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four peremptory challenges and are entitled to a greater number of peremptory challenges than is the state, even in non-capital cases. J. Van Dyke, *Jury Selection Procedures,* 282-3 (Ballinger 1977). Thus, a request that the court grant additional challenges is not a novel idea, but is merely a request to employ a practice already recognized in many courts as necessary to protect the right of a defendant to a fair trial, even in non-capital cases.

MOTION TO PROHIBIT THE IMPOSITION OF THE DEATH PENALTY

The motion to prohibit the imposition of the death penalty, and its supporting memorandum of authority drafted by Virginia Capital Case Clearinghouse, includes five sections. These five sections point out flaws in the application of Virginia's death penalty statute and together make the argument that Virginia's statute is unconstitutional.

The first section argues that both the "future dangerousness" and "vileness" aggravating factors fail to guide the jury's discretion as required by *Furman v. Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); *Godfrey v. Georgia,* 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980); *Maynard v. Cartwright,* 486 U. S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). The vileness predicate must be sufficiently narrowed to guide the jury's discretion in order to be constitutional. Virginia's vileness predicate on its face and as applied fails to guide the jury's discretion to prevent the arbitrary and capricious infliction of the death penalty.

Section two argues that the imposition of the death penalty based on the aggravating factor of "future dangerousness" is unconstitutional because the use of prior conviction evidence violates the defendant's 5th and 14th Amendments right not to be placed twice in jeopardy. It urges that, by allowing the jury to use the evidence of prior convictions to impose the sentencing of death, the defendant has been given multiple punishments for the same offense.

The third section states that the execution of a sentence of death constitutes cruel and unusual punishment in contravention of the Eighth Amendment. This argument is based on the contention that society's standards of decency have evolved to the point that execution can no longer be tolerated. Thirteen states have declined to reinstate the death penalty. Other states have death penalty statutes but no death sentences. Still other states have death sentences but no executions. It is argued that these facts demonstrate a national consensus that executions are not necessary or acceptable to serve the retributive interests of society.

Section four first argues that Virginia courts practice of failing adequately to instruct on mitigation, and the use of incomplete and misleading instructions and forms violates constitutional commands in a long line of cases starting with *Lockett v. Ohio,* 438 U.S. 586 (1978), by creating an impermissible risk that a death sentence will be imposed despite mitigating factors justifying a sentence less than death.

Section five argues that Virginia's lack of meaningful appellate review of death sentence cases violates Fourteenth Amendment due process. Virginia provides for review of death sentences by the Virginia Supreme Court. Va. Code Ann § 17-110.1 (1988). The Virginia statutory scheme does not, however, provide for meaningful appellate review.

The Virginia statutory scheme does not require the trial judge or jury to specify the findings that justified an imposition of a death sentence. Without documentation of the reasons supporting a sentence of death, the Virginia Supreme Court cannot conduct a meaningful appellate review of the imposition of the death penalty. Further, there is no review of life sentences where there is no appeal. A statutory scheme that fails to provide for meaningful appellate review violates a defendant's Eighth Amendment right against cruel and unusual punishment. *Pulley v. Harris,* 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).

This motion should be filed pretrial, as it raises systemic constitutional issues about the application of Virginia's death penalty. However, whether a questionable procedure will actually be employed in a given trial will not be known until the appropriate time in the trial. For example, one cannot be sure that the objectional standard jury instruction will be given or the improper evidence offered to support future dangerousness until witnesses are proffered and instructions given at the penalty phase. Consequently, the motion should be renewed at the time the violation allegedly occurs. *See Hoke v. Commonwealth,* 237 Va. 303, 377 S.E.2d 595 (1989) (defense counsel determined to have waived objection to venue by failing to renew motion).

ROBBERY, RAPE AND ABDUCTION: ALONE AND AS PREDICATE OFFENSES TO CAPITAL MURDER

By: Cary P. Mosely
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In Virginia, the capital statutory scheme purports to narrow the class of death eligible persons by enumerating certain circumstances under which a homicide becomes capital murder. In order to sustain a capital conviction under § 18.2-31, the Commonwealth must prove beyond a reasonable doubt (1) a willful, deliberate, premeditated killing *in addition to* one of the four enumerated first degree felonies (abduction with intent to extort money or pecuniary benefit, abduction with intent to defile, robbery and rape), or (2) a willful, deliberate, premeditated murder in one of four other contexts (killing for hire, killing by a prisoner, killing of a law enforcement officer, killing of more than one person as part of the same transaction). Va. Code Ann. § 18.31 (1-8).

Unlike the statutory schemes in other states, the Virginia statute does not require the Commonwealth to prove beyond a reasonable doubt one particularly aggravated murder. The North Carolina capital murder statute, for example, requires the prosecution prove only first degree murder to sustain a capital conviction. By contrast, in prosecutions under one of the four felony sections, the Virginia statute requires the Commonwealth to prove beyond a reasonable doubt *two* felonious activities, each with independent elements. Each of the felonies that can "elevate" premeditated first degree murder to capital murder is a separate crime that may be prosecuted where there is no homicide. Consequently, Virginia courts have the opportunity to construe the elements of robbery, rape, and abduction in both capital and non-capital contexts. This article analyzes the variations in construction of the reach of these enumerated offenses. The capital statute now includes as predicate offenses the felonies of attempted robbery and attempted rape. At present, no capital convictions have been based on attempt. Analysis of possible capital versus non-capital construction of attempt is beyond the scope of this article.

(a) Robbery as a predicate offense:

The offense of robbery has a definition which is more broadly construed by the Supreme Court of Virginia when robbery is used as

the predicate offense to a capital charge in Virginia Code § 18.2-31(4), than when it is charged independently under § 18.2-58. The judicial construction of the offense of abduction is also broad. However, abduction is applied more narrowly when used as the capital predicate as a result of limits present in the statutory language and not because of judicial construction.

A willful, deliberate and premeditated killing of "any person in the commission of robbery or attempted robbery while armed with a deadly weapon" constitutes an offense of capital murder under Code § 18.2-31(4).

The elements of robbery in Virginia include 1) a taking 2) with intent to steal and 3) violence or intimidation, which precedes or is contemporaneous with the taking. *Branch v. Commonwealth*, 225 Va. 91, 300 S.E.2d 758 (1983). Robbery is not specifically defined by statute in Virginia and the definition of robbery is found in the common law. *Johnson v. Commonwealth*, 209 Va. 291, 163 S.E.2d 570 (1968). In Virginia robbery is a crime against the person, for which a punishment is prescribed by statute in § 18.2-58. The elements of common law robbery are the 1) use or threat of violence against the victim and 2) the theft of property from the victim's person or in his presence. *Harris v. Commonwealth*, 3 Va. App. 519, 521, 351 S.E.2d 356, 356 (1986). Proof of robbery is complete when the Commonwealth proves the taking, the intent to steal, the presence of the victim, the force or intimidation overbearing the victim's will, and that the victim's possessory rights in the property are superior to those of the thief. *Hairston v. Commonwealth*, 2 Va. App. 211, 217, 343 S.E.2d 355, 361 (1986) (court affirming defendant's conviction for robbery).

A taking includes two elements, asportation and caption. R. Groot, *Criminal Offenses and Defenses in Va.* at 272 (2d ed. 1988). Caption occurs when the accused takes control over the property and asportation occurs when the accused moves the property. Almost any movement will suffice for a "taking." *Id.*

In *Branch*, a non-capital case, a second degree murder conviction was affirmed and a robbery conviction was reversed. Because the defendant had no intent to steal at the time he shot his victim, the evidence was found to be insufficient as a matter of law to support a conviction for robbery. *Id.* at 92. In other words, the offense is not robbery unless the intent to steal, or "animus furandi," is "conceived before or at the time the violence was committed." *Id.* at 93. The court recognized two factors in determining that the defendant possessed no intent to steal: that the defendant had offered the victim money immediately prior to the killing and that the taking of the victim's wallet revealed no purpose other than to cover up the defendant's crime by destroying the victim's identification documents *Id.* at 95.

In contrast, in *Whitley v. Commonwealth*, 223 Va. 66, 286 S.E.2d 162 (1982), the court affirmed the defendant's death sentence for conviction of capital murder during a robbery while armed with a deadly weapon. The court held that it is "immaterial that the victim is dead when the theft occurs." *Id.* at 73.

In *Branch* as in *Whitley*, the victim was dead when the caption and asportation occurred. But in *Whitley*, the court found the defendant killed his victim with the intent to rob him. *Id.* at 74. In *Branch*, however, the evidence revealed that the intent to steal did not surface before or during the killing, but after the killing.

The killing may occur before, during, or after the taking in capital felony-murder cases where robbery is used as the predicate offense. *See Harward v. Commonwealth*, 229 Va. 363, 330 S.E.2d 89 (1985) (dicta indicating that "in the commission of" includes a killing "before, during, and after" the felony).

In *Mason v. Commonwealth*, 200 Va. 253, 254-255, 105 S.E.2d 149, 150-151 (1958), another non-capital case, the defendant broke the window of the victim's store, entered and took a television and handed it through the window to a confederate. The shopkeeper sneaked up on the defendant and hit him with a board and the defendant then shot four times at the victim and fled. *Id.* The court held that the crime was not robbery because the taking was complete before the use of violence or intimidation toward the victim and these elements must precede or occur at the time of the taking. *Id.*

In *Pope v. Commonwealth*, 234 Va. 114, 360 S.E.2d 352 (1987), a capital case, the defendant demanded money of two women who were sitting in a car, in which the defendant had been riding, and shot the women before they could respond. The defendant contended that the evidence did not eliminate two reasonable theories of innocence: (1) that some person other than the defendant entered the car and took the deceased's purse while the other woman went for help after she drove to the hospital and (2) that the defendant took the purse *before* he shot the women, so that the underlying offense would be the lesser offense of larceny, not robbery, consistent with the rationale of *Mason*. *Id.* at 124 (emphasis added). The court held that the jury could conclude that the notion that a stranger stole the purse during that time the woman went for help, which was estimated at less than 30 seconds, was not reasonable or persuasive. *Id.* at 125. More important to our analysis, the court also upheld the trial court's ruling that the taking of the purse, the killing of its owner and the wounding of the only person who could resist the taking, were "so closely related in time, place, and causal connection as to constitute a common criminal enterprise as a matter of law." *Id.* As a result, the court held that the predicates for capital murder under § 18.2-31(d) (now § 18.2-31(4)) were established. *Id.*

Pope might be distinguished from *Mason* if Pope's taking was not complete at the time he threatened to kill his victim. The defendant in *Mason* had presumably "completed" the taking before he used the force against his victim (he handed the goods to his confederate, fired the shots at the victim, and then fled). Nevertheless in *Pope*, the capital case, robbery was found via the "close relationship" and "common criminal enterprise" language. Virginia's current capital murder statute was not in effect at the time of *Mason*. The elements of robbery, however, were ostensibly the same in both cases. The argument could be made that, had Mason killed his victim, the killing and the taking would be sufficiently "related" to support a charge of § 18.2-31(4) capital murder.

It is not necessary for an intent to commit robbery to continue for any length of time. *Durham v. Commonwealth*, 214 Va. 166, 169, 198 S.E.2d 603, 606 (1973). In *Durham*, the victim surprised the thieves by entering the room they were in and so the defendants' intention changed from commission of larceny to robbery as the defendants sought to prevent the victim from interfering by killing her. *Id.* The court held that the "putting in fear" and violence occurred at the time of the larceny and indicated an intent to commit robbery. *Id.* at 169-170. As in *Mason*, the defendant exhibited an intent to commit robbery at the time the violence was used against the victim.

In *Hoke v. Commonwealth*, 237 Va. 303, 377 S.E.2d 595 (1989), another capital case, the Virginia Supreme Court reaffirmed its commitment to the broader interpretation of "in the commission of robbery." There the defendant bound, gagged and killed the victim and stole some pills from her. The defendant said the victim "ripped him off" and killed her because he "couldn't get his stuff back." *Id.* at 310. Because the killing and the robbery were so "closely related" as part of a common criminal enterprise, the court then held that the evidence supported the jury's conclusion that the defendant was killed in the commission of a robbery while armed with a deadly weapon. *Id.* at 311.

Threats of violence or harm to the body are not essential aspects of intimidation; all that is required is that the victim be put in fear of bodily harm by the deliberate conduct or words of the

accused. *Harris v. Commonwealth*, 3 Va. App. 519, 521, 351 S.E.2d 356, 358 (1986). In *Harris*, the victim, a juvenile, was stopped by three men, turned around by the defendant, who then searched the victim and took his watch and radio. *Id.* at 521. The court held that the jury could properly infer that the victim surrendered his property as a result of his fear of harm caused by the defendant's intimidating conduct. *Id.* In Virginia, there is no requirement that the victim's fear, induced by the defendant's intimidating behavior, must be judged by an objective standard of reasonableness. *Id.* at 522. Fear is evaluated by a subjective standard: did the defendant's words or conduct actually provoke fear in the victim? R. Groot, *Criminal Offenses and Defenses in Virginia* at 75 (Supp. 1987).

In the non-capital setting, the Virginia court may narrowly construe the common law elements of robbery as distinguished from larceny. For example, the court will typically require that the "force" element occur contemporaneously with the "taking" element. Where robbery is the predicate offense for capital murder, however, the court will broadly construe, or readily expand, the rather specific common law elements of robbery. In the capital situations, the court may more easily find the elements of robbery on weak circumstantial evidence and resort to calling the killing and the taking so "closely related" as to be part of the same "criminal enterprise," although these elements may not have occurred simultaneously or contemporaneously. The rationale for this distinction is not clear. It may be that court's view that a premeditated killing, in the course of a taking, is such an aggravated course of criminal conduct that the usual rule, that criminal statutes be narrowly construed in favor of the accused, should be abandoned.

(b) Rape as a predicate offense:

When a murder is committed "in the commission of, or subsequent to a rape", assessment of the elements of rape is often clouded by the fact of murder itself. Ostensibly, proof of rape as an elevator of premeditated murder to capital murder in § 18.2-31(5) is identical to that required to prove a violation of non-capital rape under § 18.2-61(A). Va. Code Ann. § 18.2-31(5); § 18.2-61(A). In both instances, rape is defined as sexual intercourse against the victim's will by force, threat, or intimidation. Va. Code Ann. § 18.2-61(A). *See also Hoke v. Commonwealth*, 237 Va. 303, 310, 377 S.E.2d 595, 599 (1989); *Sutton v. Commonwealth*, 228 Va. 654, 662, 324 S.E.2d 665, 669 (1985).

In a non-capital context, the force element may be established by the uncorroborated testimony of the alleged victim. *Poindexter v Commonwealth*, 213 Va. 212, 217, 191 S.E.2d 200, 204 (1972). On appeal, a conviction based solely on the testimony of the victim will be sustained unless the testimony of the victim is so inherently unbelievable or so beyond human experience as to render it unworthy of belief. *Snyder v. Commonwealth*, 220 Va. 792, 796, 263 S.E.2d 55, 57-58 (1980). No positive resistance by the victim is necessary to demonstrate that the intercourse was effected without consent. *Jones v. Commonwealth*, 219 Va. 983, 986, 252 S.E.2d 370, 372 (1979). As a result, the outcome of a non-capital rape case turns on the credibility of the prosecuting witness. Therefore, any physical and forensic evidence presented by the Commonwealth serves only to corroborate, to a greater or lesser degree, the credibility of the prosecuting witness. The credibility of the victim and the weight to be given her testimony are questions exclusively in the province of the jury. *Barker v. Commonwealth*, 230 Va. 370, 373, 337 S.E.2d 729, 732 (1985). The jury may either base its decision exclusively on the victim's testimony or look beyond the victim's testimony to the corroborative physical evidence. The jury ultimately decides whether the act of intercourse was consensual or by force. *Snyder*, 263 S.E.2d at 58.

Clearly, forcible intercourse is more easily established when the victim is able to testify, or when the accused confesses. *Tuggle v. Commonwealth*, 228 Va. 493, 512, 323 S.E.2d 539, 549 (1984); *Keil v. Commonwealth*, 222 Va. 99, 105, 278 S.E.2d 826, 830 (1981). The killing of the victim and absence of confession, however, do not preclude a finding of forced intercourse. *Keil*, 278 S.E.2d at 830; *See generally Justus v. Commonwealth*, 220 Va. 971, 979, 266 S.E.2d 87, 93 (1980); *Waye v. Commonwealth*, 219 Va. 683, 251 S.E.2d 202, *cert. denied*, 442 U.S. 924 (1979). Rape may be proved by circumstantial evidence alone. *Tuggle*, 323 S.E.2d at 549. The size, height, weight, and physical condition of the victim are all relevant factors to be considered by the jury in determining the amount of force that was used by the defendant to accomplish the rape, and the resistance that was offered by the victim, or that she was capable of offering. *Justus*, 266 S.E.2d at 93.

While circumstantial evidence of force is used simply to corroborate or impeach the alleged victim's testimony in a non-capital rape case, this evidence is the deciding factor in a capital case. That is, in a rape-murder, the jury must draw inferences of force directly from the physical and forensic evidence. Given that inferences are drawn strictly from circumstantial evidence in a capital case, the Commonwealth should logically be required to put on more to prove the force element than in a non-capital case. However, case law indicates that, to the contrary, little evidence is necessary to procure a finding of force in a capital context.

On its face, the Virginia capital murder statute is narrowly drawn. Virginia Code § 18.2-31(5) provides for capital punishment when murder is committed "in the commission of, or subsequent to a rape." Va. Code Ann. § 18.2-31(5). The statute requires two independent findings; rape and premeditated murder. The offense rendering the accused death eligible, therefore, is not satisfied unless the Commonwealth first proves that sexual intercourse was procured by force and without the victim's consent. *Id.*

While the force element may be inseparable from the force necessary to effectuate the murder where the murder in fact occurs literally "in the commission" of the rape, the more likely rape-murder scenario would require an independent showing of force. This is because a common scenario includes some temporal delay between the sexual act and the murder. Defendants frequently testify that consensual intercourse was followed by a homicide. *Hoke*, 377 S.E.2d at 598. Such delay between intercourse and the killing should require the Commonwealth to establish force independent from that required to effectuate the murder. Without the victim present to testify, the element of force necessary to obtain a rape conviction must be based on the totality of the facts and circumstances. *Tuggle*, 323 S.E.2d at 550; *Justus*, 266 S.E.2d at 93. Logically, the force element of rape should become more difficult to prove in cases where the murder *in fact* occurs "subsequent to" the rape. The Commonwealth must show that prior to the murder, sexual intercourse was procured by force and without the consent of the victim. *Justus*, 266 S.E. 2d at 93.

The fact that the Commonwealth has established penetration and a subsequent murder should not automatically justify a conviction of capital murder. The evidence may suggest that the killing resulted from a quarrel in the heat of passion during or following a consensual act. In *Tuggle*, the court stated that "when the Commonwealth relies solely upon circumstantial evidence . . . it is not sufficient that the facts and circumstances proven are consistent with the accused's guilt; they also must be inconsistent with every reasonable hypothesis of his innocence." *Tuggle* 323 S.E.2d at 549; *Strawderman v. Commonwealth*, 200 Va. 855, 858, 108 S.E.2d 376, 379 (1959). Nevertheless, the *Tuggle* court found the evidence sufficient to establish force, asserting that "while the Commonwealth's evidence must exclude all reasonable hypothesis of

innocence, the hypotheses which must be excluded are those which flow from the evidence itself, and not from the imagination of the defense counsel." *Tuggle*, 323 S.E.2d at 550; *Cook v. Commonwealth*, 226 Va. 427, 433, 309 S.E.2d 325, 329 (1983). In holding that force was sufficient to establish rape, the court stated that "Havens [the victim] was subject to a most brutal and heinous sexual assault. The extensive bruises in the victim's body, the vicious bite on her breast, the forcible anal sodomy, and the fatal gunshot wound all attest to that." *Tuggle* 323 S.E.2d at 550. Had the court rested its decision exclusively on the evidence of extensive bruising and the bite on the breast, the decision would have been consistent with the announced standard for evaluation of circumstantial evidence. This would be true even considering the fact that the victim voluntarily left a social gathering with the defendant. However, the court's holding suggests that the force used to inflict the fatal wound may be considered in establishing rape. Such reasoning is circular: 1) the commonwealth must prove force to establish rape; 2) rape is essential to a finding of capital murder; 3) force required to effectuate the murder may indicate forceful sexual intercourse, rape.

The Virginia Supreme Court has sustained other capital convictions based on weak evidence of forcible intercourse. In *Justus v. Commonwealth*, the victim was killed, and the defendant never admitted forcible intercourse. *Justus*, 266 S.E.2d at 89. The victim's nude body revealed death resulted from a series of gunshot wounds to the face and head. The victim in *Justus* was pregnant at the time she was murdered. In finding force, the court held that:

> The advanced state of pregnancy . . . rendered remote the possibility that the victim would have had intercourse voluntarily with anyone, and a reasonable explanation for the semen found in and on her body was that it was the result of a rape committed during the course of killing, an act (the killing) which Justus has admitted.

Justus, 266 S.E.2d at 93. The opinion made no additional references to physical or forensic evidence of force.

In *Waye v. Commonwealth*, the victim was murdered pursuant to a brutal assault with a knife. *Waye*, 251 S.E.2d at 205. Though the court found that penetration accompanied by injury to the victim's breasts and buttocks was sufficient to establish force, the brutality of the murder was undoubtedly a deciding factor in whether or not to sustain the conviction. *Id.* at 209.

On appeal, the court will view the evidence and all reasonable inferences in the light most favorable to the Commonwealth, and the jury's judgment will be affirmed unless plainly wrong or without evidence to support it. *Tuggle*, 323 S.E.2d at 549. Yet, at the trial level, it appears in a capital context that juries may be easily moved by graphic depictions of violent murders, and that the requirement the jury consider evidence of both homicide and rape may color its evaluation of the rape evidence. Also, while the death of the homicide victim potentially deprives the prosecution of direct evidence of rape, it also deprives defense the opportunity for impeachment of that evidence or of directly exculpatory testimony. Since capital convictions are so rarely overturned by the Supreme Court of Virginia, jury instructions should be proposed making it clear that the force, however excessive, used to effectuate the killing is not automatically sufficient proof of the force element required to prove the crime of rape. More specifically, force used in the commission of the murder is not necessarily the same as that used to induce sexual intercourse. Rather, intercourse may indeed be consensual.

A further instruction should require the jury *first* consider whether defendant is guilty of rape. If the jury is unable to find the defendant guilty of rape beyond a reasonable doubt, then the jury must not even consider the offense of capital murder. Only upon an affirmative finding of rape should the jury consider whether defendant committed premeditated murder in the commission of or subsequent to a rape.

The commission of a murder during or subsequent to the independent felony of rape renders an accused death eligible. The Commonwealth relies upon this restrictive statute to "buttress" the constitutionality of the vague aggravating factors used thereafter to support sentences of death. *See* Falkner, "The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor", 2 *Capital Defense Digest* 19 (Nov. 1989); *Giarratano v. Procunier*, 891 F.2d 483 (1989). The capital murder statute does less to meaningfully narrow the class of death eligible defendants if it is interpreted to permit findings of guilt upon proof of murder and sexual intercourse.

(c) Abduction with intent to extort money for a pecuniary benefit, or with the intent to defile as predicate offenses:

Section 18.2-47 of the Virginia Code sets out the elements of the crime of abduction:

> Any person, who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes the person of another, with the intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority, or institution lawfully entitled to his charge, shall be deemed guilty of 'abduction'. . .

Not only is this statute broadly drawn, it has been broadly construed and, as will be seen from the cases noted below, abduction may be found to accompany a host of other offenses.

The physical detention of a person by a person, with the intent to deprive the former of his or her personal liberty, by force, intimidation, or deception, without any asportation of the victim from one place to another place, is sufficient to support a conviction for abduction. *Scott v. Commonwealth*, 228 Va. 519, 526, 323 S.E.2d 572, 579 (1984).

Abduction under § 18.2-47 can occur by 1) acts aimed at the victim of the abduction (the usual method of abduction) or 2) acts aimed at the custodian of the victim of the abduction. *Bennett v. Commonwealth*, 8 Va. App. 228, 380 S.E.2d 26 (1989) (court finding defendants guilty of abduction as they acted without excuse or justification and with the intent to conceal or withhold a child from one lawfully entitled to the charge of the child). In essence, the typical abduction occurs by 1) force, intimidation *or* deception *and* 2) asportation *or* detention(and practically any detention will suffice) (emphasis added). *See generally, Scott* at 526 (finding force or intimidation element in defendant's testimony that he intended to force his victim to remain where she was long enough to watch him shoot himself); *Diehl v. Commonwealth*, ___ Va. App. ___, 385 S.E.2d 228, 231 (1989) (abduction charge sustained when evidence revealed the defendant-parents shackled one of their children to a bus for several weeks); *Simms v. Commonwealth*, 2 Va. App. 614, 617, 346 S.E.2d 734 (1986) (holding that abduction was established by evidence showing the defendant-rapist had deprived his victim of liberty by use of force and threats of violence); *Coram v. Commonwealth*, 3 Va. App. 623, 352 S.E.2d 532 (1987) (holding that the abduction was separate and apart from, and not just incidental to, the crime of attempted rape, when the evidence revealed that the defendant dragged his victim to an unlighted place, an asportation which decreased the possibility of detection); *Hawks v. Commonwealth*, 228 Va. 244, 247, 321 S.E.2d 650 (1984) (holding that evidence of rape was relevant to the abduction charge and to the idea

that he intended to deprive his victim of personal liberty); *Barnett v. Commonwealth*, 216 Va. 200, 202, 217 S.E.2d 828 (1975) (holding the intimidation or force element may be achieved by physical violence or the threat of it: defendant threatened to shoot his victim if she did not get in his car and she got in the car after believing she heard the "click" of a gun); *Brown v. Commonwealth*, 230 Va. 310, 314, 337 S.E.2d 711 (1985) (holding that the initial detention, through assaults and threats of violence, was different in time and place, and in "quantity and quality the acts of force and intimidation employed in the abduction were separate and apart from the restraint inherent in the commission of rape"); *Cf., Johnson v. Commonwealth*, 221 Va. 872, 879, 275 S.E.2d 592 (1981) (holding a conviction for abduction not supported by evidence that defendant broke into victim's apartment and grabbed her and then fled, because he did this in furtherance of sexual advances and he did not intend to deprive his victim of her personal liberty, "although such a deprivation did occur momentarily").

Like robbery in the capital context, § 18.2-47 abduction is subject to broad judicial interpretation. As noted above, practically any detention, no matter how slight, may constitute an abduction, even without the element of asportation. *Scott* at 524. The legislature, however, has provided that only a much narrower range of abduction is applicable to capital cases.

A willful, deliberate and premeditated killing of "any person in the commission of abduction, as defined in §18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit" is an offense of capital murder under Virginia Code § 18.2-31(1). Also, § 18.2-31(8) states that the

> . . . willful, deliberate and premeditated killing of a child under the age of twelve years in the commission of abduction as defined in § 18.2-48 when such abduction was committed with the intent to extort money or a pecuniary benefit, or with the intent to defile the victim of such abduction.

Section 18.2-48 abduction includes four aggravating elements that elevate § 18.2-47 abduction to § 18.2-48 abduction: intent to extort money, or pecuniary benefit, intent to defile, and female under sixteen years of age for the purpose of concubinage or prostitution.

To elevate a homicide to capital murder under § 18.2-31(1) and §18.2-31(8), there must have been a § 18.2-48 abduction. Thus though basic abduction is broadly construed, the legislature has identified only two situations where certain types of abduction will support a capital charge under § 18.2-31(1) and three situations to support a capital charge under § 18.2-31(8). In other words, the statutory language of § 18.2-31 permits a capital murder charge only when a willful, deliberate and premeditated killing has occurred in the commission of *some* of the particular types of abduction set out in § 18.2-48.

Section 18.2-31(1) makes reference to extortion(for money or a pecuniary benefit) as the only type of abduction that may support a capital murder charge for the killing of "any person." The defendant need not successfully extort, but he must at least intend to extort. Section 18.2-31(8) includes all of the aggravators, except abduction of a minor female for immoral purposes, to support a capital murder charge for the killing of a child under twelve. Abduction, therefore, is broadly construed in the non-capital context and the court typically will find a force or intimidation element, no matter how slight, and a detention, no matter how brief. When abduction is used as a capital aggravator, abduction is defined more narrowly as the legislature has mandated that only particular types of abduction will support capital charges (the financial types under § 18.2-31(1) and the financial types plus intent to defile under § 18.2-31(8).

There have been to date no capital murder prosecutions under either § 18.2-31(1) or § 18.2-31(8). Consequently, it is unknown whether the Supreme Court of Virginia, as it has done with robbery, will place a different gloss on the construction of the non-capital offense when it is used to elevate murder to capital murder.

WHERE DO WE GO FROM HERE? - POST-CONVICTION REVIEW OF DEATH SENTENCES

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The trial of capital cases should be undertaken with the knowledge that there are eight further steps possible for judicial review of a conviction and sentence of death. However, the protections offered by such extensive review may become virtually nonexistent if trial attorneys do not keep in mind the law governing these further proceedings. Likewise, mistakes in representation of capital defendants at appellate and collateral stages in the state system may become fatal to further efforts to secure meaningful review in the federal system. This article is but a primer, designed only to introduce counsel to some of the issues important at each step of the post-conviction process.[1]

DIRECT APPEAL:

In Virginia after the trial court enters a final judgment sentencing an individual to death, that decision is automatically appealed to the Supreme Court of Virginia.[2] On direct appeal, the Supreme Court of Virginia must 1) review the assignments of errors, 2) determine if the trier of fact imposed the death sentence in an arbitrary or capricious manner and 3) decide if the death sentence is "excessive or disproportionate" compared to the penalty in similar cases.[3]

The severe and irreversible nature of the death penalty requires "a greater degree of reliability when it is imposed."[4] However, the safeguards which promote this greater degree of reliability only apply during the trial and direct appeal.[5] The U.S. Supreme Court has made this clear: . . . [I]t must be remembered that the direct appeal is the primary avenue of review of a conviction or sentence, and death penalty cases are no exception.[6]

Virginia has a contemporaneous objection rule[7] applicable to trials and appeals.[8] Under this rule an appellate court will not consider any assignment of error unless:

1. The objection was made with reasonable certainty at the time of the ruling;[9]

2. The grounds for the objection were stated at the time of the ruling.[10]

The purpose of the rule is to allow the trial court the first opportunity to decide questions of evidence and procedure.[11] Objections not made in conformity with this rule will not be considered, "unless for good cause shown"[12] or "in the interest of justice."[13] Good cause includes no previous opportunity to object.[14] "In the interest of justice" means