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BURKET v. COMMONWEALTH: DON'T PUT ALL YOUR DEFENSE EGGS IN THE SUPPRESSION BASKET

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BURKET v. COMMONWEALTH: DON'T PUT ALL YOUR DEFENSE EGGS IN THE SUPPRESSION BASKET

BY: JODY M. BIEBER

Russel Burket entered a plea of guilty to capital murder, apparently without an agreement that he would be sentenced to life in prison. He reserved the right to challenge on appeal the admissibility of his confession. Burket was sentenced to death. Because of the guilty plea, the confession issue was essentially the **only** matter providing any hope that his conviction and death sentence might be reversed on appeal. In *Burket v. Commonwealth*[1] the Supreme Court of Virginia affirmed the trial court's denial of the motion to suppress Russel Burket's confession. The *Burket* decision is not unusual in this respect.[2] Quite to the contrary, it is the quintessential Virginia confession case, replete with examples of how the state's highest court regularly disposes of defense challenges to the admissibility of confessions. Given the discretionary nature of confession-related rulings, the Virginia courts can and do construe confession law in favor of the Commonwealth. Consequently, when planning defense strategy it should be assumed that confessions, at least those essential to the Commonwealth's case if admitted into evidence, will be upheld on appeal. Pinning one's appellate hopes on this issue is tantamount to foregoing appeals.

What follows is a brief examination of how Virginia courts generally construe and apply the confession doctrines in capital cases.

I. WHAT IS CUSTODY?

Important to the issue of whether a confession is admissible is whether the defendant was in custody. In capital cases, the Supreme Court of Virginia apparently looks for indicators that the defendant was not.

In *Miranda v. Arizona*[3] the United States Supreme Court declared that "[t]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[4] These words underscore the significance of custodial interrogation. It is the custodial nature of police interrogation that triggers the right to *Miranda* warnings.[5] If a suspect is not in custody when he makes a confession, then he is not entitled to the safeguards of *Miranda* and his statements will be admissible in judicial proceedings. If, however, the suspect is in custody without the benefit of *Miranda* warnings and a confession is obtained, the statements are inadmissible. Thus, the determination of whether or not a suspect is in custody is often the first bone of contention in a suppression hearing. The defendant will likely argue that he was in custody without the benefit of *Miranda* warnings, while the Commonwealth will maintain that the suspect was not in custody at the time of the confession.[6] It is the duty of the trial court to make a custody determination based on all the facts and circumstances[7] and from the perspective of a reasonable person in the suspect's position.[8] In order to be in custody for purposes of *Miranda* there must be a restriction on the individual's freedom. In *Wass v. Commonwealth*[9] the court described custody as "[c]ircumstances which deprive a person of his freedom to leave or freedom of action."[10] The court then provided a set of factors to guide the custody determination, cautioning that the list was non-exhaustive.[11] The effort of the *Wass* court to identify the full spectrum of factors affecting the custody

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[1] 248 Va. 596, 450 S.E.2d 124 (1994). *See* case summary of *Burket*, Capital Defense Digest, this issue.

[2] For examples of the many Virginia capital cases where motions to suppress confessions were denied, see *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379 (1994); *Jenkins v. Commonwealth*, 244 Va. 445, 423 S.E.2d 360 (1992); *King v. Commonwealth*, 243 Va. 353, 416 S.E.2d 669 (1992); *Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380 (1992); *Thomas v. Commonwealth*, 244 Va. 1, 419 S.E.2d 606 (1992); *Yeatts v. Commonwealth*, 242 Va. 121, 410 S.E.2d 254 (1991); *Cheng v. Commonwealth*, 240 Va. 26, 393 S.E.2d 599 (1990); *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990); *Mu'Min v. Commonwealth*, 239 Va. 433, 389 S.E.2d 886 (1990); *Smith v. Commonwealth*, 239 Va. 243, 389 S.E.2d 871 (1990); *Barnes v. Commonwealth*, 234 Va. 130, 360 S.E.2d 196 (1987); *Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157 (1987); *Correll v. Commonwealth*, 232 Va. 454, 352 S.E.2d 352 (1987); *Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 267 (1986); *Pruett v. Commonwealth*, 232 Va. 266, 351 S.E.2d 1 (1986); *Boggs v. Commonwealth*, 229 Va. 501, 331 S.E.2d 407 (1985); *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815 (1985); *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371 (1984); *Washington v. Commonwealth*, 228 Va. 535, 323 S.E.2d 577 (1984); *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983); *Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979); *Johnson v. Commonwealth*, 220 Va. 146, 255 S.E.2d 525 (1979); *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978).

[3] 384 U.S. 436 (1966).

[4] *Id.* at 444.

[5] *Lanier v. Commonwealth*, 10 Va. App. 541, 555, 394 S.E.2d 495, 504 (1990).

[6] *Miranda* warnings are not implicated in "general questioning of citizens in the fact-finding process." *Miranda v. Arizona*, 384 U.S. at 477. *See Pruett v. Commonwealth*, 232 Va. at 272, 351 S.E.2d at 4.

[7] *See Wass v. Commonwealth*, 5 Va. App. 27, 32, 359 S.E.2d 836, 839 (1987); *Lanier*, 10 Va. App. at 554, 394 S.E.2d at 503.

[8] *See Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (stating that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."). *See also Wass v. Commonwealth*, 5 Va. App. at 35, 359 S.E.2d at 840 (holding that "no reasonable person [in Wass' situation] would have felt free to leave"); *Lanier v. Commonwealth*, 10 Va. App. at 555, 394 S.E.2d at 504 (holding that "a reasonable man in Lanier's position" would have felt free to leave).

[9] 5 Va. App. 27, 359 S.E.2d 836 (1987).

[10] 5 Va. App. at 32, 359 S.E.2d at 839. *Wass* was a non-capital case in which the defendant lost his motion to suppress at the trial level but won the issue on appeal.

[11] "[F]actors that must be considered are whether a suspect is questioned in familiar or neutral surroundings, the number of police officers present, the degree of physical restraint, and the duration and character of the interrogation. Whether or when probable cause to arrest exists and when the suspect becomes the focus of the investigation are relevant factors to consider. '[T]he language used by the officer to summon the individual, the extent to which he or she is confronted with evidence of guilt, the physical surroundings of the interrogation, the duration of the detention and the degree of pressure applied to detain the individual' may be significant factors as well." *Wass v. Commonwealth*, 5 Va. App. at 32-33, 359 S.E.2d at 839 (citations omitted).

determination indicates the high degree of subjectivity involved in the judicial evaluation.

When a suspect has not been formally arrested there is simply no magic formula for determining whether he is in custody for purposes of *Miranda*. Each party must persuade the trial court that its account of the interrogation and the inferences to be drawn from the surrounding circumstances are correct. It is therefore imperative for the defense to convince the court that the interrogation was conducted in a coercive and police dominated environment[12] and that any reasonable person in the suspect's shoes would not have felt free to leave.

Unfortunately for the Virginia defendant, more often than not trial courts rule in favor of the Commonwealth on the custody issue, and, in modern capital cases, this is always the outcome.[13] Although the totality of the circumstances must be considered by the trial court from the perspective of the suspect, the courts seem to concentrate on "'whether there is a formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[14] This inquiry tends to shift the court's focus from the suspect himself and the reasonable man in his shoes to the officers involved in the interrogation. Furthermore, if there is any evidence that the defendant was told by police that he was free to go or that he was not under arrest, the court is prone to find that the suspect was not in custody.[15]

To compound the disadvantages faced by the defense, review of suppression motions is conducted on the familiar standard that the appellate courts will not disturb the trial court's custody determination unless plainly wrong.[16] The trial courts are encouraged to make specific findings[17] which are later reviewed in the light most favorable to the Commonwealth.[18] Given this high level of deference, the lower court's resolution of the custody inquiry is critical and, in most instances, final.

II. INVOCATION OF THE RIGHT TO COUNSEL

It is the duty of law enforcement officers to put the suspect on notice of his *Miranda* rights at the outset of a custodial interrogation. Included in this set of rights is the right to consult with counsel prior to questioning. Once the individual is informed of his rights, the decision then becomes his whether and when to request the presence of counsel. In *Edwards v. Arizona*[19] the United States Supreme Court held that once an individual has "expressed his desire to deal with the police only through counsel, [the suspect] is not subject to further interrogation by authorities until counsel has been made available to him . . . ."[20] *Edwards* embodies a bright-line rule, requiring that all questioning terminate after the accused requests counsel.[21] The protection of *Edwards* therefore hinges on activating the right to counsel. Whether or not the suspect has actually invoked this right is often a major issue in the suppression hearing.

The Supreme Court of Virginia has traditionally employed the rigid requirement that suspects clearly and unequivocally invoke the right to counsel, resolving any and all ambiguities in favor of the Commonwealth. This narrow approach was recently approved by the United States Supreme Court in *Davis v. United States*.[22] In *Davis* the Court specifically ruled on what degree of verbal expression is required of the suspect to halt custodial questioning. Prior to *Davis* there was no consensus among the lower courts as to what combination of words and phrases constituted an effective request for an attorney.[23] Thus, in a much anticipated decision, the Court resolved the issue by requiring that the request for counsel be clear and unambiguous in order to effectively trigger *Edwards*.[24]

In a trilogy of capital cases, the Supreme Court of Virginia developed its approach to the invocation issue, now approved in *Davis*. In *Bunch v. Commonwealth*[25] the court refused to suppress the defendant's confession. In its review of the interrogation, the court noted that the defendant's statement was "couched in ambiguous terms to the effect that he *might* want to talk to a lawyer."[26] In *Poyner v. Commonwealth*[27] the court held that the defendant's statement, "Didn't you say I have a right to counsel?", was not a request for counsel.[28] Relying on *Bunch*, the court stated that "[a]t most, it sought to clarify one of the rights of which he had already been advised."[29] In a similar vein, the defendant in *Eaton v. Commonwealth*[30] asked police, "You did say I could have an attorney if I wanted one?"[31] In finding that this statement fell short of an invocation of the right to counsel, the court finally announced "the standard prevailing in Virginia is that a request for counsel must be 'unambiguous and unequivocal' in order to trigger the *Edwards* rule."[32]

As these three cases, and the more recent *Burket* decision, reveal a suspect's request for counsel is often ambiguous or equivocal. Indeed in *Davis* the Supreme Court conceded "that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually

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12 *Id.*

13 *See supra* note 2.

14 *Wass v. Commonwealth*, 5 Va. App. at 32, 359 S.E.2d at 839 (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983))(quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

15 *See Pruett v. Commonwealth*, 232 Va. 266, 351 S.E.2d 1 (holding that defendant was not under arrest and that defendant knew that he was free to leave the interview at any time); *Lanier v. Commonwealth*, 10 Va. App. 541, 394 S.E.2d 495 (holding that the record supports a finding that a reasonable man in defendants position would not have believed his freedom of movement so curtailed to the degree of formal arrest); *Burket v. Commonwealth*, 248 Va. 596, 450 S.E.2d 124 (holding that defendant was not formally arrested or deprived of his freedom of movement until after he confessed).

16 *Goodwin v. Commonwealth*, 3 Va. App. 249, 349 S.E.2d 161 (1986).

17 *Id.*

18 *Wass*, 5 Va. App. at 27, 359 S.E.2d at 836.

19 451 U.S. 477 (1981).

20 *Id.* at 484-85.

21 *Smith v. Illinois*, 469 U.S. 91, 94-95 (1984) (per curiam); *See also Solem v. Stumes*, 465 U.S. 638, 646 (1984).

22 114 S. Ct. 2350, 2356 (1990).

23 In *Smith v. Illinois*, 469 U.S. at 96 n.3, the Court summarized the varying standards employed by the jurisdictions. "Some courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous . . . . Others have attempted to define a threshold standard of clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel . . . . Still others have adopted a third approach, holding that when an accused makes an equivocal statement that 'arguably' can be construed as a request for counsel, all interrogation must immediately cease except for narrow questions designed to 'clarify' the earlier statement and the accused's desires respecting counsel."

24 *Davis*, 114 S. Ct. at 2355.

25 225 Va. 423, 304 S.E.2d 271 (1983).

26 225 Va. at 433, 304 S.E.2d at 276 (emphasis in original).

27 229 Va. 401, 329 S.E.2d 815 (1985).

28 229 Va. at 410, 329 S.E.2d at 823.

29 *Id.*

30 240 Va. 236, 397 S.E.2d 385 (1990).

31 240 Va. at 250, 397 S.E.2d at 393.

32 240 Va. at 253, 397 S.E.2d at 395.

want to have a lawyer present."[33] Recognizing this reality, the Court encouraged "the good police practice" of clarifying whether or not the suspect wants an attorney.[34]

As it now stands nothing short of "I want a lawyer" ever has or ever will qualify as an invocation of the right to counsel in Virginia. This means that police may continue to conduct interrogations when the intent of the accused to invoke his right to counsel is clear but his choice of words is not.[35] Further, even a clear request for counsel may be unavailing if accompanied by additional requests. In *King v. Commonwealth*[36] the defendant told police that "he wanted to make a statement but wanted to make it in the presence of 'an attorney for himself, somebody from the Commonwealth's Attorney's office, and Becky . . . and Becky's lawyers.'"[37] King clearly articulated his wish for a lawyer but the court nevertheless characterized the request as equivocal, "being couched in terms of his willingness to make a statement conditioned not only upon the presence of his own attorney but also the presence of a cast of characters having no discernible relevance . . . ."[38] The message seems to be that not only must the suspect's language be crystal clear but he must condition his willingness to speak **only** on the presence of an attorney.

The bottom line on this issue is not encouraging. In light of the Commonwealth's historic approach to the invocation issue, it seems unlikely that the Supreme Court's invitation in *Davis* to clarify ambiguous requests will receive widespread acceptance in Virginia. Whenever police perceive any ambiguity in the words or actions of the suspect, the request for counsel will generally be denied and any subsequent assignments of error face a fate similar to that of every capital defendant who has to date uttered anything suggesting an invocation of his right to counsel. This is clearly one context in which actions are deemed not to speak louder than extremely succinct words.

III. WAIVING THE RIGHT TO COUNSEL AND VOLUNTARY CONFESSIONS

The Supreme Court of Virginia opinions also indicate that, while capital defendants do not know exactly how to **claim** constitutional rights, they are very good at intelligently **waiving** them.

After a suspect has effectively invoked his *Miranda* right to counsel he may waive the privilege if he so desires, but the waiver is not valid unless the prosecution carries an undefined "heavy burden" of proof.[39] Not only must the Commonwealth show that the waiver was made knowingly and intelligently, but it must also demonstrate that any confessions obtained were voluntary.[40] By meeting its burden, the Commonwealth will withstand any challenges made by the defense.

The United States Supreme Court has stated that to be valid a "waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[41] Whether an accused makes a knowing and intelligent waiver depends on the totality of the circumstances of each case.[42] This broad standard gives Virginia courts the opportunity to zero in on any factor suggesting waiver. For example, the focus is often on whether the suspect has had any experience with the criminal justice system. If the suspect is not a "novice in police matters,"[43] then the court will be inclined to find a valid waiver.[44]

The court must also determine whether the suspect's confession was voluntary. In determining voluntariness the courts must discern whether the suspect's statement is the "product of an essentially free and unconstrained choice by its maker" or whether the maker's will "has been overborne and his capacity for self-determination critically impaired."[45] Even though the Virginia courts admit that they cannot discern the motives of an individual who elects to talk to the police,[46] they are willing to find voluntariness on two post hoc grounds.

First, the courts tend to heavily credit any expert testimony to the effect that the suspect had the capacity to understand his *Miranda* rights as they were read to him. In *Washington v. Commonwealth*,[47] for example, the trial court accepted the testimony of a Central State Hospital clinical psychologist in denying the motion to suppress Washington's confession. Washington had an I.Q. of 69 and claimed that his interrogators took advantage of his diminished capacity in the interrogation by conducting a very long and confusing session. Based on a competency examination, the doctor opined that the defendant exhibited a capacity to understand his rights and had a basic familiarity with the criminal justice system and its terminology. The court found that the doctor's testimony provided ample factual support for the trial court's finding of voluntariness, a finding which was not plainly wrong.[48]

The trial court's own observations of the suspect in the suppression hearing also heavily influence the voluntariness determination. In *Wright v. Commonwealth*[49] the trial court concluded from the defendant's appearance that he had considerably higher intelligence than tests

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[33] *Davis*, 114 S. Ct. at 2356.

[34] *Id.* at 2356.

[35] *Id.*

[36] 243 Va. 353, 416 S.E.2d 669 (1992).

[37] 243 Va. at 361, 416 S.E.2d at 673. Becky was King's wife and codefendant and was also charged with capital murder.

[38] 243 Va. at 360, 416 S.E.2d at 672.

[39] *Miranda*, 384 U.S. at 475.

[40] Quite apart from issues of *Miranda* warnings and right to counsel claims, of course, involuntary confessions are inadmissible. *See Arizona v. Fulminante*, 499 U.S. 279, *reh'g denied*, 500 U.S. 938 (1991).

[41] *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

[42] This determination also rests on a facts and circumstances test in which the court must examine the suspect's age, intelligence, background, experience with the law, length of the interrogation, and evidence of any police misconduct.

[43] *Bunch v. Commonwealth*, 225 Va. 423, 434, 304 S.E.2d 271, 277 (1983).

[44] *See Correll v. Commonwealth*, 232 Va. 454, 352 S.E.2d 352 (1987); *Yeatts v. Commonwealth*, 242 Va. 121, 410 S.E.2d 254 (1991).

[45] *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). *Accord Thomas v. Commonwealth*, 244 Va. 1, 419 S.E.2d 606 (1992); *Correll v. Commonwealth*, 232 Va. 454, 352 S.E.2d 352 (1987); *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371 (1984), cert. denied, 502 U.S. 902 (1991); *Jenkins v. Commonwealth*, 244 Va. 445, 423 S.E.2d 360 (1992).

[46] *Mundy v. Commonwealth*, 11 Va. App. 461, 476, 390 S.E.2d 525, 533 (1990).

[47] 228 Va. 535, 545-46, 323 S.E.2d 577, 584-85 (1984). *See also Thomas v. Commonwealth*, 244 Va. 1, 419 S.E.2d 606 (1992).

[48] One of the reasons for the requirement that confessions be voluntary is concern about the reliability of those that are not. In spite of numerous inconsistencies between Earl Washington's confession and the way the crime had to have been committed, his conviction and death sentence were upheld throughout the court system. DNA evidence ultimately established almost certainly his innocence and the governor commuted his sentence to life. *See Murray v. Washington*, 4 F.3d 1285 (4th Cir. 1993); and case summary of *Washington*, Capital Defense Digest, Vol. 6, No. 2, p. 8. *See also* Simpson, *Confessions and the Mentally Retarded Capital Defendant: Cheating to Lose*, Capital Defense Digest, Vol. 6, No. 2, p. 28 (1994).

[49] 245 Va. 177, 427 S.E.2d 379 (1993).

revealed and also possessed "street smarts" surpassing his formal level of education. Thus the court upheld the validity of the waiver at issue and the voluntariness of the confession thereafter made by Wright.

In stark contrast to the clarity and specificity required for an invocation of the right to counsel, a suspect's waiver of this right can be shown by mere circumstance. In *North Carolina v. Butler*[50] the United States Supreme Court held that "an express written or oral statement of waiver of rights is not required... waiver can be inferred from the actions and words of the person interrogated."[51] Implied waivers are often found by the courts in the context of interrupted interrogations. Basically, the initial waiver is presumed to remain in effect in subsequent questioning sessions unless the suspect affirmatively revokes the waiver.

The Virginia courts often resort to this form of waiver in order to uphold the admissibility of confessions.[52] A capital case in point is *Cheng v. Commonwealth*.[53] The suspect was advised of his *Miranda* rights and shortly thereafter gave non-incriminating statements to an officer. The next day the suspect encountered a different officer with whom he was acquainted and eventually made a confession without a renewal of his *Miranda* warnings. The court found that the suspect's initial decision to talk constituted an implied waiver of *Miranda* rendering his subsequent incriminatory statements admissible.[54]

As illustrated above, the Virginia courts adhere to the proposition that once a suspect has made a valid waiver of his rights, the waiver will remain in effect throughout subsequent interrogations. This presumption of a continuing waiver is overcome only when the suspect reasonably exhibits a desire to revoke it.[55] This means that *Miranda* warnings do not have to be renewed after a break in the interrogation.

Thus far the Supreme Court of Virginia has demonstrated a great reluctance to overrule trial court findings of valid waivers and voluntary confessions. This unwillingness is attributable to the fact-intensive nature of these dual inquiries. In *Mundy v. Commonwealth*[56] the Court spoke of its role on review as "determin[ing] whether, in light of the *totality of the circumstances*, the trial court was plainly wrong in concluding that [the suspect's] statement to the [police] was essentially a free and unconstrained choice on his part or, put another way, that his will was not overborne."[57] Once again the standard of review is highly deferential to the observations and impressions of the trial judge.

IV. HONORING THE RIGHT TO REMAIN SILENT

Finally, in Virginia, once a suspect understands and claims the right to remain silent, the police can nevertheless keep trying to elicit statements.

Once *Miranda* warnings are given to the suspect if he "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[58] In *Michigan v. Mosley*[59] the United States Supreme Court held that this directive does not mean that the police may never resume interrogation after a suspect asserts his right to silence. Rather, the suspect's right must be "scrupulously honored" by the police after it is invoked. If there is further interrogation and a subsequent confession, its admissibility is to be judged by consideration of five factors: first, whether the suspect was initially informed "that he was under no obligation to answer any questions and could remain silent if he wished";[60] second, whether the interrogation was immediately halted and the interrogators did not try to coax the suspect into reconsidering his decision to remain silent;[61] third, whether the officers resumed questioning "only after the passage of a significant period of time";[62] fourth, whether *Miranda* warnings were given before the commencement of a second round of questioning;[63] and fifth, whether the second interrogation was limited to a crime that was not at issue in the first interrogation.[64]

As with the custody and invocation issues, defense challenges based on *Mosley* grounds generally are found by the Supreme Court of Virginia to be misplaced. A prime example of the Commonwealth's treatment of a *Mosley* claim is found in *Weeks v. Commonwealth*.[65] In the course of a custodial interview in a motel room, Weeks exercised his right to remain silent which was honored at that time by the interrogating officer. Approximately ten hours later in a police station lounge, the same officer initiated a second interview in which he relayed newly developed evidence tending to inculpate Weeks. The interrogation concerned the same crime. At this time Weeks was restrained in handcuffs and leg irons. More importantly, Weeks was not readvised of his rights; rather, he was asked if he understood the rights that were earlier read. After informing Weeks of the case against him, the detective said, "This is your opportunity to provide your explanation as to what happened at the shooting scene."[66] Weeks eventually confessed to committing murder.

Based on the forgoing, Weeks moved the trial court to suppress his confession. The motion was denied. The Supreme Court of Virginia affirmed the ruling, finding no violation of *Miranda* under the fourth and fifth prongs of the *Mosley* test.[67] In *Mosley* the defendant invoked his right to remain silent, at which time police stopped questioning him and placed him in a jail cell. Within a few hours a different police officer, who wished to question Mosley about a different crime went, to the cell and reissued the *Miranda* warnings. Mosley then agreed to answer questions. On these facts the court found that police had scrupulously honored Mosley's rights.[68]

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50 441 U.S. 369 (1979).

51 *Id.* at 373.

52 *See Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990); *Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 267 (1986); *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983); *Simmons v. Commonwealth*, 225 Va. 111, 300 S.E.2d 918 (1983); *McFadden v. Commonwealth*, 225 Va. 103, 300 S.E.2d 924 (1983).

53 240 Va. 26, 393 S.E.2d 599 (1990).

54 240 Va. at 35-36, 393 S.E.2d at 604.

55 *Washington v. Commonwealth*, 228 Va. at 548-49, 323 S.E.2d at 586.

56 11 Va. App. 461, 399 S.E.2d 29 (1990).

57 11 Va. App. at 475, 390 S.E.2d at 532 (quoting *Rodgers v. Commonwealth*, 227 Va. 605, 609, 318 S.E.2d 298, 300 (1984)(emphasis added)).

58 *Miranda*, 384 U.S. at 473-74.

59 423 U.S. 96 (1975).

60 *Mosley*, 423 U.S. at 104.

61 *Id.*

62 *Id.* at 106.

63 *Id.* at 104.

64 *Id.*

65 248 Va. 460, 450 S.E.2d 379 (1994). *See* case summary of *Weeks*, Capital Defense Digest, this issue.

66 *Weeks*, 248 Va. at 469, 450 S.E.2d at 385.

67 248 Va. at 471-72, 450 S.E.2d at 386-87.

68 *Mosley*, 423 U.S. at 104.

69 *See Dubois v. Commonwealth*, 246 Va. 260, 435 S.E.2d 636 (1993) and case summary of *Dubois*, Capital Defense Digest, Vol. 6, No. 1, p. 28 (1993).

70 The Supreme Court of Virginia has repeatedly held in capital cases that "[w]hen an accused enters a voluntary and intelligent plea of guilty to an offense he waives all defenses except those jurisdictional." *Savino v. Commonwealth*, 239 Va. 534, 538, 391 S.E.2d 276, 278 (1990). However, most recently in *Burket v. Commonwealth*, 248 Va. 596, 450 S.E.2d 124 (1994), the court reviewed penalty phase issues raised by the defense, in spite of a guilty plea entered by the defendant.

In clear contrast stand the facts of *Weeks*. Not only did the same officer fail to readvise Weeks of his *Miranda* rights, but the second interrogation was centered on the very crime that had been the subject of the first interrogation. Although the Court found otherwise, these facts on their face appear to violate both the fourth and fifth prongs of the *Mosley* test. Yet once again we see not only an unwillingness by the Supreme Court of Virginia to disturb the findings of the trial courts but also a broad reading of the *Mosley* rule in order to preserve the integrity of the admission.

V. PLEADING GUILTY AND DEFENSE STRATEGIES

Motions to suppress confessions must, of course, be made and litigated with all the skill at defense counsel's command. Although the Supreme Court of Virginia has yet to find an inadmissible confession in a modern capital case, suppression motions may occasionally succeed at the trial court level and go unreported in appellate decisions. Nevertheless, defense strategy should be formulated with knowledge that, in a capital case, chances of success on suppression motions are slim to none. This makes it particularly important that a plea of guilty not be entered in a capital case absent an assurance that the sentence will not be death.[69] In the event of a death sentence, such a decision to plead guilty drops a number of potentially life-saving eggs from the appellate basket.[70] As has been demonstrated in this article, if the only egg left is review of the admission of a confession, then the basket in Virginia is virtually empty.

NOT HOLDING THE BALANCE NICE, CLEAR AND TRUE: THE RIGHT TO AN IMPARTIAL JUDGE

BY: JOHN M. DelPRETE

I. INTRODUCTION

The vast majority of trial judges in the Commonwealth of Virginia are competent individuals who impartially and diligently perform the duties of their judicial office.[1] However, as is true of any large group of professionals, one will always encounter some who fail to uphold the standards of their profession. It is those few that this article intends to address.

The duty to remain impartial is perhaps the most important responsibility of the trial judge. This not only requires that the judge be impartial in fact, but that he or she **appears** unbiased.[2] Perhaps because of the inherently inflammatory nature of many capital murder trials, this responsibility is sometimes abdicated. Prosecutorial favoritism, which can range from subtle remarks to outright harassment of defense witnesses, is one manifestation of the problem. For the defense attorney, combatting such bias is not only difficult but perilous, as most judges do not appreciate the suggestion that they might be anything less than neutral. This article provides suggestions for the defense attorney faced with a biased judge and is intended to serve as an overview of the relevant state and federal authority addressing the issue of judicial bias and disqualification.

Part II will examine the federal constitutional right to an impartial judge, Part III the constitutional and ethical standards for recusal in Virginia, Part IV the administrative remedy available in Virginia through the Judicial Inquiry and Review Commission, and Part V the federal statutory guidelines governing recusal. Finally, Part VI will discuss the various strategies and options available to defense counsel faced with a biased judge.

II. DUE PROCESS AND THE RIGHT TO AN IMPARTIAL JUDGE

A fair trial is a basic requirement of due process, guaranteed by both the Sixth and the Fourteenth Amendments to the United States Constitution. A fair trial requires that a neutral and detached judge preside over the proceedings.[3] Just as the defendant's right to a jury trial encompasses the right to an impartial jury, a defendant has a constitutional right to an impartial judge. As Justice Black explained:

> Fairness . . . requires an absence of actual bias in the trial of cases. [O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end . . . no man is permitted to try cases where he has an interest in the outcome.[4]

This standard found its origins in *Tumey v. Ohio*,[5] where a unanimous Court held that due process of law is violated when the liberty or property of a defendant is subject "to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case."[6] In *Tumey* the judge was compensated by fines generated from convictions. Even though the evidence clearly showed that the defendant was guilty, this was held not to preclude his complaint that he was denied due process.[7]

In *Ward v. Village of Monroeville*[8] the Court reaffirmed *Tumey*, stating that

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[1] For example, circuit court judges in small, rural Buckingham County, expressing doubts about the ability of the defendant to receive a fair trial before the sitting judges, voluntarily requested the Supreme Court of Virginia appoint an outside trial judge to preside over the penalty phase of a capital murder trial. The judges stated that they were "so situated in respect to this case as in their opinion to render it improper that they should preside . . . ." *Commonwealth v. Tate*, CR-744 (Cir. Ct. of Buckingham County Jan. 27, 1995).

[2] Nonverbal behavior can pose a serious threat to judicial impartiality. See Note, *Judges NonVerbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 Va. L. Rev. 1266 (1975).

[3] In *Chapman v. California*, 386 U.S. 18, 24 (1967), the right to an impartial judge was one of three rights designated as so basic to a fair trial that its infringement could never be treated as harmless error.

[4] *In Re Murchison*, 349 U.S. 133, 136 (1955).

[5] 273 U.S. 510 (1926).

[6] *Id.* at 523.

[7] *Id.* at 535.