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THE NEVER ENDING STORY: COMBATING PROCEDURAL BARS IN CAPITAL CASES

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Mickens committed the crime of murder or why he deserved to live. The court's opinion could not, of course, identify difficulties that may have been encountered in presenting the case in mitigation. Nevertheless, especially for a resentencing granted after a lengthy and well-fought appeal, this mitigation evidence seems somewhat skimpy. Counsel who desire assistance in putting together an effective case in mitigation, and who contact the Virginia Capital Case Clearinghouse, can be referred to valuable resources in this field. It is especially important to develop, at an early stage, a coherent theory as to **why** the guilty defendant deserves to live.

II. "Weighing" in Virginia.

Mickens argued that "Virginia's death penalty statutes are unconstitutional because they do not require a jury to find that aggravating circumstances 'outweigh' mitigating circumstances."[16] The Supreme Court of Virginia rejected his claim in conclusory language, citing *Mickens I*, which in turn cited *Zant v. Stephens*.[17] In *Zant*, the Supreme Court of the United States held Georgia's sentencing scheme constitutional despite the fact that Georgia required no weighing of aggravating and mitigating factors.[18] Like Georgia, Virginia is not a statutory "weighing" state. Defense counsel in future cases should avoid using the term "weighing" when fashioning arguments addressed to the many legitimate constitutional flaws in Virginia's death penalty scheme. The use of this term allows the Virginia courts an easy way to dismiss the argument and avoid confronting the real issues.[19]

III. Possible Implications of *Greene v. Georgia*

The Supreme Court of the United States recently held in *Greene v. Georgia*[20] that the Supreme Court of Georgia had incorrectly cited *Wainwright v. Witt*[21] as "controlling authority for a rule that [state] appellate courts must defer to trial courts' findings concerning juror bias."[22] As the Court was careful to point out, *Wainwright v. Witt* is controlling authority for **federal** courts reviewing the decisions of **state** trial courts, but is not a constitutional authority requiring state courts to give deference to their own trial courts.[23]

In *Mickens III*, the defendant argued that the trial court erred in refusing to remove a prospective juror for cause.[24] The Supreme Court of Virginia responded by holding that "[a]n appellate court must give deference to a trial court's decision whether to exclude or retain a prospective juror because the trial court 'sees and hears the juror.'"[25] The court then cited a state case, *Eaton v. Commonwealth*,[26] which quoted *Witt*. Thus, it is unclear whether the court meant that appellate courts "must" give deference to the trial courts because of state law, or because federal law, articulated in *Witt*, mandates it.[27] If the court in *Mickens* believed itself bound by federal law to give deference to the trial court then it erred under *Greene*; if so, Mickens arguably would be entitled to a new hearing to determine if he was denied a juror strike in violation of **state** law.

Summary and Analysis by:
Daryl Rice

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[16] *Mickens III*, 252 Va at 320, 478 S.E.2d at 305.

[17] 462 U.S. 862 (1983).

[18] *Id.* at 880.

[19] For a discussion of how to argue that the "future dangerousness" aggravating factor (as well as the term "probability") is unconstitutionally vague, *see* Spencer, *Challenging the Future Dangerousness Aggravating Factor*, Capital Defense Journal, Vol. 8, No. 2, p. 33 (1996).

[20] 117 S. Ct. 578 (1996) (*per curiam*).

[21] 469 U.S. 412 (1985).

[22] *Greene*, 117 S. Ct. at 579.

[23] *Id.* at 578-79.

[24] *Mickens III*, 252 Va. at 321, 478 S.E.2d at 306.

[25] *Id.*

[26] 240 Va. 236, 397 S.E.2d 385 (1990).

[27] Virginia law on this issue reveals further ambiguity. For an in-depth discussion of these cases and the ambiguity in Virginia case law, *see* case summary of *Greene*, Capital Defense Journal, this issue.

THE NEVER ENDING STORY: COMBATING PROCEDURAL BARS IN CAPITAL CASES

BY: CAREY L. COOPER

I. Introduction

Although the subject of procedural bar has been treated numerous times, the problem continues to create an obstacle to state and federal appellate review. Recent developments have created new snares and added nuances to old pitfalls. Particularly, the Supreme Court of Virginia has continued to surprise defense counsel with novel default traps.

Over the past ten years, thirty-three capital defendants have been executed in Virginia. All of these cases went before the Supreme Court of Virginia on direct appeal. In those thiry-three cases, ninety-eight claims were held to be procedurally barred.

The Supreme Court of Virginia implements its default and waiver doctrine based upon a policy that elevates procedural regularity above the merits of a claim. Too often, the end result is death by technicality.[1] Whenever a procedural bar applies, the Supreme Court of Virginia will refuse to hear the merits of the claim. Moreover, federal review of the claim will almost certainly be cut off. Additionally, given that the

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[1] The Virginia Court of Appeals tends to apply procedural rules much more liberally in criminal cases than the Supreme Court of Virginia does in capital cases. Although the rules are similar, the interpretations and applications are divergent. For example, the Supreme Court of Virginia interprets Rule 5:25 such that two objections may be required in order to preserve claims based upon the improper granting or denial of a challenge for cause. *See Beavers v. Commonwealth*, 245 Va. 268, 427 S.E.2d 411 (1993). *See also* discussion, Part IV, *infra*. Although Rule 5A:18 is analogous, the Virginia Court of Appeals has never imposed such a requirement in other criminal cases. *See Cudjoe v. Common-*

Supreme Court of Virginia rarely grants relief in capital cases, federal review is extremely important. At the same time, federal courts consider the failure to follow state procedural rules an "adequate and independent" state ground for denying a claim.[2] Also, federal courts adhere to a commonplace policy of deference to state court default decisions.[3] Consequently, regardless of how compelling the merits of a particular claim may be, federal courts typically refuse to consider claims whenever the trial or appellate attorney fails to accurately maneuver through Virginia's procedural minefield.

II. Saving A Defaulted Claim: The Paths To Take Are Few

If Virginia's procedural rules are found not to have been followed, chances for federal review on the merits diminish dramatically. Counsel may attempt to overcome procedural default by convincing a court to hear a claim in spite of Virginia's default rules. This feat can be accomplished through a showing of "cause and prejudice." In *Wainright v. Sykes*,[4] the United States Supreme Court held that when a state court has refused to hear the merits of a claim because it was not adequately raised, that state court's ruling constitutes "independent and adequate state grounds."[5] Accordingly, federal review is precluded unless cause and prejudice are shown.[6] Thus, as a matter of comity, a federal court may refuse to hear claims of fundamental constitutional error when an attorney fails to follow state procedural rules, regardless of whether that failure was intentional or accidental.[7]

In order to obtain federal review under the *Sykes* exception, counsel must establish both "cause" and "prejudice." Cause, which must be external, can be established by showing that the basis for a claim was not reasonably available to counsel or that official interference made compliance impossible.[8] Also, an external cause might be established where the petitioner shows that the Commonwealth withheld relevant evidence. Nevertheless, the question will arise as to whether the attorney knew or should have known about the information.[9] Consequently, this is an extremely narrow exception to the general rule that a claim will not be reviewed unless it is properly presented to all the state courts.

Another way to revive an otherwise defaulted claim is for the petitioner to show a "miscarriage of justice."[10] Again, however, this exception is extremely narrow. In order to make a showing that there has been a fundamental miscarriage of justice, a petitioner must proffer truly compelling evidence of innocence. This showing requires the petitioner to demonstrate that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."[11] Additionally, that evidence must be tied to a constitutional claim.[12] Alternatively, a petitioner may advance that he is "innocent of the death penalty."[13] This assertion requires the petitioner to establish "by clear and convincing evidence that but for a constitutional error, no reasonable jury could have found the petitioner eligible for the death penalty."[14]

As these cases illustrate, counsel may attempt to revive claims not properly preserved in the state courts. These avenues are rarely successful. The general rule remains that meritorious constitutional claims will be barred from federal review when counsel fails to overcome Virginia's labyrinth of procedural rules. Thus, the safest route to federal review requires counsel to avoid procedural bars as the potential for them arises. Accordingly, primary responsibility for the entire appellate record, including state and federal habeas, falls upon the trial and direct appeal attorneys.[15] Naturally, it can be difficult for an attorney to conduct a vigorous defense at each stage of a bifurcated capital trial while simultaneously navigating a procedural minefield. In light of this difficulty, this article groups and explains some of the significant types of defaults and waivers, and it offers advice on avoiding them.

III. Leaving Out A Step

Trial counsel is responsible for promptly making every objection, motion, and proffer during trial. Additionally, in a capital case, all motions and objections must be made on explicit federal constitutional

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wealth, 23 Va. App.193, 475 S.E.2d 821 (Va. Ct. App. 1996). Federal courts are empowered to decide defaulted claims when a state applies its default rules inconsistently. This authority, however, is exercised sparingly. So, unless the federal court chooses to settle the matter, capital defendants will have to cope with the more rigorous technical standards applied by the Supreme Court of Virginia.

[2] *Wainwright v. Sykes*, 433 U.S. 72, 81-82 (1977).

[3] *Murray v. Carrier*, 477 U.S. 478, 489 (1986) (explaining that "[t]he principle of comity that underlies the exhaustion doctrine would be ill served by a rule that allowed a federal district court 'to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.") (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)).

[4] *Id.* 433 U.S. 72 (1977).

[5] *Id.* at 81-82.

[6] *Id.* at 87.

[7] *Id.* at 87-90.

[8] *Carrier*, 477 U.S. at 488. *See also Engle v. Isaac*, 456 U.S. 107, 135 (1982) (holding cause was not shown where attorney failed to raise a claim which the court has consistently denied). *But see* as to unavailable legal basis, *Teague v. Lane*, 489 U.S. 288, 297 (1989) (holding legal basis for a claim which did not arise until after petitioner's trial and direct appeal ordinarily may not be used in habeas proceeding).

[9] *McClesky v. Zant*, 499 U.S. 467, 498 (1991). *But see Hoke v. Netherland*, 92 F.3d 1350 (4th Cir. 1996) and case summary of *Hoke*, Capital Defense Journal, this issue.

[10] *Carrier*, 477 U.S. at 495-96 (1986).

[11] *Schulp v. Delo*, 115 S. Ct. 851, 867 (1995).

[12] *Id.* at 861-62.

[13] *Dugger v. Adams*, 489 U.S. 401, 41 n.6 (1989). *See also Sawyer v. Whitley*, 505 U.S. 333, 347 (1992) (ruling that the inquiry "must focus on those elements which render a defendant eligible for the death penalty"); *Johnson v. Singletary*, 938 F.2d 1166, 1183 (11th Cir. 1991) (holding petitioner must show he is ineligible for the death penalty).

[14] *Sawyer*, 505 U.S. at 336. Nevertheless, a defaulted federal claim may be revived if state habeas counsel argues that trial or appellate counsel's failure to preserve it under state procedural rules constituted ineffective assistance of counsel. Of course, the very low standard by which effective assistance is measured makes success of the underlying claim much more difficult to achieve. *See Justus v. Murray*, 897 F.2d 709 (4th Cir. 1990); *Coleman v. Thompson*, 501 U.S. 722 (1991) (holding that ineffective assistance of counsel may be cause to excuse default).

[15] Additionally, where successive federal habeas petitions are concerned, a federal court will refuse to look at the merits of any claim that could have been, but was not, presented in a previous federal petition. *McCleskey v. Zant*, 499 U.S. 467 (1991). Thus, even where evidence to support a possible claim is weak, the potential claim must be included in the initial petition or it will be forever lost. So, anytime it appears that evidence could develop to support a claim, as long as there is a scintilla of a basis for it, the claim must be presented. This task has become even more important since the advent of the Anti-Terrorism and Effective Death Penalty Act of 1996 which reduced the availability of federal relief for constitutional violations. *See* Raymond, *The Incredible Shrinking Writ: Habeas Corpus Under The Anti-Terrorism and Effective Death Penalty Act of 1996*, Capital Defense Journal, Vol. 9, No. 1, p.52 (1996).

grounds in addition to any state grounds.[16] These state and federal grounds must be clearly articulated for every adverse ruling. When this is not done, subsequent courts may dismiss the claim without judgment on the merits pursuant to Rule 5:25.[17] Rule 5:25 states that:

> Error will not be sustained to any ruling of the trial court . . . unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice.

It should be noted that the Supreme Court of Virginia has never applied the "good cause shown" or "ends of justice" exceptions in a capital case.

On direct appeal, counsel is responsible for assigning error, briefing, and arguing all non-frivolous claims, regardless of their apparent strengths or weaknesses. Under Rule 5:17, any issue not assigned and completely briefed may be defaulted.[18] This undertaking is made more difficult by Rule 5:26 which imposes a fifty page limit on appellate briefs.[19] Essentially, these rules combine to force appellants to fully argue all state and federal grounds for each claim they seek to preserve within the bounds of a fifty-page brief. Conceivably, in an effort to comply with this fifty-page limit, counsel could omit potentially valid claims or forgo thorough argument. Counsel can, however, avoid this predicament. First, because the court has discretion to waive the page limit, counsel should request relief through a motion.[20] If the motion is denied, counsel may then petition the court to reconsider its denial. At this point, counsel could detail every possible claim that would be briefed and argued were it not for the fifty-page limit. Here, counsel must specify all state and federal grounds for each of the claims. Then, even if relief is denied, the record will reflect the claims affected by the denial so the issues may well be preserved for federal review.

Default is likely whenever counsel fails to make an objection at trial or fails to assign an error on appeal. Additionally, there are several more default traps which frequently swallow compelling constitutional claims. Following are a few examples of the most common procedural pitfalls.

IV. Failure To Renew

One objection may not always be enough. For example, in jury selection, when counsel seeks to preserve a claim that a challenge for cause was improperly denied or granted, it may not be sufficient to object once. Rather, to avoid default, an attorney must object twice: first, when the challenge for cause is improperly denied or granted and, second, just before the jury is seated. In *Beavers v. Commonwealth*,[21] the trial court ruled that counsel's motion to strike the entire jury panel was defaulted because counsel failed to object each time the three venire members in question were dismissed for cause.[22] The Supreme Court of Virginia upheld that ruling on the ground that counsel's objection, made after the jury had been selected and sworn, was untimely.[23] In light of this ruling, defense counsel should now make an objection based on the Sixth, Eighth, and Fourteenth Amendments when a challenge for cause is initially granted or denied and again when the jury is impaneled.

V. Objecting Too Late During Trial

Understandably, attorneys often try not to interrupt opposing counsel during their opening and closing statements. Attorneys may fear that the jury and/or judge will be alienated or angered by this seemingly discourteous conduct. Alternatively, counsel may believe that an objection would worsen matters by drawing the jury's attention to the damaging statements.[24] To the contrary, to preserve any claim of improper argument, defense counsel must object and move for a mistrial as soon as the prejudicial words are uttered. Additionally, objections should be made to each offensive part of the Commonwealth's argument because the court will not recognize a blanket objection to all prejudicial or inflammatory remarks.[25] If an attorney waits until the opening statement or closing argument is completed, the motion for a mistrial will be defaulted.[26]

Recently, *Mack v. Commonwealth*[27] underscored the importance of a timely objection emphasizing the fact that it is absolutely necessary to immediately interrupt opposing counsel during improper argument.[28] During the closing arguments in *Mack*, the Commonwealth's Attorney made the following inflamatory statement to the jury: "Let me ask you, folks, do you think the next time this man, after serving his sentence, gets out and commits a robbery, do you think he'll leave an eyewitness alive to identify him? He will not."[29]

After the closing argument, defense counsel objected to these statements. Upon making the objection, counsel argued that it was unnecessary to object or ask for a cautionary instruction during the argument because he believed the instruction would not cure the prejudice.[30] Disagreeing, the Virginia Court of Appeals reiterated that a timely motion is necessary to allow the court the opportunity to provide

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[16] In a capital case, all motions and objections must be made on federal constitutional grounds, particularly, the Sixth, Eighth, and Fourteenth Amendments. This necessity stems from the recognition that, in a capital case, the Supreme Court of Virginia has only the first look at trial error. Further, a defendant cannot realistically expect relief, even on a clearly meritorious claim, from the Supreme Court of Virginia. The best chance at meaningful appellate review will come with a grant of certiorari from the United States Supreme Court or federal habeas review.

[17] Va. Sup. Ct. R. 5:25.

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

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

[20] Va. Sup. Ct. R. 5:26(a) states that "**[e]xcept by permission of a justice of this Court** . . . the brief of appellant . . . shall [not] exceed 50 typed . . . pages." (emphasis added).

[21] 245 Va. 268, 427 S.E.2d 411 (1993).

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

[23] *Id.*

[24] *See Bennett v. Angelone*, 92 F.3d 1336, 1349-50 (4th Cir. 1996) (holding that refraining from objecting is a standard trial practice that does not constitute ineffective assistance of counsel).

[25] *See, e.g., Bennett v. Angelone*, 92 F.3d 1336 (4th Cir. 1996). In *Bennett*, the court recognized that certain religious arguments made by the Commonwealth were improper. Nonetheless, the court found that, in the context of the trial as a whole, the religious remarks were not prejudicial enough to constitute a denial of due process. At the same time, the court refused to take other questionable statements made by the Commonwealth into consideration because defense counsel failed to object at trial when the statements were made. *Id.* at 1345-46. An objection claiming that the entire argument, taken as a whole, violates due process should be made. *See Donnely v. DeChristoforo*, 416 U.S. 637 (1974).

[26] *Russo v. Commonwealth*, 207 Va. 251, 148 S.E.2d 820 (1966); *Price v. Commonwealth*, 213 Va. 113, 189 S.E.2d 324 (1972); *See also Cheng v. Commonwealth*, 240 Va. 26, 393 S.E.2d 599 (1990).

[27] 20 Va. App. 5, 454 S.E.2d 750 (1995).

[28] *Id.* at 6, 454 S.E.2d at 751.

[29] *Id.* at 7, 454 S.E.2d at 751.

[30] *Id.* at 8; 454 S.E.2d at 751.

a cautionary instruction to correct the alleged error.[31] The *Mack* case is illustrative. Unequivocally, it demonstrates that unless the Commonwealth is interrupted with a timely motion, the claim will be forever lost—no matter how egregious the Commonwealth's conduct.

Further, preserving the record may not always be a fruitless gesture in state court review. In *Kitze v. Commonwealth*,[32] defense counsel properly interrupted the prosecutor and objected to the statement that the defendant would "walk free" if he were found insane.[33] Ultimately, the claim was successful in the Supreme Court of Virginia despite the fact that the trial court gave a cautionary instruction to correct the prejudice. Finding the Commonwealth's argument improper and the trial court's instruction inadequate, the Supreme Court set aside Kitze's conviction.[34] The success of the *Kitze* case indicates that the Supreme Court of Virginia is willing to hear these sorts of claims when properly raised. However, *Mack* illustrates how easily the opportunity for a new trial can slip away when objections are not promptly made.[35]

VI. Incorporating By Reference

On direct appeal, counsel has the responsibility of assigning error to all non-frivolous claims which were preserved at trial. Under Rule 5:25, the Supreme Court of Virginia will consider "[o]nly errors assigned in the petition for appeal."[36] Importantly, however, assigning error is not enough. Even when claims are properly preserved at trial and properly assigned as error, they will be defaulted unless they are fully briefed.[37] Moreover, the Supreme Court of Virginia has held that it is not sufficient for counsel to make reference on appeal to arguments made and issues raised in bench briefs. These issues will be defaulted.

In Virginia, all trial briefs and memoranda become part of the record. In capital cases, it is common and acceptable to designate the entire record for appeal. Accordingly, neither the court nor opposing counsel would have difficulty identifying or accessing these arguments. Nonetheless, the Supreme Court of Virginia has held that defense counsel may not incorporate arguments by reference. For example, in *Jenkins v. Commonwealth*,[38] the defendant argued that the trial court erred in allowing an instruction offered by the Commonwealth and refusing three instructions offered by the defense.[39] On appeal, defense counsel referred to fifteen pages of trial transcript which recorded the argument counsel made on the issue. The court held that this "cross-reference" to arguments made at trial was insufficient and amounted to procedural default.[40] Similarly, in *Weeks v. Commonwealth*,[41] counsel attempted to incorporate previous arguments made on defendant's claim that the Virginia capital murder and death penalty statutes are unconstitutional by referencing a trial court memorandum.[42] In keeping with *Jenkins*, the court held that the claim was defaulted.[43]

VII. Being Late After Trial

Appellate filing deadlines precipitate yet another danger of default. Appellate claims may be entirely defaulted when an attorney misses any one of a number of deadlines. To make matters worse, these deadlines are subject to change as rules and statutes are revised. Thus, it is critical for attorneys to keep abreast of new filing requirements. Most recently, new filing deadlines have arisen out of fundamental changes made to the state habeas corpus system in 1995, [44] as well as the federal Anti-Terrorism and Effective Death Penalty Act of 1996.

After trial, the appellate procedure begins with direct appeal to the Supreme Court of Virginia. Following the trial judge's confirmation of a defendant's death sentence, a trial record will be compiled and transmitted to the Supreme Court of Virginia. Counsel will then be notified of the filing date by the clerk.[45] Within ten days of the filing date, or certification of appeal, appellant must file an assignment of error noting every issue raised at trial.[46] Additionally, within 40 days of the filing date, the appellant must file a brief, arguing each claim.[47]

After direct appeal, the next step is a petition for writ of certiorari to the United States Supreme Court. There is no risk of default involved with certiorari petitions. Therein, counsel may select one or more of the best constitutional claims to the exclusion of all others. This selectivity at the certiorari level will not result in default of claims to other courts. There is a ninety-day limit for filing petitions which begins to run from the time the judgment is entered in direct appeal.[48]

After certiorari, state habeas proceedings ensue. State habeas proceedings rarely bring relief to the capital defendant. In fact, they more often result in more default rulings.[49] Under Rule 5:7A, a petition for a writ of habeas corpus must be filed with the Supreme Court of Virginia within sixty days of the conclusion of certiorari by the United States Supreme Court.[50] Depending on the case, the sixty day period will be triggered by whichever of the following events comes first: (i) denial by the Court of a petition for a writ of certiorari; (ii) an order of the Court affirming imposition of the death sentence; or (iii) the expiration of the period for filing a writ of certiorari in the Court when such a writ is not filed. The Attorney General will have thirty days to respond.[51] Petitioner may file a reply to the Attorney General's response within twenty days of its filing.[52]

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[31] *Id.*

[32] 246 Va. 283, 435 S.E.2d 583 (1993).

[33] *Id.* at 287, 435 S.E.2d at 585.

[34] *Id.* at 288; 435 S.E.2d at 585.

[35] *See also Barnabei v. Commonwealth*, 252 Va. 161, 477 S.E.2d 270 (1996). In *Barnabei*, the defendant argued on appeal that the jury instructions were vague and incomplete and that the verdict was not rationally reviewable because it contained the term "and/or" with respect to the jury's findings of aggravating factors necessary for death eligibility. To the detriment of these claims, the defendant failed to object when the instructions were given and when the verdict was returned by the jury. Consequently, both claims were defaulted.

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

[37] Va. R. Sup. Ct. 5:17(c)(4). *See, e.g., Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990) (holding trial issues waived because appellant failed to argue issues in appellate brief).

[38] 244 Va. 445, 423 S.E.2d 360 (1992).

[39] *Id.* at 460-61, 423 S.E.2d at 370.

[40] *Id.* at 460; 423 S.E. 2d at 370.

[41] 248 Va.460, 450 S.E.2d 379 (1994).

[42] *Id.* at 474, 450 S.E.2d at 388.

[43] *Id.*

[44] Va. Code Ann. §8.01-645(C); *see* Weinig, *Virginia's New State Habeas: What Every Attorney Needs To Know*, Capital Defense Digest, Vol. 8, No. 1, p. 31 (1995).

[45] Va. Sup. Ct. Va. Rule 5:22(a). This written notification serves as the certificate to the clerk that the appeal has been awarded. *Id.*

[46] Va. Sup. Ct. R. 5:22(b).

[47] Va. Sup. Ct. R. 5:26(b)(1).

[48] Sup. Ct. R. 13(1).

[49] If a claim was raised on direct appeal and decided on its merits, it is not necessary to raise the claim again in state habeas proceedings to preserve it for federal review. However, state habeas petitions must include all other claims. Failure to include a claim in a state habeas petition will result in default. *See Turner v. Williams*, 35 F.2d 872 (4th Cir. 1994).

[50] Va. Sup. Ct. R. 5:7A(a).

[51] Va. Sup. Ct. R. 5:7A(c).

[52] Va. Sup. Ct. R. 5:7A(d).

If the petitioner files the state habeas petition on time, the Supreme Court of Virginia will then decide whether there are issues raised that warrant an evidentiary hearing.[53] If an evidentiary hearing is granted, the case will be sent to the circuit court where a hearing will be conducted within ninety days of the court's order.[54] After the hearing is completed, the circuit court will report its findings to the Supreme Court of Virginia within sixty days.[55] Objections to those findings must be filed with the Supreme Court of Virginia within thirty days of the circuit court's filing.[56] The petition is then reviewed by the Supreme Court of Virginia. Thereafter, a second petition for certiorari may be filed with the United States Supreme Court.

Should state habeas be denied, a petition for rehearing must be filed within fourteen days of receiving notice of the denial.[57] As of the date a final judgment is entered, such as the dismissal of a petition, a thirty-day limit begins to run. Within this time, counsel must file a petition for appeal.[58] In *Coleman v. Thompson*[59] the United States Supreme Court held that defense counsel's failure to file a timely notice of appeal from the final order of the state habeas court constituted procedural default which barred federal review of the claims asserted in the state habeas proceeding.[60] In sum, state habeas procedural deadlines can constitute a lethal trap for the unwary.

Assuming appealable issues survive the state habeas procedure, a petition for federal habeas corpus relief may be filed with the district court. Review of denial may be sought in the United States Court of Appeals for the Fourth Circuit, and again in the United States Supreme Court. Here, it is also essential that all claims are included and grounded in federal law. Again, the failure to meet any deadline may result in default. Prior to the advent of the Anti-Terrorism and Effective Death Penalty Act of 1996 (ATEDA), there were no filing deadlines for federal habeas petitions.[61] Consequently, these requirements impose a significant new obstacle to federal relief, an obstacle about which many attorneys may not be aware. Moreover, counsel must keep abreast of developments in this area because these new deadlines will vary depending upon whether Virginia is found to qualify for certain expedited procedures in capital cases.[62] For some states, ATEDA provides that petitioners must file within one year from the date judgment becomes final "by the conclusion of direct review or the expiration of the time for seeking such review."[63] That language does not clarify whether judgment becomes final upon the conclusion of direct appeal in the state court or upon conclusion of certiorari to the United States Supreme Court. If the expedited procedures do apply, the deadlines will be significantly shorter. In that case, the petitioner will have to file within 180 days after "final State court affirmance of the conviction and sentence on direct review."[64] This time will be tolled while relief is being sought from the United States Supreme Court on certiorari, and while collateral relief is being sought from the state court.[65] Also, the district court may grant an additional 30 days upon a showing of "good cause."[66]

VIII. Not The Same Claim

Not only must claims be guided through trial, assignment of error and briefing on direct appeal, each stage must preserve the "same claim" raised at the previous stage. The Supreme Court of Virginia recently created a novel procedural bar. The "same claim" requirement forces defense counsel to do two things: (1) initially allege all claims both narrowly and broadly; and (2) carefully ensure that each claim is consistently structured in the same manner in which it was originally raised.

In *Yeatts v. Murray*,[67] the Supreme Court of Virginia scrutinized the literal language of the assignments of error and held that claims are barred when they are briefed outside of those explicit terms. In *Yeatts*, the assignments of error listed a claim of ineffective assistance of counsel. In finding the claim defaulted, the court stressed that the assignment of error merely alleged that the circuit court erred by "dismissing the petition without ordering an evidentiary hearing as to his allegations of ineffective assistance of counsel."[68] The court determined that this assignment of error "only challenge[d] the alleged procedural failure to order an evidentiary hearing; it [did] not challenge, with reasonable certainty, the habeas court's substantive ruling on the merits of the ineffective assistance claims."[69] In light of this ruling, it is essential that habeas petitioners explicitly detail every claim which they intend to argue in their assignments of error.

In *Sheppard v. Commonwealth*,[70] the Supreme Court of Virginia established that specific claims will be defaulted when error is assigned only to the specific claims and no general assignment of error is made.[71] In *Sheppard*, the defendant assigned error to seven specific claims arising out of the sentencing phase which, he argued, rendered the jury's future dangerousness finding invalid.[72] The Supreme Court of Virginia refused to review these assignments of error because Sheppard had not assigned error to the general finding of future dangerousness but had only alleged specific errors relating to future dangerousness.[73] Essentially, then, because Sheppard did not include a broad throw-away challenge to the future dangerousness finding, but instead specifically stated why different components of the future dangerousness finding were in error, the court refused to consider each of the particular claims. Under *Sheppard*, then, it becomes necessary for counsel to allege claims both narrowly and broadly.

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53 Va. Code Ann. § 8.01-654(C)(1).

54 Va. Code Ann. § 8.01-654(C)(3).

55 *Id.*

56 *Id.*

57 Va. Sup. Ct. R. 5:20.

58 Va. Sup. Ct. R. 5:17(a)(2).

59 895 F.2d 139 (4th Cir. 1990).

60 *Id.* at 142.

61 Before ATEDA, if the Attorney General believed the defendant was taking too long to file a federal petition, the Commonwealth would negotiate a filing deadline by threatening to seek an execution date.

62 It has not yet been determined whether Virginia qualifies as an "opt-in" state. Conceivably, the state may qualify because it statutorily provides for defense counsel in collateral proceedings. However, the issue remains suject to dispute. *See* Raymond, *The Incredible Shrinking Writ: Habeas Corpus Under The Anti-Terrorism And Effective Death Penalty Act of 1996*, Capital Defense Journal, Vol. 9, No. 1, p. 52 (1996); Eade, *The Incredible Shrinking Writ, Part II: Habeas Corpus Under The Anti-Terrorism And Effective Death Penalty Act of 1996*, Capital Defense Journal, this issue.

63 28 U.S.C. § 2244(d)(1)(A).

64 28 U.S.C. § 2263(a).

65 28 U.S.C. § 2263(b)(1) & (2).

66 28 U.S.C. § 2263(b)(3)(A) & (B).

67 249 Va. 285, 290-91, 455 S.E.2d 18, 21-22 (1995).

68 *Id.*

69 *Id. at* 291, 455 S.E.2d at 22.

70 250 Va. 379, 391, 464 S.E.2d 131, 138-39 (1995).

71 *Id.* at 391, 455 S.E.2d at 138-39.

72 *Id.*

73 *Id.*

In *Gray v. Netherland*,[74] the petitioner raised a due process claim asserting that he was surprised with evidence presented during the penalty phase of his trial.[75] Based upon pretrial discovery, Gray's attorney expected the Commonwealth to introduce penalty-phase evidence connecting Gray to a double murder for which he had not been charged.[76] During discovery, the Commonwealth stated that it planned to introduce statements made by Gray to his co-defendant and to other inmates that he was responsible for the unadjudicated murders.[77] In response to further questioning from defense counsel, the Commonwealth indicated that it would not introduce any evidence beyond Gray's own alleged admissions to connect Gray to the murders.[78] Despite that assurance, the night before the sentencing phase was to begin, the Commonwealth told defense counsel for the first time that it was intending to introduce photographs of the crime scene and the victims' bodies as well as the testimony of the detective who investigated the murders and the medical examiner who performed the autopsies.[79] The next morning, defense counsel argued that he was taken by surprise and was unprepared to rebut this evidence. Gray was subsequently sentenced to death based on both the "future dangerousness" and "vileness" predicates.[80]

On certiorari, the United States Supreme Court found that the due process claim actually contained two more specific claims: (1) a notice-of-evidence claim; and (2) a misrepresentation claim.[81] As to the misrepresentation claim, the Court acknowledged that the Commonwealth may have affirmatively misled the defense.[82] However, because it was unclear whether the claim was presented in the lower courts, the Court remanded the case to determine whether the claim had been defaulted.[83] On remand, the United States Court of Appeals for the Fourth Circuit held that the claim was indeed defaulted for failure to adequately raise it in the lower courts.[84] In so holding, the court stated that when an "appeal is to a constitutional guarantee as broad as 'due process,' it is incumbent upon a habeas petitioner to refer to 'particular analysis developed in the cases' and not just due process in general."[85]

The *Gray* case is the converse of *Sheppard*. Under *Gray*, specificity is required to adequately raise a constitutional claim; under *Sheppard*, generality is required. Additionally, under *Yeatts*, counsel must be sure to explicitly structure claims to match the form originally used when the claim was first raised. The Attorney General, now aware of these new pitfalls, may attempt to divide, rename, and recharacterize a petitioner's claims. Consequently, defense counsel should be aware that life and death issues may be decided or defaulted, depending on the level of generality accepted by the court in the statement of a claim.

IX. Not The Same Argument

Another troubling procedural requirement has just recently emerged in Virginia. It now appears that attorneys will not only be required to make the "same claim" on appeal which they made at trial, but will also be required to support that claim with the *same arguments* throughout appeal. This new default rule was recently devised by the Supreme Court of Virginia in *Goins v. Commonwealth*.[86] In *Goins*, the court defaulted two assignments of error because a different *argument* in support of the objection was made on appeal.[87] First, counsel objected at trial to the testimony of an investigator regarding certain publications found in Goins's girlfriend's apartment. At trial, the objection was based upon the argument that the defense was unable to effectively cross-examine the detective because the police did not seize the publications in question. On appeal, it was argued that the testimony was irrelevant and prejudicial. Stating that this was a "new argument," the Supreme Court of Virginia held the claim defaulted.[88]

The second default in *Goins* concerned the testimony of a witness. At trial, defense counsel objected on the ground that the testimony was irrelevant. On appeal, it was argued that the testimony was irrelevant and that it was more prejudicial than probative. The Supreme Court of Virginia found that the prejudicial impact argument was defaulted because counsel did not articulate it when he made the objection at trial.[89] This holding is particularly unusual because, as every judge and attorney knows, the prejudicial/probative test goes hand in hand with the relevancy test. It is basic hornbook law that evidence is generally inadmissible if not relevant, or, if relevant, if its probative value is outweighed by its prejudicial impact.[90] Still, the *Goins* case indicates that the Supreme Court of Virginia will apply this new default rule strictly.

One might have hoped that the *Goins* default rule would amount to a mere anomaly in the court's reasoning. However, in the same year that *Goins* was decided, the "new argument" default rule was also employed in *Clagett v. Commonwealth*.[91] In *Clagett*, the Supreme Court of Virginia again held that a claim was defaulted because, although counsel properly objected at trial, a different argument in support of the objection was advanced on appeal.[92] Aside from citing Rule 5:25, the court offered no further explanation or justification for its holding.[93]

In developing this new default rule, the Supreme Court of Virginia has relied upon the contemporaneous objection rule embodied in Rule 5:25. However, this rule merely states that objections made during trial be stated with "reasonable certainty."[94] The text of the rule does not call for every conceivable ground for an objection to be raised at trial. And,

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[74] 116 S. Ct. 2074 (1996): *See*, case summary of *Gray*, Capital Defense Journal, this issue.

[75] *Id.* at 2078.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 2078-79.

[81] *Id* at 2081. The Court denied relief on the notice-of-evidence claim because it required a "new rule"under *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* held that where a United States Supreme Court ruling established a "new rule" which could not be predicted by existing precedent, the rule could not be applied retroactively to a conviction which is already final. 489 U.S. at 310.

[82] *Gray*, 116 S. Ct. at 2082-83.

[83] *Id.*

[84] *Gray v. Netherland*, 99 F.3d 158, 166 (4th Cir. 1996).

[85] *Id.* at 162 (quoting *Gray v. Netherland*, 116 S.Ct. at 2081).

[86] 251 Va. 442, 470 S.E.2d 114 (1996).

[87] *Id.* at 463, 470 S.E.2d at 128.

[88] *Id.*

[89] *Id.*

[90] *See* Charles Friend, *The Law of Evidence in Virginia*, § 136 (3rd ed. 1988).

[91] 252 Va. 79, 472 S.E.2d 263 (1996).

[92] *Id.* at 85, 472 S.E.2d at 266.

[93] Va. Sup. Ct. R. 5:25.

[94] *Id.*

nothing in the rule implies that a variation in the argument urged in support of a claim should result in default. Still, that was the interpretation embraced by the Supreme Court of Virginia in *Goins* and *Clagett*. Together, these two cases add yet another default trap to Virginia's procedural minefield. Now, defense counsel must take certain steps to preserve the record which were unnecessary only a year ago. Apparently, attorneys must now take the time, when objecting, to advance every conceivable argument. Also, counsel should renew objections and motions during trial to proffer new grounds whenever necessary. Naturally, proceeding with such painstaking caution will result in some delay at trial. Hence, counsel may want to inform the court that the delay is necessary in light of the *Goins* and *Clagett* rulings.

X. No Showing Of Prejudice

The question of whether it is error to deny a defendant experts or other resources has recently been deflected by language pointing out that the defense made no showing of prejudice. For example, in *Barnebei v. Commonwealth*,[95] the Supreme Court of Virginia held that the trial court did not err in denying the defendant's motion for an expert.[96] In *Barnabei*, the trial court ruled that the defendant failed to make the particularized showing necessary to entitle him to the appointment of a forensic pathologist.[97] The Supreme Court of Virginia, hearing the case on direct appeal, held there was no error because the record did not show that the defendant was prejudiced by the denial.[98] Apparently, the Supreme Court of Virginia now wants the trial record to reflect why the defendant was harmed by the lack of expert assistance.

When a pre-trial motion for expert assistance is denied, defense counsel should make it clear on the record that prejudice has resulted from denial of the motion. As a practical matter, this course of action creates difficulty because counsel has no way to forecast, before an expert is appointed, how a trial might be different with expert assistance. Counsel may, however, make a post-verdict proffer. Once the trial has concluded, counsel may point to particular incidents during the trial where the defendant was prejudiced because he had no expert. For example, counsel may have been unable to cross-examine the Commonwealth's expert on particular subjects due to a lack of technical expertise. When making the post-verdict proffer, counsel should be as specific as possible, detailing particular testimony and evidence to argue that prejudice resulted from the court's denial of expert assistance.

XI. Conclusion

To defend a capital case and simultaneously preserve the record for appeal is a Herculean task—particularly when the Supreme Court of Virginia continues to change the rules of the game. But the legal battlefield is littered with the actual bodies of those who did not get through the procedural minefield. That fact alone means that every effort must be made to achieve some sort of meaningful appellate review.

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[95] 252 Va. 161, 477 S.E.2d 270 (1996).

[96] *Id.* at 170-71, 477 S.E.2d at 275-76. Before trial, defense counsel filed a motion for a court-appointed forensic pathologist based upon *Ake v. Oklahoma*, 470 U.S. 68 (1985), which held that the Constitution requires appointment of a competent, independent psychiatrist to assist the defense. The *Ake* rationale has been extended to require provision of defense experts in a variety of specialties, particularly where the Commonwealth's evidence involves important expert testimony.

[97] *Id.*

[98] *Id.*

TOWARD A MORE EFFECTIVE USE OF *BATSON* IN VIRGINIA CAPITAL TRIALS

BY: DARYL L. RICE & C. COOPER YOUELL, IV

I. INTRODUCTION

At common law, the right of legal adversaries to exercise the peremptory strike to remove prospective jurors without cause was unquestioned for generations.[1] The original purpose of the peremptory challenge was to facilitate a fair trial by allowing counsel to eliminate jurors whom counsel felt were biased but who were not subject to removal for cause. No reason whatsoever needed to be given for a peremptory strike.[2] In some jurisdictions in this country, it was common, and tacitly acceptable, for such strikes to be used by the state to exclude blacks and other "undesirables" from the petit jury.[3] Finally, in 1986, these twin traditions, that of not requiring a reason for exercising the peremptory strike and that of exercising it to exclude black jurors, collided with the Equal Protection Clause of the Fourteenth Amendment.

The result of the collision was *Batson v. Kentucky*.[4] *Batson* did not outlaw peremptory strikes, however. It simply required that parties not apply them in a racially discriminatory fashion.[5] Ever since *Batson*, the United States Supreme Court, as well as the lower federal and state courts, has been struggling to reconcile equal protection with the peremptory strike. The source of the struggle is rooted in the differing

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[1] *See Swain v. Alabama*, 380 U.S. 202, 212-13 (1965) (citing sources indicating the peremptory strike is 600 years old).

[2] *See generally*, 4 William Blackstone, *Commentaries on the Laws of England*, 353 (15th ed. 1809).

[3] "[T]he practice of peremptorily eliminating blacks from petit juries in cases with black defendants [is] widespread." *Batson v. Kentucky*, 476 U.S. 79, 101 (1985) (White, J., concurring).

[4] 476 U.S. 79 (1986).

[5] Although *Batson* itself only applied to racial discrimination by the state against criminal defendants, the holding of *Batson* has been extended to prohibit discrimination by the defendant as well. *Georgia v. McCollum*, 505 U.S. 42 (1992). Likewise, *Batson* now applies in civil trials. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).