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SHOULD VIRGINIA PUT THE PLANNING BACK INTO THE PREMEDITATION REQUIRED FOR MURDER?

Virginia separates murder into capital, first degree, and second degree murder.¹ Murder is a killing committed with the specific intent to kill with malice.² Malice means the absence of sudden passion in a killer during a murder.³ Capital murder is a willful, deliberate, and premeditated killing that occurs in the commission of certain felonies, or in other

¹ See VA. CODE §§ 18.2-31, 18.2-32 (1982) (types of statutory murder are capital, first degree, and second degree murder). Capital murder is the willful, deliberate, and premeditated killing of a person during the commission of an abduction, armed robbery with deadly weapon, or rape. See VA. CODE § 18.2-31 (1982). Capital murder also includes murder committed with intent to extort money or pecuniary benefit, murder for hire, murder by a prisoner in a correctional facility or in the custody of a prison employee, murder of a law-enforcement officer when the purpose of the killing is to interfere with the performance of the officer's duties, or murder of more than one person as a part of the same act or transaction. *Id.* First degree murder is murder, other than capital murder, by poisoning, lying in wait, imprisoning, starving, or any willful, deliberate, and premeditated killing, or felony murder. See VA. CODE § 18.2-32 (1982). See *Wooden v. Commonwealth*, 222 Va. 758, 761, 284 S.E.2d 811, 813 (1981) (felony murder is the statutory offense of murder combined with commission of listed felonies). Second degree murder is murder other than first degree or capital murder. See *id.*

² See *Pugh v. Commonwealth*, 223 Va. 663, 667, 292 S.E.2d 339, 341 (1982) (murder is killing committed with malice); *Biddle v. Commonwealth*, 206 Va. 14, 20, 141 S.E.2d 710, 714 (1965) (murder is homicide committed with malice); *Hannah v. Commonwealth*, 153 Va. 863, 869, 149 S.E. 419, 421 (1929) (deliberate homicide committed with malice is first degree murder).

³ See *Wooden v. Commonwealth*, 222 Va. 758, 762, 284 S.E.2d 811, 814 (1981) (malice inheres in committing murder intentionally with ill wills towards the victim) (citing *Dawkins v. Commonwealth*, 186 Va. 55, 61, 41 S.E.2d 500, 503 (1947)); *Brown v. Commonwealth*, 86 Va. 466, 473, 10 S.E. 745, 747 (1890) (malice excludes passion in killer); *Read v. Commonwealth*, 63 Va. (22 Gratt.) 924, 939 (1872) (defendant's use of weapon in cool, deliberate manner indicates presence of malicious purpose and absence of sudden passion). *But see* *Bailey v. Commonwealth*, 193 Va. 814, 829-30, 71 S.E.2d 368, 376 (anger does not preclude premeditation), *cert. denied*, 344 U.S. 886 (1952). In *Bailey*, the court stated that a killer armed with a deadly weapon and waiting for a victim is often angry at the victim. *Id.*, 71 S.E.2d at 376. The court reasoned that a killer is guilty of first degree murder if anger caused premeditation because the elements of first degree murder are fulfilled. *Id.*, 71 S.E.2d at 376.

A killing in sudden passion occurs impulsively and without thought on the part of a killer. See *Brown v. Commonwealth*, 86 Va. 466, 473, 10 S.E. 745, 747 (1890) (act of passion results from human infirmity, not malignity of heart). An impulsive killing is manslaughter not murder. See *Brown v. Commonwealth*, 86 Va. 466, 473, 10 S.E. 745, 747 (1890) (manslaughter is killing committed in heat of passion); Comment, *Has the Burger Court Dealt a Death Blow to the Presumption of Malice in Virginia*, 10 U. RICH. L. REV. 687, 688 (1976) [hereinafter cited as *Death Blow*] (manslaughter is killing committed without malice, or in heat of passion). Although Virginia statutes give a penalty for manslaughter, Virginia has no statutory definition of manslaughter. See VA. CODE §§ 18.2-35, 18.2-36 (amended 1982) (voluntary and involuntary manslaughter are Class 5 felony).

Malice is either express malice or implied malice. *Mercer v. Commonwealth*, 150 Va. 588, 592, 142 S.E. 369, 370 (1928). A murder planned and committed in a cool and deliberate

certain circumstances.⁴ First degree murder is either a willful, deliberate, and premeditated killing or felony murder.⁵ Felony murder is a killing committed with malice during the commission of certain felonies.⁶ Second degree murder is a murder other than capital or first degree murder.⁷ Premeditation and deliberation are the distinguishing features between first degree murder and second degree murder.⁸ Premeditation is also a prerequisite for capital murder.⁹ Therefore, premeditation and deliberation determine the difference between a five to twenty year

manner constitutes express malice. *Pugh v. Commonwealth*, 223 Va. 663, 667, 292 S.E.2d 339, 341 (1982). Implied malice is a purposeful killing without adequate provocation. *Id.*, 292 S.E.2d at 341. The circumstances surrounding a killing and the conduct and statements of a killer are evidence of malice. *See Read v. Commonwealth*, 63 Va. (22 Gratt.) 924, 938 (1872) (nature and degree of provocation, reaction of defendant to provocation, character of weapon used in killing, and conduct of killer, show malice).

Traditionally, the Virginia Supreme Court has presumed malice from the act of killing. *See Perkins v. Commonwealth*, 215 Va. 69, 72, 205 S.E.2d 385, 387 (1974) (proof of killing raises prima facie presumption of malice) (citing *Jacobs v. Commonwealth*, 132 Va. 681, 686, 111 S.E. 90, 92 (1922)); *Coleman v. Commonwealth*, 184 Va. 197, 202, 35 S.E.2d 96, 98 (1945) (Virginia courts generally presume malice from proof of killing). The United States Supreme Court decision in *Mullaney v. Wilbur* renders the presumption of malice in Virginia highly suspect because the presumption operates to force the defendant to disprove malice. *See* 421 U.S. 684, 702 n.31 (1975) (defendant can not be required to disprove an element of the crime). *See Death Blow, supra* note 3, at 699-705 (presumption of malice in Virginia unconstitutional under *Mullaney* because the burden of disproving malice rests on defendant).

⁴ *See supra* note 1 (definition of capital murder). Felonies are divided into six separate classes. VA. CODE § 18.2-9 (1982). Capital murder is a Class 1 felony punishable by death or life imprisonment. VA. CODE §§ 18.2-10, 18.2-31 (1982).

⁵ *See supra* note 1 (definition of first degree murder); *supra* note 4 (explanation of felony scheme for Virginia homicide law). First degree murder is a Class 2 felony punishable by imprisonment for twenty years to life. VA. CODE §§ 18.2-10, 18.2-32 (1982).

⁶ *See* VA. CODE § 18.2-32 (1982) (felony murder is one type of first degree murder). Felony murder is malicious homicide committed during the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary, or abduction. *See id.*; *Wooden v. Commonwealth*, 222 Va. 758, 761, 284 S.E.2d 811, 813 (1981) (definition of felony murder). Felony murder requires malice but not intent to kill or premeditation. *See id.* at 762, 284 S.E.2d at 811 (malice necessary for any kind of murder).

⁷ *See supra* note 1 (definition of second degree murder); *supra* note 4 (explanation of felony scheme for Virginia homicide law). Second degree murder is a Class 3 felony punishable by imprisonment for five to twenty years. VA. CODE §§ 18.2-10, 18.2-32 (1982).

⁸ *See Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (proof of premeditation is essential for first degree murder conviction); *Baker v. Commonwealth*, 218 Va. 193, 195, 237 S.E.2d 88, 89 (1977) (premeditation elevates second degree murder to first degree murder); *see also* Michael & Wechsler, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 704-05 (1937) (first degree murder includes premeditated and deliberate homicide, felony homicide, and depraved heart murder, while all other murder is second degree murder).

⁹ *See Whitley v. Commonwealth*, 223 Va. 66, 72, 286 S.E.2d 162, 165 (1982) (capital murder is willful, deliberate, and premeditated murder occurring during commission of certain felonies); *Giarratano v. Commonwealth*, 220 Va. 1064, 1079, 266 S.E.2d 94, 99 (1980) (deliberation and premeditation elevates some intentional homicide from second degree murder to capital murder); *Harrison v. Commonwealth*, 220 Va. 188, 193, 257 S.E.2d 777, 780 (1979) (felony murder is distinguishable from willful, deliberate, and premeditated murder because premeditated murder does not require evidence essential to a conviction of felony

prison term for second degree murder and a possible death sentence for capital murder.¹⁰

Intent to kill is a threshold requirement for murder.¹¹ Without intent to kill, there usually cannot be murder and premeditation is therefore irrelevant.¹² Intent to kill can exist independently of premeditation.¹³ A murderer can decide to kill and act without premeditating on the killing.¹⁴ An unplanned killing committed with malice and intent to kill is second degree murder.¹⁵ Virginia courts presume intent to kill and malice from the act of killing.¹⁶ For second degree murder, the killer

murder). Felony murder differs from capital murder because felony murder does not require premeditation or intent. *See* *Wooden v. Commonwealth*, 222 Va. 758, 762, 284 S.E.2d 811, 814 (1981) (premeditation and intent to kill are not required for felony murder); *Ball v. Commonwealth*, 221 Va. 754, 757, 273 S.E.2d 790, 792 (1981) (unintentional killing during robbery is punishable as first degree murder); *see also* VA. CODE § 18.2-31 (1982) (definition of capital murder).

¹⁰ *See* *Whitley v. Commonwealth*, 223 Va. 66, 286 S.E.2d 162 (1982). A defendant robs a victim's house. The victim surprises the defendant and the defendant shoots and kills the victim. If the defendant does not premeditate the murder, the defendant will get only five years in prison for the killing. If he premeditates the killing, the defendant could go to the electric chair. *Id.* at 72, 286 S.E.2d at 165.

¹¹ *See* *Baker v. Commonwealth*, 218 Va. 193, 195, 237 S.E.2d 88, 89 (1977) (malicious intent to kill is element of both first degree murder and second degree murder). Although malice and intent to kill are not synonymous, malice is evidence of intent to kill. *See* *Wooden v. Commonwealth*, 222 Va. 758, 762, 284 S.E.2d 811, 814 (1981) (malice inferred from intentional killing). The fact that a killer acted without heat of passion can be evidence of intent to kill. *See* *Dawkins v. Commonwealth*, 186 Va. 55, 63, 41 S.E.2d 500, 503 (1947) (intentional illegal act implies malice); Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 759 (1949) (intent to kill usually constitutes malice). Although felony murder and depraved heart murder are malicious acts, they are not necessarily intentional. *See* *Wooden v. Commonwealth*, 222 Va. 758, 762, 284 S.E.2d 811, 814 (1981) (felony murder conviction does not require proof of intent to kill). Depraved heart murder is a killing caused by such extreme recklessness that defendant's actions constitute malice. *See* *Biddle v. Commonwealth*, 206 Va. 14, 20, 141 S.E.2d 701, 714 (1965) (depraved heart murder is malicious failure to perform a duty, such as a mother's failure to feed a child).

¹² *See supra* notes 2 & 11 (intent to kill is element of murder).

¹³ *See* *Baker v. Commonwealth*, 218 Va. 193, 195, 237 S.E.2d 88, 89 (1977) (malicious intent to kill and premeditation are separate elements of first degree murder); *King v. Commonwealth*, 4 Va. (2 Va. Cas.) 78, 88 (1817) (time to think about the killing combined with intent to kill constitutes a willful, deliberate, and premeditated murder).

¹⁴ *See supra* note 8 (premeditation differentiates between first degree murder and second degree murder).

¹⁵ *See supra* notes 1 & 2 (explanation and discussion of second degree, capital and first degree murder).

¹⁶ *See* *Pugh v. Commonwealth*, 233 Va. 663, 667, 292 S.E.2d 339, 341 (1982) (every homicide is presumed to be second degree murder); *Bradshaw v. Commonwealth*, 174 Va. 391, 398, 4 S.E.2d 752, 754 (1939) (malicious homicide is prima facie evidence of second degree murder). The United States Supreme Court decision in *Mullaney v. Wilbur* places the constitutionality of Virginia's second degree murder presumption in jeopardy. 421 U.S. 684, 702 n.31 (1975); *see also* *Death Blow, supra* note 3, at 700. In *Mullaney*, a Maine jury convicted Wilbur of murder. 421 U.S. at 684. Wilbur claimed he lacked malice because the victim provoked Wilbur's attack by making homosexual advances. *Id.* at 685. Under Maine

forms an intent to kill concomitantly with a decision to kill.¹⁷ Intent to kill can come into existence at any time up to the moment of killing.¹⁸

law, murder was criminal homicide committed with malice and manslaughter was criminal homicide committed without malice. *Id.* at 691-92. Maine's homicide statutes required that the defendant produce evidence of provocation or heat of passion to reduce homicide to manslaughter. *Id.* The *Mullaney* Court stated that shifting the burden of proving malice to the defendant increases the likelihood of erroneous murder convictions. *Id.* at 701. The Court noted that malice, or absence of malice, is a statutory element of murder in Maine. *Id.* at 697-98. The Court also stated that the burden of proving every element of the crime rests on the prosecution. *Id.* at 702 n.31. See *In Re Winship*, 397 U.S. 358, 364 (1970). The *Mullaney* court held, therefore, that the prosecution must prove malice or the absence of malice. 421 U.S. at 704.

The United States Supreme Court's decision in *Patterson v. New York*, however, upheld presumptions of elements not clearly contained in statutory law. See 432 U.S. 197, 215-16 (1977). In *Patterson*, the trial court convicted the defendant of killing his estranged wife's lover. *Id.* at 200. The defense argued on appeal that the state had to prove that Patterson did not suffer from extreme emotional disturbance. *Id.* at 201. The *Patterson* Court held that emotional disturbance is not an element of murder but a separate issue that the defendant must prove as an affirmative defense. *Id.* at 206-07.

With Virginia's second degree murder presumption, a trial court will convict a defendant of murder unless the defendant produces evidence showing provocation or mitigating circumstances. See *Hodge v. Commonwealth*, 217 Va. 338, 342, 228 S.E.2d 692, 695-96 (1976) (burden of production of evidence on defendant but burden of persuasion remains on the prosecution). The *Hodge* Court held that the burden of persuasion, however, always remains on the prosecution. *Id.* at 342, 228 S.E.2d at 697. The defendant must produce some evidence of an affirmative defense before the prosecution has the burden of the defense. *Id.* at 341, 228 S.E.2d at 695. The second degree murder presumption places the burden of introducing evidence of affirmative defenses on the defendant. *Id.*, 228 S.E.2d at 695. The prosecution might not have to prove the elements of murder because the elements are inferred from the act of killing. *Death Blow*, *supra* note 3, at 700.

Several Virginia Supreme Court decisions have upheld Virginia's second degree murder presumption despite *Mullaney*. The court in *Hodge v. Commonwealth* found that the second degree murder presumption does not conclusively establish murder and that a defendant need only produce some credible evidence showing murder in the heat of passion to overcome the presumption. 217 Va. 338, 342, 228 S.E.2d 692, 695-96 (1976). The *Hodge* court concluded that no presumption can relieve the prosecution of the burden of showing guilt of the defendant beyond a reasonable doubt. *Id.* at 343, 228 S.E.2d at 695. In *McGhee v. Commonwealth*, the court interpreted the United States Supreme Court's decision in *Patterson* to hold that the prosecution does not have the burden of disproving all affirmative defenses. See 219 Va. 560, 564-65, 248 S.E.2d 808, 811 (1978). The *McGhee* court held that a trial court may still require a defendant to negate intent to kill by showing evidence of an accidental killing. *Id.* at 564, 248 S.E.2d at 811; see *Daughtery v. Commonwealth*, 217 Va. 353, 353, 228 S.E.2d 701, 701 (1976) (second degree murder presumption does not switch prosecution's burden of showing guilt of accused beyond a reasonable doubt). Virginia courts require that jury instructions clearly explain that the second degree murder presumption does not change the burden of persuasion. See *Warlitner v. Commonwealth*, 217 Va. 348, 350, 228 S.E.2d 698, 700 (1976) (effect of presumption on jury determined by considering instructions taken as a whole), *cert. denied*, 430 U.S. 957 (1977); see also *Hodge v. Commonwealth*, 217 Va. 338, 347, 228 S.E.2d 692, 698 (1976) (court must read jury instructions as a whole to determine effect of one instruction on jury).

¹⁷ See *supra* note 11 (definition of intent to kill).

¹⁸ See *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (killer may form intent to kill at moment of killing); *Hairston v. Commonwealth*, 217 Va. 429, 432, 230 S.E.2d 626, 628 (1976)

For first degree murder, a killer deliberates or plans the homicide before making the ultimate decision to kill.¹⁹ Premeditation without the act of killing does not result in a criminally culpable act.²⁰ Although premeditation requires no specific amount of time,²¹ a long period of time increases the likelihood that even a slow thinker had time to plan a killing.²² The planning necessary for first degree murder, however, can occur in a matter of seconds.²³

Intent to kill and premeditation are states of mind.²⁴ The fact finder determines whether a defendant intended to kill and whether a defen-

(intent to kill need not exist for any particular length of time prior to killing); *Akers v. Commonwealth*, 216 Va. 40, 48, 216 S.E.2d 28, 33 (1975) (killer may form intent to kill at time of killing); *Bradshaw v. Commonwealth*, 174 Va. 391, 398-400, 4 S.E.2d 752, 755 (1939) (jury instruction that intent to kill only need exist at time of killing permitted); *McDaniel v. Commonwealth*, 77 Va. 281, 284 (1883) (killer may form intent to kill at moment of killing).

¹⁹ See *Giarratano v. Commonwealth*, 220 Va. 1064, 1074, 266 S.E.2d 94, 100 (1980) (premeditation exists if defendant had time to think of killing and intended to kill) (citing *Bradshaw v. Commonwealth*, 174 Va. 391, 399, 4 S.E.2d 752, 755 (1939)); *King v. Commonwealth*, 4 Va. (2 Va. Cas.) 78, 88 (1817) (premeditated murder requires time to think about killing and intent to kill). Virginia courts have presumed premeditation and prima facie first degree murder when the accused killed with a deadly weapon previously possessed by the accused. See *Bailey v. Commonwealth*, 193 Va. 814, 829-30, 71 S.E.2d 368, 375-76 (presumption of first degree murder arises when deadly weapon was in previous possession of killer), *cert. denied*, 344 U.S. 886 (1952); *Thomas v. Commonwealth*, 186 Va. 131, 138, 41 S.E.2d 476, 479 (1947) (presumption of first degree murder with deadly weapon in previous possession of killer forces defendant to prove extenuating circumstances); *Clinton v. Commonwealth*, 161 Va. 1084, 1089, 172 S.E. 272, 273-74 (1934) (killing with deadly weapon in previous possession of killer shows prima facie guilt of premeditated murder); *Scott v. Commonwealth*, 143 Va. 510, 523-24, 129 S.E. 360, 363 (1925) (first degree murder presumed when deadly weapon in previous possession of killer). Presumption of first degree murder is no longer valid after *Baker v. Muncy*. 619 F.2d 327, 332 (1980). In *Baker*, the court rejected the presumption of prima facie first degree murder because of the Supreme Court's decision in *Mullaney v. Wilbur*. 619 F.2d at 332. See *supra* note 16 (discussion of *Mullaney*). Although the first degree murder presumption only required that the accused show extenuating circumstances to rebut the presumption, the *Baker* court held that there was a substantial risk that the jury would interpret the presumption as providing proof of premeditation beyond a reasonable doubt. 619 F.2d at 332.

²⁰ See *supra* text accompanying note 2 (definition of murder). Planning a killing is not a crime without an actual attempt to kill. See *Nobles v. Commonwealth*, 218 Va. 548, 551, 238 S.E.2d 808, 810 (1977) (attempted murder requires intent to kill and overt act towards actual killing).

²¹ See *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (premeditation does not require an appreciable amount of time).

²² See *Whitley v. Commonwealth*, 223 Va. 66, 71, 286 S.E.2d 162, 165 (1982) (time between forming intent to kill and killing is relevant to show that defendant had the ability to premeditate); *Giarratano v. Commonwealth*, 220 Va. 1064, 1074, 266 S.E.2d 94, 100 (1980) (intent to kill must exist for sufficient period of time to permit premeditation).

²³ See *Giarratano v. Commonwealth*, 220 Va. 1064, 1074, 266 S.E.2d 94, 100 (1980) (premeditation demands only a matter of seconds).

²⁴ See *Nobles v. Commonwealth*, 218 Va. 548, 551, 238 S.E.2d 808, 810 (1977) (intent to kill is decision to kill made in person's mind); *Howard v. Commonwealth*, 207 Va. 222, 228, 148 S.E.2d 800, 804 (1966) (intent to kill is state of mind).

dant premeditated the killing.²⁵ The fact finder determines intent to kill and premeditation by drawing inferences from circumstances surrounding the killing, the conduct of the defendant, and statements made by the defendant before and after the homicide.²⁶ Although premeditation and intent to kill are difficult concepts to define,²⁷ the concepts are crucial to a determination of the culpability of a killer.²⁸ The fact finder, therefore, should receive clear direction on the meaning of premeditation and intent to kill.²⁹

William Penn originated the concept of premeditation to describe the planning element in the worst homicides.³⁰ Pennsylvania Supreme Court Justice William Bradford stated that the death penalty should exist only for deliberate, premeditated assassinations.³¹ A 1794 Pennsylvania Senate statute required premeditation and deliberation for

²⁵ See *Painter v. Commonwealth*, 210 Va. 360, 365, 171 S.E.2d 166, 170 (1969) (jury must decide whether there is sufficient evidence of a crime to prove murder beyond reasonable doubt) (citing *Bryan v. Commonwealth*, 131 Va. 709, 714, 109 S.E.477, 478 (1921)); *Bailey v. Commonwealth*, 191 Va. 510, 516, 62 S.E.2d 28, 30 (1950) (jury determines degree of murder from evidence of crime); *Wright v. Commonwealth*, 74 Va. (33 Gratt.) 880, 892-93 (1880) (same).

²⁶ See *Ridley v. Commonwealth*, 219 Va. 834, 836, 252 S.E.2d 313, 314 (1979) (intent to kill proven by circumstantial evidence) (citing *Tompkins v. Commonwealth*, 212 Va. 460, 461, 184 S.E.2d 767, 768 (1971)); *Nobles v. Commonwealth*, 218 Va. 548, 551, 238 S.E.2d 808, 810 (1977) (intent to kill shown by circumstances surrounding the killing and defendant's conduct and statements).

²⁷ See Cardozo, *What Medicine Can Do For Law*, reprinted in *LAW AND LITERATURE* 70, 99-100 (1931) (courts should change vague distinction between premeditation and intent to kill).

²⁸ See *supra* text accompanying notes 10 & 12 (explanation and discussion of importance of intent to kill and premeditation).

²⁹ See *Gregg v. Georgia*, 428 U.S. 153, 193 (juries must be guided carefully and adequately); Cardozo, *supra* note 27, at 99-100.

³⁰ See Keedy, *supra* note 11, at 772 (William Penn intended premeditation to mean thought and planning on the killing before committing the act). The intent of a killer has long determined the moral blameworthiness and punishment of a killer. See Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 981 (1932) (intent of defendant has always been crucial factor for determining punishment). English courts distinguished a killing with malice from other killings as early as the 12th century. See Green, *The Jury and the English law of Homicide 1200-1600*, 74 U. MICH. L. REV. 414, 419 (1975) (English courts defined a slaying with malice as felonious homicide in 12th century). Originally, malice in the English legal system simply denoted a desire to kill. *Id.* By the early 1500s, the punishment for planned murder committed with "malice prepensed," the old English equivalent of premeditated murder, was death. See Green, *supra*, at 476; Keedy, *supra* note 11, at 759.

In 1682 and 1683, the Pennsylvania legislature under William Penn's guidance, modified the English homicide law existing in America and restricted the death penalty to willful or premeditated murder. See Keedy, *supra* note 11, at 771.

³¹ See W. Bradford, *An Enquiry How Far The Punishment Of Death Is Necessary In Pennsylvania*, reprinted in *REFORM ON CRIMINAL LAW IN PENNSYLVANIA* 35-37 (1971) (deliberate assassination is a type of murder and requires premeditation). See *infra* note 160.

capital murder.³² Pennsylvania allowed the death penalty only for a willful, deliberate, and premeditated murder.³³ Virginia enacted Pennsylvania's statutory murder scheme, including the concepts of premeditation and deliberation, in 1796.³⁴

Beginning with *King v. Commonwealth*,³⁵ the Virginia Supreme Court enforced Virginia's statutory distinction between premeditation and intent to kill.³⁶ In *King*, a jury convicted King of second degree murder for stabbing a man to death during an argument over a card game.³⁷ A jury sentenced King to eighteen years in prison for the murder.³⁸ King appealed to the Virginia Supreme Court because the killing occurred during a fight and, therefore, only could be manslaughter.³⁹ The court held that a killing committed during a fight is an act of self defense or an act in the heat of passion, and usually is not a malicious homicide.⁴⁰ The *King* court dismissed King's appeal, however, because the court presumed the malice necessary for murder from King's use of a deadly weapon after only slight provocation.⁴¹ The court explained that first degree murder is a killing done on purpose after premeditation, while manslaughter is an accidental killing occurring under circumstances suggesting that the killer acted in the heat of passion.⁴² The court explained that first degree murder requires a killer to develop a

³² See Keedy, *supra* note 11, at 773. A 1794 Pennsylvania Senate resolution classified first degree murder as murder by poison, murder by lying in wait, or willful, premeditated, and deliberate killing. *Id.*

³³ See Note, *Capital Punishment in Virginia*, 58 VA. L. REV. 97, 101 (1972) (only first degree murder remained a capital offense under the Pennsylvania murder statute adopted by Virginia). A murder must fulfill all the requirements of an intentional, deliberate, and premeditated killing to be punishable by death. See Michael & Wechsler, *supra* note 8, at 704 (homicide must be willful, premeditated, and deliberate to be first degree murder).

³⁴ See *King v. Commonwealth*, 4 Va. (2 Va. Cas.) 78, 84 (1817) (Virginia's homicide laws borrowed from Pennsylvania); *Capital Punishment*, *supra* note 33, at 102 (Virginia adopted the same harsh degrees of murder as Pennsylvania in 1796).

³⁵ 4 Va. 78 (1817).

³⁶ See *McDaniel v. Commonwealth*, 77 Va. 281, 284 (1883) (premeditation differs from intent to kill because a premeditated killing requires time for reflection on the killing); *King v. Commonwealth*, 4 Va. (2 Va. Cas.) 78, 86 (1817) (time to think about killing is necessary for premeditation but not for intent to kill); see also *Boswell v. Commonwealth*, 61 Va. (20 Gratt.) 860, 871 (1871) (involuntary intoxication negates premeditation but not intent to kill).

³⁷ See *King v. Commonwealth*, 4 Va. 78, 78 (1817). In *King*, King and the victim argued over a bottle of whiskey. *Id.* King stabbed the victim in the stomach and fled. *Id.* at 79. A witness stated that King sharpened his knife prior to the killing and spoke of getting revenge on someone. *Id.* at 80.

³⁸ *Id.* at 78.

³⁹ *Id.* at 83; see *supra* note 3 (description of manslaughter).

⁴⁰ 4 Va. at 84 (killing during fight is manslaughter unless one party takes undue advantage or inflicts fatal blow at the beginning of fight).

⁴¹ *Id.* at 83 (malice presumed from fact that first blow fatally wounded opponent).

⁴² *Id.* at 85 (fact that first blow was fatal is evidence of an intent to kill).

plan about a killing before actually committing the homicide.⁴³ The *King* court stated that first degree murder occurs if a killer has time to think about a killing, and intends to kill for even a short time before acting.⁴⁴ The court differentiated between the time necessary to plan a murder and the time necessary to form an intent to kill.⁴⁵ The court said that premeditation requires more than deliberation and deliberation requires more than intent to kill.⁴⁶ Although the *King* court provided no guidance on the length of time required for a killer to think about a murder before forming an intent to kill,⁴⁷ the court in *McDaniel v. Commonwealth*⁴⁸ separated the time elements of intent to kill and premeditation.⁴⁹

In *McDaniel*, the trial court convicted McDaniel of first degree murder and sentenced McDaniel to death for striking and killing his victim with a stick.⁵⁰ McDaniel claimed that he acted only because of the victim's threats.⁵¹ On appeal to the Virginia Supreme Court, however, the court found that although McDaniel intended to kill the victim, the jury incorrectly convicted McDaniel of first degree murder.⁵² The court, therefore, reversed McDaniel's first degree murder conviction.⁵³ The court held that the evidence was insufficient to show that McDaniel thought about whether to kill and acted according to a preconceived plan about the killing.⁵⁴ The *McDaniel* court contrasted the time element of intent to kill with the time element of premeditation.⁵⁵ The court held that premeditation requires at least some time for reflection, while intent to kill can exist only at the moment of the killing.⁵⁶

⁴³ *Id.* at 86 (time to think provides a killer with time to think whether to kill).

⁴⁴ *Id.* at 88.

⁴⁵ *Id.* (premeditation requires more than deliberation and deliberation requires more than intent to kill).

⁴⁶ *Id.*

⁴⁷ *Id.* (no time element for deliberation can be fixed by law).

⁴⁸ 77 Va. 281 (1883).

⁴⁹ See *infra* text accompanying notes 55 and 56 (discussion of *McDaniel* court's distinction between intent to kill and premeditation).

⁵⁰ See *McDaniel v. Commonwealth*, 77 Va. 281, 285 (1883). In *McDaniel*, McDaniel borrowed the victim's horse. *Id.* at 284. When McDaniel returned the horse the victim accused McDaniel of mistreating the horse. *Id.* at 285. Since both men were intoxicated, both men became angry and a quarrel started. *Id.* at 284. Shortly after the quarrel, the victim came up to McDaniel with a stick and the defendant struck the victim. *Id.* at 285. The victim raised his stick in protection and then struck at McDaniel. *Id.* McDaniel struck back, killing the victim with his second blow. *Id.*

⁵¹ *Id.* at 282.

⁵² *Id.* at 286.

⁵³ *Id.* at 288.

⁵⁴ *Id.* at 287. The *McDaniel* court held that the defendant's statements and the blows to the victim do not warrant a finding of first degree murder without further evidence of premeditation. *Id.* at 286.

⁵⁵ *Id.* at 284.

⁵⁶ *Id.* The *McDaniel* court held that a premeditated murderer thinks about the killing before determining to kill. *Id.*

Virginia Supreme Court decisions after *McDaniel* ignored the distinction between the time elements required for premeditation and intent to kill made by the *McDaniel* court.⁵⁷ In *Mosby v. Commonwealth*,⁵⁸ Mosby shot and killed the victim during an argument over Mosby's intentions towards the victim's wife.⁵⁹ A jury found that the victim did not provoke Mosby and that Mosby killed with premeditation and malice.⁶⁰ The jury convicted Mosby of first degree murder.⁶¹ On Mosby's appeal to the Virginia Supreme Court, the court affirmed the first degree murder conviction.⁶² The court held that the will to kill and purpose of killing, not the interval of time between formation of the will to kill and the act, determines the degree of murder.⁶³ The *Mosby* court, therefore, equated intentional murder with premeditated murder.⁶⁴

After *Mosby*, the Virginia Supreme Court followed the reasoning in *Mosby* that the will to kill and purpose of killing, not the time interval between formation of intent to kill and the killing, determines the level of culpability.⁶⁵ In *Bailey v. Commonwealth*,⁶⁶ Bailey stabbed a car garage manager after a dispute over a bill for car repairs.⁶⁷ The jury convicted Bailey of first degree murder and sentenced Bailey to life imprisonment.⁶⁸

⁵⁷ See *Fuller v. Commonwealth*, 201 Va. 724, 730, 113 S.E.2d 667, 672 (1960) (will and purpose to kill, not interval of time, determines degree of murder); *Bailey v. Commonwealth*, 191 Va. 510, 516, 62 S.E.2d 28, 31 (1950) (same); *Pannill v. Commonwealth*, 185 Va. 244, 255, 38 S.E.2d 457, 463 (1946) (difference between the first degree murder and second degree murder depends on intent of killer at time of killing); *Mosby v. Commonwealth*, 168 Va. 688, 694, 190 S.E. 152, 154 (1937) (intent to kill determines degree of culpability); *Williams v. Commonwealth*, 128 Va. 698, 715-16, 104 S.E. 853, 859 (1920) (proof of intent to kill elevates murder to first degree murder). *But see* *Bradshaw v. Commonwealth*, 174 Va. 391, 399, 4 S.E.2d 752, 755 (1939) (premeditated killing requires both time to think of killing and intent to kill).

⁵⁸ 168 Va. 688, 190 S.E. 152 (1937).

⁵⁹ *Id.* at 691, 190 S.E. at 153. In *Mosby*, the victim and Mosby started arguing at a party. *Id.*, 190 S.E. at 153. The victim threatened Mosby and called Mosby a name. *Id.* at 691, 190 S.E. at 153. Mosby left the party. *Id.*, 190 S.E. at 153. Upon re-entering the room, Mosby shot the victim from behind the door. *Id.*, 190 S.E. at 153.

⁶⁰ *Id.* at 695, 190 S.E. at 155.

⁶¹ *Id.* at 691, 190 S.E. at 153.

⁶² *Id.* at 695, 190 S.E. at 155.

⁶³ *Id.* at 694, 190 S.E. at 154.

⁶⁴ *Id.*, 190 S.E. at 154.

⁶⁵ See *Hairston v. Commonwealth*, 217 Va. 429, 432, 230 S.E.2d 626, 628 (1976) (will and purpose to kill, not interval of time, determines the degree of murder); *accord*, *Akers v. Commonwealth*, 216 Va. 40, 48, 216 S.E.2d 28, 33 (1975); *Fuller v. Commonwealth*, 201 Va. 724, 730, 113 S.E.2d 667, 672 (1960); *Bailey v. Commonwealth*, 191 Va. 510, 516, 62 S.E.2d 28, 31 (1950); *Pannill v. Commonwealth*, 185 Va. 244, 255, 38 S.E.2d 457, 463 (1946).

⁶⁶ 191 Va. 510, 62 S.E.2d 28 (1950).

⁶⁷ *Id.* at 516-17, 62 S.E.2d at 29-30. In *Bailey*, Bailey drank alcohol before going to pick up his car at the victim's garage. *Id.* at 516, 62 S.E.2d at 29. Bailey refused to pay the bill for car repairs or to leave the garage. *Id.* at 514-15, 62 S.E.2d at 29-30. The victim and Bailey started to fight and Bailey stabbed the victim in the chest. *Id.*, 62 S.E.2d at 30.

⁶⁸ *Id.* at 514, 62 S.E.2d at 29.

On appeal to the Virginia Supreme Court, Bailey contended that a first degree murder conviction was improper because the period of time necessary for premeditation had not elapsed.⁶⁹ The court concurred with the jury's finding that Bailey committed a willful, deliberate, and premeditated murder without adequate provocation.⁷⁰ The court reversed the first degree murder conviction, however, because the jury selection was discriminatory.⁷¹ The *Bailey* court ignored the distinction between premeditation and intent to kill.⁷²

Twenty-five years after *Bailey*, the Virginia Supreme Court in *Akers v. Commonwealth*⁷³ continued to equate an intentional murder with a premeditated murder.⁷⁴ In *Akers*, Akers confessed to killing a fourteen year old girl to stop the girl's screams.⁷⁵ Akers met the victim at a local convenience store and forced the girl to come to his apartment.⁷⁶ The prosecution presented evidence showing either felony murder or premeditated murder.⁷⁷ The trial judge convicted Akers of first degree murder and sentenced Akers to life imprisonment.⁷⁸ On appeal to the Virginia Supreme Court, Akers contended that the trial judge erred in not requiring the prosecution to charge the defendant with only one theory of first degree murder.⁷⁹ Akers claimed that felony murder and premeditated murder are mutually exclusive theories of first degree murder.⁸⁰ The *Akers* court affirmed Akers' first degree murder conviction because sufficient evidence existed to convict Akers of both premeditated murder and felony murder.⁸¹ The court found that the evidence showed that Akers killed during an abduction for immoral purposes, committing a felony murder, and also a first degree murder by intentionally killing the victim with premeditation.⁸²

⁶⁹ *Id.* at 516, 62 S.E.2d at 29.

⁷⁰ *Id.* at 517-18, 62 S.E.2d at 30-31.

⁷¹ *Id.* at 523-24, 62 S.E.2d at 34 (evidence sufficient to reverse conviction because jury was not selected without regard to race).

⁷² See *supra* note 65 (examples of earlier courts that failed to distinguish between premeditation and intent to kill).

⁷³ 216 Va. 40, 216 S.E.2d 28 (1975).

⁷⁴ See *supra* note 65 (examples of earlier courts that failed to distinguish between premeditation and intent to kill).

⁷⁵ 216 Va. at 48, 216 S.E.2d at 33.

⁷⁶ *Id.* at 42, 216 S.E.2d at 30. In *Akers*, Akers threatened the victim with a knife to get the victim to go to Akers' apartment. *Id.*, 216 S.E.2d at 30. When Akers started unbuckling the victim's pants in the bedroom, the victim screamed. *Id.* at 42, 216 S.E.2d at 29. Although Akers did not rape the victim, he stabbed the victim in the chest seven times. *Id.*, 216 S.E.2d at 30. Akers called the police to confess the killing. *Id.*, 216 S.E.2d at 29.

⁷⁷ *Id.* at 47-48, 216 S.E.2d at 33.

⁷⁸ *Id.* at 41, 216 S.E.2d at 29.

⁷⁹ *Id.* at 47, 216 S.E.2d at 33. On appeal to the Virginia Supreme Court, Akers contested the voluntariness of his confession. *Id.* at 45, 216 S.E.2d at 31. The *Akers* court held that the defendant's confession was voluntary because the police officers conducting the interrogation protected Akers' rights. *Id.* at 46, 216 S.E.2d at 31.

⁸⁰ *Id.* at 48, 216 S.E.2d at 32-33.

⁸¹ *Id.*, 216 S.E.2d at 33.

⁸² *Id.*, 216 S.E.2d at 33.

The court held that the formation of an intent to kill results in a willful, deliberate, and premeditated murder.⁸³ The court determined that Akers formed the intent to kill when the victim began screaming for help.⁸⁴ The court, therefore, concluded that Akers committed a willful, deliberate, and premeditated murder.⁸⁵

Similar to the court in *Akers*, the Virginia Supreme Court in *Hairston v. Commonwealth*⁸⁶ upheld Hairston's conviction for premeditated murder because the defendant intended to kill the victim.⁸⁷ In *Hairston*, Hairston obtained a ride from the victim and later shot the victim in the head.⁸⁸ The trial judge convicted Hairston of first degree murder and sentenced Hairston to life imprisonment.⁸⁹ Hairston claimed that there was not the evidence of premeditation and deliberation necessary for a first degree murder conviction.⁹⁰ The *Hairston* court inferred an intent to kill from the fact that the victim died trying to escape and that Hairston later attempted to cover up the murder.⁹¹ The court, therefore, concluded that the trial judge was justified in finding willful, deliberate, and premeditated murder.⁹²

One year after *Hairston*, the Virginia Supreme Court in *Baker v. Commonwealth*⁹³ again distinguished between intentional killing and premeditated killing.⁹⁴ In *Baker*, Baker killed two men in an argument over a dice game.⁹⁵ The jury convicted Baker of first degree murder and involuntary manslaughter.⁹⁶ On appeal to the Virginia Supreme Court, Baker challenged the prosecution's jury instruction that described the elements of premeditated murder.⁹⁷ The instruction described the amount of time necessary for intent to kill without reference to the time

⁸³ *Id.*, 216 S.E.2d at 33 (intent to kill originating with act of killing suffices to prove premeditated killing).

⁸⁴ *Id.*, 216 S.E.2d at 33 (court provided no reasons for deciding that Akers formed the intent to kill when the victim began screaming).

⁸⁵ *Id.*, 216 S.E.2d at 33.

⁸⁶ 217 Va. 429, 230 S.E.2d 626 (1976).

⁸⁷ *Id.* at 432, 230 S.E.2d at 628.

⁸⁸ *Id.* at 430, 230 S.E.2d at 627.

⁸⁹ *Id.* at 429, 230 S.E.2d at 626.

⁹⁰ *Id.* at 430, 230 S.E.2d at 627.

⁹¹ *Id.* at 432, 230 S.E.2d at 628. In *Hairston*, the victim's body fell out of the car after the shooting because the victim had opened the door in an attempt to escape. *Id.*, 230 S.E.2d at 628. The defendant obtained help from a friend in burning the victim's body and car to cover up the killing. *Id.*, 230 S.E.2d at 628.

⁹² *Id.* at 432, 230 S.E.2d at 628.

⁹³ 218 Va. 193, 237 S.E.2d 88 (1977).

⁹⁴ *See* 218 Va. at 195, 237 S.E.2d at 89 (intent is element of both first degree murder and second degree murder but premeditation elevates second degree murder to first degree murder). *See supra* note 11 (explanation of intent to kill).

⁹⁵ 218 Va. at 194, 237 S.E.2d at 88.

⁹⁶ *Id.* (Baker killed one victim before killing second victim in scuffle over gun used to kill first victim).

⁹⁷ *Id.* at 194, 237 S.E.2d at 88-89.

necessary for premeditation.⁹⁸ Baker argued that the instruction misled the jury into equating the time element for intent to kill with the time element for premeditation.⁹⁹ Baker contended that the jury incorrectly believed that premeditation originating contemporaneously with the act of killing suffices to support a first degree murder conviction.¹⁰⁰ The *Baker* court recognized the difference between premeditation and intent to kill and agreed with Baker's contention that premeditation originating at the time of a killing is insufficient to support a first degree murder conviction.¹⁰¹ The court explained that although intent to kill is an element of both first and second degree murder, proof of premeditation elevates second degree murder to first degree murder.¹⁰² The *Baker* court found that although the jury instruction referred to a willful, deliberate, and premeditated murder, the purpose of the instruction was to define the time element for intent to kill.¹⁰³ The court required omission of any reference to premeditation in an instruction on intent to kill in the future.¹⁰⁴ The court, however, affirmed Baker's conviction because the court concluded that the trial court adequately preserved the distinction between premeditation and intent to kill by giving a separate instruction on premeditation.¹⁰⁵

Some Virginia Supreme Court cases, however, have not followed the *Baker* court's reasoning and have not preserved adequately the distinction between premeditation and intent to kill.¹⁰⁶ In *Smith v. Com-*

⁹⁸ *Id.* at 195, 237 S.E.2d at 89.

⁹⁹ *Id.*, 237 S.E.2d at 89.

¹⁰⁰ *Id.*, 237 S.E.2d at 89.

¹⁰¹ *Id.*, 237 S.E.2d at 89.

¹⁰² *Id.*, 237 S.E.2d at 89.

¹⁰³ *Id.*, 237 S.E.2d at 89.

¹⁰⁴ *Id.*, 237 S.E.2d at 89.

¹⁰⁵ *Id.*, 237 S.E.2d at 89.

¹⁰⁶ See *Epperly v. Commonwealth*, 224 VRR 187, 202, ___ S.E.2d ___, ___ (1982) (first degree murder requires intentional killing); *Smith v. Commonwealth*, 220 Va. 696, 703, 261 S.E.2d 550, 553 (1980) (premeditation is adoption of intent to kill); *Harrison v. Commonwealth*, 220 Va. 188, 194, 257 S.E.2d 777, 781 (1979) (premeditation requires intent to kill and act of killing).

In *Harrison v. Commonwealth*, Harrison and a companion killed a service station manager while committing an armed robbery. 220 Va. at 194, 257 S.E.2d at 778. The trial court found Harrison guilty of murder in the commission of a robbery at least as a principal of the second degree. *Id.* at 190, 257 S.E.2d at 778. On appeal, the Virginia Supreme Court stated that premeditated murder requires intent to kill and proof of a killing. *Id.* at 194, 257 S.E.2d at 781. The *Harrison* court affirmed, classifying Harrison's conviction as a first degree murder and armed robbery. *Id.* The court primarily considered whether double jeopardy barred conviction of first degree murder when a defendant had been convicted already of a related armed robbery. *Id.* at 191, 257 S.E.2d at 780. The court held that willful, deliberate, and premeditated murder, unlike felony murder, does not require evidence of the felony in a separate charge. *Id.* at 193, 257 S.E.2d at 780-81. The court held that double jeopardy does not bar convictions of premeditated murder and of a separate felony occurring at the same time as the murder. *Id.* at 194, 257 S.E.2d at 780.

monwealth,¹⁰⁷ police found the victim's body four weeks after the victim's disappearance.¹⁰⁸ Witnesses testified that the victim was with Smith shortly before disappearing.¹⁰⁹ The trial court convicted Smith of first degree murder and sentenced Smith to twenty-five years in prison.¹¹⁰ On appeal to the Virginia Supreme Court, Smith challenged the sufficiency of evidence on premeditation.¹¹¹ The *Smith* court defined premeditation as specific intent to kill.¹¹² The court accepted the reasoning of the *Akers* court that the will to kill and purpose for killing, not the interval of time, determines the degree of murder.¹¹³ The court classified Smith's actions before and after the killing as totally inconsistent with those in an accidental or unintentional killing.¹¹⁴ The *Smith* court concluded, therefore, that the evidence showed that Smith committed a deliberate, intentional, and premeditated killing.¹¹⁵

The *Smith* dissent objected to the majority's holding that intent to kill alone can suffice to prove first degree murder.¹¹⁶ Although the dissent agreed with the majority that Smith had the intent to commit murder, the dissent found no evidence of premeditation.¹¹⁷ The dissent stated that premeditation and intent to kill are distinct elements of first degree murder.¹¹⁸ The dissent described premeditation as a process of contemplation requiring much more than the adoption of an intent to kill.¹¹⁹

¹⁰⁷ 220 Va. 696, 261 S.E.2d 550 (1980).

¹⁰⁸ *Id.* at 700, 261 S.E.2d at 552. In *Smith*, the defendant claimed that another man killed the victim. *Id.* at 700, 261 S.E.2d at 552-53. Circumstantial evidence linked the defendant to the victim's disappearance. *Id.* at 698-700, 261 S.E.2d at 553-54. Witnesses testified that the defendant's car was seen in the same deserted area as the victim's body around the time of murder. *Id.* at 698-99, 261 S.E.2d at 551-52. Police recovered the victim's car in the possession of the defendant. *Id.*, 261 S.E.2d at 552. Other evidence showed that the defendant held his four year old son hostage in an attempt to resist arrest and that the defendant admitted to a cellmate that he might have killed the victim. *Id.* at 700, 261 S.E.2d at 553. The jury determined that the evidence of intent to kill and premeditation was sufficient to convict the defendant of first degree murder. *Id.* at 697, 261 S.E.2d at 555.

¹⁰⁹ *Id.* at 698-99, 261 S.E.2d at 551-52.

¹¹⁰ *Id.* at 697, 261 S.E.2d at 551.

¹¹¹ *Id.* at 702, 261 S.E.2d at 553.

¹¹² *Id.*, 261 S.E.2d at 553.

¹¹³ *Id.*, 261 S.E.2d at 553. See *Akers v. Commonwealth*, 216 Va. 40, 48, 216 S.E.2d 28, 33 (1975) (will and purpose to kill, not interval of time, determines the degree of murder).

¹¹⁴ *Id.* at 702-03, 261 S.E.2d at 554.

¹¹⁵ *Id.* at 703, 261 S.E.2d at 555.

¹¹⁶ *Id.* at 704, 261 S.E.2d at 555 (Poff, J., dissenting) (majority equates premeditation and intent to kill).

¹¹⁷ *Id.*, 261 S.E.2d at 555 (majority based conclusion of first degree murder on inferences that are insufficient to support a finding of premeditation beyond a reasonable doubt).

¹¹⁸ *Id.*, 261 S.E.2d at 555 (majority's statement that premeditation is the formation of an intent to kill is misleading).

¹¹⁹ *Id.*, 261 S.E.2d at 555 (premeditation is evidence of willful persistence in a continuing criminal design).

The dissent stated that the Virginia legislature intentionally chose premeditation as an element of the worst homicide.¹²⁰ The dissent found, therefore, that the majority opinion thwarts legislative intent by not distinguishing between premeditation and intent to kill.¹²¹ The dissent determined, in addition, that the majority opinion conflicts with previous Virginia Supreme Court decisions that separate premeditation from intent to kill.¹²²

The Virginia Supreme Court adopted the *Smith* dissent's separation of intent to kill and premeditation in *Giarratano v. Commonwealth*.¹²³ In *Giarratano*, Giarratano confessed to raping and strangling a teenage girl.¹²⁴ Giarratano also confessed to killing the girl's mother to cover up the rape and murder of the daughter.¹²⁵ The trial judge convicted Giarratano of rape, first degree murder, and capital murder.¹²⁶ On appeal to the Virginia Supreme Court, the defense argued that Giarratano lacked the mental capacity to premeditate because of insanity and intoxication, and also that the absence of time for Giarratano to develop a murder plan precluded a finding of premeditation.¹²⁷ The court found that Giarratano was able to premeditate at the time of the murder.¹²⁸ The court

¹²⁰ *Id.*, 261 S.E.2d at 555.

¹²¹ *Id.*, 261 S.E.2d at 555.

¹²² *Id.*, 261 S.E.2d at 555. The *Smith* dissent gave as examples cases where the defendant pleads intoxication as a defense to first degree murder. *Id.*, 261 S.E.2d at 555. *Griggs v. Commonwealth*, 220 Va. 46, 52, 255 S.E.2d 475, 479 (1979) (voluntary intoxication negates premeditation and deliberation); *Hatcher v. Commonwealth*, 218 Va. 811, 814, 241 S.E.2d 756, 758 (1978) (drunkenness renders defendant incapable of premeditation); *Chittum v. Commonwealth*, 211 Va. 12, 18, 174 S.E.2d 779, 782 (1970) (intoxication negates premeditation but not other elements of the crime); see also *Gills v. Commonwealth*, 141 Va. 445, 450, 126 S.E. 51, 53 (1925) (drunkenness if irrelevant in determining second degree murder or manslaughter); *Brenan v. Commonwealth*, 183 Va. 846, 850, 33 S.E.2d 639, 640 (1945) (intoxication does not negate intent to commit robbery).

¹²³ 220 Va. 1064, 266 S.E.2d 94 (1980).

¹²⁴ *Id.* at 1073-74, 266 S.E.2d at 97. In *Giarratano*, Giarratano went into the victims' apartment. *Id.* at 1073, 266 S.E.2d at 96. Under the influence of drugs, Giarratano responded to the first victim's supposed advances and raped the girl. *Id.* at 1066, 266 S.E.2d at 97. The girl refused to stop screaming, and the defendant strangled her. *Id.*, 266 S.E.2d at 97. After the defendant left the apartment, he then returned to turn off the lights. *Id.*, 266 S.E.2d at 97. Giarratano proceeded to wait for the girl's mother to prevent the mother from talking about the murder. *Id.*, 266 S.E. at 97. When the mother returned home, the defendant stabbed the mother three times as she fought the defendant. *Id.*, 266 S.E.2d at 97.

¹²⁵ *Id.* at 1073-74, 266 S.E.2d at 97.

¹²⁶ *Id.* at 1066, 266 S.E.2d at 95.

¹²⁷ *Id.* at 1073, 266 S.E.2d at 99.

¹²⁸ *Id.* at 1079, 266 S.E.2d at 103. In *Giarratano*, the doctor who examined Giarratano to determine his mental condition testified that Giarratano was mentally competent to stand trial and, at the time of the murders, was not mentally ill. *Id.* at 1070, 266 S.E.2d at 97. The doctor also testified that the drugs taken by the defendant could not cause the degree of insanity necessary to prevent the defendant from knowing right or wrong. *Id.* at 1071, 266 S.E.2d at 98. The *Giarratano* court found that the defendant's conduct immediately before and after the murders refuted the defendant's claim of mental incapacity. *Id.*, 266 S.E.2d at 99.

determined that a killer need only premeditate and plan the killing for a matter of seconds to satisfy the requirement of premeditation for first degree murder.¹²⁹ The court held that ample time elapsed, during which Giarratano told the screaming girl to be quiet, for Giarratano to deliberate and meditate on the intent to kill.¹³⁰ Although the court held that premeditation could occur in a matter of seconds, the *Giarratano* court considered premeditation and intent to kill as distinct elements.¹³¹

The court in *Whitley v. Commonwealth*¹³² recognized the difference between premeditation and intent to kill reestablished by the *Giarratano* court.¹³³ In *Whitley*, Whitley confessed to killing an elderly widow and taking the victim's car and credit cards.¹³⁴ The trial court convicted Whitley of capital murder.¹³⁵ On appeal to the Virginia Supreme Court, Whitley argued that the prosecution did not prove premeditation beyond a reasonable doubt.¹³⁶ The court found that although the time between the formation of an intent to kill and a killing does not control a finding on premeditation, the amount of time between formation of intent to kill and killing does show that defendant had sufficient time to premeditate the killing.¹³⁷ The court stated that intent to kill is the result of the process of premeditation.¹³⁸ The *Whitley* court affirmed Whitley's conviction for capital murder and upheld imposition of the death penalty.¹³⁹ The *Whitley* court's holding that intent to kill is the result of premeditation differs from previous Virginia Supreme Court reasoning equating intent to kill with premeditation.¹⁴⁰

The recent Virginia Supreme Court decision in *Epperly v. Commonwealth*¹⁴¹ did not follow the reasoning in *Whitley* distinguishing premeditation and intent to kill.¹⁴² The *Epperly* court returned to the

¹²⁹ *Id.* at 1074, 266 S.E.2d at 100.

¹³⁰ *Id.*, 266 S.E.2d at 100 (court inferred sufficient time to premeditate from Giarratano's strangling the victim after telling her to be quiet).

¹³¹ *Id.*, 266 S.E.2d at 100.

¹³² 223 Va. 66, 286 S.E.2d 162 (1982).

¹³³ *Id.* at 72, 286 S.E.2d at 164-65 (intent to kill is product of premeditation); see *supra* text accompanying note 131 (*Giarratano* court's distinction between intent to kill and premeditation).

¹³⁴ *Id.*, 286 S.E.2d at 165. In *Whitley*, Whitley went to the victim's home to use the telephone before the killing. *Id.* at 71, 286 S.E.2d at 165. The police found the victim's body with hands tied, throat cut, and umbrellas inserted in the vaginal and rectal cavities. *Id.*, 286 S.E.2d at 164-65.

¹³⁵ *Id.*, 286 S.E.2d at 164.

¹³⁶ *Id.*, at 72, 286 S.E.2d at 165.

¹³⁷ *Id.*, 286 S.E.2d at 165.

¹³⁸ *Id.*, at 286 S.E.2d at 165.

¹³⁹ *Id.* at 82, 286 S.E.2d at 171.

¹⁴⁰ See *supra* notes 57 & 65 (examples of Virginia cases equating premeditation and intent to kill by using intent to kill to separate first degree and second degree murder).

¹⁴¹ 224 VRR 187, ___ S.E.2d ___ (1982).

¹⁴² See *infra* text accompanying notes 147-49 (explanation of reasoning of *Epperly* court); see also *Whitley v. Commonwealth*, 223 Va. 66, 72, 286 S.E.2d 162, 165 (1982) (intent

reasoning enunciated in *Mosby* that intent to kill distinguishes first degree and second degree murder.¹⁴³ In *Epperly*, a jury convicted Epperly of first degree murder for killing a college coed and sentenced Epperly to life imprisonment.¹⁴⁴ Although the victim's body was never found, strong circumstantial evidence linked Epperly with the missing coed at the time of the coed's disappearance.¹⁴⁵ On appeal to the Virginia Supreme Court, Epperly argued that the evidence did not support a finding of premeditation and deliberation because the prosecution did not show an intent to kill necessary for first degree murder.¹⁴⁶ The *Epperly* court affirmed Epperly's conviction because the jury justifiably inferred intent to kill and premeditation from the evidence.¹⁴⁷ The evidence showed the brutality of the attack, the disparity in size and strength between

to kill is not the same as premeditation). See *supra* text accompanying notes 134-39 (explanation of *Whitley*).

¹⁴³ 224 VRR at 203, ___ S.E.2d at ___; see *supra* text accompanying note 64 (*Mosby* court reasoned that intent to kill determines level of culpability).

¹⁴⁴ 224 VRR at 187, ___ S.E.2d at ___.

¹⁴⁵ *Id.* at 199, ___ S.E.2d at ___ (prosecution can use circumstantial evidence to prove victim's death and that criminal violence caused the victim's death).

A person's disappearance without other evidence is legally insufficient to prove either a person's death or a defendant's actions in causing a person's death, the two elements of corpus delicti in a homicide. See *Perovich v. United States*, 205 U.S. 86, 92 (1907) (disappearance of victim is only one circumstance tending to show death); *Perkins, The Corpus Delicti of Murder*, 48 VA. L. REV. 173, 185 (1962) (proof of disappearance alone does not establish corpus delicti). The prosecution must prove corpus delicti beyond a reasonable doubt to convict a defendant of homicide. See *Smith v. United States*, 348 U.S. 147, 154 (1954). Although a rare occurrence, circumstantial evidence is sufficient to prove corpus delicti if the evidence produces a moral certainty of the victim's death in the minds of the jurors. See *Orange v. Commonwealth*, 191 Va. 423, 435, 61 S.E.2d 267, 271 (1950) (circumstances must produce moral certainty of the defendant's guilt); *Smith v. Commonwealth*, 185 Va. 800, 816, 40 S.E.2d 273, 280 (1946) (prosecution must prove by circumstantial or direct evidence that defendant caused death of victim). The evidence used to prove corpus delicti where the victim's body is missing includes direct evidence of violence linking defendant with the victim's disappearance, production of a small part of the victim's body, or incriminating evidence where the defendant confessed to the crime or admitted the victim's death. See *Perovich v. United States*, 205 U.S. 86, 88-89 (1907) (burned parts of victim's body introduced as evidence); *Orange v. Commonwealth*, 191 Va. 423, 436-37, 61 S.E.2d 267, 273 (1950) (blood on defendant, and defendant's razor blade, and motive of defendant, suffice to prove corpus delicti); *Smith v. Commonwealth*, 185 Va. 800, 817-18, 40 S.E.2d 273, 280-81 (1946) (evidence of blood at scene of crime can prove that defendant caused the victim's death).

In *Epperly*, the proof of premeditation included evidence that the victim was last seen with the defendant, that the defendant never directly denied the killing, and that the defendant questioned a friend about the legal consequences of a killing if the victim's body was missing. 224 VRR at 190-92, ___ S.E.2d at ___. Police found bloodstains matching the victim's bloodtype in the house where the victim and the defendant were last seen. *Id.* at 193, ___ S.E.2d at ___. A dog tracked the defendant's scent from the victim's abandoned car and bloodstained clothes to the home of the defendant. *Id.* at 197-98, ___ S.E.2d at ___.

¹⁴⁶ *Id.* at 202, ___ S.E.2d at ___.

¹⁴⁷ *Id.* at 203, ___ S.E.2d at ___ (jury justified in finding that Epperly decided to kill victim to silence a potential witness against him for sexual assault).

the defendant and the victim, concealment of the victim's body, the defendant's lack of remorse, and the defendant's possible motive.¹⁴⁸ The court stated that first degree murder is an intentional killing committed after a defendant had time to think.¹⁴⁹ The court failed, however, to consider whether Epperly actually planned the killing before committing the act.¹⁵⁰

Virginia courts should distinguish between premeditation and intent to kill because legislative intent requires the distinction.¹⁵¹ William Penn's introduction of premeditation into the criminal law reflects society's belief that a killer acting according to a preconceived plan is more dangerous, more culpable, and less capable of reformation than an impulsive killer.¹⁵² The Pennsylvania legislature intended that courts give "premeditation" a literal interpretation because the legislature placed the words "premeditated" and "deliberate" in conjunction with the clause describing the planning activities of poisoning and lying in wait.¹⁵³ Virginia accepted Pennsylvania's literal interpretation of "premeditation."¹⁵⁴ Virginia courts, therefore, should give literal meaning to the words "premeditation" and "deliberation" in the homicide statutes.

Virginia courts should also distinguish between premeditation and intent to kill because premeditation is a prerequisite for capital murder and the death penalty in Virginia.¹⁵⁵ Before 1972, courts could impose the death penalty for murder only upon a finding of premeditation by the killer.¹⁵⁶ The role of premeditation changed in 1972, however, because the United States Supreme Court held Georgia's death penalty unconstitu-

¹⁴⁸ *Id.* at 203, ____ S.E.2d at ____ (factual evidence determines existence of premeditation). Previous Virginia courts usually considered whether the defendant planned the killing and not specific factors to determine premeditation. *See* Giarratano v. Commonwealth, 220 Va. 1064, 1074, 266 S.E.2d 94, 100 (1980) (premeditation requires that defendant had time to think about a killing and intended to kill); *Mosby v. Commonwealth*, 168 Va. 688, 694, 190 S.E. 152, 154 (1937) (will and purpose to kill determines degree of murder); *McDaniel v. Commonwealth*, 77 Va. 281, 287 (1883) (premeditation is thinking about whether to kill and acting according to plan about killing). *But see* *Smith v. Commonwealth*, 220 Va. 696, 700, 261 S.E.2d 550, 553 (1980) (defendant's lack of remorse shows premeditation by defendant).

¹⁴⁹ 224 VRR at 203, ____ S.E.2d at ____.

¹⁵⁰ *Id.* at 203-04, ____ S.E.2d at ____.

¹⁵¹ *See* *Smith v. Commonwealth*, 220 Va. 696, 703-04, 261 S.E.2d 550, 555 (1980) (Poff, J., dissenting) (Virginia legislature intended that planning is the distinguishing factor between first and second degree murder).

¹⁵² *Id.* at 703-04, 261 S.E.2d at 555 (planning is evidence of a willful persistence in criminal action). *See supra* note 31 (discussion of William Penn's homicide laws).

¹⁵³ *See* *Keedy*, *supra* note 11, at 771-72 (Penn and Pennsylvania legislators intended that premeditation be given literal meaning); *Bradford*, *supra* note 31, at 37 (Penn intentionally avoided phrase "malice aforethought" and used premeditated murder to describe Pennsylvania's only capital offense).

¹⁵⁴ *See supra* note 34 (Virginia enacted a version of Pennsylvania's homicide laws).

¹⁵⁵ *See supra* text accompanying note 9 (explanation and discussion of requirement of premeditation for capital murder).

¹⁵⁶ *See supra* note 10 (premeditation is factor distinguishing between capital murder and second degree murder).

tional in *Furman v. Georgia*.¹⁵⁷ In *Furman*, separate trial courts convicted two defendants of rape and one defendant of murder.¹⁵⁸ The trial courts sentenced all the defendants to death.¹⁵⁹ The defendants appealed, challenging the death penalty as cruel and unusual punishment in violation of the eighth and fourteenth amendments of the United States Constitution.¹⁶⁰ Although the *Furman* court held Georgia's capital punishment statutes unconstitutional, the majority did not hold the death penalty unconstitutional in all cases.¹⁶¹ The *Furman* decision placed premeditation into the position of determining lengths of sentences instead of life and death.¹⁶² After *Furman*, the Georgia legislature amended the capital punishment statutes to comply with the constitutional requirements set by the United States Supreme Court in *Furman*.¹⁶³

Premeditation returned to the crucial position of separating life and death with the United States Supreme Court decision in *Gregg v. Georgia*.¹⁶⁴ In *Gregg*, the Court considered whether the death penalty was a per se violation of the eighth and fourteenth amendments.¹⁶⁵ The Court held that the death penalty was constitutional.¹⁶⁶ The Court found that

¹⁵⁷ 408 U.S. 238, 239-40 (1972).

¹⁵⁸ *Id.* at 240.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* The eighth amendment to the United States Constitution forbids cruel and unusual punishment. See U.S. CONST. amend. VIII. The fourteenth amendment applies the eighth amendment to the states. See U.S. CONST. amend. XIV § 1; see also *Benton v. Maryland*, 395 U.S. 784, 787 (1969) (amendments to Constitution applicable to states through fourteenth amendment). The phrase "cruel and unusual punishment" first appeared in the English Bill of Rights of 1689 to forbid severe, arbitrary, and discriminatory penalties unauthorized by statutes or beyond the jurisdiction of a court. See Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 845-46 (1969). Early courts recognized torture and "barbarious" methods of execution as "cruel and unusual punishment" prohibited by the eighth amendment. See *In re Kemmler*, 136 U.S. 436, 447 (1890) (punishment involving torture is cruel). At the same time, many states adopted the death penalty for the crime of murder. See *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (death penalty accepted in United States and England); *Furman v. Georgia*, 408 U.S. 238, 316-28 (Marshall, J., concurring) (discussion of history of death penalty).

¹⁶¹ See *Gregg v. Georgia*, 428 U.S. 153, 179 (1976). In *Furman v. Georgia*, the Supreme Court considered for the first time whether the death penalty under Georgia laws was per se unconstitutional. 408 U.S. at 240. Two Justices in *Furman* accepted the argument that society's standards of decency prohibit the death penalty. *Id.* at 370-71, 305-06 (Marshall, Brennan, J., concurring). Three other Justices in *Furman* classified Georgia's procedures for enacting capital punishment as unconstitutional. *Id.* at 305, 308-09, 256-57 (Stewart, White, Douglas, J., concurring). Therefore, the *Furman* majority did not invalidate per se the death penalty. 428 U.S. at 179.

¹⁶² 408 U.S. at 239-40 (*Furman* invalidated Georgia's death penalty).

¹⁶³ See *Gregg v. Georgia*, 428 U.S. 153, 162-63 (1976). Amended Georgia statutes retain the death penalty for murder, kidnapping for ransom or where the victim is harmed, armed robbery, rape, treason, and aircraft hijacking. See GA. CODE ANN. §§ 16-5-1, 16-5-40, 16-5-44, 16-6-1, 16-8-41, 16-11-1 (1982).

¹⁶⁴ 428 U.S. 153 (1976).

¹⁶⁵ *Id.* at 176.

¹⁶⁶ *Id.*

Georgia's recently modified capital punishment statutes fulfilled constitutional requirements.¹⁶⁷ The *Gregg* Court stated that the modified laws prevented a Georgia trial court from sentencing a murderer to death without following statutory guidelines.¹⁶⁸

The Virginia legislature enacted a version of Georgia's capital punishment scheme.¹⁶⁹ Under Virginia's new statute, Virginia courts can sentence a murderer convicted of a capital offense to death.¹⁷⁰ Virginia law requires a finding of premeditation before allowing courts to impose a death sentence.¹⁷¹ Premeditation separates a short prison term from death in the electric chair.¹⁷² Virginia courts should, therefore, give premeditation the meaning intended by the legislature.

Virginia Supreme Court decisions are unclear on whether Virginia law requires a planning element for premeditation.¹⁷³ *Baker, Giarratano, Whitley*, and the *Smith* dissent show efforts to distinguish between premeditation and intent to kill.¹⁷⁴ The recent decision in *Epperly*, however, returned to the reasoning of earlier Virginia courts equating intentional murder with premeditated murder.¹⁷⁵ Virginia courts should apply the planning requirement for premeditation. A planning requirement is consistent with legislative intent.¹⁷⁶ Virginia should follow the legislature's intent to separate premeditation and intent to kill because premeditation is a prerequisite for capital murder and the death penalty. Virginia courts, therefore, should put the planning back into premeditation.

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¹⁶⁷ *Id.* at 197 (Georgia jury can no longer impose the death penalty without following statutory guidelines).

¹⁶⁸ *Id.* (jury must find aggravating circumstances listed in the statute before recommending the death sentence).

¹⁶⁹ See VA. CODE § 18.2-31 (1982) (definition of capital murder); see *supra* note 1 (description of degrees of murder).

¹⁷⁰ See *Coppola v. Commonwealth*, 220 Va. 243, 258-59, 257 S.E.2d 797, 808 (1979) (death penalty not excessive or disproportionate if follows statewide standard), *cert. denied*, 444 U.S. 1103 (1980); *Stamper v. Commonwealth*, 220 Va. 260, 284, 257 S.E.2d 808, 824 (1979) (death penalty affirmed for conviction of commission of multiple murders during armed robbery), *cert. denied*, 445 U.S. 972 (1980).

¹⁷¹ See VA. CODE § 18.2-31 (1982) (willful, deliberate, and premeditated killing required for conviction of capital murder).

¹⁷² See *supra* notes 1 & 10 (discussion of difference in elements and punishment for degrees of murder).

¹⁷³ See *infra* text accompanying notes 174 & 175 (contrasting meanings of premeditation adopted by different courts).

¹⁷⁴ See *supra* text accompanying notes 94, 118, 123, 133 (Virginia cases distinguishing between premeditation and intent to kill).

¹⁷⁵ See *supra* text accompanying note 149 (discussion of holding of *Epperly* court).

¹⁷⁶ See *Smith v. Commonwealth*, 220 Va. 696, 703-04, 261 S.E.2d 550, 555 (1980) (Poff, J., dissenting) (Virginia legislature intended that planning is a factor distinguishing between first and second degree murder). See *supra* text accompanying notes 116-122 (discussion of the *Smith* dissent).

