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# Deliberation and Premeditation in First Degree Murder - Cummings v. State

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**Deliberation And Premeditation In First Degree Murder**

*Cummings v. State*[1]

An intimate, clandestine relationship had developed between defendant and decedent, and they often took long automobile trips together. On July 28, 1960, the decedent drove from Chicago with her sister to the home of rela-

[1] 223 Md. 606, 165 A. 2d 886 (1960).

tives in Baltimore. The defendant, who had expected to make the trip with the decedent alone, followed in his car the next day. Pursuant to plans made by telephone, defendant met the decedent for breakfast early in the morning of July 30, at a shopping center in Baltimore, but the decedent hurried off saying she would meet defendant later in the day. She returned at approximately 12:30 p.m., parked the station wagon she was driving near defendant's Cadillac, and walked over to his car. The defendant said he was tired and felt miserable and needed a place to stay. When the decedent refused to show him a place where he could rest or direct him to the route to Chicago, a "heated" argument erupted. Defendant said he was "finished." The decedent returned to her station wagon, but went back to defendant's car in response to his call. Then, angrily, she walked away, whereupon defendant shot her in the back through the open window of his automobile with a pistol which had rested on the front seat of his car. He then got out of his car and shot her six more times.

The defendant was convicted of first degree murder in the Criminal Court of Baltimore City, sitting without a jury. The Court of Appeals affirmed, holding that the trial court could have fairly concluded beyond a reasonable doubt that the defendant had deliberated and premeditated, and was, therefore, guilty of murder in the first degree.[2]

The first statute which graded murder was enacted in Pennsylvania in 1794.[3] It subsequently became a model in many other jurisdictions for similar legislation, dividing murder into two degrees and limiting capital punishment to the higher degree.[4] The Pennsylvania Act provided "That all murder which shall be perpetuated by means of . . . wilful, deliberate and premeditated killing . . . shall be deemed murder of the first degree; and all

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[2] 3 MD. CODE (1957) Art. 27, § 407, provides: ". . . any kind of wilful, deliberate and premeditated killing shall be murder in the first degree." This note deals only with the elements of premeditation and deliberation; wilfulness or specific intent to kill is assumed to be present. This third element is discussed in the course of the recent note, Assault with Intent to Murder — Necessity for Actual Intent to Cause Death, 21 Md. L. Rev. 254 (1961).

[3] CLARK AND MARSHALL, CRIMES (6th ed. 1958) 608; HOCHHEIMER, THE LAW OF CRIMES AND CRIMINAL PROCEDURE (2d ed. 1904) 380; 1 WHARTON, CRIMINAL LAW AND PROCEDURE (1957) 558, ROYAL COMMISSION, CAPITAL PUNISHMENT (1949-1953) 168; Brenner, *The Impulsive Murder and the Degree Device*, 22 Fordham L. Rev. 274, 275 (1953); Keedy, *A Problem of First Degree Murder: Fisher v. United States*, 99 U. Pa. L. Rev. 267, 268 (1950).

[4] ROYAL COMMISSION, *loc. cit. supra*, n. 3.

other kinds of murder shall be deemed murder of the second degree . . . ."[5]

In view of the dictionary meanings of the words deliberate and premeditated, those who drafted the statute undoubtedly had in mind that only those murders which were thoughtfully conceived well in advance of the actual killing would fall within the first degree category.[6] However, shortly after the statute was passed the courts proceeded to interpret it in derogation of the literal and intended meanings of the words "deliberate and premeditated,"[7] and the usual formulation came to be made in terms of whether there was sufficient time so that the accused *could* have premeditated and deliberated.[8] If he could have done so, it was rather easily assumed that he did, and the time in which premeditation and deliberation is assumed possible is now almost everywhere taken to be a very short period of time not often precisely identifiable,[9]

[5] ROYAL COMMISSION, *loc. cit. supra*, n. 3. *Cf.*, 18 Purdon's PENNA. STAT. ANNO. (1945) § 4701.

[6] PERKINS, CRIMINAL LAW (1957) 74; ROYAL COMMISSION, *op. cit. supra*, n. 3, 174; MODEL PENAL CODE (Tent. Draft No. 9, 1959) 70. However, many individuals have put forth the thesis that there should be no distinction made between the methodical killer, whose crimes ordinarily would be called first degree murder, and the impulsive killer, whose crimes would be deemed second degree murder, as the former is just as dangerous to society as the latter. In this respect see STEPHEN, 3 HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 94, wherein it is stated that "As much cruelty, as much indifference to the life of others . . . is shown by sudden as by premeditated murders."

[7] Deliberate means "to weigh in the mind; to consider the reasons for and against; to consider maturely; to reflect upon; ponder." Premeditate means "to think on and revolve in the mind, beforehand; to contrive and design previously." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1955).

[8] ROYAL COMMISSION, *op. cit. supra*, n. 3, 184, quoting from Commonwealth v. Drum, 58 Pa. 9, 16 (1868):

> "[T]he *intention* to kill is the essence of the offense. Therefore, if an intention to kill exists, it is wilful; if this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is deliberate; *and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to select the instrument, or to frame the plan to carry this design into execution, it is premeditated.* The law fixes upon no length of time as necessary to form the intention to kill . . . ." Emphasis supplied in part.

More recently, in Commonwealth v. Gibbs, 366 Pa. 182, 76 A. 2d 608, 610 (1950), in dismissing defendant's assertion that the trial court erred because its instruction considered only whether he had time to deliberate and premeditate, and not whether he did in fact deliberate and premeditate, the Court said that:

> "It was clearly correct to charge that if the intention to kill existed, defendant was guilty of murder in the first degree. * * * There must, of course, be sufficient time, however short it may actually be, for a person to deliberate and premeditate in order to form that intent. But those elements serve merely as guides for the jurors to prevent them from finding an intent where none in fact could have existed."

[9] 1 WHARTON, *op. cit. supra*, n. 3, 563-564. In the instant case, *supra*, n. 1, 611, it was stated that "[A]lthough the design to kill must precede

although the mental capacity of the individual accused is sometimes taken into account.[10] This severe dilution of the natural and proper meanings of premeditation and deliberation has made it common for experts to say that in many jurisdictions there is nothing substantial left of the first degree requirement in this area except for a specific intent to kill.[11] The American Law Institute's Model Penal Code states:

> "[T]he courts . . . almost universally have held that the criterion [premeditation and deliberation] reduces to no more than a requirement of an intent to kill. Neither calmness in the formation of a homicidal purpose nor a substantial time between resolution and action is generally held to be essential."[12]

Sometimes the judicial erosion of deliberation and premeditation is restricted by the precise wording of a statute.[13] For example, in the New York homicide statute, second degree murder is characterized as killing with a

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the killing by some appreciable . . . time, that time need not be long." Further, it was said that "[The triers of fact] may have decided . . . [the defendant] formed his intent to kill shortly before he discharged the first shot, and concluded that there was enough time for reflection and decision between then and when he fired the last one . . . so as to constitute premeditation . . . ." (612).

In Mackiewicz v. State, 114 So. 2d 684, 691 (Fla. 1959), the Court said that "The fact that only an instant elapsed between [defendant's discovery of his victim and defendant's fatal shot] . . . does not negative a premeditated design to effect [his victim's] . . . death. It is not necessary that such purpose and intent . . . shall exist for any particular length of time . . . ."

It is stated in Bailey v. Commonwealth, 191 Va. 510, 62 S.E. 2d 28, 31 (1950), that although a deliberate and premeditated killing must be predetermined upon consideration "that does not mean that a measurable period of time for pondering must have elapsed. The intention to kill may have come into being only at the time of the killing and the act still be first-degree murder. It is the will and purpose to kill and not the interval of time which fixes the grade of the offense."

[10] *Infra*, n. 28.

[11] Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. Pa. L. Rev. 759, 773-777 (1949). See also Brenner, *supra*, n. 3, 281; Michael and Wechsler, *A Rationale of the Law of Homicide: I*, 37 Col. L. Rev. 701, 707-708 (1937) and cases cited therein.

[12] MODEL PENAL CODE, *op. cit. supra*, n. 6, 69.

[13] 39 McKINNEY'S N.Y. STAT. (1944) Art. 94, § 1044, provides: first degree murder is a killing with ". . . a deliberate and premeditated design to effect the death of the person killed. . . ." § 1046, provides: ". . . killing of a human being is murder in the second degree when committed with a design to effect . . . death . . . but without deliberation and premeditation." Oregon's murder statutes are similar to New York's; see 1 ORE. REV. STAT. (1953) Title 16, Chs. 163.010 and 163.020. Although Florida divides murder into three categories, the first and second degree categories are essentially the same as New York's; see 22 FLA. STAT. ANNO. (1941) Ch. 782, § 784.04.

design to produce death but without accompanying deliberation and premeditation.[14] Because the statutory plan would be rendered totally ineffectual if deliberation and premeditation were construed to mean a "design to kill," the courts in that state have sometimes interpreted deliberation and premeditation more literally. Hence, in *People v. Guadagnino*[15] it was declared:

> "[T]here is a marked distinction in the law between deliberate premeditation and an intent to kill. * * * [A jury charge] is therefore incorrect, which confuses these things, and says that premeditation and deliberation may be formed at the instant of the killing . . . ."[16]

Of the states in which statutory language less clearly prevents the playing down of premeditation and deliberation, California affords more than lip service to the strict definitions.[17] The literal denotations of the words have been applied in that state to the extent that first degree murder convictions have been reversed even when there has been clearly present a design to cause death in the defendant's mind previous to the fatal act.[18] California has commonly held that premeditation means "to think on and revolve in the mind, beforehand; to contrive and design previously,"[19] and, also, "by cojoining the words 'wilful, deliberate, and premeditated' . . . the legislature apparently emphasized its intention to require . . . substantially more reflection than may be involved in the mere formation of a specific intent to kill."[20]

Maryland appears to be committed to the usual construction of the words deliberation and premeditation which gives them little meaning. The following remark, taken from HOCHHEIMER ON CRIMINAL LAW,[21] was cited in

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[14] 39 MCKINNEY'S N.Y. STAT. (1944) Art. 94, § 1046. See also ROYAL COMMISSION, *op. cit. supra*, n. 3, 185.

[15] 223 N.Y. 344, 135 N.E. 594 (1922).

[16] *Id.*, 597.

[17] California's murder statutes are comparable to the original Pennsylvania statute aforementioned. See 47 WEST'S ANNO. CALIF. CODES (1955) Title 8, Ch. 1, § 189.

[18] People v. Hillman, 140 Cal. App. 2d 902, 295 P. 2d 939 (1956); People v. Bender, 27 Cal. 2d 164, 163 P. 2d 8 (1945).

[19] People v. Rittger, 355 Cal. Rptr. 901, 355 P. 2d 645, 651 (1960); People v. Parrott, 174 Cal. App. 2d 301, 344 P. 2d 643, 645 (1959); People v. Keeling, 152 Cal. App. 2d 4, 312 P. 2d 407, 410 (1957); People v. Hillman, *supra*, n. 18, 941; People v. Nichols, 88 Cal. App. 2d 221, 198 P. 2d 538, 542 (1948); People v. Bender, *supra*, n. 18, 19; People v. Thomas, 25 Cal. 2d 880, 156 P. 2d 7, 18 (1945).

[20] People v. Thomas, *supra*, n. 19.

[21] HOCHHEIMER, *loc. cit. supra*, n. 3.

the instant case and had been previously quoted or paraphrased in many other Maryland cases, " '[P]remeditated' [means] the design must have preceded the killing by an appreciable length of time, time enough to deliberate . . . ."[22] However, it is evident that the Maryland Court of Appeals has not given full effect to the statement in that it has not required any calm or substantial reflection prior to the killing.[23]

It is interesting to note that in a number of cases the Court has even said that premeditation and deliberation could have occurred between the time defendant began a course of action, e.g., firing a series of shots, which resulted in the victim's death and the time when the accused ceased his conduct.[24] This generally involves an assumption that the victim was not immediately killed by one of the first acts in the series. Premeditated and deliberate shots at a man already dead have no significance on a charge of first degree murder.

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[22] Kier v. State, 216 Md. 513, 523, 140 A. 2d 896 (1958); Elliott v. State, 215 Md. 152, 160, 137 A. 2d 130 (1957); Faulcon v. State, 211 Md. 249, 257, 126 A. 2d 858 (1956); Chisley v. State, 202 Md. 87, 106, 95 A. 2d 577 (1953).

[23] Where the defendant shot and killed a policeman in an alley as the policeman preceeded him on their way to the station, the Court said that "[Defendant had] time . . . to deliberate as he was being walked to the police station and as he was taking the revolver from his pocket." Brown v. State, 220 Md. 29, 39, 150 A. 2d 895 (1959).

Defendant assaulted a woman in her home, and the Court of Appeals remarked that "[t]he brutal manner in which the victim was beaten . . . indicates a protracted period during which the assault continued. * * * There was ample evidence . . . that the action of the appellant was . . . deliberate, and . . . premeditated." Kier v. State, *supra*, n. 22, 523.

Appellant watched deceased approach until within range, and then shot and killed him with a shotgun. Defendant was held to have deliberated and premeditated. Elliott v. State, 215 Md. 152, 137 A. 2d 130 (1957).

When defendant hit and killed the victim with a car, the Court stated that "During the time . . . [appellant] drove the eight blocks with the deceased under the car * * * Appellant . . . had sufficient time to premeditate his actions . . . ." Faulcon v. State, *supra*, n. 22, 261.

The accused bludgeoned his victim to death, and the Court said: "There was opportunity for reflection and decision . . . in the length of time needed to get out of the car, pick up the piece of pipe, return to the car, and strike the fatal blows." Grammer v. State, 203 Md. 200, 225, 100 A. 2d 257 (1953).

Defendant, who had been drinking (and there was some question as to whether he was drunk), shot his victim after a brief discussion as to the ownership of some cigarettes. The Court of Appeals said that "The jury could find that two or more shots were fired and that there was an appreciable interval between the first shot and the second, or more . . . [and] the firing of two or more shots in such circumstances has been held . . . to be evidence . . . of deliberation and premeditation." Chisley v. State, *supra*, n. 22, 108.

[24] Kier v. State, *supra*, n. 22; Faulcon v. State, *supra*, n. 22; Chisley v. State, *supra*, n. 22.

In all of the cases which have come before the Court of Appeals where the defendant has contended that his crime was not deliberate and premeditated, it has been decided that the trier of fact could have reasonably determined that the accused premeditated and deliberated. The Court is presumedly loath to reduce a first degree murder conviction to second degree murder in this area because of Maryland Rule 741c which provides that "the Court of Appeals may review . . . to determine whether in law the evidence is sufficient to sustain the conviction, but the verdict of the trial court shall not be set aside on the evidence, unless clearly erroneous . . . ." The Court of Appeals has said that it must determine whether the trial court could have found premeditation and deliberation, not whether the Court itself would have found premeditation and deliberation.[25]

Since the prevailing theory is that very little time is required for premeditation and deliberation, and since in most cases the conduct of the accused prior to the event does not make it absolutely clear just when he first formed his intent to kill, it is usually very difficult, if the prosecution has pressed the charge, to direct a jury that it cannot find first degree murder or to set aside such a verdict as irrational if it is rendered. Perhaps the best hope of the defense is that the jury will suppose premeditation and deliberation to have their natural meanings, or exercise its practically uncontrolled discretion to bring in a second degree verdict, on the basis of intangible considerations. Where, as in Maryland, trial judges are commonly the triers of fact in criminal cases, the harshness of the interpretation given the original Pennsylvania-type statute may be greater, since the trial judge probably knows and attempts conscientiously to apply the artificially narrow conception of premeditation and deliberation.

A related problem concerns the effect of intoxication or of mental disorder short of legally exculpatory insanity upon one's capacity to deliberate and premeditate. Many states reasonably hold that inebriation may negative the presence of the state of mind necessary for the accused to have been capable of acting in a deliberate and premeditated manner.[26] In *Chisley v. State*[27] it was said that volun-

[25] Cummings v. State, *supra*, n. 1, 610; Kier v. State, *supra*, n. 22, 518; Grammer v. State, *supra*, n. 23. See also Dunn v. State, .... Md. ...., 174 A. 2d 185, 191 (1961).

[26] CLARK AND MARSHALL, CRIMES (6th ed. 1958) 614; Keedy, *supra*, n. 3 273 (citing cases from twenty jurisdictions).

[27] 202 Md. 87, 106, 95 A. 2d 577 (1953). Subsequently, in Breeding v. State, 220 Md. 193, 199, 151 A. 2d 743 (1959), the Court of Appeals

tary intoxication "must be considered by the jury as it bears on the question of . . . deliberation and premeditation. . . ."

The cases are nearly evenly divided as to whether a mental disturbance short of legally recognized insanity may be considered in deciding whether defendant committed a murder with deliberation and premeditation.[28] One frequently discussed case in this area is *Fisher v. United States*,[29] where a majority of the Supreme Court of the United States held that the defendant, who evidently had psychopathic tendencies and borderline mental deficiency, was to be judged, concerning his capacity to deliberate and premeditate, by a "theoretical normality,"[30] and not by his own traits. The only Maryland case in point that has been found is *Spencer v. State*,[31] which reached the same dubious result as *Fisher*. In the Maryland case, Judge Bryan, dissenting, said, "If the state of mind of an accused person is such that he was not capable of deliberation when he committed a homicide, it cannot make any possible difference from what cause the incapacity may arise."[32] Judge Bryan's reasoning is sound. It seems logically untenable to maintain, as is done in many jurisdictions, that self-produced intoxication may be prop-

announced that "voluntary drunkenness is generally not a defense." However, it was noted that the triers of fact determined that the defendant was not drunk at the time of the killing.

[28] MODEL PENAL CODE, *op. cit. supra*, n. 6, 69; Weihofen and Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 Yale L. J. 959 (1947). See generally WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE (1954) 176-188.

[29] 328 U.S. 463 (1946). For a discussion of this case see CLARK AND MARSHALL, *op. cit. supra*, n. 26, 374-6, and Taylor, *Partial Insanity As Affecting the Degree of Crime — A Commentary on Fisher v. United States*, 34 Cal. L. Rev. 625 (1946).

[30] *Id.*, 466. Mr. Justice Murphy, dissenting, rejected this objective standard and argued that ". . . there are persons who, while not totally insane, possess such low mental powers as to be incapable of the deliberation and premeditation requisite to statutory first degree murder." *Id.*, 492. See State v. Padilla, 66 N.M. 289, 347 P. 2d 312, 316 (1959), where, in granting a new trial to defendant who had been convicted of first degree murder, the court extracted the following quotation from People v. Moran, 249 N.Y. 179, 163 N.E. 553 (1928):

> "Feebleness of mind or will, even though not so extreme as to justify a finding that the defendant is irresponsible, may properly be considered . . . in determining whether a homicide has been committed with a deliberate and premeditated design to kill, and may thus be effective to reduce the grade of the offense."

Also, in People v. Caruso, 246 N.Y. 437, 159 N.E. 390 (1927), there was a reversal of a first degree murder conviction on the ground that Caruso was too distraught to have deliberated, notwithstanding the fact that he had time.

[31] 69 Md. 28, 13 A. 809 (1888).

[32] *Id.*, 48. See Recent Decision, *Criminal Law — The Diminished Responsibility Doctrine*, 20 Md. L. Rev. 376 (1960).

erly considered in deciding whether an accused deliberated and premeditated, but that mental disease may not be so considered.[33] The usual view that intoxication may prevent premeditation and deliberation (like the often held view that mental weakness short of insanity may do so) really conflicts with the Pennsylvania rule, one tendency of which is to hold the accused to the tort standard of the reasonable man by permitting a finding of his guilt if the time lapse is sufficient for the ordinary reasonable man to premeditate and deliberate.

In summary, it might be suggested that the legislature consider abandoning the premeditation and deliberation criterion,[34] openly leaving to the discretion of the trial court or jury the imposing of punishment for all murder.[35] After scrutinizing the premeditation and deliberation test, the Royal Commission on Capital Punishment reached this conclusion, adding that when an accused is convicted of murder the jury should be required to determine whether there are extenuating circumstances, and, if there are none, then the defendant should be sentenced to death.[36] Also, it is recommended in the MODEL PENAL CODE that a trial court or jury ought not to prescribe a sentence of death unless it finds that there are aggravating circumstances, which are enumerated in the CODE, and, further, that there are no substantial mitigating factors.[37]

An alternative would be to set under the existing statute a minimum time which must elapse between the conception and execution of the fatal act in order to establish premeditation and deliberation. In Belgium it

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[33] Keedy, *supra*, n. 3, 290.

[34] Any abolition of degrees of murder for intentional homicides would require reconsideration of the felony-murder rule, which in Maryland makes homicides in the course of conduct connected with certain enumerated crimes murders in the first degree, 3 MD. CODE (1957) Art. 27, §§ 408-410.

[35] Justice Cardozo has said that:

> "If intent is deliberate and premeditated whenever there is choice, then in truth it is always deliberate and premeditated, since choice is involved in the hypothesis of the intent. What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words." CARDOZO, WHAT MEDICINE CAN DO FOR LAW (1928) in LAW AND LITERATURE (1931) 100.

[36] *Supra*, n. 3, 195. " 'Extenuating circumstances' would not be defined by statute, for the same reasons for which we have found it impossible to define degrees of murder. The decision of the jury would be within their unfettered discretion and in no sense governed by principles of law."

[37] *Supra*, n. 6, 59-61.

must ordinarily be shown that two or three hours expired.[38] This time test might serve to press upon the courts a construction of the words premeditation and deliberation which more nearly approximates their intended meanings. It would, however, be extremely difficult to establish a meaningful period of time — although probably at least fifteen minutes ought to have elapsed.

But, for so long as the deliberation and premeditation criterion stands in its present state,

> "[H]omicide law can . . . move forward by looking backward. By returning for guidance to the era of literal meanings for the words with which we are concerned, we can arrive at a more rational and realistic result in our treatment of spur-of-the-moment intent cases."[39]

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[38] ROYAL COMMISSION, *op. cit. supra*, n. 3, 175.
[39] Knudson, *Murder by the Clock*, 24 Wash. U. L. Q. 305, 352 (1939).