

**REPORT OF THE
VIRGINIA STATE CRIME COMMISSION**

**Murder by Lying in Wait as a
Capital Offense**



Report Document

**COMMONWEALTH OF VIRGINIA
RICHMOND
2005**



COMMONWEALTH of VIRGINIA

Virginia State Crime Commission

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January 11, 2005

TO: The Honorable Mark Warner, Governor of Virginia

And

Members of the Virginia General Assembly

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."

Enclosed for your review and consideration is the study report on the Capital Murder Statute. The Commission received assistance from all affected agencies and gratefully acknowledges their input into this report.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "D. Albo".

David B. Albo
Chairman

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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, the staff conducted a study to see if Virginia’s capital murder statutes should be expanded to include “lying in wait” or “ambush” as an aggravating factor.

II. Executive Summary

In 2004, Delegate McDonnell made a request to the Virginia State Crime Commission for staff to study the idea of expanding Virginia’s capital murder statutes to include the concept of “lying in wait” or “ambush” as an aggravating factor that could be considered by juries.

Because this proposed factor would be inconsistent with Virginia’s current capital murder scheme, and because the broad categories in current capital sentencing instructions already allow juries to consider whether a defendant carried out his crime by “lying in wait,” it was the recommendation of the Crime Commission not to modify any of Virginia’s capital murder statutes in this manner.

III. Methodology

The Virginia State Crime Commission utilized three research methodologies to examine the topic presented for study. First, the relevant capital murder statutes were reviewed to see what effect there would be if they were modified to include the concept of “lying in wait.” The constitutionality of making this change was analyzed. Second, a review was carried out of all other states’ capital murder statutes to see how many included “lying in wait” as either an element of the crime, or an aggravator at sentencing. Finally, the relevant statutes from other states were compared to Virginia’s statutory scheme for capital punishment, and the idea of modifying Virginia’s statutes in a similar was analyzed in the context of the existing death penalty procedures.

IV. Background

Analysis of “lying in wait” as a New Capital Crime

Virginia’s capital murder statute, Va. Code § 18.2-31, currently contains 14 distinct, enumerated offenses.¹ The very next statute, Va. Code § 18.2-32, contains Virginia’s crime of first degree murder:

Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction, except as provided in § 18.2-31, is murder of the first degree, punishable as a Class 2 felony.²

This statute presents constitutional difficulties to making murder by lying in wait a capital crime in Virginia. Because Virginia has already specifically defined murder by lying in wait to be first degree murder, which does not carry the death penalty, it would likely be unconstitutional to add murder by lying in wait to Va. Code § 18.2-31 as a fifteenth category of capital murder. The United States Supreme Court has held that in order for a state’s capital murder statutes to be constitutional, they must prevent “arbitrary and capricious” application of the death penalty.³ Having two types of statutory murder, each defined in the same way, with one carrying the death penalty and the other only carrying life imprisonment, would probably violate this prohibition.

It might be possible to eliminate “lying in wait” from the definition of first degree murder, and then add it to the capital murder statute. To do so would be a policy decision which the legislature could make, and the resulting scheme would then have a much greater chance of being held constitutional. However, to do so would represent a major change in how Virginia has traditionally defined its capital murder crimes since 1975. All of Virginia’s capital crimes are currently defined by the type of victim,⁴ or the circumstances surrounding the killing.⁵ None of the statutes focus on how the murder was carried out. Instead, the general details of how the murder was planned or accomplished are facts which are considered at sentencing.⁶ To make such facts an

¹ VA. CODE § 18.2-31 (MICHIE 2004). Examples of Virginia’s capital crimes include the premeditated killing of any person in the commission of a robbery, or the commission of a rape; the premeditated killing of more than one person as part of the same transaction; and the premeditated killing of a minor under the age of 14 by someone 21 years or older.

² VA. CODE § 18.2-32 (MICHIE 2004). Class 2 felonies are punishable by “imprisonment for life or for any term not less than 20 years.” VA. CODE § 18.2-10 (MICHIE 2004).

³ See, generally, Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

⁴ For instance, the killing of a pregnant woman, Va. Code § 18.2-31(11), the killing of a law enforcement officer, Va. Code § 18.2-31(6), or the killing of a minor under the age of fourteen, Va. Code § 18.2-31(12).

⁵ Qualifying circumstances include in the commission of a robbery, Va. Code § 18.2-31(4), in the commission of a rape, Va. Code § 18.2-31(5), in a murder for hire scheme, Va. Code § 18.2-31(2), or in the commission of an act of terrorism, Va. Code § 18.2-31(13).

⁶ VA. CODE § 19.2-264.4(C) (MICHIE 2004).

element of a new capital crime would therefore be a marked departure from how Virginia defines capital, versus non-capital, homicides.

An analysis of the thirty-seven other states which have the death penalty reveals that very few have made murder by lying in wait a specific capital offense.⁷ Four states make lying in wait first degree murder, which is then eligible for the death penalty if other aggravators are found at sentencing.⁸ These states have a very different approach to the death penalty from Virginia—essentially, all premeditated murders are eligible for death penalty consideration. No state which defines capital murder in an approach similar to that of Virginia, that is, a premeditated killing plus additional elements relating to the victim or a concurrent felony, makes “lying in wait” a capital offense.

Analysis of “lying in wait” as a specifically enumerated sentencing factor

Another possibility would be for Virginia to incorporate “lying in wait” as a factor to be considered by a judge or jury during the sentencing phase of a capital trial. However, this would also be a marked departure from how Virginia currently handles its death penalty. At sentencing for a capital crime, there are two factors which are to be considered in determining whether the death penalty shall be imposed, namely future dangerousness, or the vileness of the offense:

The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.⁹

These two factors are extremely broad, allowing many different types of relevant evidence to be presented by the prosecution, including, if appropriate, whether the defendant lied in wait for his victim. Because “lying in wait” is a narrow, fact specific issue, it would be an anomaly if it were to be added to the existing statute.

An analysis of the laws of the other states which have the death penalty revealed that only three statutorily include “lying in wait” as a specifically named aggravator that can be considered at sentencing.¹⁰ These states again have capital murder statutes which are very different from Virginia’s. In all three, any premeditated killing is eligible for the death penalty, if an aggravator, such as “lying in wait,” is found during sentencing. In

⁷ See Attachment 1.

⁸ The four states are California, Cal. Penal Code § 190.2(a)(15) (West 2004); Idaho, Idaho Code § 18-4003 (West 2004); Maryland, Md. Code, Criminal Law, § 2-201; and North Carolina, N.C. Gen. Stat. § 14-17 (2004).

⁹ VA. CODE § 19.2-264.4(C) (MICHIE 2004).

¹⁰ See Attachment 1. The three states are Colorado, Colo. Rev. Stat. § 18-1.4-102(5)(f) (2004); Indiana, Ind. Code Ann. § 35-50-2-9(b)(3) (West 2004), and Montana, Mont. Code Ann. § 46-18-303(1)(iv) (2003).

essence, the “elements” needed to establish capital murder in these states are considered during sentencing, rather than during the “guilt or innocence” phase, as done in Virginia.

V. Conclusion

Because murder by lying in wait is already defined as first degree murder in Virginia, it would not be constitutional to then add murder by lying in wait or ambush as a new capital offense. While it might be possible to eliminate “lying in wait” from the definition of first degree murder, and then make murder by lying in wait a new capital crime, to do so would be a major shift from how Virginia has previously chosen to define its capital offenses. Currently, all of Virginia’s capital crimes involve either a specific kind of victim, or are defined by the circumstances surrounding the killing. None of them focus on how the murder was planned or carried out, which are facts that currently would be considered during sentencing. Very few states have chosen to make murder by lying in wait a capital offense. Those that have done so employ an entirely different statutory scheme for the death penalty, where every premeditated killing is theoretically eligible for the death penalty. Lastly, the fact that a murder was carried out in an ambush is a factor that could be considered by a jury during sentencing. Therefore, there is no need to add those specific words to Virginia’s death penalty sentencing statute.

VI. Recommendation

The Virginia State Crime Commission recommended not making any changes to Virginia’s death penalty statutes.

Attachment I
Lying in Wait as a Qualifying Offense/Aggravator

Death Penalty States: Lying in Wait as a Qualifying Offense/Aggravator

State	Lying in wait/ambush
Alabama	No
Arizona	No
Arkansas	No
California	yes, Cal. Penal Code § 190.2(a)(15) (West 2004)*
Colorado	Colo. Rev. Stat. § 18-1.4-102(5)(f) (West 2004)*
Connecticut	No
Delaware	No
Florida	No
Georgia	No
Idaho	Part of 1st degree murder definition, but not aggr. factor
Illinois	No
Indiana	Yes, Ind. Code. Ann. § 35-50-2-9(b)(3) (West 2004)*
Kentucky	No
Louisiana	No
Maryland	Part of 1st degree murder definition, but not aggr. factor
Mississippi	No
Missouri	No
Montana	Yes, Mont. Code Ann § 46-18-303(1)(iv) (2003)*
Nebraska	No
Nevada	No
New Hampshire	No
New Jersey	No
New Mexico	No
New York	No
North Carolina	Part of 1st degree murder definition, but not aggr. factor
Ohio	No
Oklahoma	No
Oregon	No
Pennsylvania	No
South Carolina	No
South Dakota	No
Tennessee	No
Texas	No
Utah	No
Washington	No
Wyoming	No
*statutory aggravating factor/circumstance	
# statutory definition of capital <u>murder</u>	