REPORT OF THE
VIRGINIA STATE CRIME COMMISSION

Year-and-a-Day-Rule

TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA

COMMONWEALTH OF VIRGINIA
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4. **Wash. Rev. Code Ann. §9A.32.010 (West 1988 & Supp. 1999).**
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I. Executive Summary

The year-and-a-day-rule is a common law rule that bars a prosecution for murder in cases in which the victim dies more than a year and a day after the infliction of the wound causing the death. The alleged rationale behind the rule is that when the infliction of the injury and the death are more than a year and a day apart, the cause of death is considered too remote from the injuries sustained during the attack. Although the rule may have been necessary in the past to alleviate causation problems, most, if not all, of its purposes and justifications have been eliminated by advances in medical science. These advances enable persons inflicted with mortal injuries to survive for longer periods and allow professionals to pinpoint the cause of death with greater certainty. Although the rule may have served a legitimate purpose in the past, it is now possible that the year and a day rule could bar a prosecution for murder in a case in which causation was determinable but advances in medicine prolonged the victim's life beyond a year and a day.

Allegations that the rule has outlived its purpose prompted Virginia to join the growing number of states that have reviewed the applicability and continued need for the year-and-a-day-rule. The Virginia State Crime Commission was requested by letter to conduct a study of the year-and-a-day-rule, including its current and future applicability in Virginia. In accordance with this request, Crime Commission staff conducted a study of the year-and-a-day-rule. This study included a review of the rule's historical origins, original justifications and purposes, and need in today's society.

Also included in this study is a synopsis of the rule's status among the various states that have recently had the opportunity to address it. The manner in which the legislatures and courts of different states have chosen to abolish or replace the rule is instructive and warrants attention. For example, while the legislatures of some states have opted to abolish the rule outright, thereby removing any requirement that the victim die within a specified amount of time, others have merely replaced the year-and-a-day-rule with a new, extended time period. Moreover, while some courts have judicially abolished the rule prospectively, others have opted to do so retroactively, applying the abolition to the case at hand. As to the latter, the United States Supreme Court recently held that a state court's retroactive abolition of the year-and-a-day-rule does not violate the Ex Post Facto Clause.

Upon conclusion of the study, Crime Commission staff concluded that the year-and-a-day-rule, in existence as part of the common law of Virginia, has outlived its purpose and should be abolished. Specific findings include:

- The original justifications for the year-and-a-day-rule no longer exist, resulting in the continued existence of an ancient common law rule that is without purpose.
- The longevity of the rule can be attributed to the fact that its infrequent use has deprived courts of the opportunity to comment on it.
- When given the opportunity, however, most courts have seized the chance to judicially abolish the rule.

- Of the 32 states that have abolished the rule, at least 17 have acted to abolish, or have been held to have abolished, the rule legislatively.
- In addition to having outlived its purpose, the year-and-a-day-rule might actually begin to prevent justice in cases where causation is certain. Advances in medical science can prolong the life of a mortally wounded victim beyond a year and a day. As a result, these advances in medical science will actually aid would-be murderers in avoiding murder convictions.
- Abolition of the year-and-a-day-rule will not relieve the government of its burden of proving causation beyond a reasonable doubt.
- The United States Supreme Court recently held that a state court may retroactively abolish the year-and-a-day-rule without violating the Ex Post Facto Clause.

II. Background

The year-and-a-day-rule is a common law rule providing that no defendant can be convicted of murder unless his victim dies by the defendant's act within a year and a day of the act.[1] If the death does not occur within this period, the law will conclusively presume that the death is the result of intervening causes. The rule, therefore, applies to cases in which the victim survives the infliction of an injury only to die more than a year and a day later. The rationale behind the rule is, when infliction of the injury and death are more than a year and a day apart, the cause of death is considered to be too remote from the injuries sustained during the attack.

The year-and-a-day-rule should not be confused with a statute of limitations. Although Virginia does have a one-year statute of limitations for misdemeanor offenses, there is no limit for when charges can be brought against a defendant for a felony, including murder. Therefore, a defendant could be charged and convicted of murder even if they succeed in eluding authorities for as long as fifty years or more, so long as the victim dies within a year and a day of the infliction of the injury.

The year-and-a-day-rule is currently 724 years old. Although it is now regarded as a rule of the common law, it began its existence as part of the Statute of Gloucester, enacted in the year 1278. As part of the Statute of Gloucester, it was intended as a statute of limitations governing the time in which an individual could initiate a private action for murder known as an "appeal of death."[2] The "appeal of death" was a "private and vindictive action instituted by an interested party and derived from the Germanic custom of 'weregild', or compensation for death."[3]

[1] Rogers v. Tennessee, 532 U.S. 541 (2001). **(See Attachment 1).**
[2] Tennessee v. Rogers, 992 S.W.2d 393, at 396 (Tenn. 1999), aff'd, 532 U.S. 451 (2001).
[3] Id.

The "appeal of death" by the private individual was gradually replaced by the indictment and was eventually abolished by statute in 1819.[4] By that time, however, the year-and-a-day-rule had transformed from a statute of limitations into the common law rule that we are familiar with today. By statute, the rule was one of limitation and ran from the death of the victim. However, by the eighteenth century, the rule ran from the infliction of the mortal wound.

A vast array of commentary on the rule after its statutory demise helped to establish a rule which, in its transformed form, became widely accepted as a common law principle.[5] The common law rule was described by contemporary commentators as one which required that; "no person shall be adjudged by any act whatever to kill another who doth not die thereof within a year and a day after"[6]; "in no case can a man be adjudged guilty of homicide, unless the death takes place within a year and a day after the injury to which it is ascribed"[7]; "[n]o one is criminally responsible for a death which occurs upwards of a year and a day…after the act by which it was caused"[8]; and "[i]n order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered."[9] Coke also included the year-and-a-day-rule as part of the definition of murder stating, "Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth…with malice afore-thought, either expressed by the party, or implied by law, so as the party wounded, or hurt, etc. die of the wound, or hurt, etc. within a year and a day after the same."[10] Although the rule began in England, its applicability to criminal prosecutions spread to the United States and was recognized by the U.S. Supreme Court as early as 1889.[11]

III. Justification and Purpose of the Year-and-a-Day-Rule

There are generally three justifications given for the initial use of the year-and-a-day-rule. Significantly, none of these justifications continue to exist today. The first and most common justification for the origin of the year-and-a-day-rule is that thirteenth century medical science was incapable of establishing causation beyond a reasonable doubt, especially when a significant amount of time elapsed between injury and death.[12] It was easier to presume that a death occurring more than a year and a day from the infliction of the injury was due to natural causes rather than from the injury.

The second justification given is that expert testimony was inadmissible in the thirteenth century. In early courts, jurors were required to rely on their own knowledge

[4] Donald E. Walther, Comment, *Taming a Giant Phoenix: The Year-and-a-Day-Rule in Federal Prosecutions for Murder,* 59 U. Chi. L. Rev. 1337, 1338-39 (1992).
[5] Id.
[6] William Hawkins, 1 Pleas of the Crown 79 (1980).
[7] Joseph Chitty, 3 Criminal Law 726 (1826).
[8] James F. Stephen, 3 A History of the Criminal Law of England 8 (1883).
[9] William Blackstone, Commentaries 197.
[10] Edward Coke, Institutes of the Laws of England, 47.
[11] Tennessee v. Rogers, 992 S.W.2d 393, at 396 (Tenn. 1999).
[12] Id..

when reaching their decision. They could not rely upon the testimony of witnesses having personal knowledge of the facts or upon the opinions of experts.[13] The fact that juries in criminal cases did not hear testimony from expert witnesses only served to exacerbate the problems associated with medical causation.[14]

Third, the rule was justified as an attempt to "ameliorate the harshness of the common law practice of indiscriminately imposing the death penalty for all homicides, first degree murder and manslaughter alike."[15]

With deep roots in the common law of England and the American colonies, the year-and-a-day-rule has managed to survive for over 700 years. Critics of the rule argue that it has outlived its purpose and should be abolished.

IV. The Year-and-a-Day-Rule has Outlived its Justification and Purpose

Due to the infrequent use of the year-and-a-day-rule, it is not often that courts have been given the opportunity to decipher the rule's applicability in today's society. This is at least part of the reason why the rule has managed to survive for so long. However, it appears that when given the opportunity, courts waste little time in attacking the validity of the rule. These courts are quick to remark that the original justifications for the rule no longer exist, rendering it unnecessary. This fact was acknowledged recently by the Supreme Court of Tennessee in the 1999 case of *Tennessee v. Rogers.*[16] In deciding to abolish the "now obsolete" year-and-a-day-rule, the Court found that "the justifications originally supporting the recognition of the rule have been eroded by advances in medical science, improved trial procedure, and sentencing reforms."[17] In support of the rule's abolition, the Court stated:

> Despite its early common law recognition and near universal acceptance, the rule has fallen into disfavor and has been legislatively or judicially abrogated by the vast majority of jurisdictions which have recently considered the issue. Most courts describe the rule as outmoded and obsolete since the reasons justifying its recognition no longer exist. In characterizing the rule as an anachronism, courts have particularly emphasized the many advances of medical science.[18]

[13] Id.
[14] Donald E. Walther, *Taming a Giant Phoenix: The Year-and-a-Day-Rule in Federal Prosecutions for Murder* 59 U. Chi. L. Rev. 1337, n. 12.
[15] *See,* Tennessee v. Rogers, 992 S.W.2d at 396 (Tenn. 1999).
[16] Id.
[17] Id.
[18] Id.

Courts from other jurisdictions that have recently been squarely faced with the year-and-a-day-rule have reached similar conclusions. The following excerpts cast light on how modern courts view the application of the rule in today's society.

> Today, the retention of the year-and-a-day-rule is clearly an anachronism. The jury may now rely on the testimony of expert witnesses and need not decide issues on the basis of their own individual knowledge. Furthermore, since great advances have been made in scientific crime detection and scientific medicine, the doubt that a mortal blow is the cause of death, when death ensues a year and a day after the blow, has been largely removed. Consequently, a period of a year and a day after which death is conclusively presumed to result from natural causes is no longer realistic.
>
> - *Ohio Court of Common Pleas* (1977)[19]

> [The-year-and-a-day-rule] was a remnant from the days when medicine and science, both as to diagnosis and treatment, were so unsophisticated that mortally wounded persons commonly died shortly after the infliction of a grievous wound. In such circumstances, it was reasonable to presume that if a wounded person died more than a year from the time of the wound, the cause of death was other than the wound. Modern medicine, however, allows doctors to employ a variety of extraordinary, even heroic, means to save and prolong the lives of victims for years, as opposed to days or months. Also, diagnostic post-mortem pathological procedures can now discover and define the cause of death with great particularity and precision.
>
> - *Illinois Supreme Court* (1995)[20]

> The availability of modern life sustaining equipment and procedures raises the specter of the choice between terminating life support systems or allowing the defendant to escape a murder charge. The presumption was wooden and arbitrary from the beginning, since it prevented a murder conviction even in those rare cases when causation could be proved. Now, when medical causation can be proven with much greater frequency and certainty, the old rule is too often demonstrably wrong to be upheld.
>
> - *Michigan Supreme Court* (1982)[21]

> We must let the light of scientific development illuminate the legal issues of today. It would be incongruous indeed that medical science has developed to the point that it may prolong human life for periods if that same development be utilized to bar conviction of a killer by prolonging the life of his victim.
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> - *North Carolina Supreme Court* (1984)[22]

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[19] State v. Sandridge, 365 N.E.2d 898, at 899 (Ohio Ct.C.P. 1977).
[20] People v. Carrillo, 164 Ill.2d 144, 207 Ill.Dec. 16, 646 N.E.2d 582, at 585. (1995).
[21] People v. Stevenson, 416 Mich. 383, 331 N.W.2d 143, 146 (1982).

> [The] relatively short time limit is seen as not only capricious but as senselessly indulgent toward homicidal malefactors."
>
> - *Massachusetts Supreme Court* (1980)[23]

> The dictates of justice and public policy favor removal of a 'capricious'obstacle' to a prosecution for murder where the victim died fourteen months after having his brains blown out by a gunshot to the rear of his head which rendered him a paraplegic. Accordingly, finding no compelling public policy reason to retain it, we abrogate the year and a day rule.
>
> - *D.C. Court of Appeals* (1987)[24]

As these recent court opinions indicate, the year-and-a-day-rule has outlived its purpose. Issues of medical causation are more readily discernable, jurors may now rely on the testimony of experts, and the death penalty is no longer indiscriminately imposed for all homicides. Despite the fact that the rule has clearly outlived its purpose, it lives on in many jurisdictions. The rule's longevity is attributable to its infrequent applicability, resulting in only rare instances where courts are given the opportunity to address it.

V. Government's Burden of Proving Causation

Even with the abolition of the year and a day rule, the prosecution's duty to prove causation beyond a reasonable doubt remains. Specifically, as the court in *Tennessee v. Rogers* noted:

> [R]egardless of whether its demise was achieved by legislative or judicial action, in other jurisdictions, abolition of the year-and-a-day-rule has not altered the general principle that causation be proven beyond a reasonable doubt. Its abolition simply allows the state to have the opportunity to attempt to prove causation.[25]

Courts that have abolished the rule emphasized this general purpose by stating, "abolition of the rule would not relieve the prosecution of its duty to prove all of the elements of the crime, including proximate causation, beyond a reasonable doubt"[26] and its abolition is not "to suggest that abrogation of the rule would remove all limitations on assessing culpability; limitations necessarily would exist by virtue of the requirements of due process and the government's burden to prove causation beyond a reasonable doubt."[27] In addition, it has been emphasized "that the refusal to apply the year-and-a-

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[22] State v. Hefler, 310 N.C. 135, 310 S.E.2d 310, at 313 (1984).
[23] Commonwealth v. Lewis, 381 Mass. 411, 409 N.E.2d 771, at 773 (1980).
[24] U.S. v. Jackson, 528 A.2d 1211, 1232 (D.C. App. 1987).
[25] Tennessee v. Rogers, 992 S.W.2d 393, at 399 (Tenn. 1999).
[26] People v. Stevenson, 416 Mich. 383, 331 N.W.2d 143, 146 (1982).
[27] United States v. Jackson, 528 A.D.2d 1211, at 1218 (D.C. 1987).

day-rule does not deprive the defendant of any fundamental right. In all homicide cases, the burden always falls upon the prosecution to prove proximate causation that death flowed from the wrongful act of the defendant. That must be the critical determinant, and not the expiration of some archaic, arbitrary, time period."[28]

VI. Option of Creating a New Time Limit

None of the jurisdictions that have *judicially* abrogated the rule have opted to create a new time limit to replace the year-and-a-day-rule.[29] Due to the fact that, as discussed above, the abolition of the year-and-a-day-rule does not relieve the State of its burden of proving causation beyond a reasonable doubt, many courts have emphasized that "no arbitrary time frame is needed."[30] In short, with or without an arbitrary time limitation, the government will have to prove causation.

The lack of need for any arbitrary time limit, including that of a year and a day, is exacerbated by the fact there is no statute of limitations for murder in Virginia. Other states that have reviewed the viability of the year-and-a-day-rule and, like Virginia, lack a statute of limitations for murder have held that any arbitrary time limit requiring that death ensue within a specified period of time is inconsistent with public policy.[31] The requirement that causation be proven "is sufficient to satisfy due process."[32] The Supreme Court of Pennsylvania found, "Society is free to prosecute murderers without a statutory limitation, and it is possible that evidence and witnesses may be lost during a long interval between crime and trial. It is therefore not a strange idea to put no restriction of time upon the death of the victim and to require only proof of causation of conventional quality at the trial."[33]

Despite the unnecessary nature of an arbitrary time limit, however, a state may elect to replace the year-and-a-day-rule by extending the length of time during which the victim must die. California has created a rebuttable presumption that the killing is not criminal if the death occurs more than three years and a day after the stroke is received or the cause of death administered. The California statute, provided at the end of this report, specifies that the prosecution shall bear the burden of overcoming this presumption.[34]

VII. Status of the Rule in Various Jurisdictions

[28] State v. Sandridge, 365 N.E.2d 898, at 899. (Ohio Ct.C.P. 1977).
[29] Tennessee v. Rogers, 992 S.W.2d 393, at 398 (Tenn. 1999).
[30] Id.
[31] Id., at 399. Citing United States v. Jackson, 528 A.2d 1211, at 1218 (D.C. 1987); People v. Stevenson, 416 Mich. 383, 331 N.W.2d 143, at 146 (1982); State v. Sandridge, 365 N.E.2d 898, at 899 (Ohio Ct.C.P. 1977).
[32] Id, at 401 (Tenn. 1999).
[33] Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501, at 506 (1960).
[34] Cal. Penal Code § 194.

A review of the jurisdictions that have recently been faced with the issue of the viability of the year-and-a-day-rule clearly indicates that the modern trend is to abolish the rule. It is clear that the rule is no longer followed in at least 32 states. In many states, the rule has not been codified and has not been considered by the courts in many years. In such states, the ability of the rule to survive judicial scrutiny is doubtful.

It must be understood that many states have not recently been faced with the year-and-a-day-rule and have, therefore, not decided whether or not it is to continue. This was recognized by the Rhode Island Supreme Court which stated:

> *"[T]he long life of the rule may result from the infrequency with which the issue has been raised" and from the fact that courts "have not been given the opportunity to address it."*[35]

This explanation was also recognized, and expounded upon, by the Massachusetts Supreme Court which stated:

> *[The longevity of the rule] is accounted for by the perdurability of statutes in some of them stating the rule, by the fact that over the past years there have been few occasions on which the issue has been raised and presented squarely to the courts for decision, and by tendency to regard so old a dogma as peculiarly suitable for internment by legislatures, not courts.*[36]

Although it is said that the rule "often subsists only because of the infrequency of contested cases"[37], when states are faced with the issue of the applicability of the year-and-a-day-rule, the life of the rule tends to come to an abrupt halt.

A. States That No Longer Follow the Year-and-a-Day-Rule

Other states have chosen many different legal remedies regarding the year-and-a-day-rule. Seven states have abolished the year-and-a-day-rule by statute. These states include:

- Arizona[38] *(statute abolished all common law offenses and defenses);*
- Arkansas;[39]
- California[40] *(Replaced with a rebuttable presumption that the killing is not criminal if death transpires more than three years and a day after the stroke received or the cause of death administered);*
- Maryland;[41]
- Missouri;[42]
- Montana;[43] and,

[35] Tennessee v. Rogers, 992 S.W.2d 393, at 397 n. 4 (Tenn. 1999). Citing State v. Pine, 524 A.2d 1104, at 1106 (R.I. 1987).
[36] Commonwealth v. Lewis, 381 Mass. 411, 409 N.E.2d 771, at 773 (1980).
[37] State v. Brown, 318 A.2d at 261.
[38] Ar. Rev. Stat. § 13-103.
[39] Ark. Rev. Stat. § 5-2-205. (1975).
[40] Cal. Penal Code § 194 (West 1988 & Supp. 1999).
[41] Md. Ann. Code art. 27, § 415 (1996).
[42] Mo. Ann. Stat. § 565.003 (Vernon 1979 & Supp. 1999).

- Washington.[44]

The highest courts' in six states have held the rule was abrogated when it was not included as part of a comprehensive criminal code adopted by the legislature:

- Georgia;[45]
- Illinois;[46]
- Iowa;[47]
- New York;[48]
- Oregon;[49] and,
- Texas.[50]

Four states have repealed the statute codifying the rule:

- Colorado;[51]
- Delaware;[52]
- North Dakota;[53] and,
- Utah.[54]

Eleven states, including the District of Columbia, have judicially abolished the year-and-a-day-rule, including:

- D.C. (prospectively);[55]
- Florida (retroactively);[56]
- Massachusetts (retroactively);[57]
- Michigan (prospectively);[58]
- New Jersey (prospectively);[59]
- New Mexico (prospectively);[60]
- North Carolina (prospectively);[61]
- Ohio (prospectively);[62]
- Pennsylvania (retroactively);[63]

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[43] Mont. Code § 45-5-102.
[44] Wash. Rev. Code Ann. § 9A.32.010 (West 1988 & Supp. 1999).
[45] State v. Cross, 260 Ga. 845, 401 S.E.2d at 511 (Ga. 1991).
[46] Carillo, 207 Ill.Dec. 16, 446 N.E.2d at 584 (Ill.)
[47] State v. Ruesga, Supreme Court of Iowa. No. 149 / 98-207. (Nov. 16, 2000).
[48] People v. Brengard, 191 N.E. 850 (1934).
[49] State v. Hudson, 56 Or.App. 462, 642 P.2d 331 (1982).
[50] State v. Martin (1988). Interpreting Tex. Penal Code § 6.04.
[51] Tennessee v. Rogers, 992 S.W.2d 393, at 397, n. 4 (Tenn. 1999).
[52] Tennessee v. Rogers, 992 S.W.2d 393, at 397, n. 4 (Tenn. 1999).
[53] Id.
[54] Id.
[55] United States v. Jackson, 528 A.2d 1211, 1218 (D.C. 1987)
[56] Jones v. Dugger, 518 So.2d 295 (Fla.Ct.App. 1987).
[57] Commonwealth v. Lewis, 381 Mass. 411, 409 N.E.2d 771 (1980).
[58] People v. Stevenson, 416 Mich. 383, 331 N.W.2d 143 (1982).
[59] State v. Young, 77 N.J. 245, 390 A.2d 556 (1978).
[60] State v. Gabehart, 114 N.M. 183, 836 P.2d 102 (1992).
[61] State v. Vance, 328 N.C. 613, 403 S.E.2d 495 (1991).
[62] State v. Sandridge, 365 N.E.2d 898 (Ohio Ct.C.P.1977).
[63] Commonwealth v.Ladd, 402 Pa. 164, 166 A.2d 501 (1960).

- Rhode Island (retroactively); [64] and,
- Tennessee (retroactively). [65]

The varying state courts have made the determination to abolish the rule, either prospectively or retroactively, on whether they classified the rule as a substantive element or as a rule of evidence. Courts that determined the rule was a substantive element refused to abolish it retroactively and did so only prospectively. Courts that recognized the rule as one of evidence felt at liberty to abolish it retroactively.

Only one state's Supreme Court, Connecticut, has held that the rule was not part of the state's common law.[66] However, three state courts that were faced with the issue deferred it to the legislatures to decide:

- Maryland (the rule was subsequently abolished by the legislature); [67]
- Missouri (the rule was subsequently abolished by the legislature); [68] and,
- Oklahoma.[69]

Finally, one state, California, has expanded the year-and-day-rule to provide a rebuttable presumption that the killing is not criminal if death transpires more than three years and a day after the stroke received or the cause of death administered. [70]

B. States That Continue to Follow the Year-and-a-Day-Rule

Seven states currently continue to follow the year-and-a-day-rule. Five states have legislatively retained the rule and two states have judicially upheld the rule. Those legislatively retaining the rule include:

- Idaho;[71]
- Louisiana;[72]
- Maine;[73]
- Nevada;[74] and,
- South Carolina.[75]

The two state judicially upholding the rule have been Alabama and Indiana[76]

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[64] State v. Pine, 524 A.2d 1104 (R.I. 1987).
[65] Tennessee v. Rogers, 992 S.W.2d 393 (Tenn. 1999).
[66] Valeriano v. Bronson, 209 Conn. 75, 546 A.2d 1380 (1988).
[67] State v. Minster, 302 Md. 240, 486 A.2d 1197 (1985).
[68] State v. Zerben, 617 S.W.2d 458 (Mo.Ct.App. 1981).
[69] Elliott v. Miller, 335 P.2d 1104, 1113 (Okla. Crim. App. 1959).
[70] Cal. Penal Code §194 (West 1988 & Supp. 1999).
[71] Idaho Code § 18-4008 (1979).
[72] State v. Moore, 196 La. 677. Codified in 1940.
[73] State v. Womer, 837 A.2d 150 (1967).
[74] Nev. Rev. Stat. § 200.100 (1979).
[75] S.C. Code Ann. § 5-2910 (1976).
[76] Smith v. State, 354 So.2d 1167 (Ala. 1977) and Indiana v. Dailey, 191 Ind. 678, 134 N.E. 481 (1922).

VIII. United States Supreme Court Cases Prior to 2001

Prior to May of 2001, the U.S. Supreme Court recognized the existence of the year-and-a-day-rule on two occasions. In the 1889 case of *Ball v. United States,* the Court recognized that the common law's ancient year-and-a-day rule was applicable to federal prosecutions for murder.[77] Although the victim in *Ball* died immediately, the indictment failed to allege the time of death, merely stating that the victim, "did languish, and languishing died."[78] The indictment's lack of allegation as to the time of the victim's death made it impossible for the Court to determine if the death transpired within a year and a day. The Court held that this omission amounted to a violation of the year-and-a-day-rule because, by the common law, it was necessary that it should appear that the death transpired within a year and a day after the stroke. The controlling element distinguishing the guilt of the assailant from a common assault was the death within a year and a day.[79]

Five years later, in *Louisville, Evansville, & St. Louis R.R. Co. v. Clarke*, a defendant attempted to use the rule as a defense to a civil remedy for negligence.[80] In declaring that the rule did not apply to civil proceedings, the Court did imply that the rule applies to criminal prosecutions, stating that it "is the rule in this country in prosecutions for murder, except in jurisdictions where it may be otherwise prescribed by statute."[81]

The *Ball* and *Louisville* cases indicated that the year-and-a-day-rule existed in the various states absent abolition. Prior to 2001, the *Ball* and *Louisville* were the only cases in which the United States Supreme Court was directly faced with the issue of the existence of the year-and-a-day-rule in this country. Over one hundred years passed by before the Supreme Court was given another opportunity to confront the rule. Now, a 2001 decision by the Supreme Court strongly indicates that courts may now refuse to apply the ancient rule even absent prior legislative or judicial abrogation.

IX. *Rogers v. Tennessee* and the Ex Post Facto Clause

A state court may retroactively abolish the year-and-a-day-rule without violating the Ex Post Facto Clause. A state's retroactive abolishment of the rule did not violate the Ex Post Facto Clause because it was not unexpected and indefensible in light of the modern trend among various jurisdictions to abolish the rule when given the opportunity.

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[77] Ball v. United States, 140 U.S. 118, 133, 11 S. Ct. 761, 766, 35 L. Ed. 377 (1889).
[78] Id, at 133.
[79] Id.
[80] Louisville, Evansville, & St. Louis R.R. Co. v. Clarke, 152 U.S. 230 (1894).
[81] Id, 239.

In other words, because the rule had been abolished in other jurisdictions, the defendant should have known that it would be abolished in his jurisdiction as well.

A. Background

In *Rogers v. Tennessee,* the United States Supreme Court was faced with the issue of whether the retroactive application of a judicial abolishment of the year-and-a-day-rule violates the Fourteenth Amendment of the United States Constitution.[82] After the defendant, Rogers, stabbed the victim in the heart with a butcher knife, the victim remained comatose in a hospital for sixteen months before dying from a kidney infection. The medical examiner ruled that the death was caused by oxygen deficiency, "secondary to a stab wound to the heart." The defendant argued that he could not be charged with murder because the death did not occur until more than a year and a day after the infliction of the wound.

Even though it determined that the year-and-a-day-rule had not been abolished by implication through its omission from Tennessee's Criminal Sentencing Reform Act of 1989, the Tennessee Supreme Court went on to hold that the year-and-a-day-rule should be abolished because it was antiquated. Like many courts before it, it determined that the rule should be abolished due to the fact that its original justifications and purposes were no longer valid and abolished the rule. However, while most other courts had abolished the rule prospectively, the Tennessee court sought to apply its abolition retroactively to the defendant.

B. The Ex Post Facto Argument

Article I, Sections 9 and 10 of the United States Constitution forbids the passage of any ex post facto law by Congress and Article I of the Tennessee Constitution prevented the passage of such a law by the General Assembly.[83] An ex post facto law is one that "makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. Second, every law that aggravates a crime, or makes it greater than it was, when committed. Third, every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. Fourth, every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender"[84]

Both the United States and Tennessee constitutions limited ex post facto prohibitions to legislative acts. However, the U.S. Supreme Court previously held in *Bouie v. City of Columbia* that "if judicial construction of a criminal statute is unexpected

[82] Rogers v. Tennessee, 532 U.S. 451 (2001).
[83] Tennessee v. Rogers, 992 S.W.2d 393, at 401 (Tenn. 1999).
[84] Id, at 402.

and indefensible by reference to the law which has been expressed prior to the conduct in issue, [the construction] must not be given retroactive effect."[85] The defendant, however, had argued that if the court wanted to abolish the rule, it could only do so prospectively, not retroactively. However, applying the *Bouie* standard, the Tennessee Supreme Court held that their retroactive, judicial abolition of the year-and-a-day-rule did not amount to a violation of the Ex Post Facto Clause because it was not an unexpected judicial construction that was indefensible in reference to prior law. It was not an unexpected judicial construction that was indefensible in reference to prior law due to the fact that many jurisdictions had already legislatively or judicially abolished the rule.[86] The Court defending its holding, stating:

> Given the fact that the rule has been abolished by every court which has squarely faced the issue, and given the fact that the validity of the rule has been questioned in this State in light of the passage of the 1989 Act, we conclude that our decision abrogating the rule is not an unexpected and unforeseen judicial construction of a principle of criminal law.[87]

In ruling that the defendant could not invoke the year-and-a-day-rule, the Tennessee Supreme Court was essentially stating that, in light of these circumstances, the defendant should have known that Tennessee might abolish the rule merely because other states had already done so.[88]

C. The U. S. Supreme Court and the Failure of the Ex Post Facto Argument

The United States Supreme Court granted certiorari to determine whether retroactively applying the repeal of the rule to the defendant violated the Ex Post Facto Clause. The Court applied the *Bouie* standard stating that "if judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, [the construction] must not be given retroactive effect." The Court also followed another principle of *Bouie* stating that if a legislature can be barred from passing a law, the state court should also be barred from achieving the identical result by judicial construction. They combined this with the recognition that "[a]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law."[89] In addition, the Court noted that its decision in *Bouie* "rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct."[90] The Court thus indicated that the due process protections in this situation were limited to the right to fair warning that the conduct would result in a criminal penalty.[91]

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[85] Id, Citing Bouie v. City of Columbia, 378 U.S. 347, 354, 84 S.Ct. 1697, 1703, 12 L.Ed.2d 894 (1964).
[86] Id.
[87] Id.
[88] *On the Docket – Medill School of Journalism.* Available at *www.medill.nwu.edu/cases.src*
[89] Rogers v. Tennessee, 532 U.S. 451 (2001).
[90] Id.
[91] Id. Citing Rose v. Locke, 423 U.S. 48, 53 (1975).

However, the Court also pointed out that to extend the clause to the courts would "circumvent the clear constitutional text" and would "evince too little regard for the important institutional and contextual differences between legislating, on the one hand, and common law decisionmaking on the other."[92] To place the same limits on judicial decisionmaking as that which is placed on the legislatures would "place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks any evolving legal system."[93] Accordingly, the Supreme Court was pointing out the practical differences between judicial decisionmaking in the interpretation of laws and the creation of laws by the legislature. The Court pointed out the need to maintain these differences, stating:

> The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of *ex post facto* principles. It was on account of concerns such as these that *Bouie* restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'[94]

The Court was pointing out the need to provide common law courts leeway in their interpretations and decision-making in order to bring the common law into conformity with logic and common sense.[95] Accordingly, the Supreme Court determined that courts, in regard to common law rules, should not be as limited by the Ex Post Facto Clause as are legislatures and confined the restraint on courts to the standard laid out in *Bouie v. City of Columbia*:

> *[A] judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.*[96]

Applying this standard, the United States Supreme Court held in a 5 – 4 decision that the Tennessee court's abolition of the year-and-a-day-rule was not unexpected and indefensible and, thus, could be applied retroactively to the defendant.

In so holding, the Court stated that the rule was an "outdated relic of the common law" and took note of the fact that the petitioner did "not even so much as hint that good reasons exist for retaining the rule."[97] The Court pointed out that "as practically every

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[92] Id.
[93] Id.
[94] Id. Citing *Bouie v. City of Columbia,* 378 U.S. at 354.
[95] Id.
[96] Id.
[97] Id.

court recently to have considered the rule has noted, advances in medical and related science have so undermined the usefulness of the rule as to render it without question obsolete."[98] The rule's abolition in these jurisdictions rendered its abolition expected. The court stated:

> *Common law courts frequently look to the decisions of other jurisdictions in determining whether to alter or modify a common law rule in light of changed circumstances, increased knowledge, and general logic and experience. Due process, of course, does not require a person to apprise himself of the common law of all 50 States in order to guarantee that his actions will not subject him to punishment in light of a developing trend in the law that has not yet made its way to his State. At the same time, however, the fact that a vast number of jurisdictions have abolished a rule that has so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible by reference to the law as it then existed.*[99]

In addition to finding that the abolition of the year-and-a-day-rule was not unexpected and indefensible, the Court also found that the Tennessee court's decision was a "routine exercise of common law decision-making in which the court brought the law into conformity with reason and common sense. It did so by laying to rest an archaic and outdated rule that had never been relied upon as a ground of decision in any reported Tennessee case."[100]

D. Justice Scalia's Dissent

In a dissenting opinion, Justice Scalia stated:

> *"[F]air warning means fair warning of what the law is, not that it may be changed."* [101]

In his dissent, Justice Scalia criticized the majority's opinion, characterizing it as one by which "the elected representatives of all the people cannot retroactively make murder what was not murder when the act was committed; but in which unelected judges can do precisely that."[102] He strongly disagreed with the Court's interpretation of *Bouie,* stating, "[t]he fair warning to which *Bouie* and subsequent cases referred was not 'fair warning that the law might be changed' but *fair warning of what constituted the crime at the time of the offense*."

Attacking the majority's position that the Ex Post Facto Clause was limited to the legislature, Scalia pointed out that the reason the clause did not specifically include

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[98] Id.
[99] Id.
[100] Id.
[101] Id.
[102] Id.

judicial decisions was because "it was an undoubted point of principle, at the time the Due Process Clause was adopted, that court's could not change the law."[103] Referring to comments by Madison that ex post facto laws were unprincipled, he stated, "I find it impossible to believe, as the Court does, that this strong sentiment attached only to retroactive laws passed by the legislature, and would not apply equally (or indeed with even greater force) to a court's production of the same result through disregard of the traditional limits upon judicial power."

Most significantly, however, Scalia stated that even if, for arguments sake, he agreed that the Ex Post Facto Clause is only violated by a court in regard to a common law rule when there is a lack of "fair warning" of the impending retroactive change, such fair warning did not exist. In response to the Court's view that the fact that most jurisdictions that have recently addressed the issue have decided to abolish the rule, Scalia questioned why they did not also count the many courts that had chosen to not address the issue as well as the jurisdictions that had decided to abolish the rule legislatively rather than judicially. Moreover, Scalia added that the Majority should have also counted in petitioner's favor the fact that many of the courts that decided to abolish the rule did so *prospectively* rather than *retroactively*. Accordingly, Scalia argued, "even if it was predictable that the rule would be changed, it was not predictable that it would be changed *retroactively*, rather than in the *prospective* manner to which legislatures are restricted by the Ex Post Facto Clause, or in the *prospective* manner that most other courts have employed."[104]

Despite Justice Scalia's persuasive argument, the fact remains that a majority of the United States Supreme Court is currently of the view that enough jurisdictions have abolished the year-and-a-day-rule to provide persons with fair warning that the rule may be abolished in their jurisdiction as well. Accordingly, it would seem that the Supreme Court of Virginia would be permitted to abolish the year-and-a-day-rule and apply it retroactively to the case before them.

X. The Year-and-a-Day-Rule in the Fourth Circuit and Virginia.

In 1994, the Fourth Circuit Court of Appeals heard a case involving a defendant who was convicted of murder in a death that transpired seventeen years after the infliction of the mortal wound.[105] When the victim died seven years after the defendant confessed and seventeen years after the infliction of the mortal wound, the defendant was tried and convicted for murder. In this case, *United States v. Chase,* the Fourth Circuit Court of Appeals felt compelled to apply the year-and-a-day-rule to reverse the conviction.[106] In so holding, the Court emphasized that they were "constrained to apply

[103] Id.
[104] Id.
[105] United States v. Chase, 18 F.3d 1166, 1168 (4th Cir. 1994). The victim, who was hit in the head with a hammer by an intruder, ultimately died from an epileptic seizure which had been caused by the blow to her head.
[106] Id, at 1169.

it" because over one hundred years had passed since the United States Supreme Court's decision in *Ball* without legislation or a Supreme Court decision overruling it.[107] The Fourth Circuit noted that, although there had been little discussion of the *Ball* case since it was decided in 1891, the Supreme Court and the Eighth Circuit, in deciding other issues, have recognized its continued vitality.[108] Such decisions have provided "persuasive dicta acknowledging [Ball's] holding that the year-and-a-day-rule is applicable in federal prosecutions for murder."[109]

The opinion in *United States v. Chase*, and its rejection of the government's arguments, reveals the proper manner of abolishing a common law rule. The government argued that the 1909 congressional codification did not include the year-and-a-day-rule in the definition of homicide.[110] The *Chase* court determined, however, that there was no evidence in legislative history that Congress specifically intended to eliminate the rule's requirements and rules of statutory construction dictate that a statutory term is presumed to have its common law meaning.[111] The court based this decision off of the Supreme Court's holding in *Evans v. United States*, where the Court stated:

> *"[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning of its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."*[112]

The Court noted that when Congress codified the definition of murder, it defined it as the "unlawful killing of a human being with malice aforethought."[113] The legislative history contained no discussion pertaining to the meaning of "unlawful killing" and did not reveal an intent to abrogate the common law understanding of the words. In fact, the

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[107] Id, 1t 1169.

[108] In Illinois v. Somerville, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973), the United States Supreme Court uncritically recognized the year and a day holding of *Ball.* In Merrill v. United States, 599 F.2d 240 (8th Cir. 1979), the court held that in an indictment, "[T]he allegation as to time of death [in Ball] was necessary to show that the death occurred within a year and a day from the date of the infliction of the injury."

[109] United States v. Chase, 18 F.3d 1166, 1170 (4th Cir. 1994).

[110] Id. 18 U.S.C. § 1111(a) defines murder as "the unlawful killing of a human being with malice aforethought." This definition includes no explicit requirement that the victim die within a year and a day of the date of which the fatal blow was struck.

[111] Id. In so stating, the Court relied on Evans v. United States, 112 S. Ct. 1881, 1885 (1992) in which the Supreme Court stated, "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."

[112] Evans v. United States, 112 S. Ct. 1881, 1885 (1992).

[113] 18 U.S.C. § 1111(a).

Court viewed the meager legislative history on the matter as an indication that Congress, in enacting the statute, did not intend to override the *Ball* holding that an indictment for murder must include an allegation that death occurred within a year and a day of the fatal blow.[114]

The Fourth Circuit recognized that modern forensic experts have many more resources at their disposal than in the past and modern juries are capable of understanding forensic testimony. However, the Court emphasized, "any further consideration of these concerns by a court of appeals is precluded by existing Supreme Court precedent. We are persuaded that the year-and-a-day-rule, as adopted in *Ball I*, is a substantive principle that is alive and controlling, until Congress or the Supreme Court instructs us otherwise."[115]

Although the Fourth Circuit was clearly of the view that it was compelled to apply the year-and-a-day-rule until the legislature or the Supreme Court said otherwise, the recent United States Supreme Court decision in *Rogers v. Tennessee* may now provide them with license to abolish the rule, and retroactively at that.

In Virginia, the year-and-a-day-rule remains a part of the common law (it has not been codified). Section 1-10 of the *Virginia Code* states, "[t]he common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."[116]

In 1857, the Court of Appeals of Virginia recognized the existence of the year-and-a-day-rule in *Livingston v. Commonwealth.*[117] Although the facts of the case concerned a death that occurred within a year and a day of the injury and the principle issue of the case pertained to testimony regarding causation, the court went on to describe the year-and-a-day-rule in language that suggests it was viewed as a necessary element.[118] Similarly, in the 1893 case of *Clark v. Commonwealth*, a case in which the victim died within a year and a day, the defendant unsuccessfully argued that causation was lacking and the death was, in fact, caused by improper surgical treatment. In ruling that the defendant was responsible for the death despite the fact that it may appear that the deceased might have recovered if he had taken proper care of himself or submitted to a surgical operation, or that unskillful or improper treatment aggravated the wound, the Supreme Court of Virginia again recognized the year-and-a-day-rule in language that inferred its existence as an element. The Court instructed the jury:

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[114] *See,* United States v. Chase, at 1170-1171.
[115] Id. at 1173.
[116] Va. Code Ann. § 1-10.
[117] Livingston v. Commonwealth, Va. App. 592, 611 (1857).
[118] Id. The court stated, "[W]here in the case of homicide it appears that a wound or beating was inflicted on the deceased which was not mortal, and the deceased, whilst laboring under the effects of the violence, becomes sick of a disease, not caused by such violence, from which disease death ensues within a year and a day, the party charged with the homicide is not criminally responsible for the death, although it should appear that the symptoms of the disease were aggravated and its fatal progress quickened by the enfeebled or irritated condition of the diseased, caused by the violence."

> *If the jury believe from the evidence that the prisoner willfully inflicted upon the deceased a dangerous wound, one that was calculated to endanger and destroy life, and that death ensued there from within a year and a day, the prisoner is none the less responsible for the result, although it may appear that the deceased might have recovered but for the aggravation of the wound by unskillful or improper treatment.*[119]

XI. Conclusion

There are three justifications for the existence of the year-and-a-day-rule. First, thirteenth century medical science was incapable of establishing causation beyond a reasonable doubt, especially when a significant amount of time elapsed between the infliction of the injury and the victim's death. Accordingly, it was easier to presume that a death occurring more than a year and a day from the infliction of the injury was due to natural causes rather than from the injury. Second, thirteenth century jurors were not permitted to hear expert testimony, including expert testimony regarding causation. The third justification was to ameliorate the harshness of the fact that the death penalty was administered for all homicides, first degree murder and manslaughter alike. These original justifications for the year-and-a-day-rule no longer exist. However, the rule has managed to survive, largely unnoticed, for over seven hundred years. The longevity of the rule can be attributed partly to the fact that its infrequent use has deprived courts of the opportunity to comment on the rule due to its infrequent use.

Recently, courts that have been faced with the issue of the viability of the year-and-a-day-rule have resoundingly declared that the original justifications for the rule no longer exist. Modern medical science not only allows causation to be deciphered more frequently and accurately, it enables mortally wounded persons to live for longer periods following the infliction of the mortal wound. Moreover, jurors may now rely on the testimony of experts and the death penalty is no longer indiscriminately imposed for all homicides. Accordingly, it is clear that the ancient rule has succeeded in outliving its purpose and it now continues to exist without justification. Continued application of the year-and-a-day-rule will result in circumstances in which advances in medical science will actually protect would-be murderers from homicide prosecutions by keeping their victims alive longer.

In addition to outliving its purpose, the year-and-a-day-rule might actually begin to prevent prosecutions in cases where causation is undeniable. Although the longevity of the rule can be attributed to infrequent usage, modern developments will increase the number of occasions in which the rule will be applicable. Developments in medical science now enable victims to be kept alive for longer periods of time. Therefore, the frequency of occasions in which victims will survive for more than a year and a day is sure to increase. In addition, new diseases such as AIDS will create the possibility that a

[119] Clark v. Commonwealth, 90 Va. 360 (1893).

would-be murderer can intentionally infect a victim with this deadly disease while remaining free from a prosecution for homicide. In the case of the intentional infliction of AIDS, a victim can be infected with the disease yet not die for many years.

Accordingly, the year-and-a-day-rule is no longer justified and should be abolished. Abolition of the rule will not diminish the government's burden of proving causation beyond a reasonable doubt. The government will still have to prove that the victim did, in fact, die as a result of the wound inflicted by the defendant. The only requirement that would be removed is the requirement that the victim die within a year and a day.

The recent decision of the United States Supreme Court in *Rogers v. Tennessee*, holding that a state court can retroactively abolish the year-and-a-day-rule without violating the Ex Post Facto Clause, has given state courts license to do the same in the future. However, rather than wait to see what the Supreme Court of Virginia will do when faced with the due process concerns associated with a retroactive abolition, Crime Commission staff has concluded that the General Assembly should abolish the rule by statute. This method is more straightforward, poses fewer constitutional concerns, and removes the risk that the judiciary will apply the ancient rule to a case, thereby allowing a would be murderer to escape a homicide conviction.

Summary of Findings

- The original justifications for the year-and-a-day-rule no longer exist, resulting in the continued existence of an ancient common law rule that is now without purpose.
- The longevity of the rule can be attributed to the fact that its infrequent use has deprived courts of the opportunity to comment on it.
- When given the opportunity, however, most courts have seized the chance to judicially abolish the rule.
- Of the 32 states that have abolished the rule, at least 17 have acted to abolish, or have been held to have abolished, the rule legislatively.
- In addition to having outlived its purpose, the year-and-a-day-rule might actually begin to hinder the administration of justice in cases where causation is certain. Advances in medical science can prolong the life of a mortally wounded victim beyond a year and a day. As a result, these advances in medical science may actually aid would-be murderers avoid murder convictions. In addition, new concerns such as AIDS increase the possibility that a victim can intentionally be inflicted with a "mortal wound" yet not die for many years.
- Abolition of the year-and-a-day-rule will not relieve the government of its burden of proving causation beyond a reasonable doubt.
- The United States Supreme Court recently held that a state court may retroactively abolish the year-and-a-day-rule without violating the Ex Post Facto Clause.

XII. Options

If the General Assembly determines to abolish the rule by statute, it will have to decide whether abolish the rule outright or to replace it with a longer time period within which the victim must die. States that have either abolished the rule outright or that have replaced the rule with a longer time period provide us with the following examples.

Maryland:

Maryland enacted a separate statute for the purpose of abolishing the rule.

A prosecution for murder or manslaughter, whether at common law or under Article 27, §§407 through 411, §387, §388, or §388A, may be instituted regardless of the time elapsed between the act or omission causing the death of the victim and the death of the victim.[120]

Missouri:

Missouri enacted a separate statute for the purpose of abolishing the rule.

The length of time which transpires between conduct which results in a death and is the basis of a homicide offense and the event of such death is no defense to any charge of homicide.[121]

Washington:

Washington abolished the rule by specifying in the definition of homicide that the death can occur at any time.

Homicide is the killing of a human being by the act, procurement, or omission of another, death occurring at any time, and is either (1) murder, (2) homicide by abuse, (3) manslaughter, (4) excusable homicide, or (5) justifiable homicide.[122]

California:

California provides us with an example of replacing the rule with the alternative that there is a rebuttable presumption that a killing is not criminal if the death does not occur within three years and a day.

To make the killing either murder or manslaughter, it is not requisite that the party die within three years and a day after the stroke received or the cause of death administered. If death occurs beyond the time of three years and a day, there shall be a rebuttable presumption that the killing was not criminal. The prosecution shall bear the

[120] Md. Ann. Code art. 27, §415 (1996). **(See Attachment 2)**
[121] Mo. Ann. Stat. §565.003 (Vernon 1979 & Supp. 1999). **(See Attachment 3)**
[122] Wash. Rev. Code Ann. §9A.32.010 (West 1988 & Supp. 1999). **(See Attachment 4)**

burden of overcoming this presumption. In the computation of time, the whole of the day on which the act was done shall be reckoned the first.[123]

[123] Cal. Penal Code §194. **(Attachment 5)**