VIRGINIA'S NEW STATE HABEAS: WHAT EVERY ATTORNEY NEEDS TO KNOW

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BY: GREGORY J. WEINIG

Early in 1995, the Virginia legislature fundamentally changed the state habeas corpus system. The changes not only affect the basic habeas procedure, but have far-reaching ramifications for all areas of state habeas practice as well. After an explanation of how the new system works procedurally, this article will address administrative issues (such as retroactivity, how the new evidentiary hearings will function, and what legal standards will apply); how the new system affects the task of habeas counsel, particularly the impact on time available for reinvestigation; and finally, the new system’s relation to important federal habeas issues.

I. THE NEW SYSTEM

The old state habeas procedure was quite simple. After the conclusion of the direct appeal process by petition for writ of certiorari to the United States Supreme Court, a petitioner sentenced to death had to follow the same procedure as any other state habeas petitioner in Virginia by applying to the circuit court of the county or city in which he had been convicted. Upon denial of relief, a discretionary petition for appeal went to the Supreme Court of Virginia, and then again to the United States Supreme Court.

The new section of the principal state habeas statute created a separate procedure for death penalty petitioners. Other existing code sections were amended and new statutes drafted. Apparently designed to save time, the new provisions initially require petitioners to apply to the Supreme Court of Virginia instead of the circuit courts. Fortunately, state habeas petitioners facing a death sentence are now statutorily guaranteed appointment of counsel. Under the old law, a petitioner received counsel for state habeas only upon request. The attorney must work quickly, however. The Supreme Court of Virginia will not even consider the petition unless it is filed within sixty days of one of three events: either the United States Supreme Court’s denial of certiorari from a petitioner’s direct appeal; or that Court’s affirmation of a petitioner’s direct appeal; or the expiration of the period for timely filing a petition for certiorari to that Court.

If the petitioner files on time, the Supreme Court of Virginia then decides whether the issues the petitioner raised warrant an evidentiary hearing. The court must now give the same docket priority to these state habeas death penalty cases that it formerly had to grant only to death penalty cases on direct appeal. If the court decides the petition does warrant an evidentiary hearing, the case is sent to the proper circuit court. The circuit court is limited to hearing only those issues which the Supreme Court enumerated in its order.

The circuit court must conduct that hearing within ninety days after the Supreme Court of Virginia’s order. After the hearing, the circuit court makes findings of fact and recommended conclusions of law. Then the circuit court reports those findings of fact and recommended conclusions of law to the Supreme Court of Virginia within sixty days after the hearing is completed. Objections to the report filed by the circuit court must themselves be filed with the Supreme Court of Virginia within thirty days after the report is filed.

1. With respect to any such petition filed by a petitioner held under the sentence of death, and subject to the provisions of this subsection, the Supreme Court shall have exclusive jurisdiction to consider and award writs of habeas corpus. The circuit court which entered the judgment of conviction may establish, to represent an indigent prisoner under its findings of fact and recommended conclusions of law.

Objections to the report filed by the circuit court must themselves be filed with the Supreme Court of Virginia within thirty days after the report is filed.

1. The provisions states:
2. Hearings conducted in a circuit court pursuant to an order issued under the provisions of subdivision 1 of this subsection shall be limited in subject matter to the issues enumerated in the order.
3. The circuit court shall conduct such a hearing within ninety days after the order of the Supreme Court has been received and shall report its findings of fact and recommend conclusions of law to the Supreme Court within sixty days after the conclusion of the hearing. Any objection to the report of the circuit court must be filed in the Supreme Court within thirty days after the report is filed.

1. For an excellent source of comparison regarding important issues under the old system, see Hobart, State Habeas in Virginia: A Critical Transition, Capital Defense Digest, Vol. 3, No. 1, p. 23 (1990).
3. The new provision states:
4. Apparently designed to save time, the new provisions initially require petitioners to apply to the Supreme Court of Virginia instead of the circuit courts.
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6. If the petitioner files on time, the Supreme Court of Virginia then decides whether the issues the petitioner raised warrant an evidentiary hearing. The court must now give the same docket priority to these state habeas death penalty cases that it formerly had to grant only to death penalty cases on direct appeal.
7. If the court decides the petition does warrant an evidentiary hearing, the case is sent to the proper circuit court. The circuit court is limited to hearing only those issues which the Supreme Court enumerated in its order.
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thirty days after the circuit court's filing.\textsuperscript{13} The petition is then decided in the Supreme Court of Virginia. Thereafter, prisoners may petition for certiorari to the United States Supreme Court. However, if during its initial review of the petition the Supreme Court of Virginia decides that a petition does not warrant an evidentiary hearing, that court summarily denies the petition. The petitioner may then petition for certiorari to the United States Supreme Court.

Finally, and perhaps most importantly, the new state habeas system also includes a statute dictating when execution dates will be set after a petitioner exhausts state habeas appeals.\textsuperscript{14} The trial court sets an execution date after notification by the Attorney General or Commonwealth's Attorney, and after the occurrence of one of the following four events: (1) denial of state habeas relief by the Supreme Court of Virginia or expiration of the time for applying for such relief; (2) final disposition of the case in the United States Supreme Court on certiorari from denial of state habeas; (3) affirmance of denial of federal habeas corpus relief by the United States Court of Appeals or expiration of the time for appealing such denial; (4) issuance of a final order by the United States Supreme Court after granting a stay to address a petition for certiorari appealing the judgment of the United States Court of Appeals.\textsuperscript{15}

The trial court must then hold a proceeding within ten days of the Attorney General's written request to set the execution date, and then the court must set a date within sixty days of that proceeding.\textsuperscript{16} After a date is scheduled, the trial court or the Supreme Court of Virginia may grant a stay of execution only if the petitioner makes a showing of substantial grounds for habeas corpus relief.\textsuperscript{17} Formerly, execution dates were not governed by statute. The Commonwealth's practice was not to seek oppressively quick execution dates. It petitioned courts to set such dates only when it felt the defense had delayed filing habeas corpus petitions too long or when a petitioner had exhausted the entire appeals process.\textsuperscript{18}

\section*{II. NEW ISSUES}

\subsection*{A. Retroactivity Issues}

Questions of retroactivity inevitably arise when a new statute amending old procedures is passed. Obviously these questions are extremely important in death penalty cases. Whole phases of appeal once available to defendants under the old law have changed, and because of the uncertain "limbo" status of cases pending at state habeas before the amendments, some petitioners may find themselves facing entirely different procedures than expected. Equally important, the new appointment of counsel statute raises similar retroactivity issues and thus further questions regarding how death row inmates petitioning at state habeas will be ensured assistance of counsel.

\textsuperscript{13} Id. This requirement raises the question of whether a petitioner must contest the findings of fact at this point in the process. A circuit court’s findings of fact are final; note that Va. Code Ann. §8.01-654(C)(3) distinguishes between the circuit court’s “findings of fact and recommended conclusions of law” by failing to qualify the circuit court’s findings of fact as “recommended.” If a petitioner waits until the Supreme Court of Virginia upholds the death sentence and then petitions in federal court, the Commonwealth could claim that the petitioner did not take the opportunity to object at the proper time. As such, the circuit court’s findings of fact would stand in federal court, and under 28 U.S.C. § 2254(d), federal courts must defer to state court findings of fact.


\textsuperscript{15} Id.


\textsuperscript{17} Id.


\textsuperscript{19} Telephone Interview with Michelle Brace, Staff Attorney of the Virginia Capital Representation Resource Center (September 25, 1995). Ms. Brace's assistance with this article was invaluable. We appreciate that she realized the importance of informing counsel about several issues connected with the new statute.


included in all habeas petitions to avoid default. Consequently, many petitioners whose cases are transferred under the new rules have grounds to contest any substantive abridgement of rights resulting from the transfer.24

2. Cases Presenting Problems with Dates for Appointment of Counsel and Filing of Petitions

The statute governing appointment of counsel in capital cases has been amended to require appointment of counsel for state habeas corpus proceedings "within thirty days after the decision of the Supreme Court of Virginia" affirming a death sentence on direct appeal.25 A new statute also imposes strict timeliness requirements on death penalty petitioners. Again, the Supreme Court of Virginia will not even consider the petition unless it is filed within sixty days of either the United States Supreme Court's denial of certiorari on direct appeal, or the Court's affirmation of a conviction, or the expiration of the period for timely filing a petition for certiorari to the Court.26

This time frame raises problems. First, there are cases in which the Supreme Court of Virginia had affirmed convictions on direct appeal before the statute's effective date, but no counsel had been appointed within the thirty day period after the affirmation. In these cases, it is thus unclear whether the Supreme Court of Virginia would be able to impose the new statutory time limits. A petitioner could also contest that imposition by reference to the procedure/substance distinction in Virginia Code section 8.01-1.27 This time, he could argue that the statutory change affected his substantive rights by denying him of the benefit of counsel at state habeas.

The same challenge to the application of the new procedures should be available prospectively for cases affirmed by the Supreme Court of Virginia after the statute's effective date, but in which the circuit court fails to appoint counsel within the required thirty day period. Petitioners will need an attorney to draft their petition. If the circuit court simply fails to appoint counsel, the petitioner will not be able to file a petition within the sixty-day period after disposition in the United States Supreme Court.

In turn, if petitioners are not granted some relief from the court's own error in these situations, the following scenario could occur. If a petitioner tries to present a claim, he must do so without the benefit of an attorney until the circuit court appoints one. In the mean time, before the tolling of the sixty-day period following the United States Supreme Court decision on direct appeal, the petitioner somehow must file a petition with the court. If the petitioner receives counsel before the expiration of the sixty days, the attorney can file a "skeletal" petition to the Supreme Court of Virginia. The petitioner himself may have to do this if no attorney is appointed in time. The "skeletal petition" is designed solely to buy time so that a genuine petition can be prepared while preventing the sixty-day limit from expiring.

A further problem with this approach is the tendency of some courts to dismiss "successive and abusive" petitions automatically. In Gorsuch v. Collins,28 a federal habeas petitioner had filed a skeletal petition, but it had been denied on the merits by the district court and this denial affirmed by the Fifth Circuit. When the petitioner later filed an adequate petition, the district court dismissed it as "successive and abusive."29 Though Virginia does not appear to have a "successive and abusive" standard for multiple petitions, counsel are advised to couch the later, fully developed petition solely in terms of an amendment to the initial "skeletal petition."

B. Evidentiary Hearings

The amendments to the main state habeas statute make it clear that the Supreme Court of Virginia not only decides whether to allow the circuit courts to conduct the evidentiary hearings, but also dictates the issues the hearing may address.30 If the higher court decides to grant an evidentiary hearing, the circuit court, after holding the hearing, makes findings of fact and recommended conclusions of law to the higher court.31 Otherwise, there is no reason to believe that the Supreme Court of Virginia's standard for analyzing claims will be any more advantageous to petitioners than the standard of the circuit courts. Presently, the circuit courts do not hold hearings without genuine issues of disputed facts. The Attorney General typically files motions to dismiss any petitions as soon as they are filed. The Attorney General includes affidavits in support of the motion and attempts to justify dismissal of the petition. One representative of the Virginia Capital Resource Center in Richmond opined that the Supreme Court of Virginia would likely analyze petitions under the same standard.32 She also believed that there will be fewer hearings under the new system than under the old one and estimated that hearings would be granted in perhaps one percent of all petitions.33 Though relief has not been granted in any state habeas case since 1977, now petitioners will have even less of a chance to make their case for relief under the new system.

C. Execution Dates

Once the Supreme Court of Virginia denies a petitioner's state habeas claims, the petitioner may apply for a writ of certiorari to the United States Supreme Court within ninety days.34 Realistically, however, it appears that petitioners will now not have time for that step. The legislature also passed a new statute governing execution dates at the same time it passed the new state habeas amendments. The time frame is dramatically quick.

First, the Attorney General notifies the trial court in writing of the need to set an execution date. Next, the trial court must find that one of four circumstances has been reached in the case.35 If the trial court does find one of those circumstances, the court must conduct a proceeding to

27 See text accompanying note 22, supra.
32 Telephone Interview with Michelle Brace, Staff Attorney of the Virginia Capital Representation Resource Center (September 25, 1995).
33 Id. As a practical matter, it is not very surprising that the changes in the state habeas system would lead to fewer grants of evidentiary hearings. Now, instead of several circuit courts, only one court, the Supreme Court of Virginia, makes decisions concerning evidentiary hearings. With only one decision-maker, logically fewer hearings will be granted.
35 Va. Code Ann. § 53.1-232.1 (1995). See text accompanying note 15, supra. The statute appears somewhat flawed in that it fails to address all of the possible contingencies for the disposal of cases once the Supreme Court of Virginia has denied state habeas relief. For example, it does not address what happens if the United States Court of Appeals reverses a district court's grant of habeas relief.
set the execution date within ten days of the Attorney General’s request. Finally, it must set the execution date within sixty days of that proceeding.36

This accelerated process makes the power of United States District Courts to grant stays of execution of paramount importance. In McFarland v. Scott37, the United States Supreme Court held that District Courts have the power to grant stays to effectuate federal petitioners’ rights to appointment of counsel. Because there are so many tasks that an attorney must perform during both state and federal habeas review,38 and because Virginia’s new statute for execution dates hastens the process so much that there will be no time for federal habeas review at all if the Attorney General’s request follows the Supreme Court of Virginia’s denial of state habeas relief (i.e., the date is set within seventy days of the Attorney General’s request), a petitioner’s case becomes essentially hopeless without such stays.39

III. THE PRACTICAL TASK FOR ATTORNEYS

The most important lesson to be derived from the introduction of the new procedures is how the immense workload required of counsel for a death-row inmate on state habeas is made even more onerous by the statutory changes. Anyone appointed as counsel in a state habeas case should immediately ask for co-counsel. The shortened time frame heightens the urgency. Even two attorneys are probably not enough, but two are probably all the court will allow a petitioner.

The attorneys will have their work cut out for them. Massive reinvestigation of the entire case is required, with special emphasis on information pertinent to the ineffectiveness of the petitioner’s trial counsel, potential violations of Brady v. Maryland40 by the Commonwealth, and prosecutorial, judicial, and police misconduct. As to ineffective assistance of counsel, under Strickland v. Washington41 habeas counsel must demonstrate that trial counsel’s performance was deficient in that it fell below some objective standard of reasonableness, and that this deficient performance resulted in prejudice to the client. As such, habeas counsel must reinvestigate much more than record errors evident from the trial transcript. Habeas counsel must go back over the evidence of guilt, innocence, and mitigation with a fine tooth comb. Without reinvestigating the entire case, habeas counsel will have no way of knowing what trial counsel could have found, and no way to judge whether trial counsel did perform adequately under Strickland.

Habeas counsel must also reinvestigate the case to discover potential Brady violations, and prosecutorial,42 judicial, and jury misconduct. The United States Supreme Court’s recent decision in Kyles v. Whitley43 opens even more avenues for habeas counsel to investigate as to Brady violations.44 Again, habeas counsel has no way of knowing what the prosecution may have withheld, or what misconduct that prosecutors, judges, or jurors may have engaged in, without thoroughly reviewing every aspect of the case. These issues are all available for the first time at state habeas, and so would not have been addressed during any investigations conducted by the defense prior to trial.

Additionally, state habeas counsel must attempt from the beginning to request experts and discovery. Counsel should request these immediately due to the speed of the state habeas process. Also, if a petitioner does not request these during state habeas, that fact can be used against the petitioner on federal habeas review, under Keeney v. Tamayo-Reyes.45 In Keeney, the United States Supreme Court extended the “cause and prejudice” standard for default articulated in Wainwright v. Sykes46 to instances where a petitioner had failed to develop a material fact in state court.47 Recently, lower federal courts have been using Keeney more frequently to default claims based on failure of counsel to investigate certain facts at trial.48 Under Keeney, a petitioner’s failure to request experts at state habeas may result in denial of such a request in federal court.

Habeas counsel must also learn a massive, complex body of law in order to serve their clients effectively. Issues such as retroactivity49 and procedural default require much study and thus even more time of habeas counsel. Counsel must learn how to preserve issues to prevent procedural default and to avoid federal determinations that state court denials of relief rested on “adequate and independent state grounds.”50

Finally, state habeas counsel should request outside help as well. State habeas cases are extremely complicated, developing very rapidly. They are very different from any other types of cases that lawyers typically handle. It is impossible for counsel to learn in one day everything needed to perform the work competently. At this writing, the status of the Virginia Capital Representation Resource Center, the most potentially helpful resource, was uncertain due to actual and pending cuts in funding. To the extent that the Resource Center continues its work, the Center can alert attorneys to problem areas and can help attorneys focus on vital issues, thereby saving counsel valuable time. The Center can also provide many other types of assistance, as it publishes a quarterly newsletter containing relevant state and federal case summaries, “how to’s”, and other useful information. Any attorney appointed to a habeas case not receiving the Center’s newsletter should call the Center and ask to be put on the mailing list and to receive all back issues. The Center may be contacted at 804-643-6845.

Both the Center, to the extent it continues, and the Virginia Capital Case Clearinghouse can also put counsel in touch with experienced habeas lawyers who may be able to provide counsel with additional help. The Clearinghouse may be reached at 540-463-8557.

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38 See section III, infra.
39 The United States Supreme Court prefers that state courts grant the necessary stays of execution. “Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested has first been sought in the appropriate court or courts below or from a judge or judges thereof.” Sup. Ct. R. 23.3 (1990). See also Barefoot v. Estelle, 463 U.S. 880, 895-96 (1983). However, the new statute’s harsh standards for granting stays makes the Supreme Court’s preference a moot issue, and thus renders the power of the district courts to grant stays very important.
44 See also Barnes v. Thompson, 58 F.3d 971 (1995), and case summary of Barnes, Capital Defense Digest, this issue.
47 Keeney, 504 U.S. at 8.