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The Lawyer's Role When the Defendant Seeks Death

Ross E. Eisenberg*

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."1

"A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."2

"In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to the plea to be entered, whether to waive jury trial and whether the client will testify."3

I. Introduction

The above excerpts from the Virginia Rules of Professional Conduct are distilled by the American Bar Association's instruction that "[t]he duties of a lawyer to be a competent, diligent, and zealous advocate for the interests of her clients also suggest that she must take reasonable steps to avoid engaging in conduct adverse to her own client's interests."4 These rules come into sharp conflict when a competent capital defendant enters a guilty plea and asks the trial court for a death sentence. On the one hand, a lawyer is required to provide competent zealous advocacy; on the other, he must act merely as a representative and abide by the client's decision. This dilemma for defense attorneys is not unknown in Virginia; several defendants have been convicted and executed in the

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past five years under circumstances in which the defendant pleaded guilty to capital murder and asked to be sentenced to death.\(^5\)

This article examines the ethical and professional obligations of the attorney whose client pleads guilty and asks for death. It surveys each step of the process by which a defendant can follow this course – competency evaluation, the guilty plea, sentencing (by refusing to present mitigating evidence or by taking the stand and literally "asking for death"), and waiver of appeal to the Supreme Court of Virginia. This article looks to developments in other states for guidance and studies the facts surrounding several competent Virginia defendants who have pleaded guilty and asked for death in recent years. Finally, this article suggests tactics for the lawyer to employ when faced with a defendant who elects execution.

II. Virginia's Rules of Ethics

On January 1, 2000, the Commonwealth of Virginia replaced its seventeen-year-old Code of Professional Responsibility ("Code") with the Rules of Professional Conduct ("Rules").\(^6\) The new Rules follow the same format as the current American Bar Association Model Rules of Professional Conduct ("ABA Model Rules").\(^7\) The new Rules are more streamlined than the prior Code and, because of their relative youth, have not yet generated a body of law in Virginia.\(^8\) As a result, many of the ethics opinions and state court cases still in force rely upon

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6. VA. CODE OF PROF'L RESPONSIBILITY Editor's Note (2000).


8. Furthermore, the Preamble to the Rules of Professional Conduct mention that other states' interpretations of the ABA Model Rules are to be regarded merely as suggestions in Virginia. See VA. RULES OF PROF'L CONDUCT Preamble (2001).
III. The Process

In considering the competent defendant who pleads guilty and asks for death, it is helpful to consider each phase of the judicial process at which the defendant can achieve part of his goal. The first phase is the competency evaluation. The second phase is the guilty plea. Third is the process of "asking for death," which can be done both by refusing to present evidence in mitigation at sentencing or by the defendant taking the stand and literally asking the court to execute him. The last phase is the defendant's waiver of an appeal to the Supreme Court of Virginia for sentence review.

A. The Lawyer's Role in Diagnosing Mental Competence

The notion of competence is fundamental to all the attorney's and defendant's successive decisions in this discussion; without a competent defendant, the lawyer takes on a larger role and may even be required to serve as the defendant's de facto guardian. More importantly, a declaration of incompetence will prevent the defendant from being able to plead guilty and ask for death. The trial court's consideration of a capital defendant's competency is critical to enforcing the defendant's right to make fundamental decisions regarding the disposition of his case.

11. VA. CONST. art. 1, § 8 (providing that an accused has the right to plead guilty in a criminal trial).
12. See U.S. CONST. amend. VI (granting the criminal defendant the right to call witnesses in his favor); U.S. CONST. amend. XIV (guaranteeing the right to be heard and to offer testimony).
14. VA. RULES OF PROF'L CONDUCT R. 1.14 cmt. 2 (2001) ("The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer must act as a de facto guardian."); VA. CODE OF PROF'L RESPONSIBILITY EC 7-12 (2000) ("Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer.").
16. Id.
In Virginia, the trial judge has an obligation to notice a defendant’s competency (or lack thereof), but the issue of a defendant’s competency may be brought to the judge’s attention by representations of counsel for either the defendant or the Commonwealth. The competency evaluators complete a competency report following an examination of the defendant, and the trial court must promptly decide whether the defendant is indeed competent to stand trial. The defense of incompetency may not be waived by the incompetent defendant, and his counsel likewise cannot waive it for him by failing to move for examination of the defendant’s competency.

Arguably a person who elects to press for his own death is, regardless of all other signs, mentally unsound. There has been some literature suggesting that defendants who elect execution are indeed suffering from a psychological disorder. The Virginia Rules of Professional Conduct require that, when a client’s ability to make adequately considered decisions in connection with his representation is impaired or when the lawyer believes the client cannot adequately act in his own interest, the attorney may seek the appointment of a guardian or take other actions to protect the client. Thus, if the attorney reasonably believes the client’s decision to seek death is not competently made,

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17. See Drope v. Missouri, 420 U.S. 162, 181 (1975) (stating that “a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial”).
18. VA. CODE ANN. § 192-169.1 (Michie 2000). Section 192-169.1(A) states, in pertinent part:

If, at any time after the attorney for the defendant has been retained or appointed and before the end of trial, the court finds, upon hearing evidence or representations of counsel for the defendant or the attorney for the Commonwealth, that there is probable cause to believe that the defendant lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed.

Id
19. VA. CODE ANN. § 192-169.1(D) (Michie 2000) (requiring the evaluators, upon completion of the competency examination, to submit a competency report to the court).
20. VA. CODE ANN. § 192-169.1(E) (Michie 2000) (mandating that the court promptly determine whether the defendant is competent to stand trial).
21. See Kibert v. Peyton, 383 F.2d 566 (4th Cir. 1967) (holding that the defense of incompetency to stand trial cannot be waived by the incompetent or the incompetent’s attorney by failure to move for a competency examination).
23. Id (questioning the defendant’s competency in Gobran v. Utah: “Was not his death wish itself pathological and to some extent the subtle product of social practices over which he had no control?”).
24. VA. RULES OF PROF’L CONDUCT R. 1.14(b) (2001) (granting the attorney the authority to seek the appointment of a guardian or take other protective action “only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest”).
the attorney can use this belief as the basis to make the decision not to press for a death sentence.

The United States Supreme Court, in *Rees v. Peyton*, highlighted the importance of exploring a capital murder defendant's competency when he presses for death. In *Rees*, the defendant pursued his Virginia death sentence ultimately to the United States Supreme Court on writ of habeas corpus. About one month after the petition had been filed, however, the defendant directed his counsel to withdraw the habeas corpus petition and discontinue any further legal proceedings. The Court placed assessment of the defendant's competency as the most important consideration and suspended the withdrawal of the defendant's petition so that he could be evaluated for competency. Counsel insisted on a psychiatric evaluation, and the psychiatrist concluded Rees was incompetent. As in *Rees*, incompetency can serve as a roadblock to a defendant's wishes to hasten execution. The client will be best served by an attorney who initiates a competency assessment as soon as the client begins to discuss a guilty plea and request the death penalty.

A client's competence was addressed in the former Code, which stated: "any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer." Furthermore, "his lawyer may be compelled in court proceedings to make decisions on behalf of the client." The Rules do not have a competency rule that equates to the aforementioned Code section. Theoretically, this means the attorney's ethical burden under the Rules is less if the defendant is declared incompetent than if the Code were still in force. If this were true, however, it would be in sharp contrast to the attorney's ongoing obligation to assess competency inferred from *Rees*.

An argument can also be made comparing the defendant who asks the court for the death penalty to a person receiving state-assisted suicide or euthanasia.

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26. See *Rees v. Peyton*, 384 U.S. 312 (1966) (holding that, when confronted with a capital defendant who withdrew a petition for certiorari one month after it was filed, the Supreme Court could not dispose of the petition until the district court determined whether the defendant had capacity to appreciate his position and make a rational choice or had been suffering from "mental disease, disorder, or defect which may substantially affect his capacity").
27. Id. at 313.
28. Id
29. Id
31. Id
33. MICHAEL MELLO, THE UNITED STATES OF AMERICA VERSUS THEODORE JOHN KACZYNSKI 191-92 (1999). In comparing a defendant who asks for death to a person seeking state-assisted suicide, the author further states:
From this perspective, is the attorney who consents to his client's wishes aiding the client in an unlawful activity? Since the death penalty is not per se unlawful, it would be difficult to frame an argument around the notion that an attorney who fails to present mitigation or foregoes an appeal of right at his client's request is participating in unlawful behavior or aiding and abetting a crime. If the death penalty is viewed in a particular instance (perhaps where there is serious doubt the defendant is in fact guilty) as a form of state-assisted suicide, however, counsel is prohibited by the Rules from taking part in such activity.  

The United States Court of Appeals for the Fourth Circuit, in Beck v. Angelone, held that a defendant (or his attorney) who wishes to challenge a trial court's decision on competency grounds can attack it in two ways: procedural competency and substantive competency. A procedural competency claim alleges that the trial court failed to hold a competency hearing once the defendant's competency was put at issue. A substantive competency claim alleges that the defendant was, in fact, tried and convicted while incompetent. The major difference between procedural and substantive incompetency claims is that, under a procedural competency claim the defendant is entitled to a presumption of incompetency, while under a substantive claim he is not. Beck strongly supports the attorney who argues that each stage of trial in which a capital defendant seeks death—guilt/innocence, sentencing, and appeal—should begin with a presumption of incompetency.

But since Gary Gilmore's consensual execution in 1977, the law has been fairly settled that a condemned prisoner—and no one else in America—does have a right to forego challenges to the legality of his execution, so long as such prisoner is deemed by the courts to be mentally competent to make the decision and he has done so voluntarily. And, when he does, the state will provide him with all the "assistance" he needs to die, including a custom-built machine and the technicians necessary to make it work. In other words, a death row prisoner who is mentally competent and fully informed of the risks and consequences of his actions, has a legal right to die. That right, I will suggest below, includes the right of attorney assistance when necessary to enforce it.

34. See Va. Rules of Prof'l Conduct R. 1.2(e) (2001) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.").

35. 261 F.3d 377 (4th Cir. 2001).

36. See Beck v. Angelone, 261 F.3d 377, 387 (4th Cir. 2001) (stating that competency claims under the Due Process Clause of the Fourteenth Amendment can raise issues of both procedural and substantive due process).

37. Id.

38. Id. at 387-88.

39. Id. at 388. Under a claim of substantive incompetency, the defendant must demonstrate his incompetency by a preponderance of the evidence. Id. (citing Burk et v. Angelone, 208 F.3d 172, 192 (4th Cir. 2000)).
B. The Guilty Plea

The competence standard for guilty pleas was set out in *Godinez v. Moran* in 1993. The United States Supreme Court held the standard of competency for pleading guilty is the same as the competency standard for standing trial: "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" Godinez further held that a competency finding is not the only requirement for a guilty plea; the court must also find that the waiver of constitutional rights is knowing and voluntary. Godinez appears not to set a higher standard of competence for pleading guilty than going to trial. It is, however, important to note that the "knowing, voluntary and intelligent" prong of Godinez is the same as that which is applied in other guilty plea cases. The guilty plea necessarily involves waiver of the three great trial rights - the privilege against self incrimination, trial by jury and confrontation. In general, the standard for a waiver of these three rights requires a deeper level of understanding than that expressed in the competence-to-stand trial standard. The differential makes perfect sense. The competence-to-stand trial standard assumes the defendant will go to trial and therefore will receive, with the assistance, guidance and advice of counsel, his three great trial rights. Precisely by his plea, conversely, the pleading defendant is giving up those rights. It necessarily follows that the waiver of rights should require a greater understanding of the meaning and effect of those rights than is required to accept the enjoyment of them. Counsel should therefore be alert to competence at the first level as well as the greater understanding necessary at the second level to execute a constitutionally valid waiver.

41. *Godinez v. Moran*, 509 U.S. 389, 399 (1993) (stating that "we can conceive of no basis for demanding a higher level of competence for those defendants who choose to plead guilty").
42. *Id.* at 396 (quoting *Dusky v. United States*, 362 U.S. 402 (1960)).
43. *Id.* at 400. A "knowing and voluntary" guilty plea is defined as "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Parke v. Raley*, 506 U.S. 20, 28-29 (1992).
44. *Godinez*, 509 U.S. at 400.
Although they set only the minimal, non-aspirational standard for attorney competence, Strickland v. Washington\(^7\) and Hill v. Lockhart\(^8\) help make the point.\(^9\) The Strickland deficiency-plus-prejudice standard is applied to guilty pleas by Hill as deficiency-plus-prejudice in the form of a "but-for" test: but for counsel's deficiencies, the defendant would not have pleaded guilty.\(^5\) When restated in terms of the Godinez waiver by a minimally competent defendant, the prejudice question should be whether the defendant, but for counsel's deficiency (failure to recognize that waiver requires more than minimal competence), could constitutionally have pleaded guilty.

According to the Virginia Rules of Professional Conduct, the decision to plead guilty ultimately rests with the client.\(^5\) Still, the lawyer should avoid allowing a guilty plea by the capital murder defendant. The attorney's involvement should go far beyond the bare minimum required by Strickland, as his duty to the client is not simply to be competent enough to avoid an ineffective assistance claim. Counsel has a continuing obligation to prepare for trial. He might also consider negotiations with the trial judge: explain to the judge that the defendant currently insists on pleading guilty, but that the attorney continues to try to convince him to go to trial. Continuing trial preparation, therefore, would be pointless and unnecessarily costly if the defendant pleads guilty. For all indigent capital defendants, continuing trial preparation in this situation raises the cost for both parties, who are financially, in fact, the Commonwealth.\(^5\) The attorney should ask the judge to allow him to stop preparing for a possible trial while he continues to urge the defendant to proceed to trial. The attorney should seek assurances that, if the defendant changes his mind and decides to go to trial, the judge will grant a continuance so that the attorney can adequately prepare. This strategy will help counsel fulfill his obligations, while not burdening the system with potentially useless trial preparation.

C. "Asking for Death"

A defendant can "ask for death" at sentencing in two ways: (1) he can refuse to present mitigating evidence, or (2) he can take the stand and plead for execution. Virginia's capital sentencing scheme does not require a defendant in

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50. Strickland, 466 U.S. at 694; Hill, 474 U.S. at 59.
52. Both parties are "financially the Commonwealth" because the Commonwealth bears the cost of prosecuting the case and providing an adequate defense for indigent capital defendants.
a capital murder trial to present evidence in mitigation. Still, the presentation of mitigating evidence is encouraged, because proportionality review by the Supreme Court of Virginia is statutorily mandated. Proportionality review can be fully effective only if the available mitigating evidence is in the record.

Virginia has addressed the problem of a capital murder defendant's refusal to present mitigating evidence at sentencing in an ethics opinion issued by the Virginia State Bar Ethics Counsel. The opinion addresses the hypothetical situation in which the defendant has been found competent by a psychiatrist but informs counsel he desires a death sentence rather than life in prison. The hypothetical assumes that counsel has investigated and found mitigating evidence in the defendant's background. Nevertheless, the defendant instructs the attorney not to present evidence in mitigation on his behalf. The issue was whether counsel would violate the Code by presenting mitigating evidence despite his client's instruction not to do so. The opinion recognized the conflict in the Code between the attorney's obligation "diligently and competently" to represent the client by making the best possible case for mercy and the attorney's responsibility to achieve the client's lawful objectives and follow the client's directions.

The underlying problem in the opinion is "whether the lawyer should follow the lawful demands of the client when those demands may cause prejudice or damage to the client's case." The opinion concludes that "the attorney is ethically bound to carry out the client's directive, even though such instruction is tantamount to a death wish." Furthermore, the opinion concludes that the defendant cannot thereafter succeed on an ineffective assistance of counsel.

53. See Commonwealth v. Tice, Case Nos. 98-2980-00 and 98-2980-01 (Tr. at 1045) (Va. Cr. Q. Feb. 14, 2000) (unreported decision) (Circuit Court for the City of Norfolk). In Tice, the trial judge gave the jury a "death is not mandatory" instruction; therefore, even if the defendant fails to present mitigating evidence, the jury is nonetheless not required to give a death sentence. Id.

54. See VA. CODE ANN. § 17.1-313(C)(1)-(2) (Michie 1999) (mandating that a sentence of death, upon final judgment in the circuit court, must be reviewed on the record by the Supreme Court, which must determine: (1) "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor"; and (2) "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant").


56. Id.

57. Id.

58. Id.

59. Id.

60. Id.; see VA. CODE OF PROF'L RESPONSIBILITY DR 6-101(A), EC 7-1 (2000).


63. Id.
There are caveats, however: for the attorney to be protected from an ineffective assistance claim, he must counsel the client regarding the risks and benefits of presenting mitigating evidence before he abides by the defendant's decision, and he must determine that the defendant's choice to seek a death sentence was "rational and stable." He must also prepare evidence in mitigation in the hopes the defendant chooses to present it.

D. Waiver of Appeal to the Supreme Court of Virginia

When a capital murder defendant in Virginia is sentenced to death, direct review of the sentence by the Supreme Court of Virginia is mandatory. "Automatic appeal" statutes such as the one in Virginia have been approved by the United States Supreme Court as an adequate safeguard against arbitrary and indiscriminate enforcement of the death penalty. Regardless, capital murder defendants in Virginia have at times directed counsel not to brief or argue the case on appeal or have attempted to waive their rights to appeal altogether. When faced with this situation, the Supreme Court of Virginia conducts its mandatory review despite the defendant's wishes. This poses an interesting dilemma for the practitioner: Should he obey his client's wishes to waive all issues for appeal? Or, because the Supreme Court will in fact conduct its statutorily-mandated review, will the attorney essentially be rendering ineffective assistance by not briefing the issues that will be reviewed? Should the attorney decide not to brief and argue these issues on appeal? If the defendant changes his mind and asserts the attorney did not adequately protect his interests, the attorney will no doubt find himself in court arguing that he passed the Strickland test.

The issue of waiver of an appeal of right was discussed in the well-publicized case of Gilmore v. Utah before the United States Supreme Court in 1976.

64. Id.
65. Id.
66. See Va. Code Ann. § 17.1-313(C)(1)-(2) (Michie 1999) (mandating that a sentence of death, upon final judgment in the circuit court, must be reviewed on the record by the Supreme Court, which must determine (1) "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor," and (2) "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant").
67. See Gregg v. Georgia, 428 U.S. 153, 206 (1976) (holding that Georgia's automatic appeal statute, which included a proportionality review element, "substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury").
68. See generally Akers v. Commonwealth, 535 S.E.2d 674 (Va. 2000); Zirkle v. Commonwealth, 551 S.E.2d 601 (Va. 2001). In both cases, the defendant waived his appeal of right, but the Supreme Court of Virginia nonetheless conducted its mandatory review.
70. 429 U.S. 1012 (1976).
71. See Gilmore v. Utah, 429 U.S. 1012 (1976) (holding that Gilmore, who had been
The Court held that the defendant, Gary Mark Gilmore, made a knowing and intelligent waiver of the right to an appeal of his death sentence to the Supreme Court of Utah. The Virginia standard is similar to that of Gilmore but not identical. In Virginia the capital defendant may not waive proportionality review or passion and prejudice inquiry by the Supreme Court; waiver of appellate issues, however, is acceptable provided the waiver is knowing, voluntary, and intelligent. Several other states have held, to varying degrees, that a capital murder defendant may not waive a statutorily mandated appeal. In People v. Stanworth, for instance, the California Supreme Court refused to allow the defendant to waive his automatic appeal of a death sentence given by a California trial court.

The North Carolina State Bar issued a proposed opinion in 1996 concerning representation of a client on death row who wished to forego an appeal of right and hasten execution. As in Virginia, a defendant convicted of capital murder and sentenced to death in North Carolina receives an automatic appeal of his sentence to the Supreme Court of North Carolina. The opinion dealt with a hypothetical defendant who asks his attorney to withdraw from representation in the automatic appeal to the Supreme Court of North Carolina, and does not want his case briefed or argued. The opinion instructs the attorney to exercise his professional judgment in assessing the situation and to consider the legal requirement of an automatic appeal of a death penalty case, the client’s expressed desire as well as his mental and emotional state, and the need for a mental evaluation of the client. Although there are no comparable written guidelines in Virginia, the process described is very similar to the methods applied by Virginia courts in assessing a capital murder defendant’s waiver of a statutorily mandated appeal.

72. Id. at 1013.
73. Patterson v. Commonwealth, 551 S.E.2d 332, 335 (Va. 2001) (holding that the defendant could permissibly make a “knowing, voluntary, and intelligent” waiver of non-statutorily mandated appellate issues).
74. 457 P.2d 889 (Cal. 1969).
75. See People v. Stanworth, 457 P.2d 889, 898 (Cal. 1969) (“It is manifest that the state in its solicitude for a defendant under sentence of death has not only invoked on his behalf a right to review the conviction by means of an automatic appeal but has also imposed a duty upon this court to make such review. We cannot avoid or abdicate this duty merely because defendant desires to waive the right provided for him.”).
79. Id.
IV. The Attorney’s Ethical Obligation in States Outside Virginia

The Supreme Court of Tennessee has examined the topic in a series of Ethics Opinions and cases. In 1984, counsel for Edmund George Zagorski contacted the Board of Professional Responsibility of the Supreme Court of Tennessee for guidance in a capital murder case in which he was representing a defendant who instructed him not to present evidence in mitigation. The Board issued a Formal Ethics Opinion considering the ethical obligations of court-appointed counsel in a capital case when the defendant instructs his attorney not to present evidence in mitigation. In its Opinion, the Board recommended that counsel fully inform the accused of his constitutional right to conduct a defense of his choice, but also advise the defendant that his rights and interests are in conflict with counsel’s moral beliefs and ethical responsibilities. If the defendant continues to insist that evidence in mitigation will not be presented, counsel should advise the defendant that a motion to withdraw from those portions of the trial will be filed with the court. The Board advised that the attorney should fully inform the court regarding the conflicts between the defendant and himself. The attorney should then seek an adjudication that the defendant is competent to represent himself during the voir dire examination of prospective jurors and the penalty stages of the trial or any other portion of the trial where the conflict is imminent. Finally, counsel should move the trial court to withdraw from representation during the portion of the trial where the conflict is apparent, and in the event this motion is denied should seek immediate review by the appellate court.

After the Board issued the 1984 Ethics Opinion, counsel abided by Zagorski’s decision not to present mitigating evidence. Despite the Ethics Opinion’s instructions, however, counsel refused to withdraw from any portion of the proceedings. Zagorski was convicted and sentenced to death, and the Supreme Court of Tennessee affirmed his sentence on appeal. Defendant then sought state habeas relief. In that case, Zagorski v. State, the defendant brought an ineffective assistance of counsel claim against his attorney who, by following the express instruction of a “competent and fully informed” Zagorski, did not investigate or present mitigating evidence at the sentencing phase of trial.

80. See State v. Zagorski, 701 S.W.2d 808 (Tenn. 1985) (affirming defendant’s two death sentences).
82. Id.
83. Id.
84. Id.
85. Id.
88. State v. Zagorski, 701 S.W.2d 808 (Tenn. 1985).
89. Zagorski v. State, 983 S.W.2d 654, 655 (Tenn. 1998).
court, taking into account its 1984 Ethics Opinion, held that, under the circumstances of this case, counsel had no obligation to seek to terminate representation; moreover, the court held that counsel in the matter acted reasonably and competently.\(^90\) The court held that in prospective cases, when a defendant instructs counsel to forego mitigation, "counsel must inform the trial court of [the] circumstances on the record and outside the presence of the jury."\(^91\) The trial court must then take three steps to preserve the defendant's interests and a complete record: (1) inform the defendant of his right to present mitigating evidence; (2) inquire of defendant and counsel whether they have discussed the importance of mitigating evidence and its potential to offset evidence in aggravation; and (3) "after being assured the defendant understands the importance of mitigation, inquire of the defendant whether he or she desires to forego the presentation of mitigating evidence."\(^92\)

Three months later, the Board reexamined its 1984 Ethics Opinion in light of the Supreme Court of Tennessee's holding in \textit{Zagoski} and issued an amended Formal Ethics Opinion.\(^93\) The amended Opinion explains that counsel, faced with a situation like that in \textit{Zagoski}, is (1) not required to withdraw from further representation of the defendant, absent the violation of another Disciplinary Rule;\(^94\) (2) must otherwise follow the instructions of the 1984 Ethics Opinion; (3) must seek a competency determination for the defendant as to whether he can make such a decision to forego the presentation of mitigating evidence; (4) must follow the instructions set forth in \textit{Zagoski}; and (5) must not make known to the court or prosecution the content of any available mitigating evidence.\(^95\)

The \textit{Zagoski} case and related Ethics Opinions are extremely important in considering similar situations in Virginia. Virginia has issued an Ethics Opinion relating to the same topic, but has not yet been confronted with an ineffective assistance of counsel claim based on counsel agreeing to withhold mitigating evidence.\(^96\) \textit{Zagoski} considers the ineffective assistance claim in both legal and ethical contexts.\(^97\) Counsel in Virginia cases would be best served to create a trial record, as instructed by \textit{Zagoski}, in order to insulate itself from a potential ineffective assistance of counsel claim. The attorney further has an obligation to

\(^{90.}\) \textit{Id.} at 660.  
\(^{91.}\) \textit{Id.}  
\(^{92.}\) \textit{Id.}  
\(^{94.}\) "Disciplinary Rule" refers to the Disciplinary Rules of Tennessee's Code of Professional Responsibility, which virtually mirrors Virginia's replaced Code of Professional Responsibility.  
continue investigating the case and preparing for trial, sentencing, and appeal. The Zagoski framework requires counsel to seek a competency determination for the defendant; this is similar to Virginia, which recognizes a continuing tripartite obligation to notice competency. Counsel should consider citing Zagoski in situations in Virginia in which the defendant wishes to forego mitigation, and note the similarity between the 1999 Tennessee Ethics Opinion and the current Ethics Opinion in Virginia addressing the same topic. Counsel in Virginia can argue the five Zagoski requirements for prevention of an ineffective assistance claim in order to combat a similar assertion.

Most states outside Virginia that have dealt with the problem of the defendant's refusal to present mitigation are in accord with the Virginia Ethics Opinion. California, however, has subjected itself to serious discussion regarding the lawyer's responsibility to present evidence in mitigation despite his client's wishes. In People v. Deere, the Supreme Court of California held, when the defendant barred his attorney from presenting mitigating evidence at the penalty phase in a capital case and instead gave a simple statement that he wished to die for his crimes, there was ineffective assistance of counsel on the part of the attorney. Deere was disapproved, but not overruled, four years later in People v. Bloom in which the Supreme Court of California held that the failure to introduce mitigating evidence did not per se render the death sentence unreliable. The court in Bloom criticized any requirement that defense counsel present mitigating evidence over a client's objections.

It is interesting to note that the court in Deere held counsel to be ineffective when, in addition to withholding mitigating evidence, the defendant took the stand and told the court he wished to die for his crimes. This is the other way

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99. See Drope v. Missouri, 420 U.S. 162, 181 (1975) (finding that “a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial”).


101. See generally Tenn. Bd. of Prof'l Responsibility, Formal Op. 84-F-73(a) (1999) (finding that the attorney must ultimately abide by the defendant's wish to forego presentation of mitigating evidence, assuming the defendant passes a competency examination); N.C. State Bar, Ethics Op. RPC 233 (1996) (holding that the attorney should take into account the defendant's mental and emotional state, and use professional judgment in abiding by the defendant's wishes).

102. 710 P.2d 925 (Cal. 1985).

103. See People v. Deere, 710 P.2d 925, 931 (Cal. 1985) ("[T]he defense attorney's honest but mistaken belief that he had 'no right whatsoever to infringe upon his [client's] decisions about his own life' operated to deny defendant his right to the effective assistance of counsel.").

104. 774 P.2d 698 (Cal. 1989).

105. See People v. Bloom, 774 P.2d 698, 717-18 (Cal. 1989) (holding that a pro se defendant could not claim ineffective assistance of counsel when he failed to present his own mitigating evidence).

106. Id. at 717-19

107. Deere, 710 P.2d at 929. In Deere, "counsel first permitted his client to make a brief statement to the court acknowledging that 'I know what I done was wrong' and 'I always believed
DEFENDANT SEEKS DEATH

The issue of taking the stand and pleading for a death sentence has occurred, but has not yet been judicially or administratively analyzed in Virginia. The capital murder defendant has a right to testify in his own behalf, even if testifying operates as an invitation to the court for execution. In addition, the Rules do not articulate an ethical bar to counsel allowing the defendant to take the stand and ask for death. The Rules expressly place the decision whether or not the client will testify in the hands of the client.

V. Virginia Case Studies

The following case studies are intended to illustrate the positions of defendants and attorneys in Virginia over the past few years who have been faced with situations similar to those outlined in this article.

A. Thomas Wayne Akers

Thomas Wayne Akers was charged with capital murder during the commission of a robbery for the beating death of 24-year-old Wesley Brant Smith. Akers and a co-defendant, Timothy Dwayne Martin, killed Smith, took Smith's car, and fled toward Canada. Akers and Martin were apprehended in upstate New York. Akers was said to have sought the death penalty from the moment he was apprehended. Akers would not talk with his attorneys for two months and, while in pretrial detention, described the murder in detail to fellow jail inmates. When questioned about the murder after his arrest, he attempted to "ask for death," and it is achieved by the defendant literally taking the stand and pleading with the court to kill him. The issue of taking the stand and pleading for a death sentence has occurred, but has not yet been judicially or administratively analyzed in Virginia. The capital murder defendant has a right to testify in his own behalf, even if testifying operates as an invitation to the court for execution. In addition, the Rules do not articulate an ethical bar to counsel allowing the defendant to take the stand and ask for death. The Rules expressly place the decision whether or not the client will testify in the hands of the client.


109. See U.S. Const. amend. VI (granting the criminal defendant the right to call witnesses in his favor); U.S. Const. amend. XIV (guaranteeing right to be heard and to offer testimony as a due process right).

110. Va. Rules of Prof'L Conduct R. 1.2(a) (2001) ("[I]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").


113. Id.

114. Id.

115. Id. Presumably, Akers spoke to fellow inmates about the murder in the hope that someone would "snitch" and the testimony would be used against him at trial in pursuit of a death
flee from the police station, and when he was subdued he told the police officers, "It's a good day to die." Akers subsequently began sending letters to the Commonwealth's Attorney admitting and describing details of the murder.

Akers entered a plea of guilty to the charge of capital murder during the commission of a robbery. He instructed his attorneys not to present any evidence on his behalf when entering a guilty plea or at sentencing. Prior to entry of the plea, Akers was evaluated by a licensed clinical psychologist and found to be competent to enter that plea. At sentencing, Akers directed his attorneys not to present any evidence in mitigation, despite the Commonwealth's overwhelming evidence in aggravation. He then asked the trial court for death. He claimed he would plot and come back to Franklin County to commit additional murders if not executed; when asked if he wished to speak prior to sentencing, he stated, "I have no sympathy for what I did, and I plan to commit another capital murder in the future." The trial court sentenced him to death, and Akers subsequently waived his right to appeal and unsuccessfully attempted to waive statutory proportionality review by the Supreme Court of Virginia.

Akers followed every step identified in this article - entered a guilty plea, refused to present mitigating evidence, took the stand and asked for death, and waived his appeal of right - and did so in an open and obnoxious fashion. The fact that he knew exactly what to say at sentencing (regarding future dangerousness) to ensure a death sentence indicates his actions were voluntary and intelligent. Counsel abided by Akers's instructions every step of the way, and neither the trial court nor the Supreme Court of Virginia identified error in the attorney's handling of the case. Perhaps the only way to attack this disturbing chain of

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117. *Id.*
118. *Id.*; see VA. CODE ANN. § 18.2-31(4) (Michie Supp. 2001) (qualifying as capital murder "[t]he willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery").
119. *Akers*, 535 S.E.2d at 676.
120. *Id.* The psychologist specifically stated, "Akers possessed the capacity to rationally understand, appreciate, and consider the consequences of his plea of guilty." He also stated that while "it makes all parties uncomfortable to see a defendant choose to place himself in the [worst] legal position possible," there was "no viable reason to question [Aker's] competency to do so." *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 674.
125. *Id.* at 674-76.
126. See supra note 123 and accompanying text (stating that "I have no sympathy for what I did, and I plan to commit another capital murder in the future").
DEFENDANT SEEKS DEATH

Events would have been to press for further competency evaluation, with the possible outcome being that a conflicting opinion would surface and delay the process in a way similar to that in Rees. The attorney could use this delay to try to convince Akers not to press for the death penalty.

B. James Earl Patterson

James Earl Patterson was convicted of capital murder in the commission of rape for the 1987 rape and murder of Joyce Sneed Aldridge. Patterson's situation is what is commonly known as a "cold-hit" DNA match. He was serving a twenty-five year sentence for another crime at the time of the capital murder charge. The suspected killer's DNA was compared with DNA in the state-maintained database and was determined to be identical to Patterson's DNA.

Patterson confessed to the rape, murder, and abduction, and pleaded guilty to all charges, against the recommendation of his attorney. Patterson then requested that no evidence in mitigation be presented at sentencing and asked the court for death. His attorney tried desperately to convince him otherwise, even appealing to Patterson's deeply held religious beliefs, but ultimately failed. At sentencing, Patterson told the judge, "I pray today that it will be some type of closure for these families." He also stated that if he received a life sentence he "could not promise 'sometime that I may not spark out and ruin more lives.'" Patterson waived any appeals and attempted to waive proportionality review by the Supreme Court of Virginia. The Court ordered a hearing to determine the defendant's competency to waive an appeal, and the trial court entered an order finding Patterson "knowingly, voluntarily, and intelligently waived his right to

127. See Rees v. Peyton, 384 U.S. 312 (1966); see supra Part III.A.
128. Patterson v. Commonwealth, 551 S.E.2d 332, 333 (2001) (affirming Patterson's sentence of death). Patterson also pleaded guilty to rape and abduction with intent to defile, entered an "Alford plea" to a charge of forcible sodomy, and was given two consecutive life sentences for the abduction and sodomy convictions. Id. at 333 n.1; see North Carolina v. Alford, 400 U.S. 25 (1970).
129. Patterson, 551 S.E.2d at 334.
130. Id.
131. Id.
132. Id.
133. Id.
135. Id.
136. Patterson, 551 S.E.2d at 335.
137. Id.
appeal." The Court affirmed his death sentence on appeal. Patterson currently sits on death row awaiting execution.

C. Daniel Lee Zirkle

Daniel Lee Zirkle was charged with the capital murder of Christina Marie Zirkle, pursuant to Virginia Code Section 18.2-31(12). He entered a plea of guilty. Before accepting Zirkle's guilty plea, the trial court considered a proffer of the evidence – despite Zirkle's concurrence – that the Commonwealth would have presented during the trial's guilt phase. The trial court also conducted an inquiry into Zirkle's mental competency and found he was fully competent to enter a plea of guilty. Prior to sentencing, he asked his attorneys not to present evidence in mitigation; they obliged and Zirkle was sentenced to death. He then directed his attorneys not to appeal the trial court's judgment. The Supreme Court directed Zirkle's attorneys to file a brief and present oral argument regarding the mandatory issues required by statute. The Supreme Court of Virginia then conducted a mandatory review despite Zirkle's waiver and affirmed his death sentence. Zirkle is currently sitting on Virginia's death row awaiting execution. Again, disproving the defendant's mental competency might have been more successful had it been pressed further, as counsel did in Rees.

138. Id.
139. Id. at 336.
141. Zirkle v. Commonwealth, 551 S.E.2d 601 (2001); see VA. CODE ANN. § 18.2-31(12) (Michie Supp. 2001) (qualifying as capital murder the "willful, deliberate and premeditated killing of a person under the age of fourteen by a person age twenty-one or older").
142. Id.
143. Id.
144. Id.
145. Id. at 602.
146. Id.
147. Id.
148. Id.; see VA. CODE ANN. § 17.1-313 (Michie 1999); see supra note 66.
David Leston Overton, Jr. pleaded guilty to capital murder in 1999. After hearing Overton's guilty plea and convicting him of capital murder, the trial court heard evidence in aggravation and mitigation. After all the evidence in mitigation was presented, Overton submitted a letter to the trial court in which he stated, "I do not wish to fight this. I humbly request that you respect [the victim's family's] wishes in sentencing me to death." The trial court then sentenced him to death. Sometime following trial, however, Overton changed his mind: he wanted to live. He did not waive his appeal to the Supreme Court of Virginia. Nevertheless, Overton failed to assign any errors on appeal except with respect to the two questions mandated by Virginia Code Section 17.1-313(C): whether his sentence had been imposed as a result of passion or prejudice, and a proportionality review. In his appeal he asked the Supreme Court of Virginia to commute his sentence of death to life imprisonment. The court denied this request, and affirmed Overton's death sentence.

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152. Id. at 423.
153. Id.
154. Id. at 422.
155. Id. at 421. This is merely an assumption, because he inexplicably asked for commutation of his sentence despite not raising any issues on appeal.
156. Id. at 421-22. Why Overton did not appeal based on other incidences of error is not clear, especially since he did in fact introduce mitigating evidence. Perhaps in examining the record for appeal it was conceded that no issues were in fact preserved. See Va. Code Ann. § 17.1-313(C)(1)-(2) (Michie 1999) (mandating that a sentence of death, upon final judgment in the circuit court, must be reviewed on the record by the Supreme Court, which must determine (1) "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor," and (2) "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant").
157. Overton did indeed ask the Supreme Court of Virginia to commute his sentence, and in its opinion the Court specifically declined to commute Overton's death sentence. Overton, 539 S.E.2d at 422. The Court could not possibly have intended to commute the sentence, for it is not allowed to by law. "Commutation," as defined by Black's Law Dictionary, means "[t]he executive's substitution in a particular case of a less severe punishment for a more severe one that has already been judicially imposed on the defendant." BLACK'S LAW DICTIONARY 274 (7th ed. 1999). Commutation in the death penalty context is an act of mercy; the proportionality review and passion and prejudice review conducted by the Supreme Court of Virginia is about justice, not mercy. For instance, if the Supreme Court conducts its proportionality review of a death sentence and finds that death was not appropriate in the case under review, it will overturn — not commute — the death sentence. Overturning a defendant's death sentence on appeal is an act of justice, as it corrects the wrong done to the defendant at the trial level; commuting that sentence to life imprisonment is an act of mercy and is a function of the Executive Branch, not of the Supreme Court.
158. Overton, 539 S.E.2d at 421.
159. Id. at 421-22.
VI. Strategies for the Lawyer

What is a lawyer to do when faced with a Thomas Akers, a James Earl Patterson, or a Daniel Lee Zirkle, who insist on the lawyer’s minimal role, plead guilty, and ask the court for death? Furthermore, what is a lawyer to do when faced with a David Leston Overton, who pleads guilty but changes his mind after sentencing and appeals to the Supreme Court of Virginia, wanting to live?

The first strategy, of course, is to try to convince the defendant to change his mind. In 1987, Professor Welsh S. White wrote an article regarding defendants who elect execution and, in the course of his research, interviewed many attorneys who had represented defendants in these situations. He found that most attorneys, when questioned about the ethical and legal conflict posed by a defendant who chooses death, did not consider it a major issue because they were convinced they could change the defendant’s mind. Tactics are largely defendant-specific, but can include appeals to family and friends, or perhaps to the defendant’s religious beliefs. For instance, if the defendant believes “Thou shalt not kill,” the attorney could try to convince him that the death penalty is state-assisted suicide and his death would be a sin in violation of the Sixth Commandment.

The attorney should operate, from start to finish, on the assumption that the defendant will in fact change his mind. Assuming the defendant does not change his mind, however, the attorney should attempt throughout trial and sentencing simultaneously to protect the defendant’s interests as well as his own. To protect adequately his own interests, the attorney should take all necessary steps to safeguard against an ineffective assistance of counsel claim. To protect against this claim requires raising the competency issue if not already raised, and meeting the *Gagliardi* standard for a guilty plea. It is extremely important to remember, however, that the standard a lawyer must meet in order to avoid an ineffective assistance claim does not prescribe what a lawyer ought to do. The level of basic competence, therefore, does not state the attorney’s duty to the capital defendant who wishes to plead guilty and ask for death.

Protecting the capital defendant’s rights and legal interests in the situation in which he chooses to plead guilty and ask for death will be tricky. Nevertheless, the attorney can protect several of the defendant’s interests while still abiding by his client’s wishes. When a defendant pleads guilty and instructs his

161. *Id* at 857.
162. The attorney should consider referring the defendant to St. Augustine, who was the first Christian authority to advance the idea that suicide was a crime against God, nature, and man. The Church adopted the idea, and it continues to be ecclesiastical law. Similarly, St. Thomas Aquinas taught that one “who deliberately takes away the life that the Creator has given him displays the utmost disregard for the will and authority of the Master.”
163. See *infra* Part III.B.
164. *Supra* note 41.
counsel not to present mitigating evidence, he effectively binds the attorney’s hands to argue substantive issues before the court. Should the defendant change his mind post-sentencing, the way David Leston Overton did, there is not much hope on these issues because they have been procedurally defaulted. Note, however, that the attorney’s hands are not tied regarding *procedural* issues. The attorney should therefore file as many motions and objections as the defendant will allow. The attorney should file these motions pretrial as well as pre-sentence; even though the defendant will plead guilty, this does not preclude counsel from filing sentence-related motions before the defendant enters his plea. The attorney should scrutinize the indictment and try to find flaws; he should file a motion declaring the capital murder and death penalty statutes unconstitutional; he should file a motion in limine asking for judicial notice that the defendant has requested not to present mitigating evidence and for permission to proffer mitigating evidence nonetheless. The attorney should file a motion in limine to limit certain kinds of victim impact evidence at the sentencing phase; this will be especially helpful if the defendant refuses to present mitigation, because it will prevent the Commonwealth from marching one victim after another up to the stand to testify at sentencing, with relatively no response from the defendant. The purpose of making the aforementioned motions is for the dual purpose of success at trial (or sentencing) and preserving a record for appeal if need be. It is impossible to know when a defendant will change his mind regarding defense strategy, and the attorney’s failure to preserve as many issues for appeal as are possible could result in the defendant’s execution despite his present desire to live.

It is worthwhile to attempt a forward-looking argument, stating that, because the defendant may only attempt to waive statutorily mandated appeal but will not successfully do so, the defendant’s Fourteenth Amendment right to due process requires that counsel preserve as many issues as possible for that appeal of right. Especially considering the defendant intends to plead guilty and request a death sentence, the attorney can argue an automatic appeal will be imminent, and the interests of justice require preservation of issues for the appeal.

If the attorney discovers an appealable issue of the magnitude to reverse a death sentence, but the defendant continues to instruct the attorney not to pursue an appeal, what is the obligation of the lawyer? This question is

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165. The defendant also receives this due process right through Article 1, Section 11, of the Virginia Constitution. VA. CONST. art. 1, § 11.

166. For a discussion of the difference between waiver of general review of a death sentence and waiver of statutory review of a death sentence, see generally State v. Dodd, 838 P.2d 86 (Wash. 1992).

167. Consider Gilmore v. Utah, 429 U.S. 1012 (1976) (Burger, J. concurring), discussed supra, where, following evaluations by five psychiatrists with three reporting, Gilmore instructed his attorneys not to appeal despite their opinion that there was substantial legal merit to an appeal. Id.
unanswered in Virginia law and likely will continue to be unanswered as long as the attorney does not act contrary to his client’s wishes. Arguably the attorney must abide by the client’s decision. In this situation, though, it is important to examine what the appealable issue precisely is; if it is, for instance, the deprivation of a constitutionally-guaranteed right, the attorney might consider pursuing an appeal contrary to his client’s wishes, justifying it only by the necessity of protecting such an essential right. The death penalty has been described by the Supreme Court of Virginia as the “ultimate penalty,” and the attorney should push the Rules to their limits when faced with a defendant who refuses to appeal. This is even more important now, because the Rules are still relatively new and therefore leave plenty of room for judicial interpretation.

VII. Conclusion

The attorney whose client pleads guilty and asks the court for death faces a tough legal, ethical, and professional dilemma. He is bound to act as a zealous advocate for his client, but at the same time must yield to the client’s ultimate wishes. The Virginia Rules of Professional Conduct offer little to no guidance as to which alternative to choose. Ethical Opinion 1737 instructs the attorney to abide by the client’s wishes if asked not to present mitigation and absolutely prohibits presentation of mitigating evidence if the competent defendant instructs counsel not to do so. Taking into consideration the trend in other states, it is not unlikely that Virginia will move toward issuing an ethical opinion stating that it is the attorney’s professional obligation to allow the client to plead guilty and ask the court to execute him. This problem will only be resolved in Virginia, however, when a lawyer is faced with a client who wants to die and the attorney refuses to allow the defendant to request execution. In the meantime, an attorney representing a defendant who intends to plead guilty and ask for death should operate on the assumption that the defendant will change his mind and should, therefore, take measures both to represent effectively the client’s interests and to protect himself from an ineffective assistance of counsel claim.
