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V. CONCLUSION

Because of the importance of mitigation evidence, the defense lawyer must ensure that the evidence offered in mitigation is not used or perceived as proof of the aggravating factor of future dangerousness. Instructing the jury that mitigation evidence proffered by the defendant is to be considered as such, and cannot be considered as proof of an aggravating circumstance, is essential to avoiding the "two-edged sword" dilemma referred to by Justice O'Connor in *Penry v. Lynaugh.* The right to present relevant mitigating evidence, have that evidence considered and given effect, and to not have that evidence used to prove or to be viewed as an aggravating circumstance is guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. It is the defense lawyer's duty and responsibility to assure that the defendant's right is recognized.

APPLYING THE VIRGINIA CAPITAL STATUTE TO JUVENILES

BY: KEVIN ANDREW CLUNIS AND NICHOLAS VANBUSKIRK

I. INTRODUCTION

Virginia practitioners increasingly are facing cases where the Commonwealth is seeking the death penalty against juvenile defendants. These defendants sometimes are as young as fifteen years of age. The most desirable outcome, of course, is to prevent the juvenile defendant from ever having to face the possibility of the death penalty. This article explores three ways in which the Virginia death penalty statute may be challenged when it is applied against juvenile offenders. The first challenge explains how the United States Supreme Court's decisions preclude the application of the death penalty against fifteen year-old offenders when, as under the Virginia scheme, the capital punishment statute does not specify a minimum age. The second challenge, based on the United States Supreme Court holdings in *Stanford v. Kentucky*[1] and *Wilkins v. Missouri*[2], focuses on the inadequacy of Virginia's transfer statutes where a defendant who is seventeen years or younger is being certified to face a possible death sentence. The final challenge examines why Virginia's statute allowing a juvenile who is facing the death penalty to waive her transfer hearing also runs afoul of *Stanford* and *Wilkins.*

II. THE STATUTE AS APPLIED TO MINORS UNDER AGE SIXTEEN.

The Eighth Amendment prohibits the infliction of "Cruel and Unusual Punishment." In implementing the mandate of this clause, the Supreme Court repeatedly has recognized that differences exist which must be accommodated in determining the rights and duties of children as compared with those of adults.[3] Similarly, the legislatures in all fifty states have specifically applied this mandate to distinguish the criminal treatment of individuals under age sixteen.[4] However, several states, including Virginia, have provided for special certification procedures that are used to authorize minors below the age of sixteen to stand trial as adults.[5] When such procedures are used to certify minors charged with capital murder and allow them to face the death penalty because the capital statute does not require a minimum age for the imposition of the death penalty,[6] the Eighth Amendment casts grave doubt on the statute's constitutionality.

The Supreme Court has held that in applying the Eighth Amendment's "Cruel and Unusual Punishment" prohibition, judges must be guided by the "evolving standards of decency that mark the progress of a maturing society."[7] In performing that task, the Court looks to the work product of state legislatures and sentencing juries and to the policies behind society's acceptance of specific penalties in certain cases.[8]

The Court applied this analysis in *Thompson v. Oklahoma*,[9] when it addressed the question of whether fifteen year-old offenders could be subject to the death penalty. Like Virginia, the Oklahoma statutes provided special procedures by which a "child"[10] could be tried as an adult,[11] and, as with the Virginia code,[12] the Oklahoma capital murder statute did not state a minimum age. Citing *Coker v. Georgia*,[13] a plurality held that the imposition of the death penalty on an offender under sixteen years of age always would be unconstitutional.[14]

In arriving at its holding, the plurality reviewed "relevant legislative enactments" and referred to a survey of "jury determinations" to support its "judgement that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."[15] Citing *Bellotti v. Baird*[16] and *Eddings v. Oklahoma*,[17] the plurality endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.[18] The *Thompson* plurality also identified data which it saw as establishing a national consensus against subjecting a fifteen year-old to the death penalty. At the time *Thompson* was decided, thirty-seven states had a death penalty. Of these thirty-seven, eighteen states had a set minimum age of sixteen or greater,[19] and no state had specifically set the age minimum at less than age sixteen.[20] In addition, there were thirteen states and the District of Columbia that did not allow the imposition of the death penalty at all. Thus, the plurality found a strong national consensus against the imposition of the death penalty against fifteen year-old defendants.

In support of this national consensus theory, the *Thompson* Court also relied on statistics showing the rarity of fifteen year-olds being

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1 492 U.S. 361 (1989).

2 *Id.* at 361.

3 *Thompson v. Oklahoma*, 487 U.S. 822, 823 (1988). *See also Goss v. Lopez*, 419 U.S. 565, 590-91 (1975). *See* case summary of *Thompson*, Capital Defense Digest, Vol. 1, No. 1, p. 21 (1988).

4 Every State has adopted "a rebuttable presumption" that a person under 16 "is not mature and responsible enough to be punished as an adult," no matter how minor the offense may be. *See Thompson*, 487 U.S. at 825, n. 22 (1988).

5 Va. Code Ann. § 16.1-269(A)(1982).

6 *See* Va. Code Ann. §§ 18.2-31 (1988), 19.2-264.2 to 19.264.5 (1990).

7 *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

8 *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 293 (1976); *Coker v. Georgia*, 433 U.S. 584, 593-597 (1977); *Edmund v. Florida*, 458 U.S. 782, 789-96 (1982).

9 487 U.S. at 820-21.

10 Okla. Stat. tit. 10, § 1101(1)(Supp. 1987).

11 *See* Okla. Stat., tit. 10, § 1112(b)(1981); Va. Code Ann. § 16.1-269 (1982).

12 Va. Code Ann. § 18.2-31 (1988).

13 433 U.S. at 592.

14 *Thompson*, 487 U.S. at 838 (opinion of Stevens, Brennan, Marshall, and Blackmun J.J.)

15 *Id.* at 822-23.

16 443 U.S. 622 (1979).

17 455 U.S. 104 (1982).

18 *Thompson*, 487 U.S. at 834 (opinion of Stevens, Brennan, Marshall and Blackmun, J.J.)

19 *See id.* at 829-30, n.30.

20 *See id.*

sentenced to death or actually being executed.[21] These statistics showed that of the 1,393 people sentenced to death between 1982 and 1986, only five of them, including Thompson, were less than sixteen years old at the time of the offense.[22] Taken together with the fact that no one under the age of sixteen has been executed since 1948, the plurality was "lead to the unambiguous conclusion that the imposition of the death penalty on a fifteen year-old offender is now generally abhorrent to the conscience of [the] community."[23]

Justice O'Connor cast the crucial fifth vote in *Thompson* rendering the death penalty unconstitutional. In her concurring opinion, Justice O'Connor joined the plurality's belief "that a national consensus forbidding the execution of any person for a crime committed before the age of sixteen" existed.[24] However, she stopped short of adopting the theory as a matter of constitutional law and instead focused on the actions of the Oklahoma legislature.[25] Under the Oklahoma statute at issue, as with the current Virginia code, a fifteen year-old became eligible for the death penalty because of how two separate statutory provisions came together: (1) special transfer proceedings allowed a fifteen year-old to be treated as an adult in certain murder trials and (2) the capital murder statute was silent as to a minimum age. Justice O'Connor pointed out that because the imposition of the death penalty constituted a "quite separately" contemplated legislative action distinct from certifying juveniles as adults, considerable risk arose that the Oklahoma legislature did not realize that its actions, when taken together, had subjected fifteen year-olds to the death penalty.[26] Justice O'Connor concluded that the Oklahoma statute was of dubious constitutionality without at least some specific legislative intent that the death penalty should be applied to defendants whose ages were below age sixteen at the time of the offense.[27]

Since *Thompson*, several state courts have addressed the issue and have vacated death sentences of fifteen year-old capital defendants because of shortcomings in their own statutory schemes. Alabama, like Oklahoma and Virginia, had a capital statute with no minimum age and a juvenile transfer statute that permitted fifteen year-olds to be treated as adults in certain circumstances.[28] The Supreme Court of Alabama vacated a fifteen year-old defendant's sentence of death based on Justice O'Connor's reasoning that the legislature had failed to establish affirmatively its intention to have juveniles of that age subjected to the death penalty.[29]

Similarly, the Louisiana Supreme Court refused to uphold the death sentence of a fifteen year-old because there was no evidence that the Louisiana Legislature made a conscious and deliberate decision to impose the death penalty on those less than sixteen years old.[30] As in Virginia, the Louisiana statute permitted the automatic certification of fifteen year-olds accused of murder, rape or robbery.[31] Because automatic certification affords even less protection than Thompson was given by the Oklahoma statute that was struck down, the danger of constitutional violation under such a scheme was even greater.

Finally, the Indiana Supreme Court vacated a fifteen year-old's capital sentence because the court questioned the constitutionality of executing a juvenile under its capital statute.[32] Like Virginia, the Indiana statute provided no minimum age at the time of the defendant's offense.[33]

Thus, even under Justice O'Connor's more limited analysis, Virginia's statute would be unconstitutional when applied to fifteen year-olds. Like the Oklahoma statute in *Thompson*, the Virginia capital statute is applicable to a fifteen year-old only by virtue of the separate transfer statute without any evidence that the Virginia legislature intended to make those offenders death eligible.[34] The Commonwealth would be hard pressed to make a compelling showing of the statutory goals achieved by applying the capital statute to these young offenders where there is no legislative intent that the statute even applied to them.

Under the *Thompson* plurality, applying the capital penalty to fifteen year-olds is per se unconstitutional.[35] And since *Thompson*, the number of states expressly declaring a minimum age greater than fifteen has increased to a total of nineteen,[36] with no state since *Thompson* having declared a minimum age of less than sixteen years. However, even if a per se ban is not found, because the Virginia legislature has not demonstrated an intention for the death penalty to apply to fifteen year-old offenders, the capital penalty is not applicable.

II. THE TRANSFER STATUTE IS INADEQUATE TO PROVIDE INDIVIDUALIZED CONSIDERATION IN CAPITAL CASES.

Virginia Code Section 16.1-269 permits the transfer of a juvenile into the jurisdiction of the circuit court. That juvenile is subject to the same criminal sanctions as an adult who had committed the same crime. Virginia's capital murder statute sets no minimum age for execution. In this way, a juvenile may stand trial and be sentenced to death under Virginia's capital statute. Yet, Virginia's transfer statute fails to adequately provide the individual consideration required in capital cases. This failure is especially significant because of the added concerns present when a juvenile is the defendant. This inadequacy of the transfer statute is a violation of the Eighth Amendment's proscription of cruel and unusual punishment.

The Eighth Amendment's proscription of "Cruel and Unusual Punishment" is dictated by "evolving standards of decency that mark the progress of a maturing society."[37] Individualized consideration for death eligibility is constitutionally required.[38] The Supreme Court of the United States has recognized the additional concerns present when dealing with a juvenile defendant. The need for individualized consideration increases:

> But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and psychological damage. Our history is replete with laws and judicial recognition that minors, especially in

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21 *Id.* at 832.
22 *See Id.*
23 *Id.*
24 *Id.* at 848-49 (O'Connor, J., concurring).
25 *Id.*
26 *Id* at 857.
27 *Id.* at 857-58.
28 *See* Ala. Code Ann. § 13 A-5-40(a)(3)(1975).
29 *Flowers v. State*, 586 So.2d 978, 979 (Ala. 1991).
30 *State v. Stone*, 535 So.2d 362 (La. 1988).
31 *See* La. Const. Art. 5 § 19 (1979).
32 *Cooper v. State*, 540 N.E.2d 1216 (Ind. 1989).
33 *See* Ind. Code Ann. § 35-42-1-1 (1971).
34 *See* Va. Code Ann. §§ 18.2-311; 16.1-269 (1982).

35 *Thompson*, 487 U.S. at 838 (opinion of Stevens, Brennan, Marshall, and Blackmun, J.J.). The plurality stated, "we are not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made, or can be expected to make any...contribution to the goals [of] capital punishment. It is nothing more than the purposeless and needless imposition of pain and suffering...and thus unconstitutional punishment." *Id. See also Gregg v. Georgia*, 428 U.S. 153, 183 (1976)("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering")
36 Missouri has recently establish a minimum age of 16 for its capital penalty. Mo. Ann. Stat. § 565.020 (Vernon 1990).
37 *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
38 *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)

> their early years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgement' expected of adults."[39]

A plurality of the court held in *Stanford v. Kentucky*[40] that this individual examination was one of the keys to trying juveniles in capital cases: "The determinations required by juvenile transfer statutes to certify a juvenile for trial as an adult ensure individualized consideration of the maturity and moral responsibility of sixteen and seventeen year-old offenders before they are even held to stand trial as adults."[41] Kentucky's transfer statute required the certifying court to examine the sophistication and maturity of the juvenile offender in making its decision whether to transfer the juvenile to stand trial as an adult.[42]

In contrast, Virginia's transfer statute is not as elaborate in its protection. The Virginia statute allows the automatic certification for certain offenders, including capital defendants, without the individualized consideration of a transfer hearing.[43] No transfer hearing means no individualized findings and without these individualized findings, a capital proceeding involving a juvenile lacks the emphasis on personal culpability that has long been reflected in Anglo-American jurisprudence.[44] Moreover, even where a transfer hearing is held, the scope of the inquiry is not as broad as that approved of by the United States Supreme Court in *Stanford*.

Despite the Virginia statute's shortcomings when compared to the transfer statutes in *Stanford* and *Wilkins*, the Virginia Supreme Court has upheld Virginia's scheme. In *Wright v. Commonwealth*, the defendant argued that although the juvenile court had made some findings (that Wright was not mentally retarded, was not amenable to treatment, and that society's interests required him to be placed under restraint), the judge never made the crucial findings required by *Stanford*, that Wright's maturity and moral responsibility were sufficient to allow the death penalty to be imposed.[45] In rejecting the claim, the Virginia Supreme Court reasoned that because such findings would take place later in the proceeding, when the jury considers age as a mitigating factor, no necessity existed to have those factors considered at the transfer hearing.[46]

The *Wright* court's holding ignores *Stanford's* emphasis on the protections that an adequate juvenile transfer hearing must provide before the death penalty can be sought against a juvenile. The *Wright* holding, in turn, was premised in part on an earlier Virginia Supreme Court holding in *Thomas v. Commonwealth*, in which the court had held that a juvenile could waive the transfer hearing altogether even where the death penalty is being sought. The *Thomas* holding itself, however, is of dubious constitutionality when considered in light of United States Supreme Court rulings.

III. VIRGINIA'S WAIVER STATUTE IS UNCONSTITUTIONAL

Virginia Code Section 16.1-270 allows a juvenile to waive the jurisdiction of juvenile court in certain cases. The statute provides:

> At any time prior to commencement of the adjudicatory hearing, a child fifteen years of age or older charged with an offense which if committed by an adult could be punishable by confinement in a state correctional facility, with the written consent of his counsel, may elect in writing to waive the jurisdiction of the juvenile court and have his case transferred to the appropriate circuit court, in which event his case shall thereafter be dealt with in the same manner as if he had been transferred pursuant to 16.1-269.12.[47]

The validity of this statute was challenged in *Thomas v. Commonwealth*.[48] The defendant argued the hearing was necessary to provide the individual consideration required by the Constitution before a juvenile can receive the death penalty. Thomas also argued that because the language spoke of waiver where the crime was "punishable by confinement," waiver should not be allowed where the sentence was death rather than imprisonment.[49] The Virginia Supreme Court rejected the arguments, concluding that "the waiver provision is clearly applicable where a juvenile is charged with a capital offense."[50] Arguing that the words "could be punished" were intended to reflect a sentencing possibility, rather than a sentencing fact, the court pointed out that capital murder can be punishable not only through imposition of the death penalty but also by imprisonment. They thus rejected Thomas' reading of the statute.

Instead of an attack based on statutory interpretation, the language of *Stanford* should be used. Absent a transfer hearing, the individualized findings of personal culpability required at pre-trial are impossible. A waiver of this hearing prevents those necessary findings from being made. The United States Supreme Court has recognized that added considerations are present when dealing with juveniles.[51] By permitting a juvenile to waive a transfer hearing, the court overlooks this key difference. The primary consideration in the capital case involving a juvenile will be the age of the defendant. By relegating age to a mitigating factor at trial, the court de-emphasizes that individualized consideration by placing it alongside any number of mitigating factors. The individualized consideration required by *Stanford*, to be meaningful, must be set apart, both procedurally and chronologically. Voluntary waiver precludes this and should not be permitted.

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39 *Eddings*, 455 U.S. 104, 115-16 (1982)(quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

40 492 U.S. 361 (1989).

41 *Id.* at 375.

42 Ky. Rev. Stat. § 208.170 (Michie 1982); The Missouri statute in the companion case, *Wilkins v. Missouri*, 492 U.S. 361 (1989), had similar provisions: Mo. Rev. Stat. § 211.071(6).

43 Va. Code Ann. § 16.1-269 (A)(3)(b)(1988).

44 *Eddings*, 455 U.S. at 104.

45 *Wright v.Commonwealth*, Nos. 920810, 920811, 1993 Va. LEXIS 26 (Feb. 26, 1993).

46 *Id.* at *5 - *6..

47 Va. Code Ann. § 16.1-270 (1982).

48 *Thomas v. Commonwealth*, 244 Va. 1, 7, 419 S.E. 2d 606 (1992). *See* case summary of *Thomas*, Capital Defense Digest, Vol. 5, No. 1 p. 43 (1992).

49 *Id.* at 7, 419 S.E.2d. at 610.

50 *Id.*

51 *Thompson v. Oklahoma*, 487 U.S. at 834.

NARROWING THE SCOPE OF CAPITAL MURDER DURING THE COMMISSION OF A ROBBERY: WHEN MUST THE INTENT TO ROB ARISE?

BY: ROBERTA F. GREEN

I. INTRODUCTION

In Virginia, "the willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery while armed with a deadly weapon" is capital murder.[1] While the statute is clear on the relationship between killing during a robbery and capital murder, Virginia case law has shown the statute to be more difficult to interpret in terms of the time frame inherent in the phrase "in the commission of" and in terms of the requisite intent. To capital defense attorneys, the timing and intent distinctions are particularly important in that they offer a window of opportunity for separating a killing from the robbery that anchors it within the boundaries of capital murder. Therefore, this brief article will outline Virginia case law on a killing "in the commission of robbery" and will suggest arguments for counsel to raise in attempting to narrow the scope of the capital murder statute.

II. CURRENT VIRGINIA CASE LAW

Branch v. Commonwealth,[2] a non-capital case, is the landmark case in this area. In *Branch*, the Supreme Court of Virginia affirmed a second degree murder conviction and reversed a robbery conviction. The facts of the case were as follows. Defendant Paul Preston Branch III was entertaining a number of friends at his home. One of the guests had brought along a firearm, which Branch took from him before allowing him to enter the house. Thereafter, Branch maintained control of the gun. As the evening progressed, an argument broke out between two of the guests, and Branch brandished the weapon in order to subdue one of the combatants, Jeffrey Ryder. However, the weapon discharged, killing Ryder almost immediately. Branch "told the others that 'it was an accident,' a stance he maintained throughout police interrogation and at trial."[3] Subsequently, in an effort to impede the identification of the body, Branch and his assembled guests went through Ryder's clothing, wallet and automobile. Branch burned the contents of Ryder's wallet, and then he and one of the guests deposited the body across town. In deciding that Branch failed to have the requisite intent for robbery, the court addressed two factors of particular importance: the principal elements of robbery and the motive for the killing.

Citing *Jones v. Commonwealth*,[4] the *Branch* court defined robbery and then divided it into its three principal elements: the taking, the intent to steal, and the violence or intimidation.[5] The court found that these three elements must occur in a particular **temporal sequence**.[6] That is, the intent and the taking must exist simultaneously, and the violence must occur before or at the time of the taking. Finally, the taking is not a robbery unless the *animus furandi*[7] existed before or at the time of the violence.[8] Considering the facts before them, the court found that robbery had not motivated Branch's act of violence and agreed that he had taken the victim's wallet only in an attempt to cover up the crime.[9] The court held that "the violent killing and the unlawful taking were **two separate acts**, performed for entirely different reasons."[10]

The Virginia Supreme Court has recently clarified its position on robbery and murder in *George v.Commonwealth*,[11] in the process distinguishing the facts of *Branch* from the facts in the case before it. Defendant Michael Carl George was convicted of capital murder in the commission of robbery while armed with a deadly weapon and was sentenced to death. The victim in the case, a fifteen-year-old boy, had been molested and murdered, and his motorcycle had been stolen. Finding that the murder was inextricably related "in time, place and causal connection to the robbery," the court held that the "killing became part of the **same criminal enterprise** as the robbery. . . . George was **motivated by the dual purpose** of molesting [the victim] sexually and robbing him."[12] Therefore, the court affirmed George's conviction.[13]

Together *Branch* and *George* serve as guides for distinguishing when a robbery and a killing are **two separate acts** and when they are part of the **same criminal enterprise**. In these cases, among others, the Virginia Supreme Court has made clear that the determination of capital murder premised on robbery relies on several factual distinctions. Where the facts support the designation of the robbery and the murder as two unrelated acts, the robbery subsection of the capital murder statute will not apply. Conversely, where the facts and defendant's motivation show the robbery and the killing as part of the same criminal enterprise, the

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[1] Va. Code Ann. § 18.2-31(4) (1991). For a clear analysis of the crime of robbery in Virginia (both as separate crime and as capital murder predicate), *see* Mosely and Richardson, *Robbery, Rape and Abduction: Alone and As Predicate Offenses to Capital Murder,* Capital Defense Digest, Vol. 2, No. 2 (1990).

[2] 225 Va. 91, 300 S.E.2d 758 (1983).

[3] *Id.* 93, 300 S.E. 2d at 759.

[4] 172 Va. 615, 618, 1 S.E.2d 200, 301 (1939). *See also Johnson v. Commonwealth,* 209 Va. 291, 163 S.E.2d 570 (1968).

[5] *Branch,* 225 Va. at 94-5, 300 S.E.2d at 759.

[6] *Id.*

[7] Intent to steal.

[8] *Id.*

[9] *Id.* at 95, 300 S.E.2d at 760.

[10] *Branch,* 225 Va. at 95, 300 S.E.2d at 760 (emphasis added).

The year before the *Branch* case, the court considered *Whitley v. Commonwealth,* 223 Va. 66, 286 S.E.2d 162 (1982), which also adds meaning to the capital murder designation. Richard Lee Whitley was convicted in the death of his neighbor on the charge of capital murder during robbery while armed with a dangerous weapon. *Id.* at 66, 286 S.E.2d at 164 (citing Va. Code Ann. § 18.2-31 (d) (1981). Whitley argued that the taking (stealing his neighbor's car) had been an after-thought, that his intent had been solely to kill his neighbor. While the Virginia Supreme Court in *Whitley* stated that "violence or intimidation must precede or be concomitant with the taking," *id.* at 73, 286 S.E.2d at 166, as robbery is a crime **against the person** of the victim rather than against property, the court found that a corpse remains a "person" if the "'taking occurs minutes after the victim is killed,' so it is immaterial that the victim is dead when the theft occurs." *Id.* (quoting *Ridley v. Commonwealth,* 219 Va. 834, 836, 252 S.E.2d 313, 314 (1979)). *See also Harward v. Commonwealth,* 229 Va. 363, 330 S.E.2d 89 (1985) (providing dicta that a killing "before, during, and after" a felony falls within "in the commission of" the felony). Therefore, finding a strict temporal analysis unnecessary, the *Whitley* court went on to consider the motive for the killing, i.e., "whether robbery was the motive for the killing." *Whitley,* 223 Va. at 73, 286 S.E.2d at 166. The *Whitley* court approved the use of circumstantial evidence for proving motive and found that Whitley had been specifically motivated for both the killing and the robbing. *Id.*

[11] 242 Va. 264, 411 S.E.2d 12 (1991).

[12] *Id.* at 280, 411 S.E.2d at 21 (emphasis added).

[13] *Id.* at 285, 411 S.E.2d at 24.