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ing the Violent Criminal Offender Through DNA Typing Profiles - A National Database System Concept, in DNA Fingerprinting: Approaches and Applications 356 (Burke, Dolf, Jeffreys & Wolff ed. 1991).

[129]Sherman, note 126 *supra*.

[130]*United States v. Jacobetz*, 91-1125; *See also* Sherman, *DNA Evidence Dispute Escalates*, The National Law Journal, page 3 (January 20, 1992).

[131]*United States v. Yee*, 91-3608; *See also* Sherman, *DNA Evidence Dispute Escalates*, The National Law Journal, page 3 (January 20, 1992).

[132]Counsel considering such a challenge to the admissibility of DNA evidence should read the following article: Hymer, *DNA Testing in Criminal Cases: A Defense Perspective*, in Forensic DNA Technology 181 (Farley and Harrington ed. 1991).

[133]*See* notes 16 and 17 *supra*.

[134]*See* note 13 *supra*.

[135]*Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988).

[136]An excellent text providing useful case authority for such motions is Giannelli & Imwinkelreid, *Scientific Evidence*, The Michie Co. (1986).

[137]*United States v. Noble*, 422 U.S. 225, 238-39 (1975).

DRUG FELONY CAPITAL MURDER IN VIRGINIA

BY: SHARRON LAMOREAUX

In 1990, Virginia amended its capital murder statute, Virginia Code § 18.2-31, by adding subdivision 9. The amendment provides that a killing during and for the purpose of furthering a drug transaction constitutes capital murder, punishable by the death penalty or life imprisonment. It is important for attorneys defending clients faced with murder and/or drug charges to be aware of the new provision and of its meaning. This article explores the structure and scope of § 18.2-31(9) and compares it to a somewhat similar federal statute.

Statutory Structure

The Virginia drug felony capital murder provision involves three separate code sections. Virginia Code § 18.2-31(9) establishes that capital murder includes a "willful, deliberate, and premeditated killing of any person in the commission of or attempted commission of a violation of § 18.2-248, involving a Schedule I or II controlled substance, when such killing is for the purpose of furthering the commission or attempted commission of such violation." Without § 18.2-31(9), a killing during a violation of § 18.2-248 could not be classified as capital murder solely because of that violation.

Section 18.2-248, violation of which is the felony predicate for § 18.2-31(9), addresses the distribution of drugs. Under this section, it is illegal to "manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance" without authorization. Maximum punishments for violations vary with the nature of the substances involved. Trafficking in less serious drugs is a misdemeanor, punishable by jail time of not more than one year and/or a fine of not more than $2,500.[1] A violation of § 18.2-248 involving more serious drugs is punishable by five to forty years for the first offense and as much as a life sentence for subsequent convictions.

Controlled substances are classified as to their degree of seriousness by five schedules in The Drug Control Act, codified at Virginia Code § 54.1-3400 *et sequitur*. Only substances in Schedules I and II are pertinent to the drug felony murder provision — murders involving substances from Schedules III, IV, and V are not provided for in § 18.2-31. Schedules I and II include substances that have a high potential for abuse, such as heroin, mescaline, methaqualone, morphine, and cocaine.[2]

Statutory Breadth: Picking the Correct Defendant

Determining the scope of § 18.2-31(9) requires examining several aspects of § 18.2-31(9) itself and of § 18.2-248. The role of The Drug Control Act in this determination, although important for purposes of knowing which substances are in Schedules I and II and which are not, is fairly straightforward and consequently will not be further considered in this article.

It should first be noted that first degree murder is necessary for § 18.2-31(9) to apply. As with the other subsections of the capital murder statute, subsection 9 requires a "willful, deliberate, and premeditated" killing. Although the usual rule that premeditation need not exist for any specified period of time prior to the killing applies,[3] still the intent to kill must be formed before or at the time of the murder.[4] An unintentional or grossly negligent or malicious killing that occurs during a drug transaction, therefore, would not be covered by the statute.

A second factor limiting the scope of the drug felony murder provision arises from § 18.2-248. Section 18.2-248 is a specific intent law —it requires manufacture, distribution, or possession of drugs or imitation drugs with intent to manufacture or distribute the same. Committing a prohibited act without having the prohibited intent is not a violation of this section and thus not a basis for a capital murder charge. For example, processing or transferring an illegal substance, thereby committing a prohibited act, without being aware of its illegality and thus not having the prohibited intent is not a violation. A murder to facilitate such an act would therefore not qualify as capital murder.

Furthermore, simple possession of a drug is also not encompassed by § 18.2-248.[5] Although possession may violate another Virginia law,[6] it is no violation of § 18.2-248 and thus again cannot be a basis for a capital murder charge. Apparently, then, a killing to further mere possession of a controlled substance, without intent to subsequently transfer the substance, is not chargeable as capital murder.

Finally, the last clause of § 18.2-31(9) is significant. The clause specifies that a murder during the commission or attempted commission of a § 18.2-248 violation must be "for the purpose of furthering the commission or attempted commission of such violation." This phrase on its face seems to narrow the applicability of § 18.2-31(9) to premeditated murders committed in the course of an illegal drug transaction expressly to advance that transaction. Premeditated murders committed during drug transactions but not to aid or advance the transactions would appear to be outside the capital murder provision. Because the requirement is "for the purpose of furthering," however, murders undertaken to aid the drug

transaction but which fail in their purpose, either not aiding or actually hindering the affair, appear to be included.

A Federal Comparison

The Virginia drug felony capital murder provision is somewhat similar to a recent U.S. statute allowing the imposition of the death penalty for certain murders that occur, among other situations, in or for drug transactions.[7] The Virginia provision may have been motivated by the federal statute, which was passed in 1988. There are a few significant differences between the two pieces of legislation that are worth exploring here.

The first difference is that whereas the federal statute is aimed at participants in criminal organizations and drug traffickers who procure murder as well as the actual perpetrators, the Virginia provision encompasses only the latter. Absent other provisions, drug kingpins or dealers who commission murders but do not carry out the actual killings themselves could not be charged with capital murder in Virginia. This is troubling if such individuals are considered to be as culpable as their agents. Neither Virginia's general conspiracy statute[8] nor its drug conspiracy statute[9] allow conspirators to a drug-related murder to be charged with capital murder. Furthermore, Virginia's "triggerman" statute provides that accessories and accomplices to murder who do not actually kill can generally only be charged and convicted of first degree murder rather than capital murder.[10] However, the murder for hire provision of Virginia's capital murder statute, although not crafted with drug rings or crime groups in mind, would probably encompass drug kingpins or others who commission murders.[11]

A second difference between the U.S. and Virginia statutes is that Virginia requires a killing in the commission of a drug transaction to be "for the purpose of furthering" the drug transaction. The U.S. statute has no such requirement and it appears that any intentional killing in a drug deal is punishable by the death penalty. The Virginia legislature, had it wanted to sweep all premeditated killings committed during drug transactions within the terms of the statute, especially with the federal statute available as an example, could have omitted the purpose phrase. If § 18.2-31(9) ended after "a Schedule I or II controlled substance," premeditated killings committed during drug transactions would have been capital murders. In fact, that is how the new subsection originally read when passed by the House of Delegates. The Virginia Senate, however, amended the provision, adding "when such killing is for the purpose of furthering the commission or attempted commission of such violation."[12] The House passed the amended provision,[13] which was signed by Governor Wilder on April 9, 1990, effective July 1 of that year.[14] The amendment indicates that the legislature intended to narrow the provision to impose death penalty eligibility only upon those who kill to further or advance ongoing drug deals.

The Bottom Line

In assessing the reach of a newly enacted statute, it is frequently useful to consider some specific situations. For example, consider a drug deal in which the buyer pays for the substance but the seller refuses to surrender the goods. Buyer kills the seller and consumes the drugs. He should not be charged with capital murder under § 18.2-31(9) because possession of a controlled substance is not a violation of § 18.2-248 as required. In addition, such a murder might be second degree and for that reason also not encompassed by drug felony capital murder.

Consider also a situation in which a seller, about to consummate a deal, suddenly realizes that the purchaser is an undercover agent. The seller kills the agent to prevent his own arrest. The murder here **thwarts** the drug transaction, rather than furthering it as required by § 18.2-31(9). Can the seller be charged with drug felony capital murder? The situation is not encompassed by the words of the statute but clearly is within the provision's spirit.

Third, the head of a drug ring is feeling the pressure of competition by a rival organization. He orders an underling to kill a particularly troublesome member of the rival gang. The underling successfully completes the task. Neither individual could be charged with drug felony capital murder because the killing did not occur during a drug transaction. The drug ring boss is further insulated from prosecution under this provision because he did not do the actual killing. Both might be susceptible to capital murder charges under the murder for hire provision.

Finally, an individual processes cocaine intending to sell it upon completion. During a police raid upon his establishment, he kills a police officer. He could be charged with drug felony capital murder.

Section 18.2-31(9) is well written and fairly clear. A careful reading of the provision and its predicate statutes reveals the requirements for prosecution for drug felony capital murder. Most likely situations are easily categorized as encompassed by or not encompassed by the provision, although the status of some, such as the undercover agent hypothetical, remains unclear. The most important thing to know about § 18.2-31(9) is that it classifies some but not all drug-related homicides as capital murder. Whether such a killing is capital murder will depend on the facts of each case.

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[1] Va. Code Ann. § 18.2-11 (1991).

[2] Va. Code Ann. §§ 54.1-3446 (1991), 54.1-3448 (1991).

[3] *Bailey v. Commonwealth*, 191 Va. 510, 62 S.E.2d 28 (1950); *Akers v. Commonwealth*, 216 Va. 40, 216 S.E.2d 28 (1975); *Hairston v. Commonwealth*, 217 Va. 429, 230 S.E.2d 626 (1976); *Smith v. Commonwealth*, 220 Va. 696, 261 S.E.2d 550 (1980).

[4] *Hairston*, 217 Va. at 432, 230 S.E.2d at 628; *Smith*, 220 Va. at 700, 261 S.E.2d at 553.

[5] Possession of a controlled substance is itself a specific intent crime. To be convicted, an accused must be shown to have intentionally possessed the substance while knowing of its presence and character. *See Clodfelter v. Commonwealth*, 218 Va. 619, 238 S.E.2d 820 (1977).

[6] In fact, possession of controlled substances violates Va. Code Ann. § 18.2-250 (1991).

[7] 21 U.S.C. § 848(e)(1)(A) reads:

> (A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment ... or may be sentenced to death;

Section 841(b)(1)(A) authorizes penalties of up to life imprisonment for persons convicted of dealing in large quantities of drugs. If death or serious injury occurs as a result of the drug dealing activity, minimum sentence is twenty years.

Section 960(b)(1) details similar penalties for those convicted of importing and exporting a controlled substance.

[8] Va. Code Ann. § 18.2-22 (1991) currently provides that, "Every

person who so conspires to commit an offense which is punishable by death shall be guilty of a Class 3 felony."

[9] Va. Code Ann. § 18.2-256 stipulates that conspiracy to commit any offense defined in Chapter 7, Article 1, which includes § 18.2-248, is punishable to no greater extent than the maximum punishment prescribed for the offense. The maximum for a violation of § 18.2-248 is life imprisonment. *See supra* Statutory Structure.

[10] Va. Code Ann. § 18.2-18 (1991). Murder for hire is excepted from the rule.

[11] Va. Code Ann. § 18.2-31(2) (1991) stipulates that, "the willful, deliberate, and premeditated killing of any person by another for hire," is capital murder. Section 18.2-18 allows hirors to be charged with and convicted of capital murder.

[12] 1990 Journals of the Senate of Virginia 1069 (1990).

[13] 1990 Journal of the House of Delegates of the Commonwealth of Virginia 1635 (1990).

[14] *Id.* at 1965-66.

OPPOSING PEREMPTORY CHALLENGES UNDER *BATSON*

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Introduction

Since the ratification of the fourteenth amendment to the United States Constitution in 1868, the United States Supreme Court has addressed purposeful racial discrimination in the selection of jurors. For example, in *Strauder v. West Virginia*,[1] the Court invalidated a state statute which mandated that only white men could serve as jurors. More recently, the Court stated, "[t]he Constitution requires . . . that we look beyond the face of the statute defining juror qualifications and also consider **challenged selection practices** to afford `protection against action of the State through its administrative officers in effecting the prohibited discrimination.'"[2] In *Swain v. Alabama*,[3] the Court held that the equal protection clause of the fourteenth amendment could be violated if the State's exercise of peremptory challenges excluded members of the defendant's race.

In *Swain*, "[t]he Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control and the constitutional prohibition on exclusion of persons from jury service on account of race."[4] "To preserve the peremptory nature of the prosecutor's challenge, the Court in *Swain* declined to scrutinize his actions in a particular case by relying on a presumption that he properly exercised the State's challenges."[5] To overcome this presumption, the Court held that a defendant could construct a prima facie case by showing "evidence that a prosecutor **'in case after case**, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries.'"[6] Although the prosecutor in *Swain* used peremptory challenges to strike all six eligible blacks on the jury venire, resulting in an all white jury, the Court held that the defendant "offered no proof of the circumstances under which prosecutors were responsible for striking black jurors **beyond the facts of his own case.**"[7]

In *Batson v. Kentucky*,[8] the Court reaffirmed that purposeful discrimination based on race in the selection of jurors violates the Equal Protection Clause. In addition, the Court stated, "prosecutors' peremptory challenges are now largely immune from constitutional scrutiny" due to the "evidentiary formulation" under *Swain* which "reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause."[9] Therefore, the Court held, "a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection **in his case.**"[10] The Court stated that the defendant

> first must show that he is a member of cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant **is entitled to rely** on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant **must show** that these facts and any other relèvant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.[11]

In evaluating the defendant's case, "the trial court should consider all relevant circumstances" such as a "pattern of strikes" or "the prosecutor's questions or statements during *voir dire* and in exercising his challenges."[12]

Once the trial judge determines that the defendant has made a prima facie case, the burden of proof then shifts to the prosecutor to "articulate a neutral explanation related to the particular case to be tried."[13] The Court stated that the prosecutor cannot rebut the defendant's prima facie case "by stating merely that he challenged jurors of the defendant's race on the assumption-or his intuitive judgement-that they would be partial to the defendant because of their shared race," nor "merely by denying that he had discriminatory motive" or that he acted in good faith.[14] "[T]he prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges."[15] But, the Court stated, "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause."[16] Once the prosecutor articulates a neutral reason for a disputed peremptory challenge, the trial court judge then must determine whether or not the peremptory challenge was discriminatory.

The trial court's determination "is a finding of fact" which "a reviewing court ordinarily should give . . . great deference."[17] The Court also stated, "[i]n light of the variety of jury selection practices followed in our state and federal courts, we make no attempt to instruct these courts how best to implement our holding" and, as to remedies, it stated, "we express no view on whether it is more appropriate in a particular case . . . for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire."[18] Thus, the Court gave trial judges wide latitude in the application of the *Batson* rule to find purposeful discrimination in peremptory challenges.

It is also important that the *Batson* Court noted that purposeful discrimination in the selection of jurors not only deprives the defendant