assistance claim was not barred, the claim did not provide a basis for habeas relief); *see also* case summary of *Smith*, Capital Defense Digest, this issue (pointing out that "winnowing" out claims is unacceptable in capital appellate advocacy because it is not possible for counsel to determine what claims will be recognized as meritorious during the often lengthy pendency of the capital appellate process).

[10] Va. R. Sup. Ct. 5:17(c).

Virginia will not consider assignments of error which are waived by the defendant's failure to argue them on brief.[11] For example, in *Stockton v. Commonwealth*,[12] a capital case, the court rigorously applied the rule. The court refused to grant the defendant's request to file a brief in excess of a fifty page limitation set by Rule 5:26.[13] Later, when the defendant attempted to rely upon issues which he raised in assignments of error but did not brief because of the page limitation, the court adhered to Rule 5:27 (now Rule 5:17(c)(4)) and refused to hear the issues.

When a case reaches state habeas, new counsel is ordinarily assigned. Her job is to preserve for federal review on the merits all the claims rejected by the Supreme Court of Virginia on direct appeal.[14] In addition, there are claims which can only be brought before the court at state habeas because the grounds become available or can reasonably be discovered for the first time at state habeas. The most common of these claims are those arising from the ineffective assistance of counsel, *Brady*[15] violations, and prosecutorial, judicial or law enforcement misconduct. These must be investigated and presented to the circuit court with the same competence and care as were trial level claims **and** their denial must be appealed back to the Supreme Court of Virginia, following the same rules outlined for direct appeal.[16]

Fashioning a perfect record under these circumstances is one way to insure that claims of fundamental constitutional error resulting in a death sentence are at least reviewed on their merits in federal court. Every effort should be made simultaneously to defend and protect the record, but it is understandable that this goal will not be reached in every case. In fact, Virginia capital litigation history reveals that it is seldom achieved.[17] Because of the importance of meaningful appellate review, every avenue to achieve it should be explored. What, then, can be done if the case has reached the door of federal court and some claims appear not to have survived the pitfalls of Virginia default and waiver doctrine?

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[11] Va. R. Sup. Ct. 5:17(c)(4).

[12] 241 Va. 192, 402 S.E.2d 196 (1991); *see* case summary of *Stockton*, Capital Defense Digest, Vol. 4, No. 1, p. 18 (1991).

[13] *Id.* at 217, 402 S.E.2d at 210.

[14] One way to preserve claims is not to present these claims at all in state habeas. *See Spencer v. Murray*, 5 F.3d 758 (4th Cir. 1993); *see also* case summary of *Spencer* (*Spencer I*), Capital Defense Digest, this issue. In *Spencer I*, the court made it clear that claims presented to the Supreme Court of Virginia and rejected on direct appeal remained procedurally eligible to be considered on the merits by federal habeas courts. Bypassing state habeas has several distinct advantages: First, any further findings of fact necessary to the claim will be made by the federal court, as opposed to the circuit court at state habeas. At least as to those facts then, there is not the problem of the requirement under 28 U.S.C. § 2254(d) that the federal court defer to state court findings of fact. Second, the common assertion by the Commonwealth that the claim is defaulted because it is not the same claim that was rejected on direct appeal will be decided initially by the federal court, rather than by a state court that often has a vested interest in preserving the trial results. Obviously, however, before bypassing state habeas, defense counsel should ensure that the claim is indeed protected by the holding of *Spencer I*.

[15] *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that due process is violated when material and exculpatory evidence is withheld from defendant).

[16] *See* Hobart, *State Habeas in Virginia: A Critical Transition*, Capital Defense Digest, Vol. 3, No. 1, p. 23 (1990); *see also Coleman v. Thompson*, 111 S. Ct. 2546 (1991) and case summary of *Coleman*, Capital Defense Digest, Vol. 4, No. 1, p. 4 (1991). In *Coleman*, the petitioner was three days late in filing a notice of appeal back to the circuit court which first examined his state habeas petition. The Commonwealth filed a motion to dismiss petitioner's appeal on the ground that it violated Rule 5:9 of the Rules of the Supreme Court of Virginia which provided that no appeal shall be allowed unless a notice of appeal is filed with the trial court within thirty days of final judgment. The Supreme Court of Virginia eventually dismissed petitioner's appeal. The United States Supreme Court held that the Supreme Court of Virginia's decision "fairly appears" to rest primarily on state law because the dismissal does not mention federal law and because the underlying dismissal motion was based solely upon state procedural grounds of failure to give timely notice of appeal.

[17] *See Swann v. Commonwealth*, 441 S.E. 2d 195 (Va. 1994) (claims that trial court improperly sustained prosecutor's objection to counsel's closing argument that the jury could assume that a life sentence meant a prison term for life; that the court allowed a witness to state that defendant's prior releases from prison were due to "mandatory release"; claim of error under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), due to prosecutor's attempt to diminish jury's sense of responsibility for its decision; and claim of violation of *Griffin v. California*, 380 U.S. 609 (1965), where prosecutor referred to defendant's invoking right not to testify against himself was defaulted). *See also* case summary of *Swann*, Capital Defense Digest, this issue; *see also Beavers, supra* (claims regarding motion to strike jury panel and motion for mistrial under *Caldwell* were defaulted); *Yeatts v. Commonwealth*, 242 Va. 121, 410 S.E.2d 254 (1991) (claims that the admission of a post-sentence psychiatric report which equated dangerousness with low intelligence as evidence of future dangerousness and motion for mistrial were defaulted); *Quisenberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218 (1991) (claim involving objection to court's definitions of terms seconds after definitions were given was defaulted along with four substantive issues); *George v. Commonwealth*, 242 Va. 264, 411 S.E.2d 12 (1991) (claim for sentence review for passion and prejudice because verdict improperly influenced in part because a charge of abduction with intent to defile was consolidated for trial with the capital murder charge was defaulted); *Justus v. Murray*, 897 F.2d 709 (1990) (claim involving sufficiency of the evidence supporting his death sentence was defaulted); *Spencer v. Commonwealth*, 238 Va. 563, 385 S.E.2d 850 (1989) (claims that the death penalty statute was "vague" and does not specify which party carries the burden of proof of mitigation were defaulted); and *Fisher v. Commonwealth*, 236 Va. 403, 374 S.E.2d 46 (1988) (claims regarding trial court's refusal to grant defense requests for statements made by defendant to informants; objections to cameras in the courtroom; constitutionality of Code § 18.2-31(b) which classified murder for hire as capital murder; constitutionality of Code §§ 18.2-18 and 18.2-31(b) which permitted an accessory before the fact in a murder for hire to be prosecuted for capital murder; constitutionality of Code § 19.2-264.2, which prescribes criteria which must be met before the death penalty may be imposed; and court's failure to notice on its own motion certain comments made by the Commonwealth's attorney in his closing statement were defaulted).

III. FEDERAL COURTS AND DEFAULTED STATE CLAIMS: COMITY, FEDERALISM, AND "ADEQUATE AND INDEPENDENT STATE GROUNDS"

Claims which have not properly been presented in accordance with state procedure are not necessarily barred from federal review. Such claims are not jurisdictional and may be heard by federal courts. Persuading the federal court to hear defaulted constitutional claims in capital cases is most often attempted in two ways: first, by showing a good reason or "cause" for the failure to follow state procedure, and demonstrating the harm or "prejudice" caused by the constitutional error; second, by demonstrating that, but for the error, petitioner could not lawfully have been exposed to a sentence of death. These methods are further described in this section.

A third means of seeking a determination of claims on their merits also exists—challenging the unjust and uneven application of state procedural bars. It is this avenue that appears to be underutilized. The federal doctrine permitting review under these circumstances is described in this section. The apparent vulnerability of Virginia on this issue is the subject of this article's next section.

First, the "cause" and "prejudice" excuses for default stem from *Wainwright v. Sykes*.[18] In *Sykes*, the Court held that if the petitioner has failed to raise a claim in an adequate manner in the state courts, and the state courts have for this reason refused to decide the merits of the claim, the state courts' rulings are an independent and adequate state procedural ground precluding the consideration of the claim in federal habeas, unless the petitioner can show "cause" for the default and "prejudice" if the claim is not considered.

Petitioner's default may occur at trial, in the failure to object,[19] or on appeal, in the failure to raise an issue.[20] Furthermore, petitioner's default must have foreclosed review on the merits in the state courts. If the state courts determine the issue on the merits despite the default, or if the state courts' rulings are not clearly on procedural grounds and are arguably on the merits, the *Sykes* rule does not apply.[21]

Where the *Sykes* rule does apply, "cause" and "prejudice" must be established in order to obtain review of a claim on the merits. "Cause" may be shown "when a procedural default is not attributable to an intentional decision by counsel made in pursuit of his client's interests."[22] Accordingly, "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[23] "Cause" can be established by showing that the factual or legal basis for a claim was not reasonably available to counsel,[24] or "that 'some interference by officials' . . . made compliance impracticable."[25] "Cause" cannot, however, be established by a showing of inadvertence (short of ineffective assistance) by counsel,[26] or by a showing that state law was so well established against the claim that any attempt to raise it would have been futile.[27] "Prejudice" can be shown if the petitioner can establish that the underlying constitutional violation "worked to his actual and substantial disadvantage . . . ."[28]

Second, the "innocent of the death penalty" basis for hearing defaulted claims was recently clarified in *Sawyer v. Whitley*.[29] Under *Sawyer*, another reason procedural default may not always be deadly to capital defendants is the existence of a second excuse, actual "innocence of the death penalty":[30] that is, innocence of the capital crime itself, or non-existence of aggravating factors sufficient to support the death penalty. The United States Supreme Court has held that to prove such a claim "one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[31] Therefore, even if cause and prejudice cannot be established, the petitioner can still avoid the *Sykes* rule if she can show that a "fundamental miscarriage of justice" will be sustained in the absence of federal habeas relief.

In the guilt/innocence context, where the petitioner can show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."[32] In the capital sentencing context, if the constitutional error has allowed the sentencer to consider "false or in any way misleading" testimony, or has "had the effect of foreclosing meaningful exploration of [mitigating evidence],"[33] the writ may be granted. Additionally, counsel should be aware that "cause" and "prejudice" are generally fact-based issues which, in the absence of fair hearing and fact finding in the state courts, entitle the petitioner to an evidentiary hearing.[34] While defense counsel should attempt the *Sykes* and *Sawyer* methods of avoiding default, she must also realize that they are rarely successful.

Finally, federal courts have recognized that state procedural bars can be unevenly and unjustly applied and have gone on to decide the merits of claims in spite of failure to comply with state procedure. These claims do not involve matters of jurisdiction and may receive federal review. Neither the rule nor its application is independent and adequate if the state applies a new procedural rule without notice or applies an existing rule sporadically or in a surprisingly harsh or unexpected manner. Moreover, the question of whether state procedural default precludes federal habeas consideration is itself a federal question.[35]

The following civil rights cases demonstrate various states' attempts to preclude a specific class of unfavored litigants from obtaining federal review. State courts attempted to achieve the desired result by relying upon state default rules that were not observed with the same intensity in cases involving other more favored groups.[36] These cases further establish a federal review doctrine developed by the United States Supreme Court which allows federal review of an otherwise defaulted claim when the procedural rules relied upon to bar review are applied arbitrarily, inconsistently or unevenly.

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[18] 433 U.S. 72 (1977).

[19] *Id.*

[20] *Murray v. Carrier*, 477 U.S. 478 (1986).

[21] *See Ulster County Court v. Allen*, 442 U.S. 140 (1979). *See also Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Engle v. Issac*, 456 U.S. 107 (1982); *Payton v. New York*, 445 U.S. 573, 582 n.19 (1980). *But see Coleman v. Thompson*, 111 S.Ct. 2546 (1991); *see also* case summary of *Smith v. Dixon*, Capital Defense Digest, this issue.

[22] *Reed v. Ross*, 468 U.S. 1, 14 (1984).

[23] *Murray*, 477 U.S. at 488.

[24] *Id.; see also Reed v. Ross*, 468 U.S. at 16-18; *Davis v. United States*, 411 U.S. 233, 243 (1972). *But see*, as to legal basis, *Teague v. Lane*, 489 U.S. 288 (1989) (if the legal basis for a claim did not arise until after petitioner's trial and direct appeal, it may be of no avail at habeas.)

[25] *Murray*, 477 U.S. at 488 (quoting *Brown v. Allen*, 344 U.S. 443, 486 (1953)).

[26] *Murray*, 477 U.S. at 490.

[27] *Engle v. Issac*, 456 U.S. at 130.

[28] *United States v. Frady*, 456 U.S. 152, 170 (1982)

[29] 112 S. Ct. 2514 (1992); *see* case summary of *Sawyer*, Capital Defense Digest, Vol. 5, No. 1, p. 18 (1992).

[30] *Sawyer* at 2518.

[31] *Id.* at 2517.

[32] *Murray*, 477 U.S. at 495.

[33] *Id.* at 538.

[34] *See generally Humphrey v. Cady*, 405 U.S. 504, 517 (1972).

[35] *Henry v. Mississippi*, 379 U.S. 443, 447 (1965).

[36] The actions of the states in the civil rights cases are closely analogous to the treatment given capital litigants by the appellate courts in Virginia.

Authority establishing the federal review doctrine is as follows: *James v. Kentucky*,[37] (only state procedural rules which are "firmly established and regularly followed . . . can prevent implementation of federal constitutional rights"); *N.A.A.C.P. v. Alabama ex rel. Patterson*,[38] (state court's refusal to review federal constitutional questions in a certiorari proceeding on the ground that mandamus was the proper mode of obtaining review was without fair or substantial support, in view of the inconsistency with prior holdings of that court, and hence was not such an independent nonfederal ground as would deprive the United States Supreme Court of jurisdiction to review the constitutional questions); *Hathorn v. Lovorn*,[39] (petitioner's reliance upon the Voting Rights Act issue for the first time in their petition for rehearing may have been untimely under a Mississippi procedural rule but did not constitute an independent and adequate state ground barring the Court's review of the federal question, where it appeared that, if Mississippi still followed such a rule, it did not do so "strictly or regularly"[40]); *N.A.A.C.P. v. Alabama ex rel. Flowers*,[41] (federal review not barred where the brief was found to basically have complied with the Alabama procedural rule and the rule had not previously been applied with such "pointless severity"[42]); *Barr v. City of Columbia*,[43] (Supreme Court reiterated that it had "often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive [the Court] of the right to review"[44]); and *Wheat v. Thigpen*,[45] (federal court could consider claims not raised by habeas petitioner on direct appeal from capital murder conviction, where state supreme court had not clearly announced or strictly or regularly followed procedural rule which would have prevented petitioner from raising such claims on writ of error coram nobis).[46]

Thus, a doctrine does exist that will permit federal review of defaulted claims where the state rules are unevenly applied, not strictly or regularly followed, or applied with "pointless severity". Recent use of the doctrine in a capital context can be found in *Ford v. Georgia*,[47] where a black defendant was convicted of kidnapping, rape and murder, and he appealed. The Supreme Court of Georgia affirmed, and the defendant petitioned for certiorari. The Supreme Court granted the petition and vacated and remanded for further consideration. On remand, the Supreme Court of Georgia held that the defendant's equal protection claim was procedurally barred as untimely under Georgia law.[48] Certiorari was granted to decide whether the rule of procedure laid down by the Supreme Court of Georgia was an adequate and independent state procedural ground that would bar review of petitioner's *Batson* claim[49] that the State's exercise of its peremptory challenges rested on the impermissible ground of race in violation of the Equal Protection Clause of the Fourteenth Amendment.[50] The Supreme Court held that the rule of procedure laid down by the Supreme Court of Georgia was not an adequate and independent state procedural ground that would bar review of the defendant's *Batson* claim because the rule was not firmly established at the time in question.[51]

There is evidence that Virginia's procedural bars are applied arbitrarily and inconsistently to preclude review of the claims of a class of unfavored litigants—death sentenced prisoners—similar to the use of procedural bars in the civil rights cases described here that established the review doctrine. Therefore, it is time to confront Virginia's irrational default rules directly through the provision of federal habeas law that also allows defaulted claims to be heard if the state procedural rules have been applied arbitrarily or inconsistently.

IV. CONFRONTING VIRGINIA'S DEFAULT RULES: UNFAIR AND INCONSISTENT

When application of state procedural bars in Virginia is examined in an attempt to identify deficiencies sufficient to permit federal review of capital habeas claims, surprising findings appear. It might be concluded that, where only property or liberty is at stake, or where the defendant is a judge,[52] procedural orderliness is not as paramount as it appears to be in capital cases.[53] In Virginia, it appears that appellate courts have often overlooked state procedural default in noncapital cases. The following

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[37] 466 U.S. 341 (1984).

[38] 357 U.S. 449 (1958).

[39] 457 U.S. 255 (1982).

[40] *Id.* at 263.

[41] 377 U.S. 288 (1964).

[42] *Id.* at 297.

[43] 378 U.S. 146 (1964).

[44] *Id.* at 149 (citing *N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)).

[45] 793 F.2d 621 (5th Cir. 1986).

[46] *See Spencer v. Kemp*, 781 F.2d 1458 (11th Cir. 1986); *Francois v. Wainwright*, 741 F.2d 1275 (11th Cir. 1984). *See also Wright v. Georgia*, 373 U.S. 284 (1963).

[47] 498 U.S. 411 (1991).

[48] *Id.* at 413.

[49] *Id.* at 425. Originally a claim based on *Swain v. Alabama*, 380 U.S. 202 (1965), was made objecting to the use of peremptory strikes to exclude blacks from the jury in case after case, over time. During the pendency of the case, *Batson v. Kentucky*, 476 U.S. 79 (1986), was decided which rejected *Swain*'s "crippling" burden of proof placed on defendants. *Batson* held that a defendant could establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. In *Ford v. Georgia, supra,* the defendant changed his original *Swain* claim to a *Batson* claim and the state tried to argue that this was a new claim and therefore defaulted. The Supreme Court rejected the state's argument and recognized both claims were challenging the purposeful exclusion of a class of jurors and that *Batson* merely changed the burden of proof.

[50] *Ford*, 498 U.S. at 418.

[51] *Id.* at 425.

[52] *Campbell v. Commonwealth*, 14 Va. App. 988, 421 S.E.2d 652 (1992).

[53] Granted most reversals under the "to attain the ends of justice" exception to the default rules have come from the court of appeals. Nonetheless, the supreme court is supposed to be applying the same language. *See* note 54, *infra*. It is not enough, then, for the supreme court to claim that they are limited by procedural rules when the court of appeals is not so limited in its application of the same language. Futhermore, on direct appeal, capital cases **must** go to the supreme court while other cases go to the court of appeals. To the extent that the court of appeals is applying the same language to reverse but the supreme court is not, the rules are being applied arbitrarily and more harshly to the detriment of death sentenced prisoners.

cases[54] demonstrate the various types of noncapital situations in which Virginia appellate courts have heard defaulted claims, as well as, reversed criminal and civil judgments in order to "attain the ends of justice".[55]

In *Campbell v. Commonwealth*,[56] the defendant, a judge, was convicted of forging a public record. The jury was instructed on an incorrect statement of law. At trial, however, the defendant did not object to the instruction. On appeal, the defendant argued that the trial court erred in instructing the jury. The prosecution argued that review of the claim was barred under Rule 5A:18 because the defendant did not preserve for appeal his objection to the jury instruction. Nonetheless, the court of appeals heard the issue and reversed the judgment "to attain the ends of justice" because the error was "patently harmful" and "contrary to fundamental notions of justice."[57]

In *Brown v. Commonwealth*,[58] the defendant was convicted of three counts of uttering forged checks in violation of Virginia Code section 18.2-172. On appeal, the defendant claimed that the evidence was insufficient to support the convictions for uttering. The Commonwealth argued that review of the claim was barred by Rule 5A:18 because the defendant failed to argue at trial the specific issues raised on appeal: that the elements of knowledge and intent to defraud were lacking. Despite the defendant's failure to raise the issue at trial, the Virginia Court of Appeals invoked the Rule 5A:18 "to attain the ends of justice" exception and reversed on insufficient evidence grounds.

In *Jimenez v. Commonwealth*,[59] the defendant was convicted on an indictment charging that he obtained advances of money with fraudulent intent upon a promise to construct a building and that he failed or refused to perform the promise in violation of Virginia Code section 18.2-200.1. On appeal, the defendant challenged the sufficiency of the evidence and the granting of a jury instruction despite his failure properly to preserve the alleged error at trial. The prosecution argued that the defendant waived his right to raise the issues on appeal because he failed to preserve the error at trial. The Supreme Court of Virginia rejected the prosecution's argument and reversed the judgment of the court of appeals. The court invoked the "to attain the ends of justice" provision of Rule 5:25 because the instruction omitted essential elements of the offense, and therefore, no evidence was produced relating to those elements.

In *Duck v. Commonwealth*,[60] the defendant was convicted of driving under the influence (second offense) in violation of Virginia Code section 18.2-266. On appeal, the defendant claimed, for the first time, that his conviction violated his due process rights because his act of invoking his right to appeal resulted in the Commonwealth alleging a more serious offense against him. The defendant argued that the trial court erred in allowing the amendment of the warrant to allege a "second offense." The Commonwealth argued that the claim was barred by Rule 5A:18 because the defendant failed to raise the issue before the trial court. The defendant conceded that he failed to raise a due process objection in the trial court but argued that he satisfied the mandate of Rule 5A:18 by objecting to the amendment of the warrant on other grounds. The court of appeals found that the claim was not preserved. Nonetheless, the court considered the claim in order "to attain the ends of justice." The court relied on *Cooper v. Commonwealth*[61] for the proposition that "[a]n appellate court may . . . take cognizance of errors though not assigned when they relate to the jurisdiction of the court over the subject matter, are fundamental, or when such review is essential to avoid grave injustice or prevent the denial of essential rights."[62] The court invoked the saving provision of Rule 5A:18 because the claim involved the denial of a fundamental constitutional right, that of due process.

In *Miller v. Commonwealth*,[63] the defendant was convicted of feloniously failing to return property. On appeal, the defendant claimed, for the first time, that the trial court erred in allowing the defendant to be brought into the courtroom in shackles in view of the jury panel and in failing to declare a mistrial. The Commonwealth argued that appellate consideration of the claim was barred by Rule 5A:18 because the defendant failed to contemporaneously object in the trial court. The court found that no objection was made prior to the jury being sworn but had difficulty determining when defense counsel became aware of the existence of the shackles prior to that time. Nevertheless, the appellate court reviewed the claim under the "to attain the ends of justice" exception to Rule 5A:18 and stated that "[w]here so fundamental a right as a fair and impartial trial is at issue, we will not assume that counsel delayed raising a timely objection."[64]

In *Miller v. Miller*,[65] the appellant appealed the trial court's order reducing the amount of monthly child support the appellee must pay for his retarded son. The trial judge gave no written explanation or justification for his decision. When appellant's attorney was presented the draft order reducing child support for his endorsement, he signed it, "seen and objected to." Otherwise, he made no objection to the trial court's reducing the amount of child support without having made written findings as to why the amount was determined. The appellee contended that the appellant failed to preserve for appeal the issue whether the trial court erred in entering its child support reduction order without making written findings, because she failed to object pursuant to Rule 5A:18 at the trial court's ruling or order on that ground. The court of appeals reviewed the

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[54] The cases described in this section do not constitute an exhaustive list. They are merely representative of noncapital cases in which claims have been heard despite default. Other cases include: *M.E.D. v. J.P.M*, 3 Va. App. 391, 350 S.E.2d 215 (1986) (court considered grounds for admissibility of evidence that were not presented to trial court "to attain the ends of justice); *Chrisman v. Commonwealth*, 3 Va. App. 371, 349 S.E.2d 899 (1986) (court considered the sufficiency of the evidence to sustain a sodomy conviction "to attain the ends of justice"); *Reed v. Commonwealth*, 6 Va. App. 65, 366 S.E.2d 274 (1988) (defendant's failure to properly preserve issue of sufficiency of evidence did not preclude appellate review of defendant's criminal trespass conviction under "ends of justice" exception); and *Brown v. Commonwealth*, 8 Va. App. 126, 380 S.E.2d 8 (1989) ("ends of justice" exception to contemporaneous objection rules permitted appellate review of error arising when trial court mistakenly sentenced defendant for burglary other than one for which he was convicted, where trial court considered facts of other burglary in imposing sentence).

[55] Va. R. Sup. Ct. 5:25; Va. R. Ct. App. 5A:18. The virtually identical court of appeals rule in pertinent part provides as follows:

> No ruling of the trial court . . . will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals **to obtain the ends of justice.**

(emphasis added)

[56] *Campbell v. Commonwealth*, 14 Va. App. 988, 421 S.E.2d 652 (1992) (en banc).

[57] *Id.* at 995, 421 S.E.2d at 656.

[58] 1993 WL 230063 (Va. App.).

[59] 241 Va. 244, 402 S.E.2d 678 (1991).

[60] 8 Va. App. 567, 383 S.E.2d 746 (1989).

[61] 205 Va. 883, 140 S.E.2d 688 (1965).

[62] *Duck*, 8 Va. App. at 570, 383 S.E.2d at 748 (citing *Cooper*, 205 Va. at 889, 140 S.E.2d at 693).

[63] 7 Va. App. 367, 373 S.E.2d 721 (1988).

[64] *Id.* at 371, 373 S.E.2d at 723.

[65] 1993 WL 544878 (Va. App.).

trial court's action "to attain the ends of justice." It did so, however, not because the trial court necessarily erred in reducing the amount of support or erred in the manner in which it did so, but rather because the entry of a support order without any written findings as to why the guideline amount is unjust or inappropriate and without justifying the deviation would not provide an adequate basis for setting support in the future.

In *Int'l Union, United Mine Workers of America, v. Covenant Coal Corp.*,[66] the unions appealed from orders which held them in contempt for violating an injunction prohibiting certain strike-related activities. The unions claimed that the trial court improperly imposed criminal contempt fines on them in violation of their constitutional protections. The unions, however, failed to make a contemporaneous or specific objection in the trial court on these grounds. Nonetheless, "to attain the ends of justice" the court addressed the issue for the first time on appeal and reversed. The appellate court found that the trial court imposed the criminal fines based on a burden of proof other than guilt beyond a reasonable doubt. Therefore, the court held that the unions were "denied their constitutional protections, which are mandated when a party is subjected to criminal penalties."[67]

In *Roane v. Roane*,[68] on appeal following a divorce action, the wife appeared pro se, filed no brief, and alleged no error. The husband had appealed asserting that the evidence was not sufficient to support the trial court's finding that corporate stock had been transmuted to marital property. The appellate court found error during its examination of the record. The court discovered that the trial court had failed to respond to the wife's request that it consider some proffered exhibits and a closer review of the husband's assertion that no guaranty existed. Despite the wife's failure to file a brief and assign error, the appellate court considered errors "to attain the ends of justice" and, *sua sponte*, found error in the trial court's failure to admit the proffered exhibits.[69]

Unlike the noncapital cases, however, where the life of a prisoner is at stake, the Supreme Court of Virginia has overlooked procedural default **"to attain the ends of justice"** only once. In *Ball v. Commonwealth*,[70] the Supreme Court of Virginia reversed the capital murder conviction of the defendant because the defendant had been convicted of a crime of which, under the evidence, he could not properly be found guilty. In *Ball*, the defendant was convicted of murder in the commission of robbery while armed with a deadly weapon under Virginia Code section 18.2-31(4), which at that time allowed conviction of capital murder only for "robbery," not "attempted robbery."[71] The defendant had not raised this issue at trial. The Commonwealth argued that review of the claim was barred under Rule 5:21 (now Rule 5:25). Nonetheless, the Supreme Court of Virginia invoked the "to attain the ends of justice" exception. The court found that in the light most favorable to the Commonwealth, the evidence showed that the victim was killed during an attempted robbery rather than in the actual commission of a robbery. At that time, the most that the defendant could be convicted of was felony murder under Virginia Code section 18.2-32.

V. CONCLUSION

Researching and attacking the bias against death sentenced prisoners demonstrated by the Virginia courts in the application of state procedural bars is an underutilized tool of appellate defense practice. Given the growing use of other doctrines to close the doors of federal court,[72] confronting Virginia's default rules directly deserves more attention. After all, before getting caught up in this legal game playing it is worthwhile to ask as a matter of policy and justice whether absolute procedural order is a value that should be elevated above protection against execution of prisoners whose trials have been infected by fundamental constitutional error.

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[66] 12 Va. App. 135, 402 S.E.2d 906 (1991).
[67] *Id.* at 149, 402 S.E.2d at 914.
[68] 12 Va. App. 989, 407 S.E.2d 689 (1991).
[69] *Id.* at 994, 407 S.E.2d at 701.
[70] 221 Va. 754, 273 S.E.2d 790 (1981).
[71] The legislature promptly changed the statute to include "attempted" robbery.
[72] *See Teague v. Lane*, 489 U.S. 288 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (adopting no-retroactivity principle in the context of capital habeas proceedings).

JUSTICE BLACKMUN AND THE "FAILED EXPERIMENT"

BY: WILLIAM S. GEIMER

On February 22, 1994, a symbolic but important event occurred. It merits at least passing mention as Virginia, now third among all states in carrying out executions in modern times,[1] continues to struggle with the administration of its capital murder statutes. In a dissent from the Court's denial of certiorari in *Callins v. Collins*,[2] Supreme Court Justice Harry Blackmun announced that he would no longer vote to sustain any death sentences. The announcement is merely symbolic in the sense that Justice Blackmun currently stands alone among court members in taking that position. But because of who Justice Blackmun is and the unique opportunity which he has had to watch the modern death penalty in action, his explanation for his change in position deserves to be read and thoughtfully considered.

This brief essay is written in the hope that it will prompt all concerned with the administration of Virginia's death penalty—judges, prosecutors, defense counsel, legislators—to read his opinion in its entirety.

Justice Blackmun was appointed by President Nixon. He came to the Court with a deeply held personal antipathy for the death penalty, but with a clear understanding of his role as one of the ultimate arbiters of the

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[1] *Death Row USA*, NAACP Legal Defense and Education Fund, Spring 1994.

[2] 114 S. Ct. 1127 (1994).