REPORT OF THE
VIRGINIA STATE CRIME COMMISSION

HB 893
Capital Murder of a Law Enforcement Officer

A BILL REFERRAL STUDY TO
THE SENATE COURTS COMMITTEE AND
THE GENERAL ASSEMBLY OF VIRGINIA

COMMONWEALTH OF VIRGINIA
RICHMOND
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I. Authority

The *Code of Virginia*, §30-156, authorizes the Virginia State Crime Commission to study, report and make recommendations on all areas of public safety and protection. Additionally, the Commission is to study matters "including apprehension, trial and punishment of criminal offenders." Section 30-158(3) provides the Commission the power to "conduct studies and gather information and data in order to accomplish its purposes as set forth in §30-156…and formulate its recommendations to the Governor and the General Assembly."

Using the statutory authority granted to the Crime Commission, staff conducted a study on making it a capital crime to kill a law enforcement officer.

II. Executive Summary

During the 2002 Session of the Virginia General Assembly, Delegate Ryan McDougle introduced House Bill 893 (HB 893),[1] which would amend Va. Code §18.2-31(6), making it a capital crime to kill, with premeditation, a law-enforcement officer for the purpose of interfering with the performance of his official duties. This bill was referred to the Senate Courts of Justice Committee where it was left in Committee pending referral and study by the Virginia State Crime Commission.

As a result of the study effort, the following observation has been made concerning HB 893. While its passage would not be unconstitutional, it would be the first time that the Virginia legislature created a special class of adults, of whom any premeditated killing, would be a capital offense, in and of itself.

Recommendation

Because this proposed legislation would be a departure from the current scheme of Virginia's capital crimes, it is the recommendation of the Crime Commission that this legislation not be adopted.

However, since deviation from current statutory law is a policy decision, if the legislature decides to adopt this idea for police officers, it must decide whether it will apply the law only to current police officers, or also former police officers, as HB 893 proposes. A review of the 50 states indicates that very few have decreed the homicide of former police officers to be an aggravating circumstance or a special, separate crime. If Virginia decides to adopt the provision including former police officers, then the beginning clause of Va. Code §18.2-31(6) must be rewritten as well, in order to avoid an internal inconsistency in that subsection.

[1] House Bill 893, 2002 General Assembly, Reg. Sess., (Va. 2002). See Attachment 1.

III. Methodology

The Virginia State Crime Commission utilized three research methodologies to examine HB 893. First, Virginia's Code and Acts of Assembly were reviewed to determine legislative history with regards to §18.2-31. Second, Virginia case law concerning the capital murder statute was reviewed for relevancy to the issues in HB 893. Third, other state statutes were analyzed to determine if similar legislation had been enacted elsewhere and the statutory provisions of the language.

IV. Background

Legislative History

The premeditated killing of a police officer, under current Virginia law, can constitute a capital offense. Va. Code §18.2-31, which defines the various capital crimes, states in relevant part:

> The willful, deliberate, and premeditated killing of a law-enforcement officer as defined in §9.1-101 or any law-enforcement officer of another state or the United States, when such killing is for the purpose of interfering with his official duties [shall constitute capital murder, punishable as a Class 1 felony].[2] *See Attachment 2.*

Virginia's modern capital murder statute did not originally include the killing of a police officer as one of its qualifying offenses.[3] The killing of a police officer was made a capital crime in 1977, although at that time, the statute only applied to Virginia police officers. The precise language used was the "willful, deliberate and premeditated killing of a law-enforcement officer as defined in §9-108 [now §9.1-101] when such killing is for the purpose of interfering with the performance of his official duties."[4]

In 1997, this subsection of Va. Code §18.2-31 was expanded with the language "or any law-enforcement officer of another state or the United States."[5] It should be noted that the definition of law-enforcement officer currently provided by Va. Code §9.1-101 includes peace officers, sheriffs, troopers, game wardens, ABC agents, railroad police, officers of the Virginia Marine Patrol and sworn investigators of the State Lottery Department.[6]

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[2] Va. Code § 18.2-31(6).
[3] 1975 Va. Acts ch. 14, 15.
[4] 1977 Va. Acts ch. 478.
[5] 1997 Va. Acts ch. 235, 514.
[6] Va. Code § 9.1-101.

Relevant Case Law

In 1980, the Virginia Supreme Court rejected the argument that this particular subsection of the capital murder statute was unconstitutionally vague.[7] In the case of Martin v. Commonwealth, the defendant contended that the wording of the statute would permit the "imposition of the death penalty without proof that the officer 'was acting in the lawful discharge of an official duty'" because it could be argued that "'any time an individual, who happens to be a police officer, on or off duty is killed, that killing necessarily will interfere with the performance of the decedent's official duties.'"[8]

Rejecting this argument, the Virginia Supreme Court noted that:

> By its clear terms, the section makes purpose a key factor in any prosecution there under; the death penalty may be imposed only where the Commonwealth proves beyond a reasonable doubt that the killing of a law enforcement officer is accompanied by the purpose of interfering with the performance of his official duties.[9]

The language of the statute did not permit the imposition of the death penalty just because a murder victim might happen to be a police officer, and the affirmative burden of proving the defendant's purpose remained with the Commonwealth; hence, the Court concluded that Va. Code §18.2-31(f)[10] was not unconstitutionally vague.[11]

The phrase "when such killing is for the purpose of interfering with his official duties," has been interpreted by the Virginia Supreme Court to mean that:

> the crucial inquiry contemplated by the statute is **not** whether the officer was in fact engaged at the time he was killed in performing a law enforcement duty, but, rather, whether the killer acted with the purpose of interfering with what **he perceived to be** an officer's performance of a law enforcement duty.[12]

Under this interpretation, it appears unlikely that any defendant could successfully argue that Va. Code §18.2-31(6) would not apply to him merely because the law-enforcement officer he killed was off-duty or was engaged in a non-official activity, such as taking a

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[7] Martin v. Commonwealth, 221 Va. 436 (1980).
[8] Martin v. Commonwealth, 221 Va. at 440 (1980).
[9] Id. at 440.
[10] Now Va. Code § 18.2-31(6); the relevant language remains the same.
[11] Martin v. Commonwealth, 221 Va. at 440 (1980).
[12] DeLong v. Commonwealth, 234 Va. 357, 369 (1987) (*emphasis in bold supplied).*

dinner break. As long as the defendant's purpose in committing the murder was to interfere or prevent the officer from carrying out his official duties, he would fall within the scope of the statute.

This was demonstrated, in a sense, by the case of Smith v. Commonwealth.[13] The facts, as recorded in the opinion, reveal that the defendant had previously made threats against police officers on a number of occasions. On the night in question, the defendant became drunk, and while on his porch, shot several rounds into the air. When a neighbor complained, the defendant expressed a desire that someone call the police, and threatened to kill the first one who arrived. Shortly after, the police did arrive, and when one officer shouted for the defendant to drop his rifle, the officer was shot and killed. While the facts arguably indicate that Smith killed a police officer, not for purposes of interfering with official duties, but because he felt great animosity towards law-enforcement, he was convicted under Va. Code §18.2-31(f) and given the death penalty.[14]

Discussion of Engrossed HB 893

Virginia HB 893, as engrossed, would modify Va. Code §18.2-31(6), by inserting at the end of the subsection the language, "or when the victim is killed because of his present or former status as a law-enforcement officer." *See Attachment 1.*

Effect of adding the words "because of his present status as a police officer"

It is not clear if the additional words "because of his present status as a law-enforcement officer," would have any significant legal effect. As discussed above, the Virginia Supreme Court has already interpreted Va. Code §18.2-31(6) to mean that a defendant would be guilty of capital murder if he killed a police officer with premeditation, and with the intent to interfere with the officer's performance of his duties, regardless of what the officer was actually doing at the time of his death. The true inquiry, as stated in DeLong v. Commonwealth, is what the defendant's purpose was when he did the killing.[15]

Due to the relative paucity of case law interpreting this subsection, it is difficult to tell if the Virginia Supreme Court would ever recognize a scenario where a defendant could kill a police officer because of his status, yet not be doing so for the purpose, either

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[13] 239 Va. 243 (1990).

[14] It should be noted that the defendant did not advance this particular argument on appeal. Rather, he contended that the evidence was insufficient to indicate he knew that the person he was shooting was a policeman. The Virginia Supreme Court rejected this insufficiency of evidence argument, citing multiple portions of the trial transcript that indicated the defendant had actual knowledge that the person he was shooting was an officer. Smith v. Commonwealth, 239 Va. 243, 261-263 (1990). The case does reveal, however, that the provisions of Va. Code § 18.2-31(6) are sufficiently broad to cover most homicides involving police officers in uniform, barring an extremely unusual fact pattern where the killing is precipitated by another motive or purpose, such as jealousy.

[15] DeLong v. Commonwealth, 234 Va. 357, 369 (1987).

directly or indirectly, of interfering with the officer's official duties. The case of Smith v. Commonwealth indicates this to be unlikely.[16]

Nevertheless, the addition of the words "present status as a police officer" would probably not have any deleterious effect on the statute, and could be safely added. Although law-enforcement officers would then be classified, literally, as a special group of citizens, the modified statute would be rationally related to a legitimate government interest, namely, providing special protection to police officers. As such, it would not run afoul of equal protection arguments.

Adding "his status as a police officer" would be something of an anomaly in Virginia's capital murder statute though, as Va. Code §18.2-31(6) would then be the first capital crime where the relevant elements were not what the defendant's intent was at the time of the homicide, but who his victim was. With the exception of young children,[17] all of Virginia's capital offenses involve the defendant having committed a premeditated murder, with an accompanying element: either the killing was done while committing another serious felony, such as rape,[18] robbery,[19] or drug dealing,[20] or while the defendant had some additional bad intent: disregarding his status as prisoner,[21] doing the killing as a "hitman"[22] or under orders from someone engaged in a criminal enterprise,[23] committing multiple homicides,[24] or with some additional specific intent.[25]

In recent years, the General Assembly has been unwilling to either expand the list of victims in Va. Code §18.2-31, or permit special classes of victims to be created, as discussed above. Since 1994, bills have been introduced which would make it a capital crime to:

- murder an employer or former employer;[26]
- a judge, juror, witness, prosecutor, defense attorney, clerk of court, or other court personnel;[27]
- a child under 16 years of age by a parent;[28]

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[16] Smith v. Commonwealth, 239 Va. 243 (1990).
[17] Va. Code § 18.2-31(12) makes it a capital crime for a person over the age of twenty-one to kill, with premeditation, a child under the age of fourteen.
[18] Va. Code § 18.2-31(5).
[19] Va. Code § 18.2-31(4).
[20] Va. Code § 18.2-31(9).
[21] Va. Code § 18.2-31(3).
[22] Va. Code § 18.2-31(2).
[23] Va. Code § 18.2-31(10).
[24] Va. Code §§ 18.2-31(7), 18.2-31(8).
[25] Va. Code § 18.2-31(11) makes it a capital crime to kill, with premeditation, a pregnant woman, but only if the defendant had the additional intent of doing so for purposes of ending the pregnancy. Of course, Va. Code § 18.2-31(6) currently makes it a capital crime to kill a police officer, but only if the defendant has the additional intent of doing so to interfere with the officer's performance of his official duties.
[26] Senate Bill 245, 1994 General Assembly, Reg. Sess., (Va. 1994)
[27] Senate Bill 246, 1994 General Assembly, Reg. Sess., (Va. 1994); Senate Bill 731, 1995 General Assembly, Reg. Sess., (Va. 1995).
[28] House Bill 125, 1996 General Assembly, Reg. Sess., (Va. 1996)

- a potential witness;[29]
- a spouse or former spouse;[30]
- a member of a neighborhood watch program;[31] or,
- a person when the killing is a hate crime.[32]

Of these nine bills, four attempted to create a special class of victim,[33] where no additional purpose or intent on the defendant's part would have been necessary to elevate the homicide to a capital crime. None of them were passed by the General Assembly.

Effect of adding the words "because of his former status as a police officer"

Unlike adding the words "present status as a police officer," including the modifier "former status as a police officer" would create a substantive change in Virginia's law. Currently, Va. Code §18.2-31(6) only applies to police officers; someone who murdered a former police officer, regardless of his intent, would not be eligible for the death penalty. As noted above, this would be something of an anomaly in Virginia's capital murder statute, in that it would be the first time the Virginia legislature deemed a premeditated murder to be a capital offense solely based on the identity of the victim, rather than some additional bad intent on the part of the defendant.[34] And, the proposed legislation would be making a "special" class out of former police officers, although equal protection concerns would probably not be implicated, as the law would bear a rational relation to the valid governmental interest of protecting police officers, current and retired.

A survey of the capital murder and homicide statutes of all 50 states reveals, though, that while many states do give some type of protection to police officers, most do so in a way similar to that of Virginia's current statute. They specify that the murder of a police officer, who is in the performance of his duties, is a more serious offense than regular homicide.[35] Incidentally, the wording of Virginia's statute avoids the problems that may occur in some of these other states, as the relevant element in Virginia is the intent of the defendant as he performed the killing, rather than in what activity the law-

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[29] Senate Bill 132, 1996 General Assembly, Reg. Sess., (Va. 1996)
[30] House Bill 251, 1998 General Assembly, Reg. Sess., (Va. 1998)
[31] House Bill 97, 1998 General Assembly, Reg. Sess., (Va. 1998)
[32] House Bill 270, 2000 General Assembly, Reg. Sess., (Va. 2000)
[33] The bills where it would have been a capital crime to kill, with premeditation, an employer or former employer, a child when the parent does the killing, a spouse or former spouse if a protective order was in place; or a hate crime killing, where the killing was perpetuated because of the victim's race, color, gender, sexual orientation, religion or national origin.
[34] As mentioned above, the one exception to this currently is the murder of a young child, under the age of fourteen, by someone older than twenty-one. Va. Code § 18.2-31(12).
[35] They do this either by specifying that the murder of a police officer is an aggravating factor to consider, or by making such a murder a separate, heightened offense. In Florida, during the punishment phase of a capital murder trial, the jury is instructed to consider a specific list of "aggravating offenses," one of which is whether the victim was a "law enforcement officer engaged in the performance of his or her official duties." Fla. Stat. § 921.141(5)(j). In Michigan, which does not have the death penalty, a person is guilty of first degree murder, carrying life imprisonment, if he commits a "murder of a peace officer or a corrections officer committed while the peace officer or corrections officer is lawfully engaged in the performance of any of his or her duties…" Mich. Comp. Laws § 750.316(1)(c).

enforcement officer was engaged. Therefore, Virginia's statute would apply to a fleeing robber who kills an unsuspecting police officer in the middle of a lunch break, while some of the other state statutes would not.

In total, 42 states have some type of statute that specifically mentions the killing of a police officer, and of these, 40 use language similar to "while in the performance of his duties." However, only six states specifically include former police officers within the context of the relevant murder statute: California,[36] Idaho,[37] Missouri,[38] South Carolina,[39] Utah,[40] and Wyoming.[41] *See Attachment 3.* Another three states have language in their statutes that arguably could be construed to include former police officers: Illinois,[42] Indiana,[43] and Mississippi.[44] *See Attachment 4.* Of the 42 states that specifically prohibit the killing of police officers, 33 states would appear to have statutes that only apply to current police officers.

If Virginia were to adopt a heightened penalty for the killing of a former police officer, by making such a crime a capital offense, it would be among the small minority of states that do so.

V. Conclusion

Whether to adopt the specific language proposed by HB 893, of course, is a policy decision. Nothing in the proposal would be unconstitutional, or inconsistent with the current provisions of the *Code of Virginia.* It should be kept in mind that the added language would actually create two changes to Va. Code §18.2-31(6). The first would make the premeditated killing of a law-enforcement officer, because of his status, and without any further intent, a capital crime. Arguably, this would not have any practical effect upon how the statute is currently applied when a law-enforcement officer is the victim of a premeditated killing while in the course of his duties. It would, though, be the first time the Virginia legislature created a special class of adults whose murder would, in and of itself, justify the death penalty. The second proposed change would make the premeditated killing of a former police officer a capital crime as well. This would be a substantive change to the law of Virginia, as the existing capital murder statute only applies to current police officers. Whether to extend Virginia's capital murder statute in this way is up to the legislature. Most states have not chosen to do this, but the ultimate decision is up to Virginia's policy makers. It should be pointed out, though, that if the legislature decides to adopt this second change, the first line of Va. Code §18.2-31(6) must be modified, to prevent an inconsistency within the subsection. Otherwise, the

[36] Cal. Penal Code § 190.2.
[37] Idaho Code § 19-2515(h)(9).
[38] Mo. Stat. § 565.032(2.)(5).
[39] S.C. Code Ann. § 16-3-20(C)(a)(7).
[40] Utah Code Ann. § 76-5-202(1)(k).
[41] Wyo. Stat. Ann. § 6-2-102(h)(viii). See Attachment 3.
[42] Ill. St. Ch. 720 § 5/9-1(b)(1).
[43] Ind. Code § 35-50-2-9(b)(6).
[44] Miss. Code Ann. § 97-3-19(2)(a). See Attachment 4.

subsection would start off with a prohibition against killing a current law-enforcement officer, but then lapse into a reference that included former law-enforcement officers as well.