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Expansion of Section 18.2-31 of the Virginia Code

Hammad S. Matin*

Introduction

When the General Assembly of Virginia enacted section 18.2-31¹ in 1975, only three crimes were punishable as capital offenses in the Commonwealth of Virginia. Within the next twenty years, the General Assembly greatly enlarged the scope of section 18.2-31 by making several more crimes punishable by death and by expanding the scope of existing capital offenses. The systematic growth and expansion of section 18.2-31 has resulted in an increase in the number of capital offenses from three to twelve² as of 1999.³ This article will trace and assess the statutory expansion of section 18.2-31 from its enactment in 1975 to the present.

In 1975, section 18.2-31⁴ included only:

- (a) the wilful, deliberate and premeditated killing of any person in the commission of abduction, as defined in section 18.2-48, when such abduction was committed with the intent to extort money, or a pecuniary benefit;
- (b) the wilful, deliberate and premeditated killing of a human being by another for hire; and
- (c) the wilful, deliberate and premeditated killing by an inmate in a penal institution as defined in section 53-19.18, or while in the custody of an employee thereof.

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1. 1975 Va. Acts, ch. 14, 15.

2. See *Payne v. Commonwealth*, 509 S.E.2d 293, 300 (Va. 1999) (holding that some subsections contain multiple offenses and thus contain more than one form of capital murder).

3. VA. CODE ANN. § 18.2-31 (Michie 1999).

4. 1975 Va. Acts, ch. 14, 15.

I. Va. Code Ann. Subsection 18.2-31(1): The Willful, Deliberate, and Premeditated Killing of Any Person in the Commission of Abduction, as Defined in Section 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

The first subsection of section 18.2-31, enacted on February 14, 1975, made the willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in section 18.2-48,⁵ when such abduction was committed with the intent to extort money or a pecuniary benefit, one of the three original capital offenses in Virginia.⁶ The murder victim in a subsection 18.2-31(1) offense can be "any person."⁷ This means that the victim of the murder can be someone other than the victim of the aggravated abduction predicate offense.⁸ The willful, deliberate, and premeditated killing must also be "in the commission of" the abduction.⁹ A killing "in the commission of" can take place before, during, or after the predicate offense.¹⁰

The predicate offense in subsection 18.2-31(1) is an abduction as defined in section 18.2-48. This section makes it a felony to abduct with the intent to extort money or pecuniary benefit, or to abduct with the intent to defile the abducted victim, or to abduct any child under sixteen years of age for the purpose of prostitution.¹¹ Abduction as a predicate to capital murder under subsection 18.2-31(1) does not include the abduction of any child for prostitution purposes.¹² Abduction is defined in section 18.2-47 as "[a]ny 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"¹³ In order to commit the abduction predicate under section 18.2-48, an individual must commit abduction as defined in section 18.2-47 and intend to extort money or a pecuniary benefit or intend to defile the victim of the abduction.

The Virginia courts have broadly interpreted the intent requirements necessary to establish the underlying offense of abduction for purposes of applying subsection 18.2-31(1). The capital murder requirement of intent

5. VA. CODE ANN. § 18.2-48 (Michie 1999).

6. 1975 Va. Acts, ch. 14, 15.

7. VA. CODE ANN. § 18.2-31(1) (Michie 1999).

8. *Harward v. Commonwealth*, 330 S.E.2d 89, 91 (Va. 1985).

9. § 18.2-31(1).

10. *Harward*, 330 S.E.2d at 91.

11. VA. CODE ANN. § 18.2-48 (Michie 1999).

12. § 18.2-31(1).

13. § 18.2-48.

to extort money or a pecuniary benefit does not require the abductor to actually succeed in realizing his or her desired ends.¹⁴ Only the intent to do so is required.¹⁵ Although the primary objective in section 18.2-48 is to punish traditional ransom killing, the courts have established an expansive definition of the "extort money or pecuniary benefit" language in the statute.¹⁶ The requisite intent to extort money or pecuniary benefit has been found where the defendant desired to obtain cancellation of a pre-existing debt,¹⁷ used hostages as human shields to facilitate escape from a robbery scene,¹⁸ and even where the defendant obtained a free ride from the victim.¹⁹

The groundwork for the statutory expansion of the original subsection 18.2-31(1) came from the General Assembly of Virginia's enactment of subsection 18.2-31(h) in 1985.²⁰ The subsection made "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" a capital offense.²¹ Subsection 18.2-31(h) was strikingly similar to subsection 18.2-31(1); subsection (h) in fact only added an offense of abducting and intending to sexually molest a child under twelve. The "killing of a child under the age of twelve years in the commission of abduction" language most likely meant that the victim of the abduction must also be the victim of the killing.²²

In 1996, the General Assembly of Virginia combined the two abduction subsections and by so doing expanded the capital murder statute.²³ The General Assembly struck the "killing of a child under the age of twelve years" language of subsection eight and incorporated the "with the intent to defile the victim of such abduction" phrase into subsection 18.2-31(1).²⁴ The 1996 amendment expands the defilement or sexual molestation intent requirement to any abductee and, thus, wholly incorporates the former child abduction subsection into subsection 18.2-31(1). The subsection also allows for the killing of "any person" in the commission of the abduction

14. *Barnes v. Commonwealth*, 360 S.E.2d 196, 201 (Va. 1987).

15. *Id.*

16. ROGER D. GROOT, *CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA* 5 (4th ed. 1998).

17. *See Kent v. Commonwealth*, 183 S.E. 177, 177-78 (Va. 1936).

18. *See Cortner v. Commonwealth*, 281 S.E.2d 908, 910 (Va. 1981).

19. *See Krummert v. Commonwealth*, 43 S.E. 2d 831, 833 (Va. 1947).

20. 1985 Va. Acts, ch. 428.

21. *Id.*

22. *Harward v. Commonwealth*, 330 S.E.2d 89, 91 (Va. 1985).

23. 1996 Va. Acts, ch. 876.

24. *Id.*

predicate offense. There is no longer any requirement that the abducted child be the person slain.

The current text of subsection 18.2-31(1) is set out in the heading to this section.

II. Va. Code Ann. Subsection 18.2-31(2): The Willful, Deliberate, and Premeditated Killing of Any Person by Another for Hire

The second of the three original subsections in the 1975 enactment of section 18.2-31 made the willful, deliberate, and premeditated killing of a human being by another for hire a capital offense.²⁵ This subsection was the first in section 18.2-31 to make someone other than the slayer eligible for the death penalty. In a subsection 18.2-31(2) crime, the Commonwealth can seek capital murder convictions for any party to the slaying²⁶ because section 18.2-18 allows the actual killer, a principal in the second degree, or an accessory before the fact to be convicted of capital murder.²⁷ The person who hires the killer will most likely be charged with capital murder under subsection 18.2-31(2) as an accessory before the fact. To convict, the Commonwealth must prove the commission of the crime by the principal, the accessory's absence at the commission of the offense, and that prior to the crime the accessory was involved as an instigator, advisor, or contriver.²⁸ The person who hires the killer may be a principal in the second degree if that person is present at the crime's commission and either commits an overt act such as inciting or advising in the commission of the crime or shares in the perpetrator's criminal intent.²⁹

The murder must of course be for hire. The requirements of the "for hire" language are not clear³⁰ but generally, something of value must be promised for the killing. For example, the "for hire" predicate offense can be satisfied by a promise that the killer would receive part of the victim's life insurance proceeds.³¹

The General Assembly amended subsection 18.2-31(2) on March 29, 1977 by replacing the killing of "a human being" language with the killing of "any person."³² This change was most likely an effort by the General Assembly to implement consistency in the statutory structure. Both subsections two and three were amended in 1977, by inserting "any person" into

25. 1975 Va. Acts, ch. 14, 15.

26. VA. CODE ANN. § 18.2-18 (Michie 1999).

27. VA. CODE ANN. § 18.2-31(10) (Michie 1999).

28. McGhee v. Commonwealth, 270 S.E.2d 729, 731 (Va. 1980).

29. See Moehring v. Commonwealth, 290 S.E.2d 891, 892 (Va. 1982).

30. GROOT, *supra* note 16, at 276.

31. See Fisher v. Commonwealth, 374 S.E.2d 46, 48 (Va. 1988).

32. 1977 Va. Acts, ch. 478.

the statute. This made them consistent with subsections one and four of section 18.2-31.

The current text of subsection 18.2-31(2) is set out in the heading to this section.

III. Va. Code Ann. Section 18.2-31(3): The Willful, Deliberate, and Premeditated Killing of Any Person by a Prisoner Confined in a State or Local Correctional Facility as Defined in Section 53.1-1, or While in the Custody of an Employee Thereof

The third subsection of the 1975 capital murder statute made the willful, deliberate, and premeditated killing by an inmate in a penal institution as defined in section 53-19.18, or while in the custody of an employee thereof, a capital offense.³³ A penal or correctional institution in section 53-19.18 included every prison, prison camp, prison farm, or correctional field unit that was established with state funds as well as every jail, jail farm, lock-up, or other place of detention owned or operated by any political subdivision of the Commonwealth.³⁴ A prisoner who murders any person while in the custody of an employee of a penal institution has also committed a capital offense under section 18.2-31(3).³⁵ The "in the custody of an employee" language most likely refers to guards or correctional agents who transport or supervise the prisoners when outside the correctional facility. The Supreme Court of Virginia has declined to rule on the qualifications and requirements necessary to either establish one as an employee of a correctional facility or his ability to have custody of the prisoner.³⁶

The first statutory amendment to section 18.2-31(3), like subsection 18.2-31(2), occurred on March 29, 1977, when the General Assembly added the killing "of any person" by an inmate to the subsection.³⁷ Before this amendment, the subsection did not specify a class of victims. The "any person" language was adopted to clarify the class of victims included in the subsection and also to maintain parallel statutory construction with subsections one and four. The 1977 amendment to subsection 18.2-31(3) made it clear that the subsection did not apply just to the killing of a guard by an inmate but a killing of anyone, including guards, visitors, employees, or other inmates. In attempting to clarify the statute, the amendment widened the scope of the capital offense in subsection 18.2-31(3).

The next amendment to subsection 18.2-31(3) occurred on April 12, 1982, in which the "a prisoner confined in a state or local correctional facility as defined in § 53.1-1" language replaced "an inmate in a penal

33. 1975 Va. Acts, ch. 14, 15.

34. 1974 Va. Acts, ch. 44, 45.

35. VA. CODE ANN. § 18.2-31(3) (Michie 1999).

36. *Mu'min v. Commonwealth*, 389 S.E.2d 886, 895 (Va. 1990).

37. 1977 Va. Acts, ch. 478.

institution as defined in § 53-19.18.³⁸ This amendment was necessitated by the repeal of section 53-19.18 and the enactment of its replacement, section 53.1-1.³⁹ Instead of one general definition of penal institution, section 53.1-1 distinguishes between local and state correctional facilities.⁴⁰ According to section 53.1-1, a local correctional facility means any jail, jail farm, or other place used for the detention or incarceration of adult offenders, excluding a lock-up.⁴¹ A state correctional facility means any correctional center or correctional field unit used for the incarceration of adult offenders established and operated by the Department of Corrections.⁴² The 1982 amendment to subsection 18.2-31(3), in which the General Assembly divided the term penal institution into two separate categories, local and state correctional facilities, illustrates the rare occasion in which the capital murder statute becomes narrower and more restrictive as a result of the amendment. The principal effect of the adoption of section 53.1-1 is to exclude the lock-up, juvenile facility, and half-way house from the scope of subsection 18.2-31(3) because they are neither local nor state correctional facilities.⁴³ Therefore the 1982 amendment to subsection 18.2-31(3) will no longer allow the premeditated killing of any person by a prisoner in a lock-up to be a capital offense.

There are a few cases that shed light on the meaning and boundaries of state and local correctional facilities. In *Mu'min v. Commonwealth*,⁴⁴ the defendant was a prisoner in a Virginia state correctional facility. The defendant was transported to a work detail under the supervision of a Virginia Department of Transportation employee.⁴⁵ The defendant left the work detail, entered a store, and killed the store clerk.⁴⁶ The defendant was convicted of capital murder under subsection 18.2-31(3) and challenged the conviction arguing that he was not confined in a state correctional facility when the murder was committed.⁴⁷ The Supreme Court of Virginia, in *dictum*, agreed with the trial judge's jury instruction that an inmate of a state correctional facility remains an inmate at all times until released from that status by the proper state authority.⁴⁸ The court relied on *Ruffin v. Com-*

38. 1982 Va. Acts, ch. 636.

39. *Id.*

40. *Id.*

41. VA. CODE ANN. § 53.1-1 (Michie 1999).

42. *Id.*

43. GROOT, *supra* note 16, at 275.

44. 389 S.E.2d 886 (Va. 1990).

45. *Mu'min v. Commonwealth*, 389 S.E.2d 886, 889 (Va. 1990).

46. *Id.* at 890.

47. *Id.* at 894.

48. *Id.* at 894 n.7.

monwealth,⁴⁹ in which the court held that a prisoner hired out to work on a railroad was still a convict in the penitentiary despite not being physically in the penitentiary when committing the murder.⁵⁰ Yet the *Mu'min* court refused to decide whether the defendant's subsection 18.2-31(3) conviction was proper because he was also convicted of capital murder under subsection 18.2-31(4).⁵¹ The reference to the *Ruffin* interpretation of a prisoner's status is therefore *dictum*.

The *Mu'min* court also misapplied *Ruffin*. The *Ruffin* court used the prisoner status concept in the context of interpreting a venue provision.⁵² Therefore, *Ruffin* should have no application to the current capital murder statute. The *Mu'min* court's flawed *dictum* also makes a portion of subsection 18.2-31(3) meaningless. If an individual, once incarcerated, is always a "prisoner confined in a state of local correctional facility" as the *Mu'min* court suggested, then the "while in the custody of an employee thereof" language is useless because the individual, regardless of his custody, will always be a prisoner confined in a correctional facility. Because it makes a part of subsection 18.2-31(3) meaningless, the *Mu'min* decision conflicts with the well-established rule of statutory construction that "it is the duty of the courts to give effect, if possible, to every word of the written law."⁵³

The current text of subsection 18.2-31(3) is set out in the heading to this section.

IV. Va. Code Ann. Section 18.2-31(4): *The Willful, Deliberate, and Premeditated Killing of Any Person in the Commission of Robbery or Attempted Robbery*

The first expansion of section 18.2-31 of the Virginia Code occurred just one year after the General Assembly enacted the section. As originally enacted, subsection 18.2-31(4) was the "willful, deliberate, and premeditated killing of any person in the commission of robbery while armed with a deadly weapon."⁵⁴ The murder victim in a subsection 18.2-31(4) offense can be "any person."⁵⁵ This means that the victim of the murder can be someone other than the victim of the robbery predicate offense.⁵⁶ The willful, deliberate, and premeditated killing must also be "in the commission of" the

49. 62 Va. (21 Gratt) 790 (1871).

50. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt) 790, 793-94 (1871).

51. *Mu'min*, 389 S.E.2d at 895.

52. *Ruffin*, 62 Va. (21 Gratt) at 792-93.

53. *Moyer v. Commonwealth*, No. 2959-97-2, 1999 WL 969706 (Va. Ct. App., Oct. 26, 1999) (internal quotes omitted) (quoting *Burnette v. Commonwealth*, 75 S.E.2d 482, 484-85 (Va. 1953)).

54. 1976 Va. Acts, ch. 503. The rape predicate was added at the same time.

55. VA. CODE ANN. § 18.2-31(4) (Michie 1999).

56. *Harward v. Commonwealth*, 330 S.E.2d 89, 91 (Va. 1985).

robbery. A killing "in the commission of" can take place before, during, or after the predicate offense.⁵⁷ The crime of robbery is not defined in the robbery statute, section 18.2-58 of the Virginia Code, because robbery in Virginia is a common law offense.⁵⁸ The common law definition of robbery is "the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation."⁵⁹ A killing "in the commission of robbery" raises issues about the nexus between the killing and the robbery. These issues are fully explored in another portion of this Symposium.⁶⁰

The first expansion of subsection 18.2-31(4) occurred on March 23, 1989, when the General Assembly added attempted robbery as a predicate offense for capital murder.⁶¹ The original impetus for including attempted robbery in subsection 18.2-31(4) came from the General Assembly's awareness of the Supreme Court of Virginia's decision in *Ball v. Commonwealth*.⁶² In *Ball*, the defendant entered a store armed with a gun and demanded money from an assistant store manager.⁶³ A struggle ensued in which the defendant shot and killed the assistant store manager.⁶⁴ The defendant failed to take anything but nonetheless was charged and convicted under subsection 18.2-31(4).⁶⁵ The Supreme Court of Virginia reversed the conviction because the defendant had committed an attempted robbery and did not kill in the commission of a completed robbery as was required by subsection 18.2-31(4).⁶⁶

The Supreme Court of Virginia's decision in *Ball*, with its correct construction of subsection 18.2-31(4), may have annoyed the General Assembly but it was not until the attempted robbery and murder of store clerk Muhammad Ashraf Chaudhary in Henrico County on January 27, 1987, that the General Assembly eventually amended subsection 18.2-31(4) to include attempted robbery.⁶⁷ Chaudhary was stabbed more than twenty times during an attempted robbery in which the four perpetrators failed to

57. *Id.*

58. *Pritchard v. Commonwealth*, 303 S.E.2d 911, 912 (Va. 1983).

59. *Id.* (quoting *Mason v. Commonwealth*, 105 S.E.2d 149, 150 (Va. 1958)).

60. Heather L. Necklaus, *Predicate Felonies in the Context of Capital Cases*, CAP. DEF. J. 37 (1999) (Part II this symposium).

61. 1989 Va. Acts, ch. 527.

62. 273 S.E.2d 790 (Va. 1981).

63. *Ball v. Commonwealth*, 273 S.E.2d. 790, 791 (Va. 1981).

64. *Id.*

65. *Id.*

66. *Id.* at 792.

67. Jeanne Cummings, *Axelle Finds Support For Broader Death Penalty*, RICHMOND TIMES-DISPATCH, Jan. 23, 1989, at 11.

open the cash register and therefore were unable to take anything.⁶⁸ All four defendants received lengthy prison sentences. This prompted Delegate Axselle of Henrico County to lobby for the inclusion of attempted robbery in the capital murder statute.⁶⁹ Delegate Axselle believed that there was overwhelming support from his constituents for expanding the death penalty to include attempted robbery after the murder of Chaudhary.⁷⁰ He introduced the bill in mid-January of 1989.⁷¹ The General Assembly amended subsection 18.2-31(4) to include attempted robbery on March 23, 1989.⁷²

On March 6, 1996, the Virginia Senate initiated a second major change to subsection 18.2-31(4) by passing a bill that removed the "while armed with a deadly weapon" language from the statute. The legislature's motivation for removing the weapon requirement from the statute can probably be traced to the Supreme Court of Virginia's analysis of a "deadly weapon" in *Quintana v. Commonwealth*.⁷³ In *Quintana*, the defendant was convicted under subsection 18.2-31(4) for murdering an elderly woman by striking her several times with a hammer obtained at the scene and then taking her belongings.⁷⁴ On appeal, the defendant argued that the hammer was not a deadly weapon.⁷⁵ The court stated that a weapon can be deadly *per se* or as used and then ruled that the weapon in the case was deadly as used.⁷⁶ Although the court ruled that the hammer as used was a deadly weapon and affirmed the death sentence,⁷⁷ this definition of a deadly weapon could have become problematic for the Commonwealth. On April 17, 1996, the General Assembly removed the "while armed with a deadly weapon" language from section 18.2-31(4),⁷⁸ probably to avoid the as used/*per se* issue. The 1996 amendment to subsection 18.2-31(4) expanded the scope of the capital offense by removing an entire element from the subsection.

The current text of subsection 18.2-31(4) is set out in the heading to this section.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. 1989 Va. Acts, ch. 527.

73. 295 S.E.2d 643 (Va. 1982).

74. *Quintana v. Commonwealth*, 295 S.E.2d 643, 645 (Va. 1982).

75. *Id.* at 649.

76. *Id.*

77. *Id.*

78. 1996 Va. Acts, ch. 959.

V. Va. Code Ann. Section 18.2-31(5): The Willful, Deliberate, and Premeditated Killing of Any Person in the Commission of, or Subsequent to, Rape or Attempted Rape, Forcible Sodomy or Attempted Forcible Sodomy or Object Sexual Penetration

In 1976, the General Assembly added subsection 18.2-31(5).⁷⁹ At that time the subsection made the "willful, deliberate and premeditated killing of a person during the commission of, or subsequent to a rape" a capital offense.⁸⁰ The General Assembly has amended and altered this subsection more than any other provision in the capital murder statute. To obtain a conviction under section 18.2-31(5), the Commonwealth must prove the elements of one of the sex offenses as defined in the relevant code section.

Rape

Rape is defined in § 18.2-61.⁸¹ The Virginia legislature has defined non-marital rape as sexual intercourse with any other person "against the complaining witness's will, by force, threat or intimidation" or "through the use of the complaining witness's mental incapacity or physical helplessness."⁸²

The 1976 version of subsection 18.2-31(5) had a narrower construction than subsection 18.2-31(4), the robbery predicate offense. Subsection 18.2-31(5) referred to the killing of "a person during the commission of, or subsequent to, rape" whereas subsection 18.2-31(4) referred to the killing of "any person in the commission of robbery."⁸³ The significance of the statutory language in section 18.2-31(5) was addressed by the Supreme Court of Virginia in *Harward v. Commonwealth*.⁸⁴ The *Harward* decision would initiate the first of several amendments to section 18.2-31(5) by the General Assembly.

In *Harward*, the defendant broke into the home of a married couple.⁸⁵ The defendant struck the husband several times with a crowbar in order to render him unconscious to facilitate the rape of the wife.⁸⁶ The defendant raped the wife twice and then left.⁸⁷ When the police arrived, the husband was dead as a result of the multiple blows to the head inflicted upon him by

79. 1976 Va. Acts, ch. 503.

80. *Id.*

81. VA. CODE ANN. § 18.2-61 (Michie 1999).

82. *Id.*

83. 1976 Va. Acts, ch. 503.

84. 330 S.E.2d 89 (Va. 1985).

85. *Harward v. Commonwealth*, 330 S.E.2d.89, 90 (Va. 1985).

86. *Id.*

87. *Id.*

the defendant.⁸⁸ The defendant was convicted of capital murder under section 18.2-31(5) and received a sentence of life in prison.⁸⁹ On appeal, the defendant argued that he could not be convicted under section 18.2-31(5) because the person killed during the commission of or subsequent to the rape must be the victim of the rape.⁹⁰

The Supreme Court of Virginia agreed with the defendant's contention and, applying the rule of strict construction, held that section 18.2-31(5) only proscribed the murder of the rape victim and could not be extended to include the murder of another.⁹¹ The court based its decision on a word-for-word comparison between section 18.2-31(5) and the other subsections of the statute. The Court found the "any person" language in subsections one and four of section 18.2-31 and the "a person" language in subsection five of the statute to be particularly noteworthy.⁹² The court stated that "any" includes all and that "a" is limited to one.⁹³ The court also noted that the "during the commission of, or subsequent to, rape" language established a narrower time frame than the "in the commission of" language found in subsections one and four of section 18.2-31. The latter includes a killing before, during or after the predicate offense, while the former excludes a killing that occurs before a rape.⁹⁴ This distinction was important in the court's analysis because of the order of Harward's offenses and the more restrictive language in subsection five; both supported the contention that the person killed must be the rape victim.⁹⁵

On April 4, 1988, the General Assembly of Virginia responded to *Harward* by replacing the "a person" and "during the commission" language relied on by the court, with the "any person" and "in the commission" language used in subsections one and four of section 18.2-31.⁹⁶ The 1988 amendment to section 18.2-31(5) expanded the capital offense to include the killing of anyone; therefore, the rape of one victim and the murder of another victim could sustain a conviction under the subsection.⁹⁷ The 1988 amendment also expanded the temporal requirement of the offense by including the "in the commission" language. As the Supreme Court of Virginia had stated in *Harward*, a killing "in the commission of" can take

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 91.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. 1988 Va. Acts, ch. 550.

97. GROOT, *supra* note 16, at 275.

place before, during, or after the predicate offense.⁹⁸ The amended section 18.2-31(5) makes it a capital offense to kill someone and then commit a rape.⁹⁹ Strangely, the General Assembly of Virginia kept the "or subsequent to" language in the subsection. Based on *Harward*, it is included in the "in the commission of" language. Thus, the "or subsequent to" phrase is extraneous.

There is no doubt that the 1988 amendment to section 18.2-31(5) was intended by the legislature to overturn the court's ruling in *Harward*. The General Assembly wanted to ensure that a *Harward* scenario was a capital offense, not only by including the killing of someone other than the rape victim in the statutory language, but also by including the killing of someone before the rape. This latter inclusion is important because if the defendant in *Harward* had killed the husband before the rape, the defendant would not have been within the scope of pre-1988 section 18.2-31(5).

Although the scope of section 18.2-31(5) had been greatly expanded with the enactment of the 1988 amendment, the General Assembly of Virginia has continued to expand the subsection. The 1989 House bill introduced by Delegate Axselle to expand subsection four of section 18.2-31 by including attempted robbery as a predicate offense inspired Senator Saslaw of Fairfax County to propose a bill that would make attempted rape a predicate offense under subsection five of section 18.2-31.¹⁰⁰ The "attempted rape" bill proposed by Senator Saslaw, who was running for lieutenant governor the same year this legislation was introduced,¹⁰¹ passed both houses of the legislature and was enacted into law with the "attempted robbery" bill on March 23, 1989.¹⁰² This amendment makes it unnecessary for the Commonwealth to prove that the rape has been completed.

Forcible Sodomy

The General Assembly further amended section 18.2-31(5) on March 15, 1991, by adding forcible sodomy and attempted forcible sodomy as predicate offenses for capital murder.¹⁰³ This amendment, like the 1989 "attempted rape" amendment to section 18.2-31(5), was an effort to legislatively expand the scope of the death penalty from the predicate offense of rape to all forms of sexual assault. Before the 1991 amendment, the Virginia courts had struggled to draw the line between rape and sodomy in the capital murder context. This struggle was nowhere more apparent

98. *Harward*, 330 S.E.2d at 91.

99. GROOT, *supra* note 16, at 275.

100. Michael Martz, *Both Chambers Back Tougher Crime Laws*, RICHMOND TIMES-DISPATCH, Feb. 7, 1989, at 7.

101. *Id.*

102. 1989 Va. Acts, ch. 527.

103. 1991 Va. Acts, ch. 232.

than 'in the Supreme Court of Virginia's decision in *Tuggle v. Commonwealth*.¹⁰⁴

In *Tuggle*, the defendant was charged and convicted under section 18.2-31(5) for the willful, deliberate, and premeditated killing of the victim in the commission of rape.¹⁰⁵ The defendant argued on appeal that the Commonwealth failed to establish sexual intercourse.¹⁰⁶ The Commonwealth based its rape charge on evidence that the victim's clothes had been pulled off, numerous abrasions, contusions, a bite mark on the breast, injury to the vaginal vault, and semen found in the victim's rectum.¹⁰⁷ The defendant argued that none of this evidence proved rape.¹⁰⁸ The Supreme Court of Virginia found that the Commonwealth had proved sexual intercourse because no evidence "reasonably suggests penetration of the victim's vagina by an object other than the defendant's penis."¹⁰⁹

Although *Tuggle* set the stage for the 1991 amendment expanding capital murder to include the forcible sodomy predicate, two murders in Prince William County in which the defendants sodomized their victims ultimately sparked the legislation that directly led to the 1991 amendment.¹¹⁰ In both cases, the defendants took small amounts of money from their victims and therefore were eligible for the death penalty under subsection 18.2-31(4), but would not have been eligible for the death penalty for having committed sodomy.¹¹¹

Senator Saslaw of Fairfax County, who introduced the 1989 amendment to subsection 18.2-31(5), also introduced the bill that added forcible sodomy and attempted forcible sodomy to the subsection.¹¹² Senator Saslaw wanted to expand the subsection to include forcible sodomy in order to close what he saw as a loophole in the law in which perpetrators of rape were eligible for the death penalty but perpetrators of forcible sodomy were not.¹¹³ Senator Saslaw's bill, designed to further expand the application of the capital murder statute, was easily approved by the legislature.¹¹⁴ After the 1991 amendment, rape, attempted rape, forcible

104. 323 S.E.2d 534 (Va. 1984).

105. *Tuggle v. Commonwealth*, 323 S.E.2d 539, 543 (Va. 1984).

106. *Id.* at 549.

107. *Id.*

108. See VA. CODE ANN. § 18.2-61 (Michie 1999).

109. Necklaus, *infra* Part II of this Symposium.

110. Bruce Potter, *Panel Advances Bill to Expand Death Penalty*, RICHMOND TIMES-DISPATCH, Feb.18, 1991, at 9.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Wilder Signs Bill Expanding Death Penalty*, RICHMOND TIMES-DISPATCH, Mar.20, 1991, at 5.

sodomy, and attempted forcible sodomy were all predicate offenses of subsection 18.2-31(5).¹¹⁵

Object Sexual Penetration

On March 16, 1995, the General Assembly of Virginia made object sexual penetration the fifth predicate offense in subsection 18.2-31(5).¹¹⁶ Object sexual penetration, as defined in section 18.2-67.2, occurs when the accused uses force, threat, or intimidation against a complaining witness and penetrates the labia majora or anus of the complaining witness, or causes the complaining witness to penetrate the accused's body with an object, or causes the complaining witness to engage in such acts with any other person or animal.¹¹⁷ Object sexual penetration in section 18.2-67.2 originally applied to only inanimate objects but was later expanded in 1993 to include both animate and inanimate objects.¹¹⁸ The inclusion of an animate object effecting sexual penetration also expanded the scope of activity punishable under subsection 18.2-31(5). The object sexual penetration must be completed for a subsection 18.2-31(5) conviction because the statute does not currently make an attempted object sexual penetration a capital offense.¹¹⁹

Payne v. Commonwealth

In *Payne v. Commonwealth*,¹²⁰ the defendant challenged the imposition of more than one death sentence for each victim he killed.¹²¹ The defendant was convicted of capital murder under both subsections four and five of section 18.2-31 for the murder of one of his victims.¹²² The court ruled that the two subsections were distinct statutory provisions and therefore the defendant could be convicted under both.¹²³ But the court extended this rationale to the second murder committed by the defendant in which he was given two capital murder sentences for violating subsection 18.2-31(5).¹²⁴ The defendant received capital murder sentences for both the killing in the commission of attempted rape and the killing in the commission of object

115. 1991 Va. Acts, ch. 232.

116. 1995 Va. Acts, ch. 340.

117. VA. CODE ANN. § 18.2-67.2 (Michie 1999).

118. 1993 Va. Acts, ch. 549.

119. Necklaus, *infra* Part II of this Symposium.

120. 509 S.E.2d 293 (Va. 1999).

121. *Payne v. Commonwealth*, 509 S.E.2d 293, 300 (Va. 1999).

122. *Id.* at 296.

123. *Id.* at 301.

124. *Id.*

sexual penetration of the one victim.¹²⁵ Although the two capital murder sentences were based upon one subsection, the court ruled that the defendant had violated two distinct statutory provisions of subsection 18.2-31(5) and had therefore committed two capital offenses.¹²⁶

The *Payne* decision greatly expanded the capital murder statute by allowing several capital offenses to be contained in each subsection of section 18.2-31. After *Payne*, section 18.2-31 can be construed to have more than twelve and possibly as many as twenty-seven distinct statutory capital provisions.¹²⁷

The current text of subsection 18.2-31(5) is set out in the heading to this section.

VI. Va. Code Ann. Subsection 18.2-31(6): The Willful, Deliberate, and Premeditated Killing of a Law enforcement Officer as Defined in Section 9-169 (9) or Any Law enforcement Officer of Another State or the United States Having the Power to Arrest for a Felony under the Laws of Such State or the United States, When Such Killing is for the Purpose of Interfering with the Performance of His Official Duties

On March 29, 1977, the General Assembly of Virginia enacted subsection 18.2-31(6), which made the willful, deliberate, and premeditated killing of a law enforcement officer a capital offense when such killing is for the purpose of interfering with the performance of his official duties.¹²⁸ This subsection was added to the capital murder statute to punish those who kill law enforcement officers in the line of duty. To be convicted under subsection 18.2-31(6), the defendant must have acted for the purpose of interfering with the performance of the law enforcement officer's official duties.¹²⁹ There is no requirement that the slain law enforcement officer actually be performing official duties,¹³⁰ but the defendant must be aware that his victim was a law enforcement officer.¹³¹ It may be difficult for the defendant to know who is a law enforcement officer because the definition eventually applied to that term exceeds its ordinary meaning.

When subsection 18.2-31(6) was enacted in 1977, "law enforcement officer" was narrowly defined under section 9-108¹³² as a full-time employee of a police department or sheriff's office administered by the State,

125. *Id.* at 298.

126. *Id.* at 301.

127. Alix M. Karl, Case Note, 11 CAP. DEF. J. 455 (1998) (analyzing *Payne*, 509 S.E.2d 293).

128. 1977 Va. Acts, ch. 478.

129. See *Martin v. Commonwealth*, 271 S.E.2d 123, 126 (Va. 1980).

130. See *Delong v. Commonwealth*, 362 S.E.2d 669, 676 (Va. 1987).

131. *Id.*

132. VA. CODE ANN. § 9-108 (Michie 1973).

responsible for the prevention and detection of crime and the enforcement of penal, traffic, or highway laws of the State.¹³³ In 1976, the General Assembly repealed section 9-108 and in its place adopted section 9-108.1(H) which originally mirrored the language of repealed section 9-108.¹³⁴ In 1977, the General Assembly amended section 9-108.1(H) by adding Alcoholic Beverage Control Commission inspectors vested with police authority to the definition of "law enforcement officer."¹³⁵ The General Assembly included the expanded definition of a law enforcement officer under section 9-108.1(H) in the 1979 amendment to subsection 18.2-31(6).¹³⁶

The next major change in the definition of a law enforcement officer occurred on April 2, 1981, when the General Assembly repealed section 9-108.1(H) and replaced it with section 9-169(9).¹³⁷ The new definition of a law enforcement officer in section 9-169(9) included the section 9-108.1(H) language and added any police agent appointed under the provisions of section 56-353.¹³⁸ A police agent under section 56-353 is appointed by the president or any other executive officer of any railroad company incorporated by the Commonwealth to preserve the peace and enforce the law.¹³⁹ The statutory expansion of section 9-169(9) did not stop with the inclusion of Alcohol Beverage Control agents and railroad police. The history of section 9-169(9) is one of growth and inclusion of and to the "law enforcement officer" definition. With every addition to section 9-169(9), the scope of subsection 18.2-31(6) is widened and the death penalty applied more broadly. On March 15, 1983, the General Assembly amended subsection 18.2-31(6) by replacing the repealed section 9-108.1(H) with section 9-169(9) and thereby officially expanding the definition of "law enforcement officer."¹⁴⁰

The General Assembly again amended section 9-169(9) on March 25, 1983, by including any game warden who is a full-time sworn member of the enforcement division of the Commission of Game and Inland Fisheries in the definition of a "law enforcement officer."¹⁴¹ The 1982 and 1983 amendments to section 9-169(9) all added separate classes of individuals to the "law enforcement officer" definition but the General Assembly's amendment on March 9, 1989, ushered in a more sweeping expansion of

133. 1968 Va. Acts, ch. 740.

134. 1976 Va. Acts, ch. 771.

135. 1977 Va. Acts, ch. 357.

136. 1979 Va. Acts, ch. 582.

137. 1981 Va. Acts, ch. 632.

138. *Id.*

139. VA. CODE ANN. § 56-353 (Michie 1999).

140. 1983 Va. Acts, ch. 175.

141. 1983 Va. Acts, ch. 357.

section 9-169(9). It included any part-time employee of a police department or sheriff's office to the definition.¹⁴²

On March 20, 1991, the General Assembly of Virginia added officers of the Virginia Marine Patrol to the section 9-169(9) definition.¹⁴³ The following year, full-time members of the State Lottery Department security division became law enforcement officers under section 9-169(9).¹⁴⁴ In 1993, the General Assembly added two more groups to section 9-169(9): Department of Motor Vehicle enforcement officers when fulfilling duties pursuant to section 46.2-217¹⁴⁵ and any agent, investigator, or inspector appointed under section 56-334.¹⁴⁶ According to section 46.2-217, enforcement members of the Department of Motor Vehicles are those authorized to enforce the criminal laws of the Commonwealth.¹⁴⁷ Agents, investigators, and inspectors under section 56-334 were individuals appointed by the Department of State Police to enforce the laws and regulations governing the operation of motor vehicles on the highways of the Commonwealth.¹⁴⁸ In 1995, the General Assembly repealed section 56-334¹⁴⁹ but has not removed the section 56-334 language from section 9-169(9).

From 1977 to 1993, there was a phenomenal expansion in the meaning of a "law enforcement officer." In section 9-108(H), the statutory predecessor of section 9-169(9), a law enforcement officer was a full-time police officer. The succession of statutory amendments within this six year period to both section 9-108(H) and section 9-169(9) reflected the General Assembly's desire to denominate various state agents and officials as law enforcement officers. Whatever was intended by these amendments, each expanded the reach of capital murder under subsection six of 18.2-31.

As remarkable as the rapid expansion of section 9-169(9) is, the General Assembly of Virginia's amendment to subsection 18.2-31(6) in 1997 is by far the most dramatic and dynamic expansion of the capital murder offense. On March 11, 1997, the General Assembly added "any law enforcement officer of another state or the United States having the power to arrest for a felony under the laws of such state or the United States" to the class of potential victims. The significance of the 1997 amendment is the dramatic increase in the scope of who qualifies as a victim under the subsection. The 1997 amendment altered subsection 18.2-31(6) from a statute designed to

142. 1989 Va. Acts, ch. 233.

143. 1991 Va. Acts, ch. 338.

144. 1992 Va. Acts, ch. 422.

145. VA. CODE ANN. § 46.2-217 (Michie 1999).

146. 1950 Va. Acts, ch. 357; 1993 Va. Acts, ch. 533.

147. § 46.2-217.

148. 1993 Va. Acts, ch. 533.

149. 1995 Va. Acts, ch. 744, 803.

prevent or punish individuals who kill Virginia police or state agents to a statute under which the death penalty applies to the killing of virtually all law enforcement officers whether employed by Virginia, other states, or the United States.¹⁵⁰

The current text of subsection 18.2-31(6) is set out in the heading to this section.

VII. Va. Code Ann. Subsection 18.2-31(7): The Willful, Deliberate, and Premeditated Killing of More than One Person as a Part of the Same Act or Transaction

On April 1, 1981, the General Assembly of Virginia enacted subsection 18.2-31(7),¹⁵¹ set out above. There are two gradation elements in subsection 18.2-31(7). Murder under subsection 18.2-31(7) requires a second willful, deliberate, and premeditated killing and both killings must occur as "part of the same act or transaction."¹⁵²

The second willful, deliberate, and premeditated killing elevates the initial premeditated murder to capital murder.¹⁵³ Therefore, the defendant receives capital punishment for the first premeditated murder and not the second murder. Although both killings in a subsection 18.2-31(7) charge must be premeditated murders, the defendant need not be the actual slayer of the second murder victim.¹⁵⁴ The "triggerman rule," section 18.2-18, applies to capital murder under subsection 18.2-31(7). The defendant need only be the actual killer in the principal murder charged and at least an accomplice in the murder of the other victim.¹⁵⁵

In *Woodfin v. Commonwealth*,¹⁵⁶ the Supreme Court of Virginia elaborated on the requirement that the series of murders be part of the same act or transaction. The court noted that the "part of the same act or transaction" language is synonymous with "same criminal episode."¹⁵⁷ The court further defined the "same act or transaction" element in terms of a temporal nexus: the slaying must be so closely connected "in time, place and circumstance that a complete account of one charge cannot be related without relating details of the other charge."¹⁵⁸ The temporal nexus

150. 1997 Va. Acts, ch. 235.

151. 1981 Va. Acts, ch. 607.

152. VA. CODE ANN. § 18.2-31(7) (Michie 1999).

153. GROOT, *supra* note 16, at 276.

154. See *Graham v. Commonwealth*, 464 S.E.2d 128, 130 (Va. 1995).

155. *Id.*

156. 372 S.E.2d 377 (Va. 1988).

157. *Woodfin v. Commonwealth*, 372 S.E.2d 377, 379 (Va. 1988).

158. *Id.* (quoting *State v. Fitzgerald*, 516 P.2d 1280, 1284 (Or. 1973)) (internal quotation marks omitted).

requirement makes subsection 18.2-31(7) a "mass murder" subsection rather than a "serial murder" one.¹⁵⁹

The manner in which a defendant is charged under subsection 18.2-31(7) will affect sentencing consequences and possible convictions. In *Morris v. Commonwealth*,¹⁶⁰ the court held that a single count of subsection 18.2-31(7) will support only one penalty, despite its basis in two premeditated killings.¹⁶¹ The reasoning behind *Morris* is that the two murders only prove one capital murder, which means only one penalty, either death or capital life, is possible.¹⁶² In one case, a single count alleging both capital murder under subsection 18.2-31(7) and first degree murders for killings in the same transaction was sufficient to support capital and first degree convictions.¹⁶³ The more common method to obtain multiple convictions is to charge capital murder in one count and the other premeditated murders in separate counts.¹⁶⁴

The current text of subsection 18.2-31(7) is set out in the heading to this section.

VIII. Va. Code Ann. Subsection 18.2-31(8): The Willful, Deliberate, and Premeditated Killing of More than One Person Within a Three-year Period

The original sponsor of subsection 18.2-31(8), set out above, was Senator Saslaw of Fairfax County,¹⁶⁵ the sponsor of several section 18.2-31 statutory expansions. Senator Saslaw introduced the bill in 1991 in response to the killings of three prostitutes in Arlington County by a man who was ineligible for the death penalty.¹⁶⁶ On April 17, 1996, the General Assembly of Virginia added subsection eight, which makes the willful, deliberate, and premeditated killing of more than one person within a three-year period a capital offense.¹⁶⁷ The subsection 18.2-31(8) language is similar to subsection 18.2-31(7); the only difference between the two is the temporal nexus requirement. A conviction under subsection 18.2-31(8) does not require any connection or "same act or transaction" between the murders, but the murders must occur within the three-year time period.¹⁶⁸ Assuming that the Supreme Court of Virginia will apply the manner in which defendants are

159. See VA. CODE ANN. § 18.2-31(8) (Michie 1999) (covering "serial murder").

160. 321 S.E.2d 633 (Va. 1984).

161. *Morris v. Commonwealth*, 321 S.E.2d 633, 635 (Va. 1984).

162. GROOT, *supra* note 16, at 276.

163. See *Buchanan v. Commonwealth*, 384 S.E.2d 757, 762 (Va. 1989).

164. GROOT, *supra* note 16, at 277.

165. Bruce Potter, *Panel Advances Bill to Expand Death Penalty*, RICHMOND TIMES-DISPATCH, Feb. 18, 1991 at 9.

166. *Id.*

167. 1996 Va. Acts, ch. 959.

168. VA. CODE ANN. § 18.2-31(8) (Michie 1999).

charged under subsection seven to subsection eight, two premeditated killings within a three-year period will support only one capital murder conviction.¹⁶⁹ Like subsection seven, both murders must be premeditated. The triggerman rule, section 18.2-18, applies to subsection 18.2-31(8),¹⁷⁰ but it is not clear if the capital defendant must be the actual slayer in each murder charged.

Senator Saslaw's original serial murder bill was rejected by the House Courts of Justice Committee because of a disagreement over the definition of a serial killer.¹⁷¹ However, five years later the General Assembly passed the bill into law. If the legislature intended subsection 18.2-31(8) to punish only serial killers, using that subsection to charge what have been subsection 18.2-31(7) offenses should not be permitted. The "same act or transaction" will always be subsumed in the three year period. Yet there is a difference between mass murder and serial murder. It is unclear whether subsections seven and eight can be used interchangeably for the killing of multiple victims in a single act or transaction. If both subsections can be used for "mass murders," then subsection 18.2-31(7) becomes a dead letter because the Commonwealth can simply charge and convict under subsection 18.2-31(8).

The current text of subsection 18.2-31(8) is set out in the heading to this section.

IX. Va. Code Ann. Subsection 18.2-31(9): The Willful, Deliberate, and Premeditated Killing of Any Person in the Commission of or Attempted Commission of a Violation of Section 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

In 1990, the General Assembly added subsection nine to section 18.2-31.¹⁷² That subsection is set out above. The predicate offense of subsection 18.2-31(9) that elevates the premeditated murder to capital murder is the "commission of or attempted commission of a violation of section 18.2-248."¹⁷³ Under section 18.2-248, it is an offense to manufacture, sell, give,

169. GROOT, *supra* note 16, at 277.

170. VA. CODE ANN. § 18.2-18 (Michie 1999).

171. Potter, *supra* note 165.

172. 1990 Va. Acts, ch. 746.

173. In a capital murder under subsection nine, a premeditated murder combined with a drug offense becomes a capital murder if the reason for the killing is to further the drug offense or attempted drug offense. Without this purpose for the killing, the premeditated murder is a first degree murder. Capital murder under subsection nine differs from other capital felony murders in which a murder combined with predicate felony (robbery, rape, forcible sodomy, attempted robbery, rape or forcible sodomy, and object sexual penetration) becomes a capital offense upon the existence of premeditation. Without the premeditation, the murder with predicate felony is treated as a first degree crime. An unpremeditated killing in the commission of a drug offense is second degree murder. VA. CODE ANN. § 18.2-33

distribute, or possess with the intent to manufacture, sell, give, or distribute a controlled substance.¹⁷⁴ The predicate offense in subsection 18.2-31(9) covers the entire spectrum of drug manufacture and distribution activity, including attempts to engage in drug activity.¹⁷⁵ Therefore, the actual completion of a section 18.2-248 offense is not required to satisfy the broad subsection 18.2-31(9) predicate offense.

The one limitation to the expansive section 18.2-248 predicate offense is that the relevant "controlled substance" must be a "Schedule I or II controlled substance." Schedule I and Schedule II controlled substances are listed in sections 54.1-3446¹⁷⁶ and 54.1-3448,¹⁷⁷ respectively. Although numerous drugs are listed in the schedules, the most common Schedule I drug is heroin and the most common Schedule II drug is cocaine.¹⁷⁸ It is not a capital offense to kill any person in the commission of a section 18.2-248 offense if the drug involved is not listed in one of the two schedules.¹⁷⁹

Another requirement for the capital murder offense in subsection 18.2-31(9) is that the "killing is for the purpose of furthering the commission or attempted commission of [a section 18.2-248] violation."¹⁸⁰ The "purpose" requirement is similar to that of subsection 18.2-31(6) and probably has the same meaning.¹⁸¹ If so, the killer need not actually further the commission of the section 18.2-248 crime by committing the murder. The "purpose" requirement is satisfied if the killer believes and perceives that the killing will further the commission of the violation, even if the victim's death in no way furthers the crime.¹⁸²

The victim of the subsection 18.2-31(9) murder can be "any person."¹⁸³ The murder victim need not have participated or been involved in the section 18.2-248 predicate offense.¹⁸⁴ But as the killing must be for the "purpose of furthering" the commission of section 18.2-248, in that the defendant must view the killing of the victim as somehow furthering the drug activity. Similar to other subsections, the "in the commission of or

(Michie 1999).

174. VA. CODE ANN. § 18.2-248 (Michie 1999).

175. VA. CODE ANN. § 18.2-31(9) (Michie 1999).

176. VA. CODE ANN. § 54.1-3446 (Michie 1999).

177. VA. CODE ANN. § 54.1-3448 (Michie 1999).

178. GROOT, *supra* note 16, at 275.

179. This is second degree murder. See *supra* note 173; VA. CODE ANN. § 18.2-33 (Michie 1999).

180. § 18.2-31(9).

181. GROOT, *supra* note 16, at 275.

182. See *Delong v. Commonwealth*, 362 S.E.2d 669, 676 (Va. 1987).

183. § 18.2-31(9).

184. *Harward v. Commonwealth*, 330 S.E.2d 89, 91 (Va. 1985).

attempted commission of" temporal requirement means that the killing can take place before, during or after the predicate offense.¹⁸⁵

The General Assembly enacted subsection 18.2-31(9) in an attempt to confront and address the rising level of violence from the "crack epidemic" of the 1980's. The "death penalty for drug dealers" bill was an effort by legislators from Richmond concerned about the drug-related murders in that city.¹⁸⁶ The General Assembly also passed the legislation to take advantage of the political benefit in appearing tough on drugs and drug-related crime.¹⁸⁷

In 1990, the bill was sponsored by freshman Delegate Eck of Richmond and strongly supported by then-Governor Wilder. Delegate Eck used the expansion of the death penalty as a political issue and had vowed to introduce this capital murder legislation if elected.¹⁸⁸ According to Delegate Eck, the bill was introduced to curb the drug-related murders plaguing Richmond, in which thirty out of the city's 102 murders in 1989 were linked to drugs.¹⁸⁹ Delegate Eck believed that the capital murder legislation would remedy the drug-related violence that was "destroying the fabric of society."¹⁹⁰ On a less dramatic and more pragmatic tone, Delegate Eck noted that his bill could be used by prosecutors as a plea bargaining tool, to persuade perpetrators to cooperate in an investigation or face possible capital punishment.¹⁹¹

The bill that would eventually gain strong support from both houses of the General Assembly was initially delayed by a political battle between Delegate Cranwell of Roanoke County and Senator Stallings of Virginia Beach.¹⁹² When Delegate Cranwell, who co-wrote the drug dealer-capital murder bill, moved to place Senator Stallings gun liability bill off the table, Senator Stallings responded by moving to delay the vote on the death penalty bill.¹⁹³ This gamesmanship between the two politicians lasted for several days but eventually gave way to allow passage of the bill by the General Assembly. The legislative history of subsection nine of section 18.2-31 illustrates the disturbing use of death as a bargaining chip in Virginia politics.

185. *Id.*

186. Olivia Winslow, *Legislators' Bills Posed to Fight Drug War in State*, RICHMOND TIMES-DISPATCH, Feb. 25, 1990, at C4.

187. *Id.*

188. *Id.*

189. Michael Hardy, *Death Penalty Bill is Taken Hostage*, RICHMOND TIMES-DISPATCH, Mar. 2, 1990, at A8.

190. *Id.*

191. Winslow, *supra* note 186, at C4.

192. Michael Martz, *Drug-Related Death Penalty Bill Idles in Political Hostage-Taking*, RICHMOND TIMES-DISPATCH, Feb. 26, 1990, at 5.

193. *Id.*

The current text of subsection 18.2-31(9) is set out in the heading to this section.

X. Va. Code Ann. Subsection 18.2-31(10): The Willful, Deliberate, and Premeditated Killing of Any Person by Another Pursuant to the Direction or Order of One Who is Engaged in a Continuing Criminal Enterprise as Defined in Subsection I of Section 18.2-248

On March 13, 1997, the General Assembly of Virginia added subsection ten to section 18.2-31.¹⁹⁴ Subsection ten is set out above. The structure of subsection ten is similar to the murder for hire subsection¹⁹⁵ in that both require a victim, a slayer, and a director.¹⁹⁶ The killing of "any person" refers to the victim, "by another" refers to the slayer, and "pursuant to the direction or order of one who is engaged in a continuing criminal enterprise" refers to the director of the killing. Another similarity between these two subsections is that principals in the second degree as well as accessories before the fact can be convicted of capital murder.¹⁹⁷ This exception to the triggerman rule allows the person who orders the killing, an accessory before the fact, to face capital punishment.

A premeditated murder becomes capital murder under subsection 18.2-31(10) if the killer acts on the direction or order of one engaged in a continuing criminal enterprise.¹⁹⁸ It appears that the actual killer need not be involved in the continuing criminal enterprise but that the person who directs or orders the killing must be involved to sustain a subsection 18.2-31(10) conviction.¹⁹⁹ The person who directs or orders the killing must be engaged in a continuing criminal enterprise as defined in subsection I of section 18.2-248.²⁰⁰ The manufacturing, selling, giving, distributing, or possessing with intent to manufacture, sell, give, or distribute a controlled substance or an imitation controlled substance is prohibited under section 18.2-248.²⁰¹

Subsection I of section 18.2-248 defines a continuing criminal enterprise in the context of a "drug kingpin."²⁰² Under this statute, a person is involved in a continuing criminal enterprise if he commits violations of section 18.2-248 that are a part of a "continuing series of violations of this section" which are undertaken by the person with five or more other

194. 1997 Va. Acts, ch. 313.

195. VA. CODE ANN. § 18.2-31(2) (Michie 1999).

196. GROOT, *supra* note 16, at 277.

197. VA. CODE ANN. § 18.2-18 (Michie 1999).

198. GROOT, *supra* note 16, at 277.

199. *Id.*

200. VA. CODE ANN. § 18.2-31(10) (Michie 1999).

201. VA. CODE ANN. § 18.2-248 (Michie 1999).

202. § 18.2-248(H).

people, to whom that person is in a supervisory, organizing, or management position and from which the person obtains substantial income or resources.²⁰³ From the continuing criminal enterprise definition in subsection I of section 18.2-248, subsection 18.2-31(10) is limited to drug kingpins and high ranking members of drug syndicates who order others to kill. There is no requirement that the individual killed be a target of or related to the kingpin's drug activities.

The General Assembly's enactment of subsection 18.2-31(10) in 1997 was the second attempt to respond to and deal with the murders caused by drug activity. The first salvo came in the form of subsection 18.2-31(9), making it a capital offense to kill someone in furtherance of drug activity.²⁰⁴ In adding subsection ten to the capital murder statute, the General Assembly followed the lead of the federal government which had enacted the Federal Death Penalty Act of 1994.²⁰⁵ That statute made it a capital offense for an individual to violate the Controlled Substances Act²⁰⁶ as part of a continuing criminal enterprise offense in which the defendant is a "principal administrator, organizer, or leader of such an enterprise, and the defendant, in order to obstruct the investigation or prosecution of the enterprise or an offense involved in the enterprise, attempts to kill or knowingly directs, advises, authorizes, or assists another to attempt to kill any public officer, juror, witness, or members of the family or household of such a person."²⁰⁷

Although the General Assembly of Virginia may have been inspired by 18 U.S.C. § 3591(b)(2) in enacting subsection 18.2-31(10), there are some striking differences between the two statutes. The federal death penalty provision closely tailors the victim category of 18 U.S.C. § 3591 to include public officers, jurors, witnesses, and their family members. The statute is designed to specifically protect executive and judicial processes. The aim of the federal statute is to discourage the drug syndicates from obstructing justice by ordering others to kill those involved in bringing the defendants to justice.

The Virginia statute, subsection 18.2-31(10), has no specific class of victims, and applies broadly to "any person" killed. The language in the statute is much broader and more general than the language in 18 U.S.C. § 3591(b)(2), even though the General Assembly used the federal legislation as its model for subsection ten. This reflects the General Assembly's perpetual desire to expand the capital murder statute and perhaps makes it over-inclusive.

203. § 18.2-248(I).

204. § 18.2-31(9).

205. 18 U.S.C. § 3591 (1994).

206. 21 U.S.C. § 848(c)(1) (1994).

207. 18 U.S.C. § 3591.

The current text of subsection 18.2-31(10) is set out in the heading to this section.

XI. Va. Code Ann. Subsection 18.2-31(11): The Willful, Deliberate and Premeditated Killing of a Pregnant Woman by One Who Knows That the Woman is Pregnant and has the Intent to Cause the Involuntary Termination of the Woman's Pregnancy Without a Live Birth

On March 22, 1997, the General Assembly of Virginia added subsection eleven to the capital murder statute.²⁰⁸ That subsection is set out above. There are three requirements in a subsection 18.2-31(11) capital murder. The victim in the premeditated killing must be a pregnant woman. The killer must know that the victim is pregnant. The killer must intend to cause the involuntary termination of the woman's pregnancy without a live birth. There is no requirement for the death of or injury to the fetus.²⁰⁹ The killer must only intend to terminate the pregnancy and can be convicted under subsection 18.2-31(11) even if the fetus is unharmed.

Subsection 18.2-31(11) was enacted along with two other provisions in a comprehensive statutory scheme meant to punish, at several levels, those who kill or cause injury to a pregnant woman with the intention to cause the involuntary termination of the pregnancy.²¹⁰ The premeditated murder of a pregnant woman by one who knows the victim is pregnant and acts with the intent to terminate the pregnancy, of course, commits a capital murder under subsection 18.2-31(11). The General Assembly also addressed the non-premeditated murder of a pregnant woman in section 18.2-32.1;²¹¹ that offense is punished under section 18.2-32.1 by a term of imprisonment of ten to forty years.²¹² The penalty section for the 18.2-32.1 crime lies between first and second degree murder.²¹³ The 1997 statutory scheme also covers the aggravated malicious wounding of a pregnant woman in section 18.2-51(2)(B).²¹⁴

The 1997 amendments and enactments by the General Assembly created a broad array of criminal offenses and punishments for harming pregnant woman and intending to cause the termination of their pregnancies. Why the General Assembly thought it necessary to include the crime in the capital murder statute is not clear.

The current text of subsection 18.2-31(11) is set out in the heading to this section.

208. 1997 Va. Acts, ch. 709.

209. GROOT, *supra* note 16, at 277.

210. 1997 Va. Acts, ch. 709.

211. VA. CODE ANN. § 18.2-32.1 (Michie 1999).

212. 1997 Va. Acts, ch. 709.

213. § 18.2-32.1.

214. VA. CODE ANN. § 18.2-51(2)(B) (Michie 1999).

XII. Va. Code Ann. Subsection 18.2-31(12): The Willful, Deliberate and Premeditated Killing of a Person under the Age of Fourteen by a Person Age Twenty-one or Older

On April 22, 1998, the General Assembly added subsection twelve to section 18.2-31.²¹⁵ That subsection is set out above. The gradation elements that elevate the premeditated murder to capital murder are the ages of the victim and the killer. The murder victim must be "under the age of fourteen" which means thirteen years old or less.²¹⁶ The killer must be twenty-one or older. The General Assembly of Virginia had previously made a premeditated murder a capital crime based on the age of the victim. In the 1985 enactment of section 18.2-31(h), the premeditated killing of a child under twelve in the commission of aggravated abduction was a capital crime.²¹⁷ Subsection (h) was merged into subsection one in 1996,²¹⁸ when the intent to defile language was added to the subsection.²¹⁹ By enacting subsection 18.2-31(12), the General Assembly has resurrected the old subsection (h) by creating an age-specific capital offense.

The enactment of subsection twelve is a perfect example of the General Assembly's political and emotional motivation behind expanding the capital murder statute. On May 2, 1997, four year old Brenda Ann "Annie" Leftwich died alone in the utility room of her parents' trailer, tied down to her urine-drenched bed.²²⁰ A rag had been stuffed in her mouth, while the rest of her body was covered with bruises, bite marks, and scars.²²¹ Wild squirrels in the room had gnawed on the defenseless child. She was bound, gagged, and left to die by her parents.²²²

The gruesome and disturbing facts of this murder outraged residents of southwestern Virginia, many of whom clamored for the use of the death penalty in this case.²²³ The media attention from this case, coupled with the public's furor over the murder, mobilized Virginia legislators into action. Delegate Phillips of Dickenson County introduced the bill, known as "Annie's Law," that proposed to make torturing a child to death a capital crime.²²⁴ The bill was rejected for fear of being unconstitutional and then

215. 1998 Va. Acts, ch. 887.

216. GROOT, *supra* note 16, at 277.

217. 1985 Va. Acts, ch. 428.

218. 1996 Va. Acts, ch. 959.

219. See *supra* note 24.

220. Panel Passes Revised Annie's Law "Language a Little Better," Bill's Sponsor Says, RICHMOND TIMES-DISPATCH, Mar. 9, 1998, at B3.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

later amended by the Senate Courts of Justice Committee to make the "willful, deliberate and premeditated killing of a child under age eighteen by an adult" a capital offense.²²⁵ The final wording was later changed to a child under fourteen murdered by a person twenty-one years of age or older. Delegate Phillips admitted introducing the death penalty bill because people appalled by the child's murder asked him to make it a capital crime.²²⁶ Of course, the elements of subsection 18.2-31(12) have little relation to the facts of the case which generated it and will permit capital murder convictions in cases that do not, even remotely, resemble "Annie's" case.

The current text of subsection 18.2-31(12) is set out in the heading to this section.

Conclusion

The history of the Virginia capital murder statute, section 18.2-31, has been one of constant growth and expansion. In the past twenty-five years, since the inception of section 18.2-31, the General Assembly of Virginia has added nine subsections to the statute while also expanding the scope of existing subsections. These additions, augmented by the decision in *Payne v. Commonwealth*,²²⁷ have resulted in a quite broad capital murder statute.

There are three primary reasons for the General Assembly's expansion of the capital murder statute. Some additions or expansions of section 18.2-31 are a direct result of some gruesome and well-publicized murders. The murder of four year-old Annie Leftwich mobilized the General Assembly²²⁸ to enact subsection twelve in which killing a child under fourteen is punished, and the murder of store clerk Muhammad Ashraf Chaudhary led to the expansion of subsection four to include attempted robbery.²²⁹ The General Assembly's attempt to confront and be seen by the public as responding to societal ills and evils is another motivation for adding crimes to section 18.2-31. The drug epidemic of the 1980's in which urban areas of Virginia thought themselves overwhelmed by drug-related homicides directly led to the enactment of subsections nine and ten.

The final justification for the expansion of section 18.2-31 is the General Assembly's response to decisions made by the Supreme Court of Virginia in which the capital murder statute was properly read to limit its application. For example, the General Assembly responded to what it considered a narrow reading of subsection five by the Supreme Court of

225. *Id.*

226. *Id.*

227. 509 S.E.2d 293 (Va. 1999).

228. *Panel Passes Revised Annie's Law 'Language a Little Better,' Bill's Sponsor Says*, RICHMOND TIMES-DISPATCH, Mar. 9, 1998, at B3.

229. Jeanne Cummings, *Axselle Finds Support For Broader Death Penalty*, RICHMOND TIMES-DISPATCH, Jan. 23, 1989, at 11.

Virginia in *Harward v. Commonwealth*.²³⁰ Subsection five was amended immediately thereafter.²³¹

Section 18.2-31 escaped amendment in 1999. Indications are, however, that expansion will continue. The General Assembly has recently considered several proposed capital murder offenses to expand section 18.2-31. As recently as the 1999 legislative session, the General Assembly considered another proposed addition to section 18.2-31. In response to the gruesome and disturbing murder in *Ceparano v. Commonwealth*,²³² in which the victim was decapitated, Senate Bill 1036²³³ was proposed.²³⁴ That bill would have made a premeditated killing involving dismemberment a capital offense.²³⁵ Although Senate Bill 1036 was not enacted, it is typical of death penalty legislation. The event that generated the bill was decapitation; the bill refers to dismemberment. Thus, it is not clear that the bill would have even reached the case that spawned it, but it is clear the bill would have reached many cases that did not include decapitation. This form of legislation is reminiscent of subsection twelve, which began its legislative life as a bill covering a narrow class of cases but emerged from the legislative process in a vastly broader form.

In the 1998 legislative session, aside from enacting subsection twelve, the General Assembly also considered making the following capital offenses: the murder of a crime watch member, the murder of a spouse after the issuance of a protective order, and the murder of a witness prior to trial.²³⁶ More strikingly, at least two bills in the 1998 session would have made capital offenses of non-homicide crimes. One of these would have applied the death penalty to a defendant convicted of a second sexually violent offense.²³⁷ The other, House Bill 381,²³⁸ would have amended 18.2-248, the principal drug statute, to make drug kingpins and some drug dealers eligible for the death penalty.²³⁹ The proposed legislation makes drug kingpin activity a capital crime because it "results in so many serious injuries and deaths as to constitute an act of violence committed against all citizens of the

230. 330 S.E.2d 89 (Va. 1985).

231. See 1988 Va. Acts, ch. 550.

232. See Laurence Hammack, *Grayson County Case Prompts Bill Proposal*, ROANOKE TIMES, Nov. 18, 1998, at B1.

233. S.R. 1036, 1999 Sess. (Va. 1999).

234. Hammack, *supra* note 232, at B1.

235. S.R. 1036, 1999 Sess. (Va. 1999).

236. Frank Green, *5 More Capital Offenses Eyed*, RICHMOND TIMES-DISPATCH, Jan. 28, 1998, at A6.

237. *Id.*

238. H.R. 381, 1998 Sess. (Va. 1998).

239. *Id.*

Commonwealth."²⁴⁰ If the bill had passed, it would have virtually subsumed subsections nine and ten of section 18.2-31, arguably without the General Assembly's intention to do so. House Bill 381 is another example of the General Assembly's use of the death penalty to attempt to remedy the societal problem linked to drugs. Quite clearly, responding to societal phenomena is a legislative prerogative. Where, however, the legislature considers application of the ultimate sanction, it should do so with great care and circumspection. The history and apparent future of section 18.2-31 makes one doubt that its expansion has been, or will be, meticulous.

240. *Id.*

