

VIRGINIA CAPITAL SENTENCING VERDICT FORMS: A HISTORY AND PROPOSALS  
FOR THE NEXT ROUND OF CHALLENGES\*

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**I. Introduction**

Verdict forms play an integral part in the Virginia capital jury's sentencing decision. After the jury hears evidence during the sentencing phase of a capital trial, the court provides instructions and verdict forms that are intended to comply with *Gregg v. Georgia*<sup>1</sup> and the two requirements of the Supreme Court's Eighth Amendment cases: to limit the jury's discretion, and to guarantee that the jury considers the defendant's individual circumstances.<sup>2</sup> But Virginia capital sentencing instructions have proven to be insufficient, standing alone, to ensure that juries actually understand and apply the procedural requirements that Virginia's capital sentencing scheme was designed to implement.<sup>3</sup> Therefore, sentencing verdict forms are essential to clarify the proper decision-making procedure. This memorandum reviews how, over time, persistent challenges by capital defendants have made the Virginia Supreme Court more receptive to the idea of accurate verdict forms that clarify the jury's sentencing choices. It also shows how verdict forms can and should become even clearer guides for the jury.

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<sup>1</sup> *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (finding that the statutory scheme under which the defendant was sentenced did not violate the Constitution). In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court held death sentences imposed under statutes that violated the Eighth and Fourteenth Amendments to be invalid because the statutes gave juries unchecked power to choose or not choose the death penalty. After *Furman*, state legislatures amended their death penalty statutes to ensure individualized consideration and guided discretion. The Georgia statute satisfied the first mandate by allowing the jury to consider all evidence—in mitigation and in aggravation—in making its sentencing decision. *Gregg*, 428 U.S. at 165–66. It satisfied the second mandate by requiring the jury to find one of several statutory aggravating factors before it could even consider the death penalty. *Id.*

<sup>2</sup> *Id.* at 206.

<sup>3</sup> See *supra* Part III.A.1.

## II. History

### A. Pre-*Atkins v. Commonwealth*

After *Gregg v. Georgia*, the Virginia General Assembly enacted a capital sentencing scheme that included actual capital sentencing verdict forms for the jury to use in the sentencing decision.<sup>4</sup> The statutory forms set out both sentencing options and explained the process by which the jury could reach its sentences.<sup>5</sup> The use of these forms accords with the principle that good jury decision-making thrives on solid frameworks or how-to guides.<sup>6</sup> If the rules and the choices are not clear, then juries will reach arbitrary decisions.<sup>7</sup>

But the statutory forms were far from perfect. First, capital defendants claimed that the forms set out an imbalanced decision-making process because they favored the death option over the life option.<sup>8</sup> Defendants argued that the forms were slanted in favor of the death penalty because the forms never mentioned that the jury could sentence the defendant to life despite

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<sup>4</sup> Va. Code § 19.2-264.4(D), repealed by Va. Acts 2010, ch. 658 (2010):

“The verdict of the jury shall be in writing, and in one of the following forms:

(1) ‘We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed.....foreman’

or

(2) ‘We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed .....foreman.’”

<sup>5</sup> *Id.*

<sup>6</sup> See Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL. & L. 788, 796 (2000) (arguing that juries are good fact-finders but not law-appliers, and so juries benefit from tools like interrogatories—specific questions the jury must answer—and special verdicts—returning findings on facts but leaving the application of law to the judge).

<sup>7</sup> *Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (“[T]he provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury.”).

<sup>8</sup> *Mueller v. Commonwealth*, 244 Va. 386, 412, 422 S.E.2d 380, 396 (1992) (finding no merit in the defendant’s argument that the verdict form submitted did not inform the jury of its sentencing options).

finding aggravating factors.<sup>9</sup> Initially, however, the supreme court rejected this challenge,<sup>10</sup> holding that the forms did not have to fully explain the jury’s choices as long as the instructions did.<sup>11</sup>

Second, the statutory form did not guide the jury on the concept of mitigation. The statute’s shortcomings regarding mitigating factors were first challenged in *Clark v. Commonwealth*.<sup>12</sup> Clark argued that the statute listed and defined aggravating factors but not mitigating factors.<sup>13</sup> This asymmetry, Clark argued, led the jury to focus more on the concrete aggravating factors and ignore the abstract mitigating factors.<sup>14</sup> The court disagreed, citing *Lockett v. Ohio*<sup>15</sup> to support its view that the effect of listing aggravating factors but not mitigating factors was to ensure that juries “may consider any and all mitigating factors.”<sup>16</sup>

For many years, the Virginia Supreme Court adhered to *Clark*.<sup>17</sup> In *Buchanan v. Angelone*<sup>18</sup> and then again in *Weeks v. Angelone*,<sup>19</sup> the United States Supreme Court found that bare bones instructions<sup>20</sup> that did not even mention the word “mitigation” but simply told the jury to “consider all of the evidence” were constitutional.<sup>21</sup> In Virginia, an instruction to

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 413, 396.

<sup>11</sup> *Id.*

<sup>12</sup> *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Lockett v. Ohio*, 438 U.S. 586 (1978). In this case, the defendant attacked her death sentence because it was imposed under an Ohio statute that imposed severe limitations on which mitigating factors the jury could consider. *Id.* at 602. The Court agreed, holding that the jury must be allowed to consider anything about the defendant’s character, record, or the circumstances of the offense, and Ohio’s restrictions on mitigating factors violated the Eighth and Fourteenth Amendments. *Id.* at 605–608.

<sup>16</sup> *Clark*, 220 Va. at 212, 257 S.E.2d at 791.

<sup>17</sup> See, e.g., *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985), *cert. denied*, 475 U.S. 1099 (1986); *Hoke v. Commonwealth*, 237 Va. 303, 315, 377 S.E.2d 595, 602, *cert. denied*, 491 U.S. 910 (1989), *Stockton v. Commonwealth*, 241 Va. 192, 209, 402 S.E.2d 196, 215, *cert. denied*, 502 U.S. 902 (1991); *Stewart v. Commonwealth*, 245 Va. 222, 245, 427 S.E.2d 394, 409, *cert. denied*, 510 U.S. 848 (1993); *Roach v. Commonwealth*, 251 Va. 324, 336, 468 S.E.2d 98, 105, *cert. denied*, 519 U.S. 951 (1996).

<sup>18</sup> *Buchanan v. Angelone*, 522 U.S. 269 (1998).

<sup>19</sup> *Weeks v. Angelone*, 528 U.S. 225 (2000).

<sup>20</sup> *Buchanan*, 522 U.S. at 277.

<sup>21</sup> *Weeks*, 528 U.S. at 234.

“consider all the evidence” would be adequate, standing alone, to inform the jury of its duty to consider mitigating factors, even in the presence of one or both statutory aggravating factors. Because this instruction is proper, the Virginia Supreme Court’s earlier decision in *Mueller* would not require the verdict forms to say anything more about mitigation. Therefore, a Virginia jury might not ever hear about or understand “mitigation.” Virginia’s Model Jury Instructions have partially addressed this problem,<sup>22</sup> but it demands further attention. Section III.A.1 takes up this issue.

### **B. *Atkins v. Commonwealth***

Until 1999, the Virginia Supreme Court did not recognize verdict forms’ potential as guides for procedural fairness. That began to change in *Atkins v. Commonwealth*.<sup>23</sup> In *Atkins*’ trial, the instructions contained a correct statement of the law: the jury must find at least one of the aggravating factors to have been present before imposing a sentence of death.<sup>24</sup> The verdict forms contained an incorrect statement of law: the jury must “find at least one of the aggravating factors to have been present before imposing a sentence of either death or life imprisonment.”<sup>25</sup> The supreme court found that the conflict between the instructions and the verdict forms created a confusing situation for the jury and reversed *Atkins*’ death sentence.<sup>26</sup> The court had previously held that “when the principle of law is materially vital to [the] defendant in a criminal case, it is reversible error for the trial court to refuse a defective instruction instead of correcting it . . . .”<sup>27</sup> In *Atkins*, the court held that “it is [also] materially vital to the defendant in a criminal

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<sup>22</sup> *Supra* notes 66–68 and accompanying text.

<sup>23</sup> *Atkins v. Commonwealth*, 257 Va. 160, 510 S.E.2d 445 (1999).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 178, 456–57.

<sup>26</sup> *Id.* at 179, 457.

<sup>27</sup> *Whaley v. Commonwealth*, 214 Va. 353, 355–56, 200 S.E.2d 556, 558 (1973); *accord* *Bryant v. Commonwealth*, 216 Va. 390, 392–93, 219 S.E.2d 669, 671–72 (1975).

case that the jury have a proper verdict form.”<sup>28</sup> Therefore, the trial court failed in its “duty to give the jury a proper verdict form.”<sup>29</sup> The supreme court found that Atkins had not “rais[ed] a precise objection to the [improper] verdict form” but properly objected to it nonetheless by submitting a form with a correct statement of law.<sup>30</sup>

### C. Post-*Atkins*

The first case to expand *Atkins* was *Powell v. Commonwealth*.<sup>31</sup> At trial, the Commonwealth proffered five penalty-phase verdict forms:

“[O]ne for the imposition of a sentence of death based upon a finding of both aggravating factors, one for the imposition of a sentence of death based upon a finding of future dangerousness only, one for the imposition of a sentence of death based upon a finding of vileness, one for the imposition of a life sentence, and one for the imposition of a life sentence and a fine up to \$100,000.”<sup>32</sup>

Powell objected, arguing that the jury “need[s] forms that indicate they can find one or both aggravating factors and still impose a punishment [of] imprisonment for life or a [punishment] of imprisonment for life and a fine of [up to] \$100,000.”<sup>33</sup> The trial court ruled that the Commonwealth’s forms were adequate.<sup>34</sup> The supreme court reversed, holding that the trial court “must give the jury verdict forms providing expressly for the imposition of a sentence of imprisonment for life and a fine of not more than \$100,000 when the jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt.”<sup>35</sup>

Before *Powell*, the statutory verdict forms may have confused the jury into using this logic: If we find an aggravating factor to be present, then we must vote for death. After *Powell*,

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<sup>28</sup> *Atkins*, 257 Va. at 178, 510 S.E.2d at 456.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 178, 456 n.8.

<sup>31</sup> *Powell v. Commonwealth*, 261 Va. 512, 552 S.E.2d 344 (2001).

<sup>32</sup> *Id.* at 529–30, 354.

<sup>33</sup> *Id.* at 530, 354.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 545, 363.

the form explicitly guided the jury into the proper decisional framework: If we find one or both aggravating factors, that only makes death possible, but not mandatory. We still have the freedom to consider mitigating factors and the two life choices and to vote for life. The old statutory forms did not reflect this choice.

The Virginia General Assembly reacted to *Powell*, but seems to have missed its actual holding. The post-*Powell* amendment added to the statutory verdict forms the option of “life without the possibility of parole and a fine of not more than \$100,000” but failed to include the option of life in the presence of aggravating factors.<sup>36</sup> Thus the effect of the 2003 statutory amendment was to codify rather than correct the defect that had caused the Virginia Supreme Court to find reversible error in *Powell*.

That is where matters stood when *Morrisette v. Warden of Sussex I State Prison*<sup>37</sup> reached the court on a petition for a writ of habeas corpus. In *Morrisette*, the court considered whether defense counsel was ineffective during the penalty phase of Morrisette’s trial for failing to object to a form that did not list the possibility of life in the presence of aggravating factors.<sup>38</sup> Morrisette’s trial had ended in August 2001,<sup>39</sup> over two months after the Virginia Supreme Court

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<sup>36</sup> Va. Code § 19.2-264.4(D), 2003 Va. Acts chs. 1031 & 1040:

“The verdict of the jury shall be in writing, and in one of the following forms:

(1) “We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed.....foreman”

or

(2) “We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at (i) imprisonment for life; or (ii) imprisonment for life and a fine of.....

Signed .....foreman.”

<sup>37</sup> *Morrisette v. Warden of Sussex I State Prison*, 270 Va. 188, 613 S.E.2d 551 (2005).

<sup>38</sup> *Id.* at 195, 558.

<sup>39</sup> *Id.* at 188, 553.

decided *Powell*. The court applied the *Strickland v. Washington* test for ineffectiveness of counsel.<sup>40</sup> On the first factor, the court found that in light of *Powell*, “any reasonably competent attorney would have known that it was imperative that he or she object to a verdict form that did not include . . . [the sentencing option]” of life imprisonment and a fine when the jury finds one or more aggravating factors.<sup>41</sup> This omission also prejudiced Morrisette’s defense because “[t]he implicit jury confusion caused by the conflict between the instructions and the verdict forms was ‘sufficient to undermine confidence in the outcome’” of his capital murder trial.<sup>42</sup> Therefore, the court found Morrisette’s trial counsel to have been ineffective, and vacated the death sentence.<sup>43</sup>

In *Morrisette*, the Commonwealth argued that the 2003 statutory amendments rejected any changes to the forms suggested in the *Powell* decision.<sup>44</sup> The court did not directly address the effect of the 2003 amendments to the statutory forms.<sup>45</sup> Instead, it reaffirmed its holding in *Powell* by overruling some of its earlier decisions, including *Mueller*.<sup>46</sup> The court stated that the challenges to the verdict forms in *Mueller* were not based on the notion that it was “materially vital to the defendant in a criminal case that the jury have [sic] a proper verdict form” that corresponds to the trial court’s sentencing instructions.<sup>47</sup> The court could not reconcile its reasoning in *Atkins*—that it is materially vital to provide the jury with proper instructions and verdict forms—with its expressed confidence in *Mueller* that then jury would correctly resolve

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<sup>40</sup> See *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984) (Stating that the test for ineffective assistance of counsel is whether the representation “fell below and objective standard of reasonableness” and whether “there is a reasonable probability that, but for counsel’s . . . error, the result of the proceeding would have been different . . .”).

<sup>41</sup> *Morrisette*, 270 Va. at 203, 613 S.E.2d at 563.

<sup>42</sup> *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

<sup>43</sup> *Id.* at 204, 563.

<sup>44</sup> *Id.* at 198, 560.

<sup>45</sup> *Id.* at 195, 558.

<sup>46</sup> *Id.* at 202, 562; see also *supra* notes 8–11 and accompanying text (explaining the rationale and holding of *Mueller*).

<sup>47</sup> *Morrisette*, 270 Va. at 202, 613 S.E.2d at 562 (quoting *Atkins v. Commonwealth*, 257 Va. 160, 178, 552 S.E.2d 445, 456).

any inconsistency between them, so the court overruled *Mueller*.<sup>48</sup> In doing so, the court implicitly rejected the Commonwealth's argument that the 2003 statutory amendments overruled *Powell*.

The newly-amended statutory verdict forms, however, still did not contain the "materially vital" option of life imprisonment despite the jury's finding of one or both aggravating factors. In *Prieto v. Commonwealth*,<sup>49</sup> whereas the trial court insisted on using the statutory verdict forms, the Virginia Supreme Court expressly recognized their inadequacy. It stated that Virginia Code § 19.2-264.4 did not dictate any requirements for jury instructions.<sup>50</sup> Furthermore, the court noted that "it is the interplay between a circuit court's instructions to the jury and an appropriate sentencing verdict form that is central" in the penalty phase of a capital trial.<sup>51</sup> Therefore, there are a "myriad of possible instructions and verdict forms" that might be used in a capital case.<sup>52</sup> The court noted that the statutory forms are just generic examples and circuit courts often do not use them.<sup>53</sup> The only requirement of verdict forms is that they "explicitly correspond to the circuit court's [proper] jury instructions."<sup>54</sup> The court found that "although the jury was instructed that in finding one or both of the aggravating factors, the jury could sentence Prieto to life imprisonment, with or without a fine, there simply was no corresponding option in the statutory verdict form" that the circuit court used.<sup>55</sup> The forms that the trial court used were defective.<sup>56</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> *Prieto v. Commonwealth*, 278 Va. 366, 682 S.E.2d 910 (2009).

<sup>50</sup> *Id.* at 407, 932.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

The court did not declare the statutory forms unconstitutional in *Prieto*. But, it stated that the forms were generic examples and they were defective if a circuit court used them as written. The Virginia General Assembly reacted by repealing the statutory forms.<sup>57</sup> The legislature finally seemed to accept the “materially vital” concept created in *Atkins*, expanded in *Powell*, and affirmed in *Morrisette* and *Prieto*. Verdict forms must explicitly correspond to accurate instructions, and the Virginia Code no longer contains statutory forms that suggest otherwise.

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<sup>57</sup> Va. Code § 19.2–264.4, Va. Acts ch. 658 (2010):

A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. Upon request of the defendant, a jury shall be instructed that for all Class 1 felony offenses committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

A1. In any proceeding conducted pursuant to this section, the court shall permit the victim, as defined in § 19.2–11.01, upon the motion of the attorney for the Commonwealth, and with the consent of the victim, to testify in the presence of the accused regarding the impact of the offense upon the victim. The court shall limit the victim's testimony to the factors set forth in clauses (i) through (vi) of subsection A of § 19.2–299.1.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2–299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) the defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense, or (vi) even if § 19.2–264.3:1.1 is inapplicable as a bar to the death penalty, the subaverage intellectual functioning of the defendant.

C. 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.

D. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

Verdict forms have come a long way since the first statutory forms passed in 1978. Today's forms guide the capital sentencing jury's decision-making process.<sup>58</sup> They make it clear that jurors always have to the right to choose life. The forms promote procedural fairness, but Section III explores ways in which they can do even better at that task.

### **III. The Future of Capital Sentencing Verdict Forms**

#### **A. Mitigation**

##### ***1. Defining Mitigation***

In *Clark v. Commonwealth*, the Virginia Supreme Court held that verdict forms do not describe mitigating factors so that jurors “may consider any and all mitigating factors.”<sup>59</sup> This approach is problematic for several reasons. The Capital Jury Project (“CJP”),<sup>60</sup> a research program that has conducted in-depth personal interviews with nearly 1200 jurors from over 350 capital trials in 14 states, highlights these reasons. The CJP data have demonstrated that jurors need the instructions and verdict forms to explain abstract concepts like mitigation in a clear and thorough manner.<sup>61</sup> If the instructions and verdict forms do not define mitigation, jurors often fail to properly consider mitigating evidence in a few different ways.

First, many jurors decide to impose the death penalty before the penalty phase has even commenced.<sup>62</sup> Such “premature” jurors are much less likely to change their minds if they don't understand what mitigation is.<sup>63</sup> Also, jurors are likely to misunderstand critical aspects of

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<sup>58</sup> For an example of verdict forms, see Virginia Capital Case Clearinghouse, *Draft Verdict Forms*, available at <http://www.vc3.org/jury/>.

<sup>59</sup> *Clark v. Commonwealth*, 220 Va. 201, 212, 257 S.E.2d 784, 791 (1979).

<sup>60</sup> Capital Jury Project homepage, available at <http://www.albany.edu/scj/CJPhome.htm>.

<sup>61</sup> See Craig Haney & Mona Lynch, *Clarifying life and death matters: An analysis of instructional comprehension and penalty phase closing arguments*, 21 *Law & Human Behavior* 575, 576 (1997) (noting that the concept of mitigation is not familiar in a non-legal context).

<sup>62</sup> William J. Bowers and Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 *CRIM. LAW BULLETIN* 51, 56–60 (2003)

<sup>63</sup> *Id.*

mitigation such as the burden of proof, the lack of unanimity requirement, and the constitutional mandate to consider it if these concepts are not conveyed by clear instructions.<sup>64</sup> Finally, many jurors mistakenly assume, unless instructed otherwise, that responsibility for their sentencing decision rests on the law, the judge, or even the defendant rather than on themselves.<sup>65</sup>

The lack of clarity on mitigation and the resulting juror confusion is a serious procedural problem. Virginia’s Model Jury Instructions reflect a first effort to address that problem.<sup>66</sup> These instructions reflect the fact that *Weeks* and *Buchanan* only address the minimum constitutional requirements for mitigation in jury instructions. The generally-used Model Instruction mentions the jury’s duty to consider mitigation,<sup>67</sup> and defines the term as follows: “[I]n determining the appropriate punishment you shall consider any mitigation evidence presented of circumstances which do not justify or excuse the offense but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment.”<sup>68</sup>

Verdict forms can undoubtedly also mention and define mitigation. Again, *Weeks* and *Buchanan* only define the constitutional minimum for instructions. In Virginia, it is the interplay between the instructions and verdict forms that is central.<sup>69</sup> For this reason, the optimal instruction/verdict form combination<sup>70</sup> would include a clear definition of mitigation in both.

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<sup>64</sup> *Id.* at 66–71.

<sup>65</sup> *Id.* at 72–75.

<sup>66</sup> Both the capital defense community and commonwealth attorneys at least accept these model instructions as a starting point. See Virginia Capital Sentencing Model Jury Instructions, available at [http://www.ocalynchburg.com/Jury%20Instructions/Index%20of%20Instructions.htm#\\_Homicide](http://www.ocalynchburg.com/Jury%20Instructions/Index%20of%20Instructions.htm#_Homicide). There is a link to this website on VC3.org. But, there are also links to several additional instructions. Some of these instructions are endorsed by the Virginia State Bar. See Virginia Capital Case Clearinghouse, *Jury Instructions*, available at <http://www.vc3.org/jury/>.

<sup>67</sup> See Virginia Capital Sentencing Model Jury Instructions, available at [http://www.ocalynchburg.com/Jury%20Instructions/Index%20of%20Instructions.htm#\\_Homicide](http://www.ocalynchburg.com/Jury%20Instructions/Index%20of%20Instructions.htm#_Homicide) & <http://www.vc3.org/jury/> (“But if you nevertheless believe from all the evidence, including evidence in mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant at . . . [imprisonment for life] . . .”).

<sup>68</sup> *Id.*

<sup>69</sup> *Prieto v. Commonwealth*, 278 Va. 366, 407, 682 S.E.2d 910, 932 (2009).

<sup>70</sup> *Id.*

The definition, moreover, can be much clearer than the model instruction, which is forty words long, contains potentially unfamiliar terms like “extenuate” and “culpability,” and uses the word “or” three times.<sup>71</sup> The “model” definition is also too narrow because mitigation is broader than that which reduces the defendant’s “moral culpability.”<sup>72</sup>

A model definition of mitigation should afford the capital jury the proper freedom to consider many things to be mitigating. One possibility is, “Mitigation is any evidence or fact that any juror believes to support a sentence of life imprisonment.” This definition is broad and understandable.

## ***2. Listing Mitigating Factors***

In addition to this definition, verdict forms should contain a non-exhaustive list of mitigating factors. Such non-exhaustive lists are routinely employed in federal capital cases, as illustrated by the example attached. This list of mitigating factors is as long and as exhaustive as necessary to capture the range of mitigation on which the defendant actually relies. But to guard against the danger of inadvertently limiting the jury’s discretion to consider additional mitigating factors identified by the Virginia Supreme Court in *Clark v. Commonwealth*, the federal list includes blank lines for the jury to fill in its own mitigating factors. On the Virginia forms, the previously proposed definition of the mitigation should appear prominently before the list to encourage the jury to fill in those blank lines. The federal form also includes blank boxes to the right of each factor for the foreperson to fill in how many jurors found that factor. Their purpose

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<sup>71</sup> *Supra* note 68 and accompanying text.

<sup>72</sup> *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (“[P]etitioner proffered [testimony] regarding his good behavior during the over seven months he spent in jail awaiting trial,” and “the jury could have drawn favorable inferences from this testimony regarding petitioner’s character and his probable future conduct if sentenced to life in prison”). This inference “would not relate specifically to petitioner’s culpability for the crime he committed” but “would be ‘mitigating’ in the sense that they might serve ‘as a basis for a sentence less than death.’” *Id.* at 4–5 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

is to clarify that the jury is not required to find a mitigating factor unanimously.<sup>73</sup> Virginia forms should also use such a means of making clear that deciding which mitigating factors exist and should be considered is, ultimately, a task for each individual juror rather than for the jury as a whole, acting by unanimous vote.

## **B. Unanimity**

### ***1. Mitigating Factors***

Most verdict forms currently in use run the risk of creating the impression that the jury must be unanimous on mitigating factors to even consider them. For example, the unanimity requirement for aggravating factors might appear right before the discussion of mitigating factors.<sup>74</sup> The sentence about mitigating factors might read, “We, the jury, having found the defendant guilty of capital murder AND . . . having considered the evidence in mitigation . . . .”<sup>75</sup> A reasonable juror might think that the process of considering mitigation is collective and the decision about whether to consider any one factor must be unanimous.<sup>76</sup> This mistaken belief is unconstitutional.<sup>77</sup> To eliminate this possibility, the forms should be amended to read, “We, the jury, having found the defendant guilty of capital murder AND . . . having *each individually* considered the evidence in mitigation . . . .” The individual decision is also reflected in the definition of mitigation above.<sup>78</sup>

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<sup>73</sup> *Infra* note 77 and accompanying text.

<sup>74</sup> Virginia Capital Case Clearinghouse, *Draft Verdict Forms*, available at <http://www.vc3.org/jury/>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Mills v. Maryland*, 486 U.S. 367, 384 (1988) (“We conclude that there is a substantial probability that reasonable jurors, . . . in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance.”).

<sup>78</sup> See definition, *supra* page 12.

## 2. “Elements” of the Vileness Aggravating Factor

Finally, the jury is required to find aggravating factors unanimously.<sup>79</sup> Virginia Capital Case Clearinghouse’s draft forms would extend unanimity to “elements” of the vileness aggravating factor by requiring that the “[Foreperson must initial one or more of the above elements [of vileness] only if found beyond a reasonable doubt and unanimously agreed upon.]”<sup>80</sup> Unanimity on “elements” of an aggravating factor is an unsettled issue. If “torture, depravity of mind, and aggravated battery to the victim” are elements of the vileness aggravating factor, then the jury must find them unanimously. But if these three things are merely facts with which the Commonwealth may attempt to prove the vileness factor, then the Constitution does not require unanimity. The Supreme Court explained the distinction between elements of a crime and mere factual means of proving a crime in two leading cases—*Schad v. Arizona* and *Richardson v. United States*.

In *Schad v. Arizona*, the Court reviewed whether a trial court erred by not instructing the jury that it was required to agree on a single theory of first degree murder.<sup>81</sup> At trial, the prosecutor had advanced theories of both premeditated murder and felony murder.<sup>82</sup> On appeal to the Arizona Supreme Court, the defendant argued that not requiring the jury to agree on one of these alternative theories allowed for a non-unanimous capital verdict in violation of the Sixth,

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<sup>79</sup> Va. Code § 19.2–264.4(C), Va. Acts ch. 658 (2010) (stating that the Commonwealth must prove that the accused “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”); *Id.* § 19.2–264.4(D) (“In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.”); *Prieto v. Commonwealth*, 278 Va. 366, 413, 682 S.E.2d 910, 935 (2009) (“[W]e hold that in the penalty phase of capital murder trials the death penalty may not be imposed unless the jury unanimously finds either one or both of the aggravating factors of “vileness” or “future dangerousness” beyond a reasonable doubt.”).

<sup>80</sup> Virginia Capital Case Clearinghouse, *Draft Verdict Forms*, available at <http://www.vc3.org/jury/>.

<sup>81</sup> *Schad v. Arizona*, 501 U.S. 624 (1991).

<sup>82</sup> *Id.* at 629.

Eighth, and Fourteenth Amendments.<sup>83</sup> The Arizona Supreme Court disagreed: “‘In Arizona, first degree murder is only one crime . . . . Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.’”<sup>84</sup>

The United States Supreme Court affirmed, explaining that this is not really a unanimity issue, but rather a question of whether “premeditated murder and felony murder are separate crimes as to which the jury must return separate verdicts.”<sup>85</sup> The Court held that because the Arizona courts “determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law” unless the determination is unconstitutional.<sup>86</sup> This determination does not violate the Due Process Clause of the Fourteenth Amendment because widespread acceptance of Arizona’s definition of the first degree murder “is a strong indication that [it does] not “‘offen[d] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”<sup>87</sup>

In *Richardson v. United States*,<sup>88</sup> the Court reinforced the importance of deeming certain facts to be elements of a crime rather than mere means of proving the crime. The consequence of considering a certain fact to be an element of the offense “is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each

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<sup>83</sup> *Id.*

<sup>84</sup> *State v. Schad*, 163 Ariz. 411, 417, 788 P.2d 1162, 1168 (1989) (quoting *State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982)).

<sup>85</sup> *Schad v. Arizona*, 501 U.S. 624, 631 (1991).

<sup>86</sup> *Id.* at 636.

<sup>87</sup> *Id.* at 642 (citing *Patterson v. New York*, 432 U.S. 197, 202 (1977) (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958))).

<sup>88</sup> *Richardson v. United States*, 526 U.S. 813 (1999).

element.”<sup>89</sup> In this case, to prove a violation of 21 U.S.C. § 842, the jury must unanimously find that the defendant committed a “continuing series of violations” and also unanimously agree about which violations make up the continuing series.<sup>90</sup> Each violation is an element of the offense rather than a mere means of proving the series because the customary statutory use of the word “violation” indicates that it is an element.<sup>91</sup>

The Virginia Supreme Court has traditionally considered “torture, depravity of mind or aggravated battery to the victim”<sup>92</sup> to be separate means of proving that the defendant’s “conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman.”<sup>93</sup> In *Clark v. Commonwealth*, the court held that “jury need not specify which portion of the [aggravating] factor it finds in order to fulfill the requirement that a verdict be unanimous.”<sup>94</sup> Then, in *Jackson v. Commonwealth*,<sup>95</sup> it reaffirmed that “depravity of mind, aggravated battery, and torture” are not discrete elements of vileness that would require separate proof but rather are “several possible sets of underlying facts [that] make up [the] particular element.”<sup>96</sup>

The Virginia Supreme Court has not revisited its holdings in *Clark* and *Jackson* since the United States Supreme Court decided *Ring v. Arizona*.<sup>97</sup> In *Ring*, the Court determined that statutory aggravating factors must be found by a jury and beyond a reasonable doubt because these factors increase the maximum potential penalty from life imprisonment to death, and are therefore the functional equivalents of elements of a greater offense of death-eligible capital

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<sup>89</sup> *Id.* at 817.

<sup>90</sup> *Id.* at 817–20.

<sup>91</sup> *Id.* at 818–19.

<sup>92</sup> Va. Code § 19.2–264.4(C), Va. Acts ch. 658 (2010).

<sup>93</sup> *Id.*

<sup>94</sup> *Clark v. Commonwealth*, 220 Va. 201, 213, 257 S.E.2d 784, 792 (1979).

<sup>95</sup> *Jackson v. Commonwealth*, 266 Va. 423, 587 S.E.2d 532 (2003).

<sup>96</sup> *Id.* at 434–35, 541 (citing *Richardson*, 526 U.S. at 817).

<sup>97</sup> *Ring v. Arizona*, 536 U.S. 584 (2002).

murder.<sup>98</sup> It is not clear whether the Virginia Supreme Court’s characterization of “depravity of mind, aggravated battery, and torture” as means rather than elements renders the *Ring* analysis inapplicable. On the other hand, if *Ring* applies to all *factual determinations* that might increase the penalty from life imprisonment to death, then the distinction between means and elements in *Clark* and *Jackson* might not matter. It is important to keep this unresolved issue in mind when using the VC3 draft verdict forms as a template.

#### **IV. Conclusion**

Juries’ decision making processes in the penalty phase of capital trials can be fraught with problems. Effective verdict forms promote procedural fairness. The Virginia Supreme Court has become increasingly receptive to arguments about procedural fairness on the verdict forms. But there are still gaps in the case law governing capital sentencing verdict forms that must be corrected before Virginia juries fully understand their sentencing responsibilities under state law and the federal constitution.

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<sup>98</sup> *Id.* at 609.

**ATTACHMENT**

Sample Federal Capital Sentencing Verdict Form

United States v. Barnes—U.S. District Court for the Southern District of New York—2008