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**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

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.

capital murder designation is appropriate. Therefore, a Virginia practitioner defending against a capital murder charge predicated on robbery will want to argue that the facts of the case, especially the timing of the defendant's intent, indicate that the murder was not motivated by the robbery and, therefore, the killing was not "in the commission of" the robbery. While the facts of the case are the key, other arguments are available to help narrow the capital murder statute's application.

III. ARGUMENTS FOR NARROWLY CONSTRUING THE CAPITAL MURDER STATUTE

At least three arguments are available for narrowing the court's application of the capital murder statute if the Commonwealth should argue that it need not prove the co-existence of the intent to kill and intent to steal.¹⁴ First, as the court is bound by the plain meaning of the statute, an argument to the actual wording may prove compelling. Second, counsel may want to argue that neither the deterrent nor retribution purposes of the statute is served if a killing is unrelated to the robbery that anchors it in capital murder. Finally, the third argument grows from the constitutional mandate that statutes defining eligibility for capital punishment must draw meaningful distinctions between capital and non-capital offenses.

A. The Plain Meaning of the Statutory Language

Virginia Code Section 18.2-31(4) specifies that the killing must occur "in the commission of" a robbery or an attempted robbery. A conventional understanding of "commission" is the "doing . . . [of] a criminal act."¹⁵ Placing this language into the statute, "in the commission" would then require that the intent to steal arise before or during the killing and would exclude an intent to rob that arose after the killing. After all, how can one kill in the process of "doing" a robbery if the robbery has not yet occurred — in fact, has not even begun — at the time of the killing?

The court is bound in its interpretation to follow the plain meaning of the statute, and the capital murder statute's plain meaning negates its use where an intent to rob arises after the killing. The statute requires that the robbery be underway when the killing occurs. Therefore, any continuing enterprise analysis that draws on intent arising after the killing runs counter to the plain meaning of the capital murder statute and would involve the judiciary overstepping the proper bounds of statutory interpretation.

B. The Statute's Deterrent and Retribution Effects

Arguably, the capital murder statute, as it incorporates robbery, can be seen as serving deterrence and retribution goals. First, including killings that occur in the course of a robbery within the rubric of capital murder arguably will deter robberies and killings during robberies, as persons will know of the increased penalty awaiting them in the capital murder statute. Second, those who undertake robberies can be seen as having sufficiently "evil minds" as to warrant retribution by the death

¹⁴ In *Whitley*, the Commonwealth argued that intent to rob can arise after the killing if part of a "continuing criminal enterprise." The Virginia Supreme Court referred to the argument as "viable" but did not decide the issue since it found the murder was committed with an intent to rob. *Whitley*, 223 Va. at 73, 286 S.E.2d at 166.

¹⁵ Black's Law Dictionary 272 (6th ed. 1990). See also Webster's Dictionary (3rd ed. 1986) (defining "commission" as "the act of committing, performing or doing").

¹⁶ *Enmund v. Florida*, 458 U.S. 782, 783 (1982). See also *Saunders v. Commonwealth*, 242 Va. 107 (1991) (citing *Enmund* for the proposi-

tion of common criminal design).

penalty if a killing occurs. Neither purpose, however, is served where the killing is not motivated by the robbery.

The theory that robbers will be deterred from committing robbery, or that they will commit the robbery more "safely" because they know the death penalty awaits them if someone is killed, makes little sense if the intent for robbery does not arise until after the killing. How can an act — here, robbery — be deterred if it was not intended in the first place? The United States Supreme Court used similar reasoning when it found the death penalty unconstitutional for accomplices to felony murder where a killing was not highly foreseeable: "[I]t is unlikely that the threat of the death penalty for murder will measurably deter one who does not . . . intend to kill,"¹⁶ and in fact, "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.'"¹⁷

Moreover, if the purpose is to punish the culpability of robbers who kill during the robbery because they were out to break the law in the first place, the statute would serve no purpose when applied to a killing where the robbery motive occurs after the killing has already taken place. The only remaining retribution purpose is focused on the fact that a killing took place, but that rationale would make every murder subject to the death penalty. As the next point makes clear, such a broad retribution justification would be unconstitutional.

C. The Constitutional Mandate

The United States Supreme Court has repeatedly held that capital statutes must provide a "meaningful basis" for distinguishing capital murder from non-capital murder.¹⁸ For this constitutionally mandated "meaningful distinction" to exist with reference to Section 18.2-31(4), the statute must be read to include only those robberies intended at the time of the killing. If an intent to rob does not arise until after the killing, nothing about the killing itself can be seen as justifying the ultimate sanction of the death penalty. The killing, without more, becomes indistinguishable from any other killing. Thus, for Virginia's statute to meaningfully distinguish between murder and capital murder, it must be interpreted as referring only to cases where the intent to rob arises prior to or concomitant with the killing.

IV. CONCLUSION

Defense counsel facing a capital murder charge predicated on robbery will find their arguments against such a charge buttressed by strong Virginia Supreme Court language stating that the intent to rob must exist before or at the time of the killing, regardless of when the taking actually occurs. Furthermore, while the Commonwealth has argued that intent can arise later, adopting the "continuing criminal enterprise" concept, defense counsel will want to consider the facts and the circumstantial evidence related to motivation in order to argue that in fact the killing and the robbery were two separate acts. The test, as adopted by the Virginia Supreme Court, remains defendant's motivation at the time of the killing, as "the offense is not robbery unless the *animus furandi* was conceived before or at the time the violence was committed."¹⁹

¹⁷ *Id.* at 799 (quoting *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)).

¹⁸ *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (opinion of Stewart, J., joined by Blackmun, Powell, and Stevens, J.J.) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)). See also *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980).

¹⁹ *Branch v. Commonwealth*, 225 Va. 91, 95, 300 S.E.2d 758, 759 (1983).

Beyond the facts of the case at hand and the Virginia case law, counsel will want to argue that the plain meaning and the purposes of Section 18.2-31 (4) support a finding that the intent to rob must arise either before or during the killing. Moreover, such a reading of the statute

is mandated by the U.S. Supreme Court's narrowing construction expressed in *Gregg* and *Godfrey*. In order to clearly distinguish capital murder from a general killing, the intent to rob must be in place at the time of the killing and not after.

CHRONOLOGICAL OUTLINE OF A CAPITAL MURDER TRIAL

BY: RHONDA L. OVERSTREET

The text outline included in this issue of the Capital Defense Digest designates in chronological order a general guide of steps to follow in litigating a capital trial. At each step there is a detailed set of points which counsel should evaluate when preparing for trial or appellate review. These points are provided as an attempt to inform counsel of the various issues which often arise during trial. Many of these issues address motions and actions which are mandatory on the part of counsel, and others simply suggest trial strategy. The reader will also take note that under several of the stages, an annotation section is provided. These annotations refer to cases which have come out of the Virginia Court of Appeals. Although specific death penalty issues are treated mainly by the Supreme Court of Virginia, these annotations include cases in which lower courts address issues generally applicable to most criminal trials, including capital cases. The purpose behind listing the court of appeals cases is to provide counsel with an additional resource for formulating arguments. As is often the case, the language in Virginia Supreme Court decisions may not be favorable, and therefore these cases give counsel another source for mounting arguments and challenges to certain criminal issues. Specifically, annotations have been developed on jury matters, including voir dire and *Batson* issues, discovery, state habeas and procedural default.

The flow chart which follows sets out nine potential stages which occur in a capital murder case. Designated below each particular stage is a listing of critical points which should be considered and addressed during the applicable time period. This list, however, is not comprehensive and does not suggest every issue that may have importance during a certain stage in the case.

I. ARREST

II. BAIL

- A. § 19.2-126 - the bail section referring to capital murder. However the statute directs the capital defendant to § 19.2-123(A), the second paragraph.
- B. Although the defendant technically possesses right to bail at pre-trial, there is little chance in reality of getting out on bail.

III. PRELIMINARY HEARING

- A. Arrest before Indictment- § 19.2-218
An accused arrested upon a warrant charging Capital Murder is statutorily entitled to a Preliminary Hearing before he can be indicted.
- B. The requirement for a Preliminary Hearing is **procedural**, not jurisdictional, and therefore, any defect in connection with it (including failure to hold it) **must** be raised before trial or be deemed waived.
- C. When the case begins with an indictment, §19.2-218 is not implicated. Once indictment is returned, the usual procedure is issuance of a *capias*.

IV. INDICTMENT

- A. If there is any defect or any variance between the allegations therein and the evidence offered in proof, the court may permit amendment before jury returns verdict.
- B. Various pre-trial motions concerning the indictment, including a defect in the charge **must** be made pre-trial. **Please see the Pre-trial section for further details.**

V. PRE-TRIAL PROCEDURE

- A. Under Virginia law, several types of issues **must** be raised pretrial. Virginia courts are extremely strict in applying these procedural rules. An issue that is not timely raised is almost certainly defaulted. If waived under state law, it cannot be federally reviewed.
- B. Since additional federal review is almost certain in a capital case, it is important to preserve all federal issues for appellate review. Therefore **federalize** all claims at this stage.
- C. Virginia Supreme Court Rule 3A:9 governs pre-trial practice