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Obtaining Unanimity and a Standard of Proof on the Vileness Sub-Elements with Apprendi v. New Jersey

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I. Introduction

Pursuant to section 19.2-264.2 of the Virginia Code, a sentence of death may be imposed upon a finding that the defendant's conduct in committing the crime was "outrageously or wantonly vile, horrible or inhuman in that involved torture, depravity of mind or an aggravated battery to the victim."[1] The vileness aggravator can be established with any one of the three "sub-elements" of torture, depravity of mind, or aggravated battery. A capital sentencing jury must find the presence of at least one of these sub-elements.[2] However, the jury is not required to agree unanimously upon which sub-element its sentence rests.[3] Consequently, a jury may impose a death sentence when some jurors consider the murder vile because it involved torture, others because the murder involved aggravated battery to the victim, while still others because the murder evidenced the defendant's depravity of mind.[4] Further, these sub-elements need not be proven beyond a reasonable doubt.[5] Only the more generalized finding of vileness must be so proven.[6]

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1. VA. CODE ANN. § 19.2-264.2 (Michie 2000). The other statutory aggravator, future dangerousness, is defined in § 19.2-264.2 as "a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society." *Id.*

2. *See* VA. CODE ANN. § 19.2-264.4(C) (Michie 2000).

3. *See id.*

4. *See* Douglas R. Banghart, *Vileness: Issues and Analysis*, 12 CAP. DEF. J. 77, 98 (1999) (discussing the sub-elements of the vileness aggravator and the effect of a lack of a unanimity requirement for the sub-elements).

5. *See* § 19.2-264.4(C).

6. *Id.*

The failure of the Virginia General Assembly and the Virginia courts to require that these sub-elements be found unanimously and proven beyond a reasonable doubt violates the constitutional mandates the United States Supreme Court has established for capital sentencing schemes.[7] *Godfrey v. Georgia*[8] stated that a capital sentencing scheme must "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.'"[9] The lack of both a unanimity requirement and a reasonable doubt standard for the vileness sub-elements may result in a jury's imposition of a death sentence without agreement as to the basis of its sentence. Moreover, the jury is not required to employ clear and objective standards; it is given no standards. Nevertheless, the lack of a unanimity requirement for the vileness sub-elements has withstood constitutional challenges based on the *Godfrey* standards.[10]

Challenges to the lack of unanimity and the lack of a reasonable doubt standard in finding the vileness sub-elements have been given new ammunition, however, by three recent United States Supreme Court decisions. The practical issue in each of these cases centers on the distinction between an element of a crime and a sentencing factor.[11] However, the constitutional

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7. Sentences of death imposed without the use of clear and objective standards to channel the jury's discretion are arbitrary and capricious death sentences which violate the Eighth Amendment. Godfrey v. Georgia, 446 U.S. 420, 428 (1980). Further, death sentences are qualitatively different from other punishments and therefore require a heightened degree of reliability. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

8. 446 U.S. 420 (1980).

9. Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (citations omitted).

10. *See* Briley v. Commonwealth, 273 S.E.2d 57, 66-67 (Va. 1980); Briley v. Bass, 584 F. Supp. 807, 842 (E.D. Va. 1984). These two cases involve the same defendant, Linwood E. Briley, but encompass two unrelated criminal series of events and three separate capital murder convictions. In *Briley v. Commonwealth*, the Supreme Court of Virginia held Virginia's vileness aggravator was not unconstitutionally vague in light of the *Godfrey* decision. *Briley v. Commonwealth*, 273 S.E.2d at 65-67. The court distinguished the facts of *Godfrey* from the case before it, finding the instant case so inhuman and outrageous "that it could only have been done by those possessed of depraved minds" while Godfrey "killed without warning and instantly." *Id.* at 66-67. In *Briley v. Bass*, the United States District Court for the Eastern District of Virginia upheld Virginia's vileness aggravator by reading *Godfrey* as approving of the Georgia vileness aggravator. However, the district court also held that the trial court's instructions regarding the Georgia aggravator were unconstitutionally vague. *Briley v. Bass*, 584 F. Supp. at 842. The District Court explained that the *Godfrey* Court found unconstitutional "the vagueness of the sentencing judge's instructions to the jury as to how this [vileness] criteria was to be applied," and that such vagueness was not present in the case before the court. *Id.*

11. *See* Apprendi v. New Jersey, 120 S. Ct. 2348, 2360-66 (2000) (holding that any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt);

issues which these cases implicate include fundamental rights such as the right to a fair and impartial jury and the right to have every element of a crime proven beyond a reasonable doubt. The most recent decision, *Apprendi v. New Jersey*,[12] constitutes a break in the Supreme Court's pattern of avoiding the constitutional issues raised in these "sentencing factor" cases.[13]

In *McMillan v. Pennsylvania*,[14] the United States Supreme Court first used the term "sentencing factor" to refer to a factor not found by a jury that could nonetheless increase a sentence imposed by a judge.[15] The *McMillan* Court refused to establish a bright line test to assess whether such sentencing factors ran afoul of constitutional guarantees and instead employed a multi-factor set of criteria to determine whether *Winship* protections applied to sentence enhancements.[16] The *McMillan* decision touched off a trend by state legislatures and by Congress of placing more discretion in the hands of sentencing judges.[17] With the explosion of recidivist statutes and the passage of the Federal Sentencing Guidelines, this trend has become more pronounced in recent years.[18]

While the *McMillan* Court avoided the larger constitutional concerns raised by the statute in question by circumventing the settled *Winship* and

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Richardson v. United States, 526 U.S. 813, 817 (1999) (holding that the phrase "series of violations" in the federal continuing criminal enterprise statute requires a jury to unanimously agree upon which specific violations form the basis of its finding); Jones v. United States, 526 U.S. 227, 232 (1999) (holding that the federal carjacking statute contains three separate offenses each of which must be proven beyond a reasonable doubt and agreed upon by a jury).

12. 120 S. Ct. 2348 (2000).

13. Apprendi v. New Jersey, 120 S. Ct. 2348, 2355-60 (2000) (addressing a defendant's right to a trial by jury and the reasonable doubt standard for factors employed to enhance a sentence).

14. 477 U.S. 79 (1986).

15. McMillan v. Pennsylvania, 477 U.S. 79, 85-86 (1986).

16. *Id.* at 86-88; *see In re* Winship, 397 U.S. 358, 364 (1970) (holding that the Due Process Clause mandates that defendants cannot be convicted except upon proof of every element of the crime beyond a reasonable doubt and that the State bears the burden of proving every element beyond a reasonable doubt).

17. *See generally* Mark D. Knoll, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of* McMillan v. Pennsylvania, 22 SEATTLE U. L. REV. 1057, 1058-59 (1999) (explaining that the *McMillan* decision prompted a revolutionary change in the use of sentencing factors to enhance penalties).

18. *See, e.g.*, 18 U.S.C. § 3559(c) (1994); VA. CODE ANN. § 53.1-151(B1) (Michie 1998); FLA. STAT. ANN. § 775.082 (West 2000); CAL. PENAL CODE § 667(a)(1) (West 1999); 28 U.S.C. §§ 991-998 (1988) (Federal Sentencing Guidelines); *see also* U.S. SENTENCING GUIDELINES MANUAL (1999).

Mullaney[19] issues, the recent trend of offering sentencing judges more discretion has returned these questions to the forefront.[20] After the *McMillan* decision, the United States Supreme Court flirted with these constitutional issues and often successfully avoided them.[21] However, in its 2000 term, the United States Supreme Court decided to face these issues in *Apprendi*. In *Apprendi*, the Supreme Court held that any factor, aside from prior convictions, which increases the penalty for a crime beyond the statutorily prescribed maximum must be found by a jury beyond a reasonable doubt.[22]

Two fundamental constitutional rights were at issue in *Apprendi*. The first of these was a defendant's right to a trial by a fair and impartial jury as guaranteed by the Sixth Amendment.[23] The second right implicated in *Apprendi* was due process.[24] *Winship* and *Mullaney* established that the Due Process Clause requires prosecutors to prove beyond a reasonable doubt every element necessary to constitute the crime for which a defendant may be charged and that the burden of disproving these facts cannot be shifted to the defendant.[25] The *Mullaney* Court further recognized that a state cannot circumvent *Winship* protections merely by "redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear

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19. 421 U.S. 684 (1975).

20. *See* Mullaney v. Wilbur, 421 U.S. 684, 701-04 (1975) (holding that the Due Process Clause mandates defendants cannot be bound to disprove elements of a crime; prosecutors must prove beyond a reasonable doubt every element of the crime charged); *Winship*, 397 U.S. at 364.

21. *See, e.g.*, Richardson v. United States, 526 U.S. 813, 818-20 (1999) (avoiding the constitutional issues by construing the statute in question so that the constitutional issues were not implicated); Jones v. United States, 526 U.S. 227, 239-52 (1999) (same); Almendarez-Torres v. United States, 523 U.S. 224, 243-47 (1988) (finding that the use of prior convictions to increase a sentence did not violate the Constitution because recidivism is a traditional sentencing factor and because the sentencing factor did not shift the burden of proving the elements of the crime to defendants); Patterson v. New York, 432 U.S. 197, 205-11 (1977) (holding that a New York statute which required defendants to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance in order to reduce a second-degree murder charge to manslaughter did not violate the Due Process Clause because the State still had to prove every element of second-degree murder).

22. *Apprendi*, 120 S. Ct. at 2362-63.

23. *Id.* at 2355-56; *see* U.S. CONST. amend VI; *see also* Duncan v. Louisiana, 391 U.S. 145, 157-58 (1968) (holding that the right to a jury trial is a fundamental right and therefore the Fourteenth Amendment guarantees jury trials for all serious criminal cases).

24. *Apprendi*, 120 S. Ct. at 2355-56.

25. *Mullaney*, 421 U.S. at 701-04; *Winship*, 397 U.S. at 364.

solely on the extent of punishment."[26] Yet, the labeling of these elements of punishment as "factors" was squarely at issue in *Apprendi*.[27]

The convergence of these two fundamental constitutional rights in *Apprendi* forced the Supreme Court to answer the question it avoided twice in its 1999 term. In *Jones v. United States*,[28] the Court construed the federal carjacking statute as containing three separate offenses.[29] The alternate reading of the statute was that it contained a single offense with three maximum penalties, two of which depended on factors exempt from the jury's consideration.[30] The *Jones* Court employed statutory construction to avoid larger constitutional issues.[31] Similarly, in *Richardson v. United States*,[32] the Supreme Court avoided the constitutional implications of the federal continuing criminal enterprise statute by construing the statute to require jury unanimity with respect to each drug violation comprising the series of offenses.[33] The Court thereby avoided the constitutional issues which would arise if the statute were construed otherwise.[34] The alternate construction required unanimity only for the general element of a "series" of drug violations rather than the underlying drug violations comprising the series.[35]

Apprendi answered the constitutional question left unanswered in *Jones* and pronounced a rule that questions the use of sentencing factors in situations in which the factor increases the maximum statutory punishment.[36] By implication, *Apprendi* also foreshadows the answer to the constitutional question left unanswered in *Richardson*. The first portion of this article will review the *Apprendi* decision in detail and consider its complicated history. The second part will apply *Apprendi* to the Virginia capital sentencing scheme. This article proposes that *Apprendi*, *Jones*, and *Richardson*, taken together, require that each sub-element of the vileness aggravator upon

26. *Mullaney*, 421 U.S. at 698.

27. *Apprendi*, 120 S. Ct. 2360-62.

28. 526 U.S. 227 (1999).

29. Jones v. United States, 526 U.S. 227, 251-52 (1999); *see* 18 U.S.C. § 2119 (Supp. V 1988).

30. *Jones*, 526 U.S. at 229.

31. *Id.* at 251. The Court stated that "the Government's view would raise serious constitutional questions on which precedent is not dispositive. Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions." *Id.*

32. 526 U.S. 813 (1999).

33. Richardson v. United States, 526 U.S. 813, 824 (1999).

34. *See id.* at 818-20.

35. *Id.* at 817-18.

36. *See Apprendi*, 120 S. Ct. at 2362-63.

which a capital jury may impose a death sentence be unanimously agreed upon by the jury and be proven beyond a reasonable doubt.

II. The Apprendi *Decision*

A. Facts and Procedural Posture

In the early morning of December 22, 1994, Charles C. Apprendi, Jr., fired several shots into the home of an African-American family who had moved into his previously all-white neighborhood. This was the fourth occasion on which this particular home was fired upon. Apprendi later admitted that he fired four or five shots into the home, and he made two important statements.[37] In the first statement, Apprendi denied knowing the family personally, "but because they are black in color he [did] not want them in the neighborhood."[38] Apprendi also stated that he was "just giving them a message that they were in his neighborhood."[39]

Apprendi was charged under a twenty-two count indictment that included charges relating to the shootings as well as numerous unlawful firearm possession charges.[40] Pursuant to a negotiated plea agreement, Apprendi pleaded guilty to three of the counts – two counts of second-degree possession of a firearm for an unlawful purpose and one count of third-degree unlawful possession of a prohibited weapon.[41] Based upon the two statements made to the police, the State requested an enhanced sentence under the New Jersey hate crime statute even though Apprendi was not charged under that statute.[42]

At a subsequent evidentiary hearing to determine the purpose of the shootings, Apprendi presented a psychologist and seven character witnesses

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37. State v. Apprendi, 731 A.2d 485, 486 (N.J. 1999).

38. *Id.* (internal quotation marks omitted).

39. *Id.* (internal quotation marks omitted).

40. *Id.* at 486-87. Apprendi's indictment included charges related to the shootings for attempted murder, attempted aggravated assault, and harassment. The possession charges included possession of a firearm for an unlawful purpose, possession of a prohibited weapon, and possession of a destructive device. *Id.*

41. *Id.* at 487. Under the agreement, the prohibited weapon sentence was to run concurrently with the sentence imposed on the two other possession charges. The sentences for the two other possession charges were reserved to the discretion of the trial court. *Id.*

42. *Id.* The New Jersey hate crime statute in effect at the time of Apprendi's sentencing stated that a court may sentence a person convicted of certain crimes to "an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e." N.J. STAT. ANN. § 2C: 44-3 (West 1995). Subsection (e) states the following: "The defendant in committing the crime acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity." N.J. STAT. ANN. § 2C: 44-3(e) (West 1995).

who testified that Apprendi did not have a reputation for racial bias. Denying that he was biased toward African-Americans, Apprendi testified that the shootings resulted from the consumption of too much alcohol. He further testified that his statements to the police had been mischaracterized. The judge, however, relied upon the testimony of the police officer present at questioning and found that the crime was motivated by racial bias.[43] Apprendi was sentenced to twelve years on one of the second-degree unlawful purpose possession charges and two shorter concurrent sentences on the remaining charges.[44] Because the maximum for second-degree offenses was ten years imprisonment, the twelve year sentence that Apprendi received exceeded that maximum.[45] The hate crime statute provided for a punishment range between ten and twenty years imprisonment, which is the ordinary range for a first-degree crime in New Jersey.[46] The hate crime statute, in essence, sentenced crimes one degree higher by sentencing a second-degree crime with a first-degree sentence.[47]

On appeal, the Appellate Division of the Superior Court of New Jersey found that the use of the preponderance standard to enhance Apprendi's sentence did not violate *Winship*'s mandate that the State prove each element of a crime beyond a reasonable doubt.[48] The Appellate Division reasoned that racial bias was not an element of the crime because the hate crimes provision was included in a section of the New Jersey Code of Criminal Justice entitled "'authority of court in sentencing.'"[49] Citing *McMillan*, the court noted that the State's burden of proof on sentencing factors is not subject to the reasonable doubt standard, because the sentencing factor at issue, the presence of racial bias, is not an element of the crime.[50]

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43. Apprendi v. New Jersey, 120 S. Ct. 2348, 2352 (2000).

44. *Id.*

45. *See* N.J. STAT. ANN. § 2C: 43-6(a)(2) (West 1995) (establishing the range of punishment for second-degree offenses as between five and ten years imprisonment).

46. *See* N.J. STAT. ANN. § 2C: 43-6(a)(1) (West 1995) (establishing the range of punishment for first-degree offenses as between ten and twenty years imprisonment).

47. *See Apprendi*, 120 S. Ct. at 2363.

48. State v. Apprendi, 698 A.2d 1265, 1269 (N.J. Super. Ct. App. Div. 1997). As part of the plea agreement, Apprendi reserved the right to challenge the constitutionality of the hate crime statute. State v. Apprendi, 731 A.2d 485, 487 (N.J. 1999); *see In re* Winship, 397 U.S. 358, 364 (1970) (holding that the Due Process Clause mandates that defendants cannot be convicted except upon proof of every element of the crime beyond a reasonable doubt).

49. *Apprendi*, 698 A.2d at 1268 (internal citation omitted in original).

50. *Id.* (citing McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986)). In holding that Pennsylvania's Mandatory Sentencing Act did not violate *Winship* and *Mullaney*, the *McMillan* Court noted that "[s]entencing courts have traditionally heard evidence and found

A divided New Jersey Supreme Court affirmed.[51] The court first noted the language employed by the United States Supreme Court in the *Jones* decision, which expressed significant doubt about the constitutionality of allowing judges to determine penalty-enhancing findings by a preponderance of the evidence.[52] The court then considered *McMillan* and decided that the statute did not impose impermissible burden shifting or create a separate offense with a separate penalty.[53] Instead, the state legislature "simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor."[54] Though the hate crimes statute was unlike the statute at issue in *McMillan* in that it increased the maximum penalty to which a defendant was subject, it was not clear to the court that this would change the "constitutional calculus" of due process.[55]

Thus, the question starkly presented to the United States Supreme Court was how to reconcile the New Jersey hate crime statute with the statute at issue in *McMillan*. The New Jersey hate crime statute provided for enhancement of a sentence beyond the statutory maximum if the sentencing judge found, by a preponderance of the evidence, that the crime was motivated by racial bias.[56] The statute challenged in *McMillan* established minimum sentences for enumerated felonies if the sentencing judge found, by a preponderance of the evidence, that the defendant visibly possessed a firearm during the commission of the offense.[57] *McMillan* skillfully avoided the constitutional issues these sentencing factors presented by employing a multi-factor test to assess whether *Winship* was violated.[58] Would the *Apprendi* Court also carefully circumvent the *Winship* and *Mullaney* mandates in favor of judicial discretion at sentencing?

[sentencing] facts without any prescribed burden of proof at all." *McMillan*, 477 U.S. at 91. In *Apprendi*, the Appellate Division of the Superior Court of New Jersey found the racial bias component a sentencing factor and not an element of the crime. *Apprendi*, 698 A.2d at 1268. Thus, the hate crime sentencing factor was not subject to the reasonable doubt standard. *Id.*

51. *Apprendi*, 731 A.2d at 486.

52. *See id.* at 493. The *Jones* Court noted that interpreting the federal carjacking statute to allow judges to find penalty-enhancing factors by a standard less than reasonable doubt "would raise serious constitutional questions." Jones v. United States, 526 U.S. 227, 251 (1999).

53. *Apprendi*, 731 A.2d at 494-95 (relying upon *McMillan*, 477 U.S. at 90-91).

54. *Id.* at 494-95.

55. *Id.* at 495.

56. *See* N.J. STAT. ANN. § 2C: 44-3 (West 1995).

57. *See* McMillan v. Pennsylvania, 477 U.S. 79, 81-82 (1986); 42 PA. CONS. STAT. ANN. § 9712(a), (b) (West 1998).

58. *McMillan*, 477 U.S. at 86-88; *see infra* notes 78-90 and accompanying text.

B. Background: Jones v. United States *and* Richardson v. United States

The year before the United States Supreme Court considered *Apprendi*, the Court deftly avoided the precise constitutional issues raised in *Apprendi* in two companion cases that construed two federal criminal statutes. The first case, *Jones v. United States*, involved the federal carjacking statute and considered whether the carjacking statute defined three distinct offenses or a single crime with three penalty options, two of which turned on factors not considered by the jury.[59] The Court considered the language of the carjacking statute as well as similar statutes and concluded that the statute contained three separate offenses, not mere enhancements of a single offense.[60] The Court noted that reading the statute as containing sentence enhancements would raise serious constitutional issues.[61] However, the Court resolved its reading of the statute with the well-settled rule that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[62]

Similarly, in *Richardson v. United States*, the Supreme Court avoided the constitutional implications raised by the federal continuing criminal enterprise statute that included as an element that the defendant participated in a "series of violations" of the federal drug laws.[63] The issue was whether

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59. Jones v. United States, 526 U.S. 227, 229 (1999). The federal carjacking statute, as it appeared at the time Jones was arrested, stated the following:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall–
> (1) be fined under this title or imprisoned not more than 15 years, or both,
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

18 U.S.C. § 2119 (Supp. V 1988). Congress subsequently amended this statute in 1994 and 1996. *See Jones*, 526 U.S. at 230 n.1; 18 U.S.C. § 2119 (Supp. IV 1998).

60. *Jones*, 526 U.S. at 232-39.

61. *See id.* at 239.

62. *Id.* (quoting United States ex rel. Attorney Gen. v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)); *see* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (stating the construction rule that if an interpretation of a statute would raise serious constitutional problems, the statute should be interpreted to avoid these constitutional concerns unless such construction is plainly contrary to the intent of Congress); United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) (same).

63. *See* Richardson v. United States, 526 U.S. 813, 818-20 (1999). The statute at issue reads as follows:

> [A] person is engaged in a continuing criminal enterprise if–
> (1) he violates any provision of [the federal drug laws, i.e.,] of this subchapter

the phrase "series of violations" referred to one element made up of several possible sets of facts that a jury need not agree on, or whether the phrase created several elements, each of which the jury must agree upon unanimously and separately.[64] Again, to avoid possible constitutional concerns, the Court employed statutory construction principles to hold that the statute defined separate elements that the jury must unanimously agree upon.[65] As in *Jones*, the Court pointed out the constitutional issues that would arise if the statutory construction it employed was not possible, but avoided them under the same avoidance principle articulated in *Jones*.[66] With these two avoidance cases in its recent past, the Court granted certiorari in *Apprendi*.[67]

C. *The* Apprendi *Opinion*

1. *Historical Analysis*

The Court began its analysis with a historical review of the two constitutional rights at issue in *Apprendi*. First, the Court recognized the right to a jury trial as a centuries old right meant "'[t]o guard against a spirit of oppression and tyranny on the part of rulers.'"[68] At the time of our Nation's founding, this right had come to be understood to require "'the unanimous suffrage of twelve of [the defendant's] equals and neighbours.'"[69] In the Court's view, the companion right to verdicts based upon proof beyond a reasonable doubt was equally well founded in the common law.[70] The Court noted that this higher degree of proof was found in ancient

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or subchapter II of this chapter the punishment for which is a felony, and
(2) such violation is a part of a continuing *series of violations* of [the federal drug laws, i.e.,] this subchapter or subchapter II of this chapter–
(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
(B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(c) (1994) (emphasis added).

64. *Richardson*, 526 U.S. at 817-18.

65. *See id.* at 818-20.

66. *Id.* at 820 (quoting Gomez v. United States, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.")).

67. Apprendi v. New Jersey, 120 S. Ct. 525 (1999) (mem.).

68. Apprendi v. New Jersey, 120 S. Ct. 2348, 2356 (2000) (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-41 (4th ed. 1873)).

69. *Id.* at 2356 (alteration in original) (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)).

70. *Id.* at 2356.

times, though its current form of "proof beyond a reasonable doubt" did not emerge until the late eighteenth century.[71]

The Court also noted that any distinction between elements of crimes and mere sentencing factors was foreign to criminal procedure at the time of our Nation's founding.[72] The substantive law imposed sentences, not the judge; therefore, once the jury found a defendant guilty of a crime, the judge simply imposed the sentence that was already prescribed by statute.[73] This was not to say that judges lacked all discretion, but generally the judge was bound to impose a sentence within the range provided by the substantive law.[74]

Lastly, the Court cited *Winship* and *Mullaney* for the proposition that the common law reasonable doubt requirement has a vital role in modern criminal proceedings and that this protection extends to a defendant's sentence.[75] *Mullaney* also rejected the notion that states could avoid the protection provided in *Winship* by "redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment."[76] Yet, eleven years after the *Mullaney* decision, the Supreme Court condoned a similar labeling of sentencing factors in *McMillan*.[77]

2. *Wagging the Dog and Avoiding* Winship*:* McMillan v. Pennsylvania *and* Almendarez-Torres v. Unites States

The term "sentencing factor" was first used by the United States Supreme Court in *McMillan v. Pennsylvania*.[78] Pennsylvania's Mandatory

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71. *Id.* (citations omitted).

72. *Id.*

73. *See id.* at 2356-57.

74. *See id.* at 2357. A sentencing judge might pardon the defendant if he found the circumstances of the case demanded it or grant the defendant benefit of clergy whereby the defendant would be branded on the hand. For information regarding benefit of clergy and its application in Virginia, see generally A. Leon Higginbotham, Jr., *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1009-11 (1992).

75. *Apprendi*, 120 S. Ct. at 2359-60; Mullaney v. Wilbur, 421 U.S. 684, 701-04 (1975); *In re* Winship, 397 U.S. 358, 364 (1970). The *Apprendi* Court noted that the statute invalidated in *Mullaney* was unconstitutional because it impermissibly shifted the burden of proof to the defendant. The statute presumed the presence of malice in all murders and placed the burden of rebutting this presumption on the defendant. If the defendant was unable to rebut the presumption of malice, the defendant was subject to the greater punishment of life imprisonment. If the defendant could prove a lesser degree of culpability, such as heat of passion, the charge was reduced to manslaughter which carried a punishment of only twenty years imprisonment. *Apprendi*, 120 S. Ct. at 2359-60.

76. *Mullaney*, 421 U.S. at 698.

77. McMillan v. Pennsylvania, 477 U.S. 79, 87-91 (1986).

78. *See id.* at 89-90.

Minimum Sentencing Act ("Act") provided that defendants convicted of certain enumerated felonies were subject to a mandatory minimum sentence of five years imprisonment if the sentencing judge found by a preponderance of the evidence that the defendant had "visibly possessed a firearm" during the commission of the offense.[79] The Act divested the judge of discretion to impose a sentence of less than five years, but did not authorize a sentence in excess of that otherwise allowed for the underlying felony.[80] Petitioner McMillan argued that visible possession of a firearm in the commission of an offense was an element of the crime and that it therefore must be proven beyond a reasonable doubt under *Winship*.[81] The United States Supreme Court considered a number of factors in deciding that the Act did not violate *Winship*.[82] Of particular interest to the Court was the fact that the Act did not allow imposition of a sentence greater than that prescribed by statute for the underlying felony. The Court stated that

> [s]ection 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. . . . The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense. Petitioners' claim that visible possession under the Pennsylvania statute is 'really' an element of the offenses for which they are being punished – that Pennsylvania has in effect defined a new set of upgraded felonies – would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment . . . but it does not.[83]

The Court also reasoned that its decision in *McMillan* was governed not by *Mullaney* but by *Patterson v. New York*,[84] which stressed the deference that must be given to state legislatures to define crimes and administer justice.[85]

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79. *Id.* at 81; *see* 42 PA. CONS. STAT. ANN. § 9712(a), (b) (West 1998).

80. *McMillan*, 477 U.S. at 81-82.

81. *Id.* at 84.

82. *Id.* at 84-91.

83. *Id.* at 87-88.

84. 432 U.S. 197 (1977).

85. Patterson v. New York, 432 U.S. 197, 205-11 (1977) (holding that a New York statute that required defendants to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance in order to reduce a second-degree murder charge to manslaughter did not violate the Due Process Clause because the State still had to prove every element of second-degree murder).

The Pennsylvania legislature was not circumventing the holdings of *Winship* and *Mullaney* but was well within constitutional boundaries because it took "one factor that has always been considered by sentencing courts to bear on punishment – the instrumentality used in committing a violent felony – and dictated the precise weight to be given that factor if the instrumentality is a firearm."[86] Thus, because the Act did not define an element and stayed within statutorily prescribed maximum punishments, the Court concluded that the Act fell on the "permissible side of the constitutional line."[87]

In describing the *McMillan* decision, the *Apprendi* Court quickly enumerated the following two important principles from which the *McMillan* Court did not budge: "(1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense; and (2) that a state scheme that keeps from the jury facts that 'expos[e] [defendants] to greater or additional punishment,' may raise serious constitutional concern."[88] With these principles in mind, the *Apprendi* Court limited the *McMillan* decision to meet concerns from the dissenters that the majority was overruling *McMillan*.[89] *McMillan* was limited to cases in which the sentence imposed did not exceed the statutory maximum penalty available for that offense.[90]

Having disposed of the problematic *McMillan* decision, the *Apprendi* Court then directed its attention to the next problem, *Almendarez-Torres v. United States*.[91] Petitioner Almendarez-Torres, an alien, pleaded guilty to reentering the United States without the permission of the Attorney General in violation of 8 U.S.C. § 1326(a), an offense that carries a maximum punishment of two years imprisonment.[92] Almendarez-Torres, however, received

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86. *McMillan*, 477 U.S. at 89-90.

87. *Id.* at 91.

88. *Apprendi*, 120 S. Ct. at 2360 (alteration in original) (quoting *McMillan*, 477 U.S. at 85-88) (citations omitted).

89. *Id.* at 2361 n.13. The dissenting Justices made two objections to the majority's limitation of *McMillan*. *See id.* at 2385-86 (O'Connor, J., dissenting). First, the dissent read the majority opinion as requiring *any* factor that increased or altered punishment be proven to a jury beyond a reasonable doubt. To the dissenters, *McMillan* had already rejected this rule; therefore the majority should have overruled *McMillan*. *Id.* at 2385. Second, the dissent viewed *Patterson*'s deference to legislative definitions of crimes as the guiding principle in *McMillan*, at least to the extent it avoided the constitutional issues raised in *McMillan*. Therefore, because *McMillan* relied in large part on legislative deference, the majority's limitation of *McMillan* was inadequate because it failed to accommodate this deference rationale. *Id.* at 2386.

90. *Id.* at 2361 n.13.

91. Almendarez-Torres v. United States, 523 U.S. 224 (1998).

92. *Id.* at 227; *see* 8 U.S.C. § 1326(a) (Supp. IV 1988). Section 1326(a) states that

a sentence of seven years and one month after the judge determined that Petitioner was also in violation of section 1326(b).[93] Section 1326(b) authorizes a prison sentence of up to twenty years for any alien in violation of subsection (a) whose initial deportation was due to an aggravated felony conviction.[94] Petitioner appealed with a claim that his indictment was deficient because it failed to allege every fact of the crime for which he was charged; the indictment failed to allege that Petitioner's prior deportation was due to an aggravated felony conviction.[95] The United States Supreme Court rejected Petitioner's claim, finding that the aggravated felony conviction lacking in the indictment was a sentencing factor and not a separate element.[96] Because an indictment need only allege the elements of the crime for which it charges and not sentencing factors, the government was not required to charge the aggravated felony conviction in the indictment.[97]

The *Apprendi* Court disposed of *Almendarez-Torres* on two grounds. First, the Court viewed *Almendarez-Torres* as answering only the sufficiency of the indictment question and therefore not implicating *Winship* at all.

> [S]entencing [Almendarez-Torres] to a term higher than that attached to the offense alleged in the indictment did not violate the strictures of *Winship* . . . . Because Almendarez-Torres had admitted the three earlier convictions for aggravated felonies – all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own – no question concerning the right to a jury trial or the standard of proof that would apply

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any alien who–

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless

(A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or

(B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.

§ 1326(a).

93. *Almendarez-Torres*, 523 U.S. at 226-27; *see* 8 U.S.C. § 1326(b) (Supp. IV 1988).

94. § 1326(b).

95. *Almendarez-Torres*, 523 U.S. at 227.

96. *Id.* at 235, 243-47.

97. *Id.* at 226-28. The Court stated that while indictments must "set forth each element of the crime that it charges," they need not set forth "factors relevant only to the sentencing of an offender." *Id.* at 228 (citation omitted).

> to a contested issue of fact was before the [*Almendarez-Torres*] Court.[98]

Second, the *Apprendi* Court recognized that the *Almendarez-Torres* holding was largely based on the fact that the increased punishment was due to the prior commission of a serious felony.[99] The Court employed the following description of *Almendarez-Torres* from *Jones*: "[A]s *Jones* made crystal clear, our conclusion in *Almendarez-Torres* turned heavily upon the fact that the additional sentence to which the defendant was subject was 'the prior commission of a serious crime.'"[100]

More importantly, the *Apprendi* Court characterized *Almendarez-Torres* as "at best an exceptional departure" from the traditions of *Winship* and *Mullaney*.[101] Because *Almendarez-Torres* was limited to the question of recidivist statutes and whether prior convictions were required to be recited in indictments, it did not affect the general rule explained by the *Apprendi* Court that a jury must find every element of a crime beyond a reasonable doubt.[102] Like *McMillan*, *Almendarez-Torres* was not overruled but merely narrowed in applicability.

3. Holding and Application

Having concluded its historical analysis and disposing of some questionable cases, the Court was ready to announce its holding and apply it to the New Jersey statute in question. Recognizing that *Almendarez-Torres* carved out an exception for recidivist provisions, the Court held that

> [o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in [*Jones*]: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a

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98. *Apprendi*, 120 S. Ct. at 2361.

99. *Id.* at 2361-62.

100. *Id.* (quoting *Almendarez-Torres*, 523 U.S. at 230). The *Apprendi* majority did note that there was some disagreement in *Almendarez-Torres* over whether the decision should be restricted to recidivism provisions. The *Apprendi* majority stated that "'[t]he majority and dissenters in *Almendarez-Torres* disagreed over the legitimacy of the Court's decision to restrict its holding to recidivism, but both sides agreed the Court had done just that.'" *Id.* at 2362 (quoting *Jones*, 526 U.S. at 249 n.10).

101. *Id.* at 2361.

102. *Id.* at 2361-62.

> criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'[103]

The Court then applied its holding to the New Jersey hate crime statute. Rejecting New Jersey's claim that the statute identified motive only and not an element of the crime, the Court concluded that the defendant's state of mind was at issue in proving bias and that intent was indeed an element.[104] The Court then reasoned that the labeling of a factor as an element or a sentence enhancement is irrelevant; it is the effect of the factor that is important.[105] The effect of the hate crime provision is to elevate an otherwise second-degree offense to one of first-degree, which directly conflicts with *Winship* and *Mullaney*.[106]

D. The Walton *Paragraph*

The final paragraph of the majority opinion in *Apprendi* addresses *Walton v. Arizona*.[107] In *Walton*, the United States Supreme Court held that Arizona's capital sentencing scheme did not run afoul of the Constitution.[108] Arizona permitted the imposition of death sentences by judges after a judge determined the presence of applicable aggravators and weighed them against the proffered mitigators in a separate sentencing hearing.[109]

In affirming Walton's death sentence, the Court held that the aggravators were not "elements" and therefore need not be proven to a jury.[110] Instead, the aggravators were merely, "'standards to guide the making of [the] choice between the alternative verdicts of death and life imprisonment.'"[111] The Court then concluded that placing the burden on the defendant to establish mitigating circumstances by a preponderance of the evi-

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103. *Id.* at 2362-63 (quoting *Jones*, 526 U.S. at 252-53 (Stevens, J., concurring)).

104. *Id.* at 2364. In the Court's view, a defendant's intent in committing a crime is "perhaps as close as one might hope to come to a core criminal offense 'element.'" *Id.*

105. *Id.* at 2365.

106. *Id.*; *see supra* notes 44-47 and accompanying text for an explanation of how the New Jersey hate crime statute sentenced crimes one degree higher.

107. Walton v. Arizona, 497 U.S. 639 (1990).

108. *Id.* at 647-56.

109. ARIZ. REV. STAT. ANN. § 13-703(B) (West 1989).

110. *Walton*, 497 U.S. at 648-49. Walton was convicted of first-degree murder and sentenced to death after the trial judge found two aggravators and concluded that the offered mitigators did not warrant leniency. *Id.* at 645. The aggravators found by the judge were the following: "(1) [t]he murder was committed 'in an especially heinous, cruel, or depraved manner,' ... and (2) the murder was committed for pecuniary gain." *Id.* at 645 (quoting ARIZ. REV. STAT. ANN. § 13-703(F)(6), (F)(5) (West 1989)) (citations omitted).

111. *Id.* at 648 (quoting Poland v. Arizona, 476 U.S. 147, 156 (1986)) (alteration in original) (internal quotation marks and citation omitted).

dence did not violate the Eighth and Fourteenth Amendments because the State's burden of proving the aggravating circumstances remained intact.[112] Finally, the Court rejected Walton's claim that the "heinous, cruel or depraved" aggravator failed to channel the sentencer's discretion as required by the Eighth and Fourteenth Amendments.[113] The Court distinguished between death sentences imposed by a jury and those imposed by a judge.

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. . . . But th[is] logic . . . has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions.[114]

Because the Arizona Supreme Court had narrowed the definition of "heinous, cruel or depraved," the Supreme Court presumed the that Arizona trial judges were applying the narrower definition.[115]

The *Apprendi* Court employed the *Walton* decision to dispose of a possible argument that the *Apprendi* rule would render invalid state capital sentencing schemes that allow a judge, after a jury verdict on a capital crime, to impose a death sentence by finding aggravating factors.[116] The Court then cited a footnote from the dissent in *Almendarez-Torres* to support this proposition.

> 'Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.'[117]

With this footnote from a dissenting opinion, the *Apprendi* Court attempted to dismiss any argument that the rule articulated in *Apprendi* applied to sentencing factors used in capital sentencing schemes.

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112. *Id.* at 649-51.

113. *Id.* at 652-56.

114. *Id.* at 653.

115. *Id.*

116. *Apprendi*, 120 S. Ct. at 2366.

117. *Id.* at 2366 (quoting *Almendarez-Torres*, 523 U.S. at 257 n.2 (Scalia, J., dissenting) (emphasis deleted)).

However, what the *Apprendi* Court failed to note is that most states, including Virginia, leave the capital sentencing decision in the hands of the jury.[118] Thus, the rationale that guided *Walton* is not applicable in jury sentencing states. As noted above, the *Walton* decision rested in part on the fact that trial judges are "presumed to know the law and to apply it in making their decisions."[119] This presumption is simply not present in sentencing schemes in which the jury makes the determination between a sentence of life and of death. Thus, the attempt of the *Apprendi* Court to prevent challenges to state capital sentencing schemes is thwarted by the limited application of *Walton*. For these reasons, the *Apprendi* decision may be employed to challenge aspects of Virginia's capital sentencing scheme.

III. Unanimity and a Standard of Proof for the Vileness Sub-Elements

A. Jones, Richardson, *and* Apprendi *Require Unanimity for the Vileness Sub-Elements and Proof of the Sub-Elements Beyond a Reasonable Doubt*

1. The Trilogy of Opinions

The companion cases of *Jones* and *Richardson* must be read along with *Apprendi* as a trilogy in order to appreciate the significant and broad effect of *Apprendi*. *Jones* left unresolved the constitutional issues implicated by the sentencing enhancements found in the federal carjacking statute.[120] The *Jones* Court did not address whether a defendant could receive an enhanced sentence by factors proven only by a preponderance of the evidence instead of proven beyond a reasonable doubt.[121] *Apprendi* answered this issue left unsettled in *Jones* and established the principle that any fact that increases the statutorily prescribed maximum penalty, other than a prior conviction, must be proven beyond a reasonable doubt.[122]

The *Richardson* Court similarly refused to address the constitutional questions raised by the continuing criminal enterprise statute.[123] The *Richardson* Court refused to determine whether a guilty verdict based on any number of underlying violations upon which the jury did not unanimously agree would comport with the Constitution. The constitutional issue was whether lack of unanimity by the jury as to which violations of

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118. *See* VA. CODE ANN. §§ 19.2-264.2 to -264.4 (Michie 2000).

119. *Walton*, 497 U.S. at 653.

120. Jones v. United States, 526 U.S. 227, 232-39 (1999); *see supra* notes 59-62 and accompanying text for discussion of the *Jones* opinion.

121. *See Jones*, 526 U.S. at 238-52.

122. *Apprendi*, 120 S. Ct. at 2362-63.

123. Richardson v. United States, 526 U.S. 813, 818-20 (1999); *see supra* notes 63-66 and accompanying text for discussion of the *Richardson* opinion.

the crime form the basis of its verdict violates fundamental notions of fairness and a tradition of jury unanimity.[124] Like *Jones*, *Richardson* avoided these larger constitutional issues.

Jones, *Richardson*, and *Apprendi* must be read as a trilogy. *Jones* and *Richardson* both construed federal statutes to avoid the constitutional issues involved. *Apprendi* answered the issues left unresolved in *Jones*. This decision foreshadows a similar treatment of the issues left unaddressed in *Richardson*.[125] Because the *Apprendi* Court finally dealt with the troubling issues presented in *Jones*, one can presume that the Supreme Court will likewise address the unresolved issues from *Richardson* when those issues are next presented to Court. The similarities of *Jones* and *Richardson*, and the *Apprendi* Court's resolution of the *Jones* issues, indicate that the *Richardson* issues will be resolved in the same manner. Thus, by reading these cases as a trilogy, a prediction may be made as to how the Supreme Court will decide the issues left unaddressed in *Richardson*.

2. Richardson *Requires Unanimity and Elevates the Vileness Sub-Elements to Elements*

The *Richardson* opinion is significant for two reasons. The specific holding of *Richardson* implies the vileness sub-elements must be found unanimously.[126] But the broader implication of *Richardson* is more important. In essence, *Richardson* elevates the sub-elements of vileness to the stature of elements. Because the sub-elements are elements under *Richardson*, *Apprendi* applies and requires the elements be proven beyond a reasonable doubt.

The application of *Richardson*'s specific holding to Virginia's capital sentencing scheme requires that the vileness sub-element used to impose a death sentence be agreed upon by the jury unanimously.[127] The Virginia

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124. *Richardson*, 526 U.S. at 818-20.

125. *See* discussion *infra* Part III(A)(2).

126. *Richardson*, 526 U.S. at 824 (holding the continuing criminal enterprise statute contains several elements, namely the drug violations, each of which the jury must unanimously agree upon).

127. A careful reading of *Richardson* reveals that the decision seems to limit itself to only guilt-innocence determinations. *See id.* at 818-19. The Court stated that "[t]o hold each 'violation' here amounts to a separate element is consistent with a tradition of requiring jury unanimity where the issue is whether a defendant has engaged in *conduct that violates the law*." *Id.* at 818 (emphasis added). This possible limitation on the holding of *Richardson* is obviated by the United State Supreme Court's conclusion that, for constitutional purposes, a penalty phase of a capital trial is procedurally indistinguishable from the guilt-innocence phase. *See* Bullington v. Missouri, 451 U.S. 430, 438 (1981) ("The [capital] presentence hearing

capital sentencing scheme provides three possible sub-elements which a jury must find, alone or in combination, in order to find vileness and recommend that the defendant be sentenced to death. These factors are torture, depravity of mind, and aggravated battery.[128] These factors need not be considered in detail by the jury; it is only necessary that it unanimously agrees that the murder involved either torture *or* depravity of mind *or* aggravated battery.[129]

Richardson involved a similar situation. The continuing criminal enterprise statute in *Richardson* mandated that the jury find the defendant guilty of a series of violations while not agreeing as to which violations the defendant actually committed.[130] This is the precise situation presented to a capital jury in Virginia. The jury may make a finding of vileness without unanimity as to which sub-element is present; only the general finding of vileness need be agreed upon unanimously.[131] The *Richardson* Court's holding that the jury must find unanimously which of the offered violations form the basis of its guilty verdict, mandates that a Virginia jury unanimously agree as to which sub-element formed the basis of its finding of vileness.

In addition, *Richardson* serves to elevate the sub-elements of vileness to the stature of elements. The *Richardson* Court found that the continuing criminal enterprise statute contained not one element, but separate elements upon which the jury must unanimously agree.[132] The Court's statutory construction allowed the Court to avoid the constitutional issues. However, before avoiding these issues, the Court discussed two considerations regard-

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resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence."); *see also* Lankford v. Idaho, 500 U.S. 110, 127 (1991) (finding capital sentencing proceedings sufficiently similar to guilt-innocence trials in adversarial format and in standards governing decision-making so that guarantees of fairness and due process apply to capital sentencing proceedings). Because the two proceedings are procedurally indistinguishable, rights that extend to defendants at the guilt-innocence phase extend to the sentencing phase as well. *See* Specht v. Patterson, 386 U.S. 605, 609-11 (1967) (holding that due process protections such as the right to counsel, the right to confront witnesses, and the right to present favorable evidence must be available at sentencing hearings because sentences may be based upon an additional finding of fact that was not originally an element of the offense charged).

128. *See* VA. CODE ANN. § 19.2-264.2 (Michie 2000).

129. *See* Banghart, *supra* note 4, at 98 (explaining that a Virginia capital jury need not unanimously agree upon one vileness factor at sentencing; it is only necessary that it agree that one or more of the factors are present).

130. *Richardson*, 526 U.S. at 816.

131. *See* VA. CODE ANN. § 19.2-264.4 (Michie 2000).

132. *Richardson*, 526 U.S. at 824.

ing the issues.[133] It is these two considerations that extend *Richardson* beyond its specific holding and imply that the vileness sub-elements are actually elements.

These constitutional considerations involve due process guarantees, the right to a fair trial, and the right to a fair and impartial jury. First, the *Richardson* Court reasoned that treating the violations as alternative means would increase the likelihood of "permitting a jury to avoid discussion of the specific factual details of each violation," and allow for the "cover-up [of] wide disagreement among the jurors about just what the defendant did, or did not, do."[134] Second, and as a corollary to the first consideration, the Court recognized the aggravated risk when multiple means are involved that the "jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony . . . that where there is smoke there must be fire."[135]

The same constitutional considerations are implicated in the Virginia capital sentencing scheme when a jury is permitted to issue a death sentence based upon the vileness aggravator. If the jury is permitted, as it is now, to find vileness without agreement as to which element forms the basis of its finding, the jury will not sufficiently consider the factual details of the crime or of each element. Further, because the jury may gloss over the factual details of the crime and the elements of vileness, the jury may draw impermissible inferences. Without proper consideration of the details of the crime, the jury will draw on other evidence introduced at sentencing to impose a death penalty. For example, some particularly damaging victim impact testimony might sway a jury to find depravity of mind present, though the proper inquiry to establish this element is a factual consideration of the crime, not the victim's testimony about the impact of the crime.[136]

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133. *Id.* at 819.

134. *Id.*

135. *Id.*

136. There is no standard in Virginia for finding the depravity of mind sub-element. *See* Banghart, *supra* note 4, at 87-90. The few Virginia decisions to consider the depravity of mind sub-element in detail have affirmed the finding of depravity of mind solely on the facts of the murder. The cases merely conclude on the facts presented that the jury could have reasonably found depravity of mind was present to support their finding of vileness. *Id.*; *see* Poyner v. Commonwealth, 329 S.E.2d 815, 832-33 (Va. 1985); Sheppard v. Commonwealth, 464 S.E.2d 131, 139 (Va. 1995). For a detailed discussion of the irrelevancy of victim impact evidence in the Virginia capital sentencing context, see generally Matthew L. Engle, *Due Process Limitations on Victim Impact Evidence*, 13 CAP. DEF. J. 55 (2000) (arguing that victim impact evidence is not relevant to any of the aggravating or mitigating circumstances in the Virginia capital sentencing scheme). For a review of the insufficiencies of the current Virginia Model Jury Instructions on vileness, see generally Melissa A. Ray, *"Meaningful*

The same constitutional issues raised by the continuing criminal enterprise statute in *Richardson* are implicated when a capital jury finds vileness without agreeing unanimously upon the underlying element.

At this point, reading *Jones*, *Richardson* and *Apprendi* as a trilogy becomes especially helpful. Because *Apprendi* addressed the unanswered constitutional issues in *Jones*, the issues raised in *Richardson* will likely be resolved in the same fashion as soon as a similar *Richardson* unanimity issue is presented to the United States Supreme Court. *Apprendi* foreshadows *Richardson*'s constitutional answers.

Because the two constitutional considerations of *Richardson* are implicated by the vileness sub-elements, and because reading *Jones*, *Richardson*, and *Apprendi* as a trilogy suggests that *Richardson*'s holding will be affirmed, it seems likely that the vileness sub-elements will also be read as elements. The specific holding of *Richardson* requires the vileness sub-elements be found unanimously. However, the *Richardson* opinion actually goes farther and serves to elevate the sub-elements to elements. This latter application of *Richardson* is crucial to applying *Apprendi* to the Virginia capital sentencing scheme.

3. Apprendi *Requires Proof Beyond a Reasonable Doubt for the Vileness Sub-Elements*

The application of *Apprendi* to the Virginia capital sentencing scheme turns on the limit in the *Apprendi* holding that the sentencing factor must extend the punishment beyond the statutorily prescribed maximum.[137] The Court stated this limitation clearly by saying that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the *prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt."[138] There are two alternative ways to apply *Apprendi* with the maximum sentence limitation to Virginia capital trials, but both result in the requirement that the vileness elements be proven beyond a reasonable doubt.[139] A third application of *Apprendi* ignores this requirement entirely, but also requires the vileness elements be proven beyond a reasonable doubt.[140]

Guidance": Reforming Virginia's Model Jury Instructions on Vileness and Future Dangerousness, 13 CAP. DEF. J. 85 (2000) (proposing amendments to the Virginia Model Jury Instruction on vileness including a better definition for the depravity of mind sub-element).

137. *See Apprendi*, 120 S. Ct. at 2362-63.

138. *Id.* (emphasis added).

139. *See* discussion *infra* Parts III(A)(3)(a) and (b).

140. *See* discussion *infra* Part III(A)(3)(c).

a. The Statutory Maximum in Virginia is Life Imprisonment and Apprendi *Requires that the Finding of an Aggravator Which Increases this Maximum Punishment to Death be Proven Beyond a Reasonable Doubt*

The first way to apply the *Apprendi* decision is a strict statutory construction. A sentence of death may not be imposed in Virginia unless one of the two statutory aggravators is found by the jury; if the jury cannot find one of the aggravators present, it must impose a life sentence.[141] Viewed in this manner, the aggravators increase the statutorily presumed punishment of life imprisonment. Thus, because the aggravators increase the punishment beyond the statutorily prescribed maximum of life imprisonment, the holding of *Apprendi* is directly applicable. *Apprendi* requires that the sentence enhancement (the statutory aggravator) which increases the punishment beyond the statutory maximum of life imprisonment be found beyond a reasonable doubt.[142] However, the statutory aggravators must already be proven beyond a reasonable doubt in Virginia, therefore *Apprendi* alone does not make any significant difference to the capital sentencing scheme of Virginia.[143] However, *Richardson* served to elevate the vileness sub-elements to elements.[144] Therefore, the statutory aggravator of vileness as well as the underlying element that supports that finding must be proven beyond a reasonable doubt. Thus, *Richardson* and *Apprendi* require at least one of the vileness sub-elements to be proven beyond a reasonable doubt because the finding of vileness increases the punishment beyond the statutory maximum of life imprisonment.

An understanding of the statutes at issue in *Jones* and *Apprendi* is vital to this application of *Apprendi* to the Virginia capital sentencing scheme. The *Apprendi* Court considered New Jersey's hate crime statute and the unlawful possession of a firearm statute to which the bias enhancement was applied.[145] The possession charge plus the finding of a biased intention resulted in an enhanced sentence.[146] Because the hate crime statute increased the maximum punishment applicable to the possession charge, the *Apprendi*

141. *See* VA. CODE ANN. § 19.2-264.2 (Michie 2000); *see also* VA. CODE ANN. § 19.2-264.4(E) (Michie 2000) ("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.").

142. *Apprendi*, 120 S. Ct. at 2362-63.

143. *See* § 19.2-264.4(C) ("The penalty of death shall not be imposed unless the Commonwealth shall prove *beyond a reasonable doubt* that . . . [the defendant's] 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.") (emphasis added).

144. *See supra* notes 132-136 and accompanying text.

145. *Apprendi*, 120 S. Ct. at 2352-53.

146. *Id.* at 2352.

Court concluded that the hate crime statute impermissibly sentenced a defendant without a reasonable doubt guarantee, or even a jury determination, of the presence of the biased intention.[147]

In contrast, *Jones* involved one statute, the federal carjacking statute.[148] This statute provided a base punishment (up to fifteen years imprisonment) for the carjacking offense, but then increased the punishment to a possible twenty-five years imprisonment if serious bodily injury resulted, or a possible life imprisonment sentence if death resulted.[149] The *Jones* Court held that this statute contained three separate and distinct offenses so that the additional factors of serious bodily injury or death of a victim had to be proven beyond a reasonable doubt to a jury.[150] But, like the statute in *Apprendi*, the punishment for the underlying crime, carjacking, increased with the finding of an additional factor - serious bodily injury or death of the victim.[151] Though *Jones* involved a single statute that provided both the underlying crime and the enhancement factors and *Apprendi* involved two statutes, the patten of punishment is the same: an underlying crime plus another factor results in punishment greater than the maximum applicable for the underlying crime.

The Virginia capital sentencing scheme invokes this same pattern.[152] The jury finds a defendant guilty of capital murder.[153] This crime carries a maximum punishment of life imprisonment without parole.[154] If, and only if, the jury finds one of the statutory aggravators present, the jury is permitted to increase the punishment beyond the statutorily prescribed maximum of life imprisonment and impose a death sentence.[155] Thus, the pattern remains the same: an underlying crime plus an additional factor permits a sentence beyond that available for the underlying crime. Because *Apprendi* held that this pattern was unacceptable unless the jury found the presence of the additional factor, and further found it beyond a reasonable doubt, the

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147. *Id.* at 2362-66.

148. *See* Jones v. United States, 526 U.S. 227, 230 (1999); 18 U.S.C. § 2119 (Supp. V 1988).

149. § 2119.

150. *See Jones*, 526 U.S. at 251-52.

151. *See id.* at 230; § 2119.

152. *See* § 19.2-264.4.

153. *Id.*

154. VA. CODE ANN. § 18.2-10 (Michie 1996). Section 18.2-10(a) defines punishment for Class 1 felonies as "death, or imprisonment for life, and . . . a fine of not more than $100,000." § 18.2-10(a). Capital murder is a Class 1 felony in Virginia. VA. CODE ANN. § 18.2-31 (Michie 1996).

155. §§ 19.2-264.4(c), 19.2-264.2.

Apprendi statute violated the Due Process Clause. The Virginia vileness factor similarly will violate the Due Process Clause under the holding of *Apprendi* unless the jury is instructed to find the vileness sub-element beyond a reasonable doubt.

b. Choosing Between Life and Death as Punishment is Radically Different from Choosing Among a Range of Punishments; Therefore the Protections Apprendi *Contemplates Are Applicable*

An alternate application of *Apprendi* with its statutorily prescribed maximum limitation is also possible. The Virginia capital sentencing statute may alternatively be read to establish death as the maximum sentence possible for capital murder.[156] This reading of the statute makes *Apprendi* inapplicable at first glance, because the vileness aggravator under this reading does not extend the sentence beyond its statutorily prescribed maximum; rather, such finding brings the punishment *to* its statutory prescribed maximum. However, a comparison between the *Apprendi* sentencing range and the capital sentencing choice in Virginia coupled with a close reading of the *Apprendi* opinion reveals that *Apprendi* is applicable to the vileness aggravator and demands the vileness sub-elements be proven beyond a reasonable doubt. Unlike the sentencing range available in *Apprendi*, the sentence possible for a capital murder conviction in Virginia is not a range at all. The only possible sentences are death and life imprisonment.[157] No other alternatives are available.[158] Thus, sentencing a capital crime in Virginia is not a decision within a range; it is a choice. A capital jury must *choose* between life and death. However, this choice can only be made upon the

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156. *See* § 18.2-10(a).

157. *Id.*

158. *See id.* For capital murders committed after 1995, life imprisonment means life in prison without parole. Prior to 1995, the Virginia Code denied a defendant parole in two instances. *See* VA. CODE ANN. § 53.1-151 (Michie 1999). A defendant was parole ineligible if convicted of a third rape, murder or robbery (or any combination of these three) so long as the third crime was not part of the same act or transaction. VA. CODE ANN. § 53.1-151(B1) (Michie 1999). A defendant was also parole ineligible if paroled from a previous life sentence and then sentenced to life imprisonment again for the commission of a second crime. VA. CODE ANN. § 53.1-151(E) (Michie 1999). The General Assembly of Virginia subsequently abolished parole for all felony offenses committed on or after January 1, 1995. VA. CODE ANN. § 53.1-165.1 (Michie 1999). Geriatric parole is available to convicted felons except those convicted of capital murder. VA. CODE ANN. § 53.1-40.01 (Michie 1999). Capital murders committed after 1995 are therefore not parole eligible crimes, and the only two punishment options for capital murder convictions are death and life imprisonment without the possibility of parole.

finding of one of the statutory aggravators.[159] Thus, for a capital jury, an additional element, one of the aggravators, must be proven before the choice whether to impose a death sentence may be considered at all.

The stark choice between life and death that a capital jury faces is fundamentally different from the choice a judge or jury makes within a sentencing range of a number of years of imprisonment. In *Specht v. Patterson*,[160] the Supreme Court considered a Colorado felony sentencing scheme that subjected sexual offenders, normally facing a maximum penalty of ten years imprisonment, to a possibility of life imprisonment if a judge found that the defendant posed a threat of "bodily harm to members of the public, or is an habitual offender and mentally ill."[161] The Supreme Court found that this scheme failed to satisfy requirements of due process because the defendant was denied a host of rights at sentencing.[162] The Court noted that the scheme placed the defendant in a "radically different situation" from the usual sentencing proceeding.[163]

Because the jury's sentencing choice is limited to life and death, a capital defendant is placed in a "radically different situation" than non-capital felony defendants. A capital defendant faces a radically different situation from every other type of felon because only capital defendants may be killed by the state. This poignant difference means that the choice a capital sentencing jury faces subjects the defendant to the rule of *Apprendi*. The protections provided in *Apprendi* are aimed at preventing defendants from receiving punishment without due process of law. The same protections are certainly implicated when the possible sentence is death. The choice between death and life is a radically different situation from the discretion to impose a number of years of imprisonment within a sentencing range.

Apprendi is therefore applicable because the same protections guaranteed in *Apprendi* are also implicated in the Virginia capital sentencing scheme. Like the first application of *Apprendi*, this application relies on the elevation of the sub-elements to the stature of elements under the *Richardson* decision. *Richardson* implies that the sub-elements are elements; *Apprendi* requires that the elements be proven beyond a reasonable doubt. The *Apprendi* Court's consistent treatment of the reasonable doubt requirement

159. *See* § 19.2-264.4.

160. 386 U.S. 605 (1967).

161. Specht v. Patterson, 386 U.S. 605, 607 (1967).

162. *Id.* at 610-11. At sentencing, the defendant was denied the rights to counsel, to be heard, to confront and cross-examine the witnesses against him, and to offer his own evidence. *Id.* at 608.

163. *Id.*

as a respected tradition that applies to guilt-innocence determinations and sentencing proceedings alike, adds credibility to this application of *Apprendi*. The general protections *Apprendi* contemplates are undisturbed by this application, and yet still require that the vileness sub-elements be proven beyond a reasonable doubt.

c. History Remains: The Historical Analysis of Apprendi *Requires that the Vileness Sub-Elements be Proven Beyond a Reasonable Doubt*

A final application of *Apprendi* to the Virginia capital sentencing scheme is possible. This application avoids the limitation of the statutorily prescribed maximum by disposing of the case the Court relied on to create this limitation. This application is a return to the historical principles previously recognized in *Winship* and *Mullaney*.

The *Apprendi* Court began its historical analysis with the following summary of the rights implicated in the case:

> At stake in this case are constitutional protections of surpassing importance: the proscription of deprivation of liberty without 'due process of law,' and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.' Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime for which he is charged, beyond a reasonable doubt.'[164]

After conducting a thorough historical review of the two rights listed above, the Court concluded that the two rights are fundamental.[165] This conclusion made obvious to the Court the novelty of a system that removes from the jury the determination of facts that expose the defendant to a penalty that exceeds the statutory maximum.[166] Armed with these fundamental rights and the opinions that establish and affirm them, *Winship* and *Mullaney*, the Court then turned to its recent decisions interpreting sentencing factors, *McMillan* and *Almendarez-Torres*.

Considering *Almendarez-Torres* first, the Court was troubled by the fact that the *Almendarez-Torres* decision found prior convictions to be a "traditional" basis upon which a court increases an offender's sentence.[167] The *Apprendi* Court reconciled this traditional sentencing factor with the fundamental rights at issue in *Apprendi* by carving out an exception for prior

164. *Apprendi*, 120 S. Ct. at 2355-56 (alterations in original) (citations omitted).

165. *See id.* at 2359.

166. *Id.*

167. *Id.* at 2361-62; *see* Almendarez-Torres v. United States, 523 U.S. 224, 243 (1998).

convictions.[168] The *Apprendi* Court was comforted by the fact that the prior convictions were proven beyond a reasonable doubt on a prior occasion. Apparently, this was the redeeming fact for the *Almendarez-Torres* opinion.

The *McMillan* decision, however, was a bigger hurdle and did not survive as easily. *McMillan* finessed the *Winship-Mullaney* rule in holding that the Pennsylvania statute did not violate constitutional guarantees. But it is important to note that *McMillan* rested in large part on *Patterson v. New York*.[169] *Patterson* noted that, even after *Winship*, a state legislature is entitled to substantial deference in denoting what facts must be proven beyond a reasonable doubt by defining those facts as elements.[170] A state legislature's decision to define factors as elements or as defenses is "not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[171] *McMillan* extended this deference rationale to a state's definition of a sentencing factor.[172] Like *Apprendi*, the *McMillan* decision claimed to be grounded in traditional rights and principles of justice.[173] What, then, kept the *Apprendi* Court from overruling *McMillan* and returning entirely to the constitutional principles established in *Winship* and *Mullaney*? The answer is the Federal Sentencing Guidelines.[174]

Thus, the Court's holding protected the *McMillan* and *Almendarez-Torres* opinions and avoided questioning the Federal Sentencing Guidelines. However, assume the Court did not have the albatross of the Federal Sentencing Guidelines with which to contend. If the Court did not need to protect the Federal Sentencing Guidelines, and if the historical analysis in *Apprendi* was as important to the Court as its length and depth suggests, the departure from these historical traditions in *McMillan* and *Almendarez-Torres*

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168. *See Apprendi*, 120 S. Ct. at 2362-63.

169. *See* McMillan v. Pennsylvania, 477 U.S. 79, 84-88 (1986); Patterson v. New York, 432 U.S. 197 (1977).

170. *See Patterson*, 432 U.S. at 210-11 & 211 n.12.

171. *Id.* at 201-02 (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)).

172. *See McMillan*, 477 U.S. at 85-86.

173. *See id.* at 89-91.

174. *See Apprendi*, 120 S. Ct. at 2366 n.21. In a footnote, the majority noted that the dissent questioned at length the effect the majority's decision would have on the Federal Sentencing Guidelines. The majority avoided the issue by stating that the Guidelines were not before the court and therefore would not be considered. *Id.* The majority avoided the constitutional implications of its decision on the Federal Sentencing Guidelines because the implications would place the constitutionality of the Federal Sentencing Guidelines in serious doubt. *Id.* at 2391-95 (O'Connor, J., dissenting); *see* 28 U.S.C. §§ 991-998 (1988); *see also* U.S. SENTENCING GUIDELINES MANUAL (1999).

might have led to their overruling.[175] Without the *McMillan* and *Almendarez-Torres* opinions, what remains of the *Apprendi* opinion is its lengthy historical analysis.

This historical analysis is largely a reaffirmation of the principles established in *Winship* and *Mullaney*.[176] A return to the once-settled principles of *Winship* and *Mullaney* would produce the same result that the first two applications of the *Apprendi* opinion present. *Winship* held that the Due Process Clause requires the state to prove beyond a reasonable doubt every fact necessary to constitute the crime for which a defendant may be charged.[177] *Mullaney* held that a state cannot avoid the rule of *Winship* by redefining elements of different crimes as factors that bear solely on punishment.[178] Further, *Mullaney* extended the rationale of *Winship* to sentencing proceedings.[179]

The application of *Winship* and *Mullaney* to the Virginia capital sentencing scheme requires the vileness elements be proven beyond a reasonable doubt. Because *Richardson* implied the sub-elements of vileness are elements, the elements of vileness must therefore be proven beyond a reasonable doubt under *Winship* and *Mullaney*. Further, *Mullaney* stands for the proposition that a state cannot avoid *Winship* by merely redefining elements that affect punishment as sentencing factors.[180] Thus, labeling the elements of vileness as sub-elements does not avoid the protections of *Winship* simply because they are not called elements.

This final application of the *Apprendi* opinion illustrates *Apprendi*'s flaws. If *McMillan* and *Almendarez-Torres* are purged from the majority opinion because the majority keeps these opinions simply to avoid addressing the legitimacy of the Federal Sentencing Guidelines, the remainder of the opinion is the historical analysis reaffirming the principles established in *Winship* and *Mullaney*. This illustrates that *McMillan* and *Almendarez-Torres* were ripe for overruling.

Whichever application is employed, the *Apprendi*, *Jones*, and *Richardson* trilogy requires that the vileness elements be proven beyond a reasonable

175. It is arguable, however, that the *Almendarez-Torres* Court's finding that prior convictions are a "traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence," would have salvaged the *Almendarez-Torres* opinion. Almendarez-Torres v. United States, 523 U.S. 224, 243 (1998). A similar argument is not present for the *McMillan* decision.

176. *See supra* notes 68-77 and accompanying text.

177. *In re* Winship, 397 U.S. 358, 364 (1970).

178. Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975).

179. *See id.* at 698-701.

180. *Id.* at 698.

doubt and found unanimously by the jury. This ensures capital defendants the right to a fair trial and the guarantee of due process. Though the holdings of these cases seem limited, read collectively they offer serious potential for reforming the Virginia capital sentencing scheme with regards to the vileness aggravator. These decisions combined with other favorable United States Supreme Court case law suggest that these reforms are not only possible, but probable.

B. Statutory Construction and Supreme Court Capital Jurisprudence Further Support Requiring Unanimity and Proof Beyond a Reasonable Doubt for the Vileness Elements[181]

1. Statutory Construction of Section 19.2-264.2 Reveals that the Sub-Elements are Elements

The rules of statutory construction strengthen *Richardson*'s application which elevates the sub-elements of the vileness aggravator to elements. The applicable construction rule is that when a criminal statute describes in the disjunctive how a crime may be committed, the words contained in that description are elements, not means.[182] This rule presumes that when a legislature describes specifically how a crime may be committed, the described actions constitute the crime.[183] For example, the common law definition of robbery requires "'taking by force *or* threat of force.'"[184] The elements are the taking by use of force or threat of force, not whether the defendant used a knife or gun during his robbery.[185]

Applying this rule to the vileness aggravator, the Virginia General Assembly is presumed to have decided that what is important in a vileness analysis is whether the defendant's conduct evidenced torture, depravity of mind or aggravated battery.[186] The General Assembly was not concerned with how these sub-elements were accomplished, but only that one of them was present.[187] Considering the heightened standard of reliability that governs capital cases and the General Assembly's explicit description of

181. This section does not involve analysis of the *Apprendi* decision. The section outlines additional reasons supporting the argument of this article, namely that the vileness factors need to be proven beyond a reasonable doubt and found unanimously. These alternate reasons might be employed by defense counsel to bolster a motion for unanimity and proof beyond a reasonable doubt on the vileness factors.

182. *See* Banghart, *supra* note 4, at 99.

183. *Id.* at 100.

184. *Id.* at 99-100 (internal citation omitted in original).

185. *Id.* at 100.

186. *See id.*

187. *Id.*

vileness, one can presume the description encompasses elements and not simply means.[188]

2. *The Need for Clear and Objective Standards*

In *Godfrey v. Georgia*, the United States Supreme Court considered Georgia's vileness aggravator which is identical to Virginia's vileness aggravator.[189] The Court struck down the use of this aggravator because it did not limit adequately the jury's discretion in determining if the crime committed had been vile.[190] The Court stated that a capital sentencing scheme "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.'"[191] The sentencing jury in *Godfrey* imposed a death sentence based upon only a finding that the crime was "'outrageously or wantonly vile, horrible and inhuman.'"[192] This general finding of outrageous or wanton vileness was reversed, because the finding lacked guidance from the trial court and did not evidence any inherent restraint on the capricious infliction of the death penalty.[193]

The edict of the Supreme Court in *Godfrey* that a sentencer's discretion be channeled by clear and objective standards is directly applicable to the argument presented in this article. The lack of unanimity and reasonable doubt requirements for the vileness sub-elements offers no guidance to a capital jury in Virginia. The jury is merely instructed to find vileness beyond a reasonable doubt with vague references to the sub-elements of torture, depravity of mind and aggravated battery. This constitutes a lack of clear and objective standards.[194]

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188. *Id.*; *see* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (holding death sentences require a heightened degree of reliability because death sentences are qualitatively different from other punishments).

189. *See* Godfrey v. Georgia, 446 U.S. 420, 422-23 (1980); GA. CODE ANN. § 27-2534.1(b)(7) (1978).

190. *Godfrey*, 446 U.S. at 427-29.

191. *Id.* at 428 (citations omitted).

192. *Id.* at 426 (internal citation omitted in original).

193. *See id.* at 428-29. The Court noted ordinary people could reasonably characterize any murder as involving outrageous or wanton vileness or involving horrible or inhuman characteristics. *Id.*; *see also* Gregg v. Georgia, 428 U.S. 153, 206-07 (1976) (Stewart, J.) (holding that the Georgia death penalty scheme adequately addresses the constitutional concerns raised in *Furman v. Georgia* because the scheme properly channels the jury's discretion and prevents imposition of the death penalty in a capricious and arbitrary manner); Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam).

194. For a discussion of how the current Virginia Model Jury Instruction on vileness fails to provide the constitutionally required clear and objective standards, see Ray, *supra* note 136, at 96 (proposing amendments to the Virginia Model Jury Instruction on vileness

Particularly relevant to this discussion is the *Godfrey* Court's analysis of the Georgia Supreme Court cases analyzing the vileness aggravator. Following the *Gregg v. Georgia*[195] decision, the Supreme Court of Georgia made some observations about the Georgia vileness cases, noting the centrality of both unanimity and proof beyond reasonable doubt.[196] For example, the Supreme Court of Georgia concluded the following: "We believe that each of [the vileness cases] establishes *beyond any reasonable doubt* a depravity of mind and either involved torture or an aggravated battery to the victim as illustrating the crimes were outrageously or wantonly vile, horrible or inhuman."[197] Further, the Supreme Court of Georgia concluded from its vileness cases that the similarity of torture and aggravated battery and their collective dissimilarity to depravity of mind mandated unanimous verdicts.[198]

Thus, the Supreme Court of Georgia concluded that the elements of torture, depravity of mind and aggravated battery were proven beyond a reasonable doubt in a number of its vileness cases and that these elements required unanimity.[199] These conclusions were indirectly endorsed by the United States Supreme Court in *Godfrey*. The *Godfrey* Court noted that the Supreme Court of Georgia had reached these limiting conclusions about Georgia's vileness aggravator.[200] However, because these limiting conclusions were not employed by the trial court in *Godfrey*, the vileness aggravator did not properly channel the sentencer's discretion.[201] The *Godfrey* Court implied that if the standards articulated by the Supreme Court of Georgia had been used by Godfrey's trial court, the sentencer's discretion

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including detailed definitions of the sub-elements).

195. 428 U.S. 153 (1976).

196. *See* Harris v. State, 230 S.E.2d 1, 11 (Ga. 1976); Blake v. State, 236 S.E.2d 637, 643 (Ga. 1977); *see also* Gregg v. Georgia, 428 U.S. 153, 200-01 (1976) (Stewart, J.) (rejecting defendant's claim that Georgia's vileness aggravator was so vague that juries were free to "act as arbitrarily and capriciously as they wish in deciding whether to impose the death penalty" in violation of the Eighth and Fourteenth Amendments).

197. *Harris*, 230 S.E.2d at 11 (citations omitted) (emphasis added) (reviewing vileness cases and affirming death sentence based on a vileness finding because the crime was at the "core" of the vileness aggravating circumstance).

198. *Blake*, 236 S.E.2d at 643 (affirming death sentence and holding that the three factors of torture, aggravated battery, and depravity of mind are capable of unanimity but need not be found unanimously if the more general finding of vileness is found unanimously).

199. *Godfrey*, 446 U.S. at 432-33.

200. *Id.*

201. *Id.* at 432. The Court concluded that in Godfrey's case the trial courts did not "satisfy the [limiting] criteria laid out by the Georgia Supreme Court itself in the *Harris* and *Blake* cases." *Id.*

might have been properly channeled and appropriate standards employed.[202] Two of these standards articulated by the Supreme Court of Georgia were unanimity as to the vileness sub-elements and proof beyond a reasonable doubt of the sub-elements.[203] If the use of these two standards would have made the Georgia vileness aggravator constitutionally permissible in *Godfrey*, then the same standards must be employed in Virginia in order to comport with *Godfrey*'s mandate of clear and objective standards. By requiring a capital jury to agree unanimously upon which sub-element the finding of vileness is based and find that sub-element beyond a reasonable doubt, the jury is adequately directed to consider the factual basis of the murder and how it evidences the defendant's depraved mind or propensity towards torturing his victims or battering them in an aggravated manner. Unanimity and a reasonable doubt standard for the vileness sub-elements will offer specific sentencing instruction to capital juries and should therefore be employed to comply with *Godfrey*'s edict for clear and objective standards in capital sentencing.[204]

3. *The Need for Reliability*

In *Woodson v. North Carolina*[205] the United States Supreme Court struck down North Carolina's mandatory death penalty scheme for any first-degree murder conviction.[206] In so doing, the Supreme Court recognized that a sentence of death is "qualitatively different" from a sentence of life imprisonment.[207] Because of this qualitative difference, the Court found that "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[208]

This heightened need for reliability in capital cases is satisfied by the requirement of unanimity and proof beyond a reasonable doubt for the vileness sub-elements. Requiring unanimity for the vileness sub-elements ensures that the jury will focus its inquiry on the details of the murder and

202. *Id.* at 432.

203. *See Blake*, 236 S.E.2d at 643; *Harris*, 230 S.E.2d at 10-11.

204. For a discussion of how the current Virginia Model Jury Instruction on vileness fails to provide the constitutionally required clear and objective standards, see Ray, *supra* note 136, at 96 (proposing amendments to the Virginia Model Jury Instruction on vileness including more detailed definitions of the sub-elements).

205. 428 U.S. 280 (1976).

206. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (holding death sentences require a heightened degree of reliability because death sentences are qualitatively different from other punishments).

207. *Id.*

208. *Id.*

on the meaning of the vileness sub-element in question. Further, it will require the jury to agree on the definition of the sub-element and to find that the details of the crime fall squarely within that definition before recommending a death sentence. Unanimity guarantees that the jury will properly perform the inquiry which it was empaneled to conduct.

Similarly, the reasonable doubt requirement protects the integrity of the criminal trial. A capital jury that finds vileness without agreeing that a sub-element was proven beyond a reasonable doubt is encouraged to consider other evidence introduced at sentencing and impose a punishment based on factors other than the aggravator. As the *Richardson* Court warned, this encourages juries to conclude that "where there is smoke there must be fire."[209] By requiring the jury to consider every doubt they have about a defendant's conduct in committing a murder, the court will ensure that the jury has properly questioned whether the aggravator has been proven beyond a reasonable doubt. The jury's intense consideration of the evidence to reach a decision beyond all reasonable doubt enhances the reliability of the sentencing process.

To honor the Eight Amendment's underlying respect for humanity, the reliability of death sentences should be the goal of any capital sentencing scheme. By requiring a capital jury to focus its sentencing deliberations on the factual details of the crime and agree on their findings unanimously and beyond all reasonable doubt, the reliability of capital sentencing in Virginia is enhanced. Both the reliability requirement of *Woodson* and the Eighth Amendment are satisfied by requiring unanimity and reasonable doubt for the vileness sub-elements.

IV. Conclusion

The *Jones*, *Richardson*, and *Apprendi* trilogy represents a break in the United States Supreme Court's recent jurisprudence with respect to judicial discretion at sentencing. The Court had evaded issues raised by sentencing factors that were not found by a jury and that increased a defendant's punishment beyond that prescribed by law. The Court, in a number of opinions, successfully avoided the constitutional issues that the sentencing factors raised. However, *Jones* and *Richardson* foreshadowed that these issues could be ignored no longer. In *Apprendi*, the Court confronted these issues because they could no longer be avoided.

Reading these three cases as a trilogy and considering their implications beyond their specific holdings presents an opportunity for substantial reform of the Virginia capital sentencing scheme. The decisions require that the vileness sub-elements be proven beyond a reasonable doubt to a capital

209. Richardson v. United States, 526 U.S. 813, 819 (1999).

jury and further require the jury to agree unanimously as to which sub-element formed the basis of their finding of vileness. *Richardson* serves to elevate the vileness sub-elements to elements and mandates that the jury agree unanimously upon which element their finding of vileness is based. *Apprendi* requires that the vileness sub-element be proven beyond a reasonable doubt. These reforms will provide the jury clear and objective standards to guide its decision and will enhance the reliability of the Virginia capital sentencing scheme.

The Virginia capital sentencing scheme is designed to ensure that no defendant in Virginia is put to death without being afforded due process of law. A sentence of death based on vileness under the current application of the vileness aggravator is done without due consideration of the underlying details of a crime. The aspects of the crime applicable to the vileness determination are only considered in general terms while other aspects of sentencing not relevant to the vileness determination are given undue weight. The jury instinctively decides based on all the evidence presented at sentencing whether a defendant's conduct was vile or not.

Unanimity will require the jury to make a specific factual determination of vileness instead of the generalized finding that is acceptable under the current application of the Virginia capital sentencing scheme. The jury must consider the details of the crime and compare them to the different sub-elements of the vileness aggravator. In order to find that the details amount to one of these elements, the jury must agree unanimously. This will require the jury to debate the factual basis for each sub-element and agree in unison on its presence. This is the role the jury was designed to perform at sentencing under the Virginia capital sentencing scheme. Further, requiring the jury to decide that the aggravator was proven beyond a reasonable doubt will provide the jury clear and objective standards with which to make its decision. This will enhance the reliability of the death sentence. These reforms should be implemented to guarantee that all death sentences are imposed fairly and without any indicia of impropriety.