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# WEEKS v. COMMONWEALTH 248 Va. 460, 450 S.E.2d 379 (1994) Supreme Court of Virginia

Counsel should use all available means to obtain information in addition to the formal discovery process. In regard to discovery, counsel should make requests as particular and specific as possible, thereby limiting the courts' ability to recharacterize the requests as requests which do not encompass the *Brady* material later found to have been withheld. In addition, every request or demand must be made on the record and must require that the trial judge rule on each and every piece of information requested. Even in "open file" jurisdictions, the record must reflect what was demanded, the response made, and exactly what material defense counsel received, and when it was received.

Summary and analysis by:
Angela Dale Fields

## WEEKS v. COMMONWEALTH

### 248 Va. 460, 450 S.E.2d 379 (1994)
### Supreme Court of Virginia

#### FACTS

Late on the night of February 23, 1993, twenty year-old Lonnie Weeks was travelling southbound on I-95 between Washington and Richmond with his twenty-one year-old uncle, Lewis J. Dukes, Jr.[1] Dukes was driving the car at a high rate of speed when they passed the vehicle of Virginia State Trooper Jose M. Cavazos around midnight. Dukes eventually stopped the car on the Dale City exit ramp, where Trooper Cavazos pulled up behind them.[2] Trooper Cavazos asked the two men to get out of the car. Dukes complied, but as Weeks exited, he drew a pistol and shot the officer at least six times. Trooper Cavazos died several minutes later.[3]

Weeks and Dukes left the scene in their vehicle and stopped at a gas station.[4] Soon after at a nearby motel, another police officer stopped and questioned Weeks and Dukes. They volunteered information about the shooting, claiming they had "heard the shots" while in the motel parking lot.[5] Subsequent suspicious behavior on the part of Weeks and Dukes prompted the police officers on the scene to detain them with their consent.[6] State police Special Agent J.K. Rowland advised Weeks that he was "free to leave" but then read Weeks *Miranda* warnings. Weeks wrote on the "Advice of Rights" form: "Do not want to discuss case further."[7] Meanwhile, Dukes told another police officer that Weeks had shot the trooper. When this police officer informed Rowland of Dukes' account, Rowland arrested Weeks.[8] Later, at about 6:00 p.m. that evening (February 24), Rowland asked Weeks if he remembered the rights read to him earlier that day. Weeks answered that he did, was questioned further, and soon confessed to shooting the trooper.[9]

Weeks was indicted for capital murder for the willful, deliberate, and premeditated killing of a police officer for the purpose of interfering with the police officer's performance of official duties;[10] grand larceny of a motor vehicle; and use of a firearm in the commission of murder.[11] The jury later found Weeks guilty of capital murder and sentenced him to death based on the "vileness" aggravating factor. After considering a probation officer's report and the probation officer's testimony relating to punishment, the court upheld the sentence of death.[12]

#### HOLDING

Deciding his appeal and conducting its statutory review, the Supreme Court of Virginia held that Weeks' sentence had not been imposed under passion, prejudice, or other arbitrary factor, and that the sentence was not excessive or disproportionate to penalties imposed in similar cases.[13] The court also rejected all of his forty-seven assignments of error[14] and affirmed the conviction and sentence of death.[15]

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[1] *Weeks v. Commonwealth*, 248 Va. 460, 464, 450 S.E.2d 379, 382-83 (1994).

[2] *Id.* at 464, 450 S.E.2d at 383.

[3] *Id.* at 465, 450 S.E.2d at 383.

[4] *Id.*

[5] *Id.* at 466, 450 S.E.2d at 383-84.

[6] *Id.* at 466-67, 450 S.E.2d at 384.

[7] *Id.* at 468, 450 S.E.2d at 385.

[8] *Id.* at 469, 450 S.E.2d at 385.

[9] *Id.*

[10] Va. Code Ann. § 18.2-31(6) (Supp. 1994).

[11] *Weeks*, 248 Va. at 463, 450 S.E.2d at 382.

[12] *Id.* at 464, 450 S.E.2d at 382.

[13] *Id.* at 478-79, 450 S.E.2d at 390-91.

[14] As noted in the text, Weeks commendably raised forty-seven assignments of error for appeal, although the Supreme Court of Virginia refused to consider ten of these errors since they were not briefed or argued. For further information on these ten errors, *see* Section III and the text accompanying Footnote 62 *infra*. As to some of the remaining thirty-two issues, either the court summarily rejected them, they did not involve death penalty law, or the court applied broad and well-settled principles of law to situations which are too fact-specific to be useful generally. These issues include: (1) the constitutionality of Weeks's two-hour detention without arrest; (2) the trial court's denial of Weeks's motion to suppress his confession, based on the failure of authorities to scrupulously honor Weeks's request to remain silent (more specifically, the court's application of the five factors in the United States Supreme Court's decision in *Michigan v. Mosley*, 423 U.S. 96 (1975), used to determine whether re-interrogation of a criminal defendant, once that defendant has exercised his *Miranda* rights, is constitutional—*see* Bieber, Commonwealth v. Burket: *Don't Put All Your Defense Eggs in the Suppression Basket*, Capital Defense Digest, this issue); (3) the trial court's error in denying individual voir dire; (4) the trial court's error in denying Weeks' challenge for cause to a juror whose wife's first cousin had been a police officer killed in the line of duty; (5) the trial court's error in permitting hearsay testimony concerning statements of Dukes to investigators that Weeks had killed the trooper; (6) the trial court's error in denying Weeks's motion to strike the Commonwealth's evidence of capital murder based on the evidence's failure to prove premeditation sufficiently. Of the remaining issues, the trial court stated that it had "considered all the arguments in support of those issues, and conclude[d] that none ha[d] any merit." *Weeks*, 248 Va. at 476, 450 S.E.2d at 390.

[15] *Weeks*, 248 Va. at 479, 450 S.E.2d at 391.

## ANALYSIS/APPLICATION IN VIRGINIA

### I. Denial of Ex Parte Motions

#### A. Motion for Disclosure of Records

The trial court denied three of Weeks' pre-trial motions made *ex parte*. First, Weeks made an "Ex Parte Motion for Disclosure of Records Maintained by the Central Criminal Records Exchange" (hereinafter CCRE).[16] The applicable statute provides in part:

> Upon an ex parte motion of a defendant in a felony case and upon the showing that the records requested may be relevant to such case, the court shall enter an order requiring the Central Criminal Records Exchange to furnish the defendant, as soon as practicable, copies of any records of persons designated in the order on whom a report has been made under the provisions of this chapter.[17]

Weeks requested copies of the criminal records of himself, Dukes, and "certain North Carolina residents likely to be called as witnesses by the prosecutor."[18] Apparently, the prosecutor arrived in court and wished to argue against granting Weeks' motion. Weeks objected, but the trial court overruled his objection. The court then denied the motion.[19]

The Supreme Court of Virginia found that the trial court had committed no reversible error in denying the motion and rejected this assignment of error accordingly.[20] The court stated that it would assume arguendo[21] that Weeks was "entitled to be heard ex parte, and that the trial court erred in denying his motion under the statute," though it noted that "the statute is silent about the nature of any hearing on such motion."[22] But the court found that nothing in the trial record indicated that the trial court's ruling had prejudiced Weeks. Additionally, the court described Weeks' motion as "redundant," since the trial court had previously ordered the Commonwealth to provide Weeks with criminal history information concerning any Commonwealth witnesses at hearings or trial.[23]

The Supreme Court of Virginia thus held that even if Weeks had a statutory right to an *ex parte* hearing on his motion, the absence of a showing of prejudice rendered the trial court's error harmless, leaving Weeks without a remedy.[24] The court was correct in noting that the statute says nothing about the nature of the hearing on this *ex parte* motion. Otherwise, the statutory language is clear. Logically speaking, an *ex parte* motion means nothing without an implicit *ex parte* hearing on that motion. The statute does not contemplate any sort of an adversary proceeding. Additionally, the statute is almost entirely mandatory, not discretionary. Defense counsel need only make a minimal showing of relevance that the information requested "may be relevant to [the] case"[25] to invoke the court's statutory duty to grant the defendant's motion. The trial court's failure to grant Weeks an *ex parte* hearing and its eventual denial of the motion both clearly contravened the plain meaning of the statute.

On at least one past occasion, such failure on the part of a trial court to comply with a statutory mandate has led the Supreme Court of Virginia to overturn a defendant's conviction without any showing of prejudice. In *Gray v. Commonwealth*[26] the Commonwealth's failure to comply with statutory filing requirements for a certificate of forensic analysis led the court to reverse the defendant's conviction for possession of a controlled substance and remand the case for a new trial.[27] The trial court in that case had held that the Commonwealth's failure to comply with the filing requirement was not error since the defendant had not been prejudiced. But the Supreme Court of Virginia held that prejudice to the defendant was irrelevant.[28] Instead, the court construed the statute strictly against the Commonwealth, finding that the Commonwealth's failure to follow the requirements of the statute exactly mandated a reversal and remand.

The court in *Gray* rejected the Commonwealth's arguments in favor of reading requirements into the statute which were not in the text. The court stated that the filing requirements statute "deals with criminal matters, and it undertakes to make admissible evidence which otherwise might be subject to a valid hearsay objection. Thus, the statute should be construed strictly against the Commonwealth and in favor of the accused."[29] The court further noted that reading additional requirements into the statute, as the Commonwealth was suggesting, "would be to construe the statute strictly against the accused and in favor of the Commonwealth, a result clearly contrary to the applicable rule of construction."[30]

Analogizing *Gray* to Weeks' case, both the Commonwealth's presence at the hearing and the trial court's denial of the motion could only be justified by the trial court's (or Supreme Court of Virginia's) reading additional requirements into the statute, as those courts did. But under *Gray*, whether or not Weeks was prejudiced should have been irrelevant. The statute should have been construed strictly against the Commonwealth and Weeks' conviction should have been overturned.

Nonetheless, attorneys in Virginia should understand that, under the rationale of *Weeks*, defendants effectively may not be entitled to a statutory right to an *ex parte* hearing on this particular motion unless they are prepared to put in the record for appellate review a showing that the

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16 *Id.* at 472, 450 S.E.2d at 387.

17 Va. Code Ann. § 19.2-389 (Supp. 1994).

18 *Weeks*, 248 Va. at 472, 450 S.E.2d at 387.

19 *Id.*

20 *Id.*

21 The trial court also stated that it would assume that "the statute is applicable to discovery in felony cases." *Weeks*, 248 Va. at 472, 450 S.E.2d at 387.

22 *Weeks*, 248 Va. at 472, 450 S.E.2d at 387.

23 *Id.* at 472-73, 450 S.E.2d at 387.

24 *Id.* at 472, 450 S.E.2d at 387.

25 Va. Code Ann. § 19.2-389 (Supp. 1994).

26 220 Va. 943, 265 S.E.2d 705 (1980).

27 The statute which required such a filing, Va. Code Ann. § 19.2-187 (Supp. 1994), provides in relevant part:

> In any hearing or trial of any criminal offense . . . a certificate of analysis of a person performing an analysis or examination, performed in any laboratory operated by the Division of Consolidated Laboratory Services or the Division of Forensic Science or authorized by such Division to conduct such analysis or examination . . . when such certificate is duly attested by such person, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided (i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial.

28 *Gray*, 220 Va. at 946, 265 S.E.2d at 706.

29 *Id.* at 945, 265 S.E.2d at 706 (citing *Ansell v. Commonwealth*, 219 Va. 759, 761, 250 S.E.2d 760, 761 (1979)).

30 *Id.* at 946, 265 S.E.2d at 706.

Commonwealth's attendance or the denial of the motion prejudiced the defendant. Furthermore, nothing in the court's opinion suggested or stated that this "prejudice" analysis could not or would not be extended to other statutory rights of defendants. Counsel should therefore continue to insist that the denial of an *ex parte* hearing, as per this statute, is manifest error. If the trial court rejects this argument, counsel's options are limited. It is suggested that counsel request a post-trial hearing, at which counsel attempts to get in the record a showing that the defendant was prejudiced by the clearly erroneous denial of a clear statutory right. *Weeks* virtually requires such a showing. Denial of the post-trial hearing would constitute a separate error. This claim should also be federalized to preserve it through all stages of future state and federal review. The federal basis for such an error is that an arbitrary denial of a state created right constitutes a denial of Fourteenth Amendment Due Process.[31]

### B. Motion for Scientific Investigation

Weeks' second pre-trial motion was a "Motion For Scientific Investigation, Ex Parte." The statute governing this motion provides in relevant part:

> In any case in which an attorney of record for a person accused of violation of any criminal law of the Commonwealth, or the accused, may desire a scientific investigation, he shall, by motion filed before the court in which the charge is pending, certify that in good faith he believes that a scientific investigation may be relevant to the criminal charge. The motion shall be heard ex parte as soon as practicable and the court shall, after a hearing upon the motion and being satisfied as to the correctness of the certification, order that the same be performed by the Division of Forensic Science or the Division of Consolidated Laboratory Services . . . .[32]

Weeks requested the scientific investigation to ascertain information about Trooper Cavazos' death, such as whether he had died instantly from his wounds.[33] At the hearing on the motion, the trial court indicated it would hear the motion when Weeks showed that he could not obtain the results of any such tests which the state Division of Forensic Science had probably already performed. Weeks' attorney withdrew the motion as untimely instead of objecting when the trial court imposed an obligation not found in the statute.[34]

The attorney apparently never renewed the motion. The Supreme Court of Virginia stated that Weeks could not contest the ruling on appeal since he had "acquiesced in the trial court's ruling."[35] The court's holding as to this motion presents similar problems to its holding on the Motion for Disclosure of Records. If anything, the holding is more clearly erroneous because the statute explicitly provides for an *ex parte* hearing, and its subject matter is potentially more important to defendants than the right to secure criminal records. The statute guaranteed Weeks an affirmative right to investigative assistance.[36] The statute only requires that defendants make a minimal showing of a good faith belief that the scientific investigation **may** be relevant to the defense's efforts.[37] Upon such a showing, made *ex parte*, defendant is entitled to the scientific assistance. The state of alternative sources of information available to defendant is irrelevant.

Despite this minimal required showing, however, the trial court and the Supreme Court of Virginia decided that counsel's failure to renew the motion (and thus establish the minimal showing) defaulted it permanently.[38] This default also presents an issue. At the federal court level, Weeks may have two available arguments to obtain relief from this default. First, it can be argued that because this unlawful requirement was unilaterally imposed by the trial judge, there was no default. Second, it can be argued that because there were no adequate state grounds for the state's action, Weeks could establish the requisite "cause and prejudice" for habeas relief under *Wainwright v. Sykes*[39] by arguing that the imposition of a greater showing than is statutorily required caused the default and prejudiced him by denying him the requested expert assistance.

Additionally, the trial court allowed the prosecutor to be present despite the statute's clear command that the motion be heard *ex parte*. This result illustrates that even with minimal statutory requirements imposed on defendants, statutory rights may still be defaulted unless reasserted whenever counsel has the least indication that an issue may be lost. The ease with which this occurred here should serve to warn counsel about how simple it is for defendants to forfeit statutory rights when the Supreme Court of Virginia seeks a way around plain errors.

Counsel should further note that the analysis in *Gray v. Commonwealth*,[40] detailed *supra* in Section I-A, may also be used to persuade trial courts to construe statutes properly. Again, counsel is advised to insist on a ruling on these matters, refuse to make showings which are not required by statute, and make post-trial proffers demonstrating prejudice from denial of statutory guarantees. In many cases prejudice from violation of 2.1-434.11 will be significant and easier to demonstrate than the effect of violations of 19.2-389.

### C. *Ake* Motion

Weeks also made a motion for expert assistance concerning pathology and ballistics. The trial court denied both his request to be heard *ex parte* on this motion and the motion itself.[41] Weeks had requested that his motion for funding this expert assistance "'be treated under the same procedure as required by Title 18 USC 3006A(e) in Federal Court.'"[42] The Supreme Court of Virginia disagreed and rejected this assignment of error, stating that the court had "already decided that a defendant charged

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31 *See, e.g., Wolff v. McDonnell*, 418 U.S. 539 (1974) (violation of Due Process for state to deprive inmate of statutory right to good time credit without following appropriate procedures); *Hicks v. Oklahoma*, 447 U.S. 343 (1980) (violation of Due Process for state to deprive defendant of statutory right to jury sentencing; such denial was arbitrary denial of defendant's liberty interest created by the statute). *See generally* Konrad, *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*, Capital Defense Digest, Vol. 3, No. 2, p. 16 (1991).

32 Va. Code Ann. § 2.1-434.11 (Supp. 1994). *See also* Heavner, *Leaving No Stone Unturned: Alternative Methods of Discovery in Capital Cases*, Capital Defense Digest, this issue.

33 *Weeks*, 248 Va. at 473, 450 S.E.2d at 387.

34 *Id.* at 473, 450 S.E.2d at 388.

35 *Id.*

36 Va. Code Ann. § 2.1-434.11 (Supp. 1994).

37 The statute states that "[u]pon . . . request" the Division shall provide the defense any investigation results it has conducted "which is related in any way to a crime for which such person is accused." Va. Code Ann. § 2.1-434.11 (Supp. 1994).

38 *Weeks*, 248 Va. at 473, 450 S.E.2d at 388.

39 433 U.S. 72 (1977).

40 220 Va. 943, 265 S.E.2d 705 (1980).

41 *Weeks*, 248 Va. at 473, 450 S.E.2d at 388.

42 *Id.*

with capital murder is not entitled to an ex parte hearing on his motion for expert assistance."[43]

The United States Supreme Court's decision in *Ake v. Oklahoma*[44] may conflict with the Supreme Court of Virginia's pronouncement. Although *Ake* involved expert assistance for an insanity defense, the Court's analysis has since been extended to many other forms of expert assistance,[45] including the pathology and ballistics assistance which Weeks sought.[46] In *Ake* the Court held that when defendants have made a preliminary showing that expert assistance is so essential to their particular case as to be one of the "'basic tools of an adequate defense or appeal,'" due process requires a state to provide that assistance.[47] Implicit, if not virtually explicit, in *Ake*'s holding was the notion that such defendants were entitled to be heard *ex parte* when they desired to make a showing of necessity for the assistance at trial. "When the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent."[48]

First, defense counsel is advised to make such *Ake* requests on federal grounds—that denial of this assistance is denial of due process under the Fourteenth Amendment. Second, an *ex parte* hearing on that motion is vital to defense counsel's efforts in such situations. To make the preliminary showing required in *Ake*, defense counsel must present evidence to the court which, were it known to the prosecution, could easily be used against the defense. Additionally, most capital defendants are indigent and represented by appointed counsel. Neither they nor their counsel can afford the expert assistance, and so must call on the authority of *Ake*. Wealthy defendants have no need to disclose information to the prosecution when obtaining expert assistance. Further, the resources of the Commonwealth far outweigh the resources of these defendants and the Commonwealth is not required to make disclosures to defendants in order to secure those resources.

Counsel is strongly urged to persevere with this issue by contesting the denial of an *ex parte* hearing and by preserving and briefing this error at all stages of appeal. At the very least, whether defense counsel is entitled to an *ex parte* hearing on an *Ake* motion is a more complex issue than was indicated by the court's cursory treatment of it in Weeks' appeal.

### II. Denial of Motion for Bill of Particulars

Weeks also moved for a bill of particulars, which included a request to identify the aggravating factors which the Commonwealth would seek to prove in order to authorize a death sentence and a request for narrowing constructions of the "vileness" factor if the Commonwealth intended to rely upon it. The trial court partially denied these motions. The Supreme Court of Virginia held that since Weeks had not challenged the sufficiency of the indictment, no bill of particulars was required.[49] The court's holding raises two important concerns. First, there are constitutional grounds for requesting notice of aggravating factors. Refusing to grant this motion denies defendants their due process right to defend against the state's case for death. This issue is more fully discussed in the case summary of *Williams v. Commonwealth*,[50] this issue. One aspect of this is illustrated, however, in *Weeks*. It is the danger that a defendant will find out what the appellate court determines to constitute "vileness" only after he has been convicted and sentenced to death based on that factor.

After Weeks' conviction and death sentence, the Supreme Court of Virginia explained that "vileness" in this case was established in part by the fact that Weeks "returned to the scene, falsely claiming that he attempted to render assistance to the victim when his real purpose was to retrieve incriminating evidence."[51] The indictment gave him no notice of the aggravating factors to be used in his case. Weeks had no opportunity to contest the court's claim, since he had no notice that these incidents would be used to establish "vileness" in his case. He could offer no evidence to rebut the evidence the appellate court would later conclude established "vileness." In particular, he had no notice that evidence of his real purpose in returning to the scene might be pivotal to his eligibility for a death sentence.

Denial of this opportunity to defend against the state's case for death may and should eventually be held reversible error. Capital defense attorneys are advised to keep insisting on a bill of particulars or some form of record notice of the aggravating factors and narrowing constructions. Attorneys are also advised that the right to a fair opportunity to defend against the state's case for death is firmly established in analogous United States Supreme Court decisions, including *Gardner v. Florida*,[52] *Skipper v. South Carolina*,[53] *Lankford v. Idaho*,[54] and *Simmons v. South Carolina*.[55]

### III. Incorporation by Reference on Appeal of Previous Materials of Record

The Supreme Court of Virginia refused to hear Weeks' claim that the Virginia capital murder and death penalty statutes are unconstitutional.[56] The court decided that Weeks' impermissible effort to incorporate by reference a trial court memorandum on this issue defaulted his claim.[57] Unfortunately this rule, set forth in *Jenkins v. Common-*

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[43] *Id.* The decision cited for this proposition was *Ramdass v. Commonwealth*, 246 Va. 413, 422, 437 S.E.2d 566, 571 (1993), *rev'd on other grounds sub nom. Ramdass v. Virginia*, 114 S. Ct. 2701 (1994).

[44] 470 U.S. 68 (1985).

[45] *See, e.g., O'Dell v. Commonwealth*, 234 Va. 672, 685, 364 S.E.2d 491, 499 (1988) (court appointment of forensic expert); *United States v. Patterson*, 724 F.2d 1128 (5th Cir. 1984) (fingerprint specialist); *Barnard v. Henderson*, 514 F.2d 744 (5th Cir. 1975) (ballistics expert); *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980) (pathologist); *United States v. Fogarty*, 558 F.Supp. 856 (E.D. Tenn. 1982) (handwriting analyst); *Bowen v. Eyman*, 324 F.Supp. 339 (D. Ariz. 1970) (serologist). *See also Thornton v. State*, 339 S.E.2d 241 (Ga. 1986) (dental expert); *Patterson v. State*, 232 S.E.2d 233 (Ga. 1977) (narcotics analyst).

[46] *See Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980) (pathology); *Barnard v. Henderson*, 514 F.2d 744 (5th Cir. 1975) (ballistics).

[47] *Ake*, 470 U.S. at 77 (citation omitted). The showing required is quite extensive. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) (motion for investigator, fingerprint, and ballistics expert must be supported by more than "undeveloped assertions"); *Messer v. Kemp*, 831 F.2d 946, 960 (11th Cir. 1987) (en banc) (insufficient showing of role of requested psychiatric expert in relation to behavior of defendant); *Moore v. Kemp*, 809 F.2d 702, 718 (11th Cir. 1987) (en banc) (motion for independent forensic experts insufficient as to type of expert and roles they would play). Consequently, much of defense strategy often must be revealed in order to make this showing.

[48] *Ake*, 470 U.S. at 82-83.

[49] *Weeks*, 248 Va. at 474, 450 S.E.2d at 388.

[50] 248 Va. 528, 450 S.E.2d 365 (1994).

[51] *Weeks v. Commonwealth*, 248 Va. at 478, 450 S.E.2d at 391.

[52] 430 U.S. 349 (1977).

[53] 476 U.S. 1 (1986).

[54] 500 U.S. 110 (1991).

[55] 114 S. Ct. 2187 (1994).

[56] *Weeks*, 248 Va. at 474, 450 S.E.2d at 388. The court observed that it had rejected similar claims repeatedly, suggesting the same result even if the claims had not been found to be defaulted.

[57] *Id.*

*wealth*,[58] forces capital defendants into a Catch-22 situation. Under Virginia's strict procedural default rules, defendants must raise, preserve, and brief every issue at every level of appeal.[59] Failure to do so can preclude lifesaving claims from federal review.[60] But Virginia also places a fifty page brief limitation on appellants.[61] If a defendant cannot fit all of his claims within fifty pages, he either must default these issues or attempt to raise them in some other way. The only ways to insure full and fair presentation of claims are either to incorporate previous briefs or memoranda by reference or to request relief from the fifty page limit. In fact, Weeks was unable to brief several issues he had assigned as error because the Supreme Court of Virginia denied his request for relief from the limit.[62]

Since defendants must preserve all issues on appeal, arguably they should be able to incorporate previous briefs or memoranda by reference. This is especially important in capital cases because **all** non-frivolous issues must be preserved, including those repeatedly rejected by the Supreme Court of Virginia, if a client is to benefit from later favorable constitutional rulings.[63] All previous briefs or memoranda automatically become part of the record in Virginia and thus there would be no problems with identification of the materials or access to them by the adverse party.[64] But the Supreme Court of Virginia does not agree. Defense counsel is therefore advised to pursue the second option mentioned above—to ask the court for relief from the fifty page limitation. If the court refuses, counsel should ask for reconsideration of the issue and specifically identify the claims desired to be raised, but requiring relief from the page limit. Though the request for reconsideration itself may be unsuccessful, it could provide a basis for subsequent habeas corpus claims. Basic habeas law states that there is no default if there was no full and fair opportunity to be heard.[65] The Supreme Court of Virginia may continue to put capital appellants in this box, but a properly made record may persuade the federal courts to refuse to be accomplices.[66]

### IV. Victim Impact Testimony

The Commonwealth introduced evidence of the impact of Trooper Cavazos' death on both his family and on the troopers who were his co-workers.[67] Such impact evidence is allowed in the post-sentence report to the trial judge.[68] But the Virginia Code is silent about such testimony to the jury before it has fixed punishment. Weeks attacked the use of victim impact testimony on two grounds. First, he argued that victim impact testimony is irrelevant to the jury's sentencing decision. Second, he contended that even if such testimony were relevant, such evidence should be limited to impact on only the family of Trooper Cavazos, and should not be extended to the trooper's fellow police officers (i.e., co-workers).[69]

In rejecting the first argument, the court relied on the Virginia Code's silence as to victim impact testimony before the jury and on the United States Supreme Court's decision in *Payne v. Tennessee*.[70] In *Payne* the Court decided that states could allow victim impact testimony in capital cases if they so desired,[71] thus overruling two previous United States Supreme Court cases which held otherwise,[72] *Booth v. Maryland*[73] and *South Carolina v. Gathers*.[74] The Supreme Court of Virginia decided that since *Payne* allowed the states to use victim impact testimony and the Virginia Code was silent on the subject, the Commonwealth's use of such evidence was permissible in Weeks's trial.[75]

Weeks' second attack on the use of victim impact testimony was that such testimony should not be extended to the trooper's co-workers. The Supreme Court of Virginia stated that Weeks had defaulted this claim.[76] The court decided that Weeks had not distinguished between the testimony of family members and the testimony of co-workers or other sources at trial, and so could not challenge the admissibility of the troopers' testimony on appeal.[77]

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[58] 244 Va. 445, 461, 423 S.E.2d 360, 370 (1992), *cert. denied*, 113 S. Ct. 1862 (1993).

[59] *See* Va. Sup. Ct. R. 5:17, 5:25.

[60] *See Smith v. Murray*, 477 U.S. 527 (1986).

[61] Va. Sup. Ct. R. 5:26(a).

[62] Telephone Interview with Daniel Morrissette, trial attorney for Lonnie Weeks, Jr. (February 28, 1995). Mr. Morrissette indicated that he knew of other cases where capital defendants had been granted relief from this limitation. If correct, this fact may also have implications for the default problem. If a state procedural rule is not uniformly applied, a federal court is not bound to accept it as an adequate state rule, and may grant the defendant habeas corpus relief from defaulting the rule. *See infra* note 65 and accompanying text.

[63] *See, e.g., Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, 502 U.S. 824 (1991); *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994), and case summary of *Simmons*, Capital Defense Digest, Vol. 7, No. 1, p. 4.

[64] Va. Sup. Ct. R. 5:10, 5:15.

[65] *See, e.g., Ford v. Georgia*, 498 U.S. 411, 421-25 (1991) (retroactive application of procedural rule based on case decided after defendant's trial not allowed since defendant would have no notice of such procedure); *Johnson v. Mississippi*, 486 U.S. 578, 587-89 (1988) (state court denial of post-conviction relief based on waiver is inadequate); *James v. Kentucky*, 466 U.S. 341, 348-49 (1984) (rejecting state court denial of relief based on a distinction that is unclear and not closely followed); *County Court of Ulster County v. Allen*, 442 U.S. 140, 150-51 (1979) (claim not defaulted when state did not have clear rule applicable to the issue raised).

[66] For a more complete treatment of this issue, *see* Ahrend, *Beating a Potential Deathtrap: How to Preserve the Appellate Record for Federal Review and Avoid Virginia's Procedural Default*, Capital Defense Digest, this issue. *See also Williams v. Commonwealth*, 248 Va. 528, 450 S.E.2d 365 (1994), and case summary of *Williams*, Capital Defense Digest, this issue.

[67] *Weeks*, 248 Va. at 475-76, 450 S.E.2d at 389.

[68] Va. Code Ann. § 19.2-264.5 states that victim impact statements in capital cases shall be made in the same form as victim impact statements described in § 19.2-299.1. Although § 299.1 (enacted before § 264.5) explicitly states that victim impact statements shall not be included in the pre-sentence report in capital cases, § 264.5 evidently supersedes that particular provision on § 299.1 (since it was enacted subsequent to § 299.1 and since it explicitly provides that victim impact statements shall be made in capital cases).

[69] *Weeks*, 248 Va. at 476, 450 S.E.2d at 389.

[70] 501 U.S. 808 (1991).

[71] *Id.* at 827.

[72] *Id.* at 828-30.

[73] 482 U.S. 496 (1987).

[74] 490 U.S. 805 (1989).

[75] *Weeks*, 248 Va. at 476, 450 S.E.2d at 389.

[76] *Id.*

[77] *Id.*

Had Weeks not been held to have defaulted this second claim, however, he may have had a viable argument. The United States Supreme Court stated in *Payne* (in a passage that the Supreme Court of Virginia quoted verbatim in *Weeks*) that "[a] State may legitimately conclude that evidence about the victim and **about the impact of the murder on the victim's family** is relevant to the jury's decision as to whether or not the death penalty should be imposed."[78] The Court's holding says nothing about such testimony being admitted as to any persons other than family members. Consequently, defense counsel should object if the Commonwealth attempts to put on victim impact testimony as to anyone other than family members. This issue should be distinguished from objecting to victim impact testimony by family members, so as to avoid the fate of default that Weeks suffered. If overruled, counsel should preserve the issue on federal constitutional grounds so that it may ultimately be resolved on its merits in a federal habeas proceeding.

Summary and analysis by:
Gregory J. Weinig

[78] *Payne*, 501 U.S. at 827 (emphasis added).

## BURKET v. COMMONWEALTH

### 248 Va. 596, 450 S.E.2d 124 (1994)
### Supreme Court of Virginia

#### FACTS

On January 14, 1993, Katherine Tafelski and her daughter Ashley, age five, were found dead in their beds in the family residence. Autopsies revealed that both victims suffered massive head injuries, inflicted by the same blunt object. Katherine suffered sexual penetration by an inanimate object. It was determined that the victims' wounds were inflicted by automotive tools. Katherine's son Andrew, age three, was found unconscious in his bed, suffering a double break in his jaw and an eye wound. The children's friend, Chelsea Brothers, suffered bruises to her entire body.[1]

Russel Burket lived next door to the Tafelskis. During a videotaped police station interrogation on January 20, 1993, Burket confessed to the murders and assaults.[2] Burket was charged with double homicide, two counts of malicious wounding, sexual penetration with an inanimate object, and statutory burglary. After the trial court denied a motion to suppress the confession, Burket pled guilty to all the charges but reserved the right to challenge on appeal the admissibility of his statements.[3]

In a separate penalty hearing, Burket received two life sentences and two twenty year terms for the four non-capital convictions.[4] Burket was sentenced to death for the capital murder, predicated upon findings of both "future dangerousness" and "vileness."[5]

Burket appealed only the capital murder conviction. Among his assignments of error, Burket argued it was error for the trial court not to suppress his confession which was obtained in a custodial interrogation in violation of his *Miranda* rights and Fifth Amendment right to counsel.[6]

#### HOLDING

Consolidating the automatic review of Burket's death sentence with his appeal of the capital murder conviction, the Supreme Court of Virginia found no reversible error on any of the presented issues,[7] including the admissibility of Burket's confession.[8]

#### ANALYSIS/APPLICATION IN VIRGINIA

In upholding the admissibility of Burket's confession, the Supreme Court of Virginia rejected the *Miranda* violations alleged by Burket. First, Burket claimed that his initial request for counsel was made in a custodial interrogation, thereby triggering his right to *Miranda* warnings which were not administered until after detectives obtained a full-blown confession.[9] Second, given the detectives' failure to immediately issue the *Miranda* warnings, Burket claimed his later custodial statements were rendered inadmissible.[10] Third, after finally being advised of his *Miranda* rights, Burket argued that they were violated by the failure of his interrogators to terminate questioning.[11] Finally, Burket alleged the trial court erred in finding that he validly waived his *Miranda* rights.[12] Based on the trial court findings and its own independent review of the record, the court found no merit to any of these claims.

[1] *Burket v. Commonwealth*, 248 Va. 596, 599-602, 450 S.E.2d 124, 126-27 (1994).

[2] 248 Va. at 602-04, 450 S.E.2d at 128-29.

[3] 248 Va. at 598-99, 450 S.E.2d at 125-26.

[4] 248 Va. at 599, 450 S.E.2d at 126.

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

[6] *Burket v. Commonwealth*, 248 Va. at 604, 450 S.E.2d at 129.

[7] In light of Burket's failure to raise at trial the issues of victim impact testimony and parole eligibility, the Supreme Court of Virginia refused to address the issues on appeal. 248 Va. at 612-613, 616, 450 S.E.2d at 133, 135. *See* Va. Sup. Ct. R. 5:25. Burket also argued that the death penalty was imposed contrary to the Eighth Amendment prohibition against cruel and unusual punishment and his right to due process under the Fourteenth Amendment. These challenges were also summarily dismissed by the court on the basis of precedent. 248 Va. at 612, 450 S.E.2d at 133.

[8] 248 Va. at 617, 450 S.E.2d at 135.

[9] 248 Va. at 604, 450 S.E.2d at 129.

[10] *Id.*

[11] 248 Va. at 608, 450 S.E.2d at 131.

[12] 248 Va. at 611, 450 S.E.2d at 132.