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Melissa A. Ray

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“Meaningful Guidance”: Reforming Virginia’s Model Jury Instructions on Vileness and Future Dangerousness

Melissa A. Ray*

I. Introduction

Virginia’s Model Jury Instructions (“the Instructions”) are intended to be correct statements of the law which guide juries in reaching verdicts and sentencing offenders.¹ This article concerns the instructions given to a capital jury at the sentencing phase of a trial, when the jury is charged with making a penalty determination.² A capital jury in Virginia must find at least one of two aggravating factors, vileness or future dangerousness, before it can recommend a sentence of death.³ The current version of the Instruc-

*. J.D. Candidate, May 2001, Washington & Lee University School of Law; B.S., Auburn University.

1. VA. MODEL JURY INSTRUCTIONS CRIMINAL (Lexis Law Publishing 1999). “The Supreme Court of Virginia and the Virginia Court of Appeals have neither adopted nor approved [the Instructions].” *Id.* at I-vi.

2. See VA. CODE ANN. § 19.2-264.4 (Michie 2000) (providing for a separate sentencing phase in capital cases). This article addresses only the instructions given to a capital jury during the sentencing phase of trial, after it has found the defendant guilty of a capital crime. The Virginia General Assembly has also directed “that the Virginia Supreme Court, in conjunction with the Virginia State Bar, investigate and recommend to the General Assembly on or before January 1, 2001, model jury instructions for felonies, *not* including capital murder, concerning the abolition of parole.” *Fishback v. Commonwealth*, 532 S.E.2d 629, 632 n.3 (Va. 2000) (quoting 2000 VA. H.B. 705) (emphasis added).

3. Section 19.2-264.2 states that:

In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

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

tions provides instructions for each of the statutory aggravating factors.⁴ This article seeks to update those instructions in order to provide a more complete statement of the law of the Commonwealth.⁵ Part II of this article sets forth the current model jury instructions used in Virginia to instruct juries on the aggravators of future dangerousness and vileness. Part III provides suggested amendments to the vileness and future dangerousness Instructions, along with examples of the judicial decisions and arguments upon which those suggested amendments are based. Part IV discusses the potential consequences of proffering the amended instructions suggested by this article.

II. Current Model Jury Instructions

The Instructions currently provide instruction 33.122 for use when the Commonwealth has presented evidence of both vileness and future dangerousness which reads as follows:

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than \$100,000.00. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following aggravating circumstances:

- (1) That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society;
- or
- (2) That his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt both of these circumstances, then you may fix the punishment of the defendant at death. But if you nevertheless believe from all the evidence, including evidence in mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant at:

- (1) Imprisonment for life; or

4. VA. MODEL JURY INSTRUCTIONS CRIMINAL Nos. 33.122, 33.125 (Lexis Law Publishing 1999).

5. Virginia Code § 19.2-263.2 permits lawyers to introduce hand-crafted jury instructions, stating that "[a] proposed jury instruction submitted by a party, which constitutes an accurate statement of the law applicable to the case, shall not be withheld from the jury solely for its nonconformance with model jury instructions." VA. CODE ANN. § 19.2-263.2 (Michie 2000).

- (2) Imprisonment for life and a fine of a specific amount, but not more than \$100,000.00.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of these circumstances, then you may fix the punishment of the defendant at death. But if you nevertheless believe from all the evidence, including evidence in mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant at:

- (1) Imprisonment for life; or
- (2) Imprisonment for life and a fine of a specific amount, but not more than \$100,000.00.

If the Commonwealth has failed to prove beyond a reasonable doubt at least one of these circumstances, then you shall fix the punishment of the defendant at:

- (1) Imprisonment for life; or
- (2) Imprisonment for life and a fine of a specific amount, but not more than \$100,000.00.

Any decision you make regarding punishment must be unanimous.

The version of Model Instruction 33.125 designed to be given to juries when the Commonwealth has introduced evidence of future dangerousness, but has not introduced evidence of vileness reads as follows:

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than \$100,000.00. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt the following aggravating circumstance:

That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

If you find from the evidence that the Commonwealth has proved that circumstance beyond a reasonable doubt, then you may fix the punishment of the defendant at death. But if you nevertheless believe from all the evidence, including evidence in mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant at:

- (1) Imprisonment for life; or
- (2) Imprisonment for life and a fine of a specific amount, but not more than \$100,000.00.

If the Commonwealth has failed to prove that circumstance beyond a reasonable doubt, then you shall fix the punishment of the defendant at:

- (1) Imprisonment for life; or
- (2) Imprisonment for life and a fine of a specific amount, but not more than \$100,000.00.

Any decision you make regarding punishment must be unanimous.

The version of Model Instruction 33.125 for use when the Commonwealth has introduced only evidence of vileness is nearly identical to the instruction for future dangerousness.⁸ The phrase "[t]hat, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society" is replaced by the phrase "[t]hat his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder."⁹

III. Proposed Model Jury Instructions Based on Case Law

Virginia Code section 19.2-263.2 allows attorneys to proffer jury instructions other than those contained in the Instructions.¹⁰ "It is permissible of course to draft instructions in the language of the applicable statute, but it is not obligatory to do so if the meaning of the law is not changed by the language used."¹¹ The following proposed model jury instructions on the aggravating factors of vileness and future dangerousness are based upon statements of the law found in the Virginia Code, decisions of the Supreme Court of Virginia, and decisions of the United States Supreme Court.

A. Vileness

1. The Far-Reaching Definition of Vileness

Virginia Code section 19.2-264.2 states in pertinent part that "a sentence of death shall not be imposed unless the court or jury shall . . . find . . . that [the defendant's] conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim"¹² The United States Supreme Court has ruled that "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of

7. VA. MODEL JURY INSTRUCTIONS CRIMINAL No. 33.125 (Lexis Law Publishing 1999).

8. *Id.*

9. *Id.*

10. § 19.2-263.2.

11. *Fitzgerald v. Commonwealth*, 292 S.E.2d 798, 808 (Va. 1982) (approving language used in the Instructions which differed from the statutory language).

12. VA. CODE ANN. § 19.2-264.2 (Michie 2000). For a more complete discussion of the expansion of the vileness predicate to conceivably include most capital murders, see Douglas R. Banghart, *Vileness: Issues and Analysis*, 12 CAP. DEF J. 77 (1999).

whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."¹³ As the Court noted in *Godfrey v. Georgia*,¹⁴ "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'"¹⁵ A capital sentencing scheme must therefore provide some meaningful guidance to juries to give them a rational basis for distinguishing circumstances in which the death penalty should be imposed from circumstances in which it is not warranted.¹⁶

Virginia's current model jury instructions do not provide such guidance to jurors, nor does the explicit language of section 19.2-264.2.¹⁷ Although the statute and the model instructions modify the terms "wantonly vile, horrible or inhuman" with the terms "torture, depravity of mind [and] aggravated battery," the sub-elements do not, of themselves, provide sufficient guidance to jurors. Although the Supreme Court of Virginia has held that "it is not reversible error for a trial court to refuse to define the statutory terms included in the aggravating circumstances upon which a sentence of death may be based," the inclusion of the definitions of the sub-elements of the vileness predicate would assist juries in making reasonable, rationally reviewable decisions.¹⁸ The Supreme Court of Virginia has stated that

it is conceivable that the language defining [vileness] could be tortured to mean that proof of an intentional killing is all the proof necessary to establish that circumstance. We regard such a construction as strained, unnatural, and manifestly contrary to

13. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (relying on *Furman* to affirm constitutionality of death sentence and emphasizing Eighth Amendment's requirement that the death sentence not be imposed arbitrarily or capriciously); see *Furman v. Georgia*, 408 U.S. 238 (1972).

14. 446 U.S. 420 (1980).

15. *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) (quoting GA. CODE ANN. § 27-2534.1(b)(7) (1978)) (striking down death sentence imposed under Georgia's vileness predicate because the jury was not given adequate guidance in determining whether the murders met the statutory criteria for vileness). The language of the vileness predicate in Virginia Code § 19.2-264.2 is identical to the language in the Georgia statute which was held to be unconstitutionally applied in *Godfrey*. See § 19.2-264.2.

16. *Godfrey*, 446 U.S. at 428. "Part of a State's responsibility . . . is to define the crimes for which death may be the sentence in a way that obviates standardless [sentencing] discretion. It must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death." *Id.* (internal quotation marks and citations omitted).

17. See VA. CODE ANN. § 19.2-264.2 (setting forth the conditions for imposing a sentence of death, namely that the trier of fact must find the presence of vileness or future dangerousness and recommend the death sentence).

18. *Bunch v. Commonwealth*, 304 S.E.2d 271, 285 (Va. 1983) (sustaining sentence of death based on vileness aggravating factor); see *Godfrey*, 446 U.S. at 428.

legislative intent. The General Assembly was selective in choosing the types of intentional homicide it felt justified a potential sentence of death; clearly, then, it did not intend to sweep all grades of murder into the capital class.¹⁹

Surely then, the court should not object to jury instructions which enable jurors to distinguish between those homicides which "justif[y] a potential sentence of death" and those which do not.²⁰

The terms "torture, depravity of mind [and] aggravated battery" are not sufficiently defined, either in the statute or by case law.²¹ Each term, however, can be regarded as a "sub-element" of the vileness predicate.²² The Supreme Court of Virginia has given certain constructions to some of the sub-elements, and the definitions of the terms torture, depravity of mind, and aggravated battery can be somewhat illuminated by examining the judicial decisions which have found the presence of those sub-elements.

a. Torture

The Supreme Court of Virginia has not given a particular construction to the sub-element "torture," though the term has been defined at common law as "[t]o inflict intense pain to body or mind for purposes of punishment, or to extract a confession or information, or for sadistic pleasure."²³ The court has also noted that the term torture "ordinarily connote[s] conduct preceding the death of the victim."²⁴ The court upheld a sentence of death based on vileness when "[t]he systematic torturing of [the] victim by slashing her with a machete and a knife, followed by comprehensive mutilation, reflected relentless, severe, and protracted physical abuse inflicted with brutality and ferocity of unparalleled atrociousness."²⁵ The language of *Fitzgerald*, "relentless, severe, and protracted physical abuse" illustrates the common law definition of torture and perhaps should be offered as part of

19. *Smith v. Commonwealth*, 248 S.E.2d 135, 149 (Va. 1978) (affirming sentence of death based on both statutory aggravating factors).

20. *Id.*

21. See § 19.2-264.2; see also *Banghart*, *supra* note 12, at 79.

22. For a more thorough discussion of the elevation of the sub-elements of the vileness predicate to elements requiring proof beyond a reasonable doubt and juror unanimity, see generally M. Kate Calvert, *Obtaining Unanimity and a Standard of Proof on the Vileness Sub-Elements with Apprendi v. New Jersey*, 13 CAP. DEF. J. 1 (2000).

23. BLACK'S LAW DICTIONARY 1490 (6th ed. 1990). For a more thorough discussion of the "torture" sub-element and the infrequency of the Commonwealth's reliance thereupon, see *Banghart*, *supra* note 12, at 80-82.

24. *Jones v. Commonwealth*, 323 S.E.2d 554, 565 (Va. 1984) (affirming sentence of death based on vileness predicate).

25. *Fitzgerald v. Commonwealth*, 292 S.E.2d 798, 813 (Va. 1982) (upholding sentence of death and finding that it was not disproportionate to the sentence imposed in other capital cases where the defendant raped or robbed the victim and the death sentences rested solely on the vileness predicate).

an instruction on vileness in cases involving physical torture. The Supreme Court of Virginia held that sufficient evidence of psychological torture was present when a defendant told his ten-year-old victim that he would take her home but instead "took her into the woods, raped her, and then killed her."²⁶ Torture, both physical and psychological, existed when a defendant "violently raped and sodomized his child victim, severely injuring her before strangling her to death."²⁷ Both of these cases, *Mueller* and *Spencer*, upheld a finding of vileness based on depravity of mind.²⁸ Thus, while finding that the defendants' actions constituted psychological torture, the court rested its findings of vileness on the depravity of mind sub-element rather than the torture sub-element of vileness.²⁹

b. Depravity of Mind

In *Smith v. Commonwealth*,³⁰ the Supreme Court of Virginia construed the definition of the "depravity of mind" sub-element of vileness as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation."³¹ In *Stewart v. Commonwealth*,³² the defendant argued that the "execution-type murders" of his wife and infant child did not exhibit depravity of mind.³³ The Supreme Court of Virginia disagreed, finding that the shootings at close range and the deliberate arrangement of the bodies were evidence that the defendant's actions were "more depraved" than ordinary murders and exhibited the degree of moral turpitude defined in *Smith*.³⁴ As noted above, several cases hold that psychological torture is evidence of depravity of mind.³⁵ For example, in *Poyner v. Commonwealth*,³⁶ the Supreme Court of Virginia ruled that depravity of mind can be shown by proof of psychological torture.³⁷

26. *Mueller v. Commonwealth*, 422 S.E.2d 380, 396 (Va. 1992) (affirming death sentence and finding that the defendant's actions "extended over a period of time and under such circumstances as to permit an inference of psychological torture").

27. *Spencer v. Commonwealth*, 393 S.E.2d 609, 622-23 (Va. 1990) (affirming sentence of death based on predicates of vileness and future dangerousness).

28. *Mueller*, 422 S.E.2d at 396; *Spencer*, 393 S.E.2d at 623.

29. *Mueller*, 422 S.E.2d at 396; *Spencer*, 393 S.E.2d at 623.

30. 248 S.E.2d 135 (Va. 1978).

31. *Smith v. Commonwealth*, 248 S.E.2d 135, 149 (Va. 1978). The victim in *Smith* was raped, and died from asphyxia, drowning and multiple stab wounds. *Id.* at 139.

32. 427 S.E.2d 394 (Va. 1993).

33. *Stewart v. Commonwealth*, 427 S.E.2d 394, 409 (Va. 1993).

34. *Id.* (citing *Smith*, 248 S.E.2d at 149).

35. See *supra* notes 26-29 and accompanying text.

36. 329 S.E.2d 815 (Va. 1985).

37. *Poyner v. Commonwealth*, 329 S.E.2d 815, 832 (Va. 1985) (affirming five death sentences based on predicates of vileness and future dangerousness, and holding that depravity

One of Poyner's victims "had time to realize [his] deadly purpose and to peer down the barrel of a .38-caliber pistol in the hands of a person who had let her get a good look at his face."³⁸ The victim obeyed all of Poyner's demands and, according to defendant's testimony, begged for her life.³⁹ Poyner let her walk away from him "toying with her, implying that she might be spared" before he fatally shot her.⁴⁰ The court determined that such actions established depravity of mind on the part of the defendant, sufficient to satisfy the vileness predicate.⁴¹ In *Sheppard v. Commonwealth*,⁴² the Supreme Court of Virginia stated that "[e]xecuting two persons in their home and then stripping their bodies of jewelry and stealing their personal property manifestly demonstrates a depravity of mind."⁴³ The court provided no further discussion of why the murders in *Sheppard* were more depraved than other murders. The facts in *Gray v. Commonwealth*⁴⁴ that established depravity of mind apparently included the defendant's advance planning of the murder, firing six shots into the back of the victim's head while the victim lay face-down on the ground, and "laughter and total lack of remorse" about the murder.⁴⁵ The Virginia cases do not lend themselves to formulating a clear set of hypothetical circumstances which evidence depravity of mind. Situations ranging from murder plus robbery to murder involving psychological torture to cold and calculated murder in which the defendant takes pleasure have all been found to support a finding of depravity of mind.⁴⁶

c. Aggravated Battery

The Supreme Court of Virginia construed the sub-element of "aggravated battery to the victim" to mean "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder."⁴⁷ In *Reid v. Commonwealth*,⁴⁸ the Supreme Court of

of mind can be established by proof of psychological torture).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. 464 S.E.2d 131 (Va. 1995).

43. *Sheppard v. Commonwealth*, 464 S.E.2d 131, 139 (Va. 1995).

44. 356 S.E.2d 157 (Va. 1987).

45. *Gray v. Commonwealth*, 356 S.E.2d 157, 179-80 (Va. 1987) (affirming sentence of death based on finding aggravated battery and depravity of mind sufficient to constitute vileness).

46. See *supra* notes 30-45 and accompanying text.

47. *Smith v. Commonwealth*, 248 S.E.2d 135, 149 (Va. 1978) (affirming sentence of death based on a finding of future dangerousness).

48. 506 S.E.2d 787 (Va. 1998).

Virginia upheld a death sentence based on the aggravated battery sub-element of the vileness predicate.⁴⁹ Reid stabbed his victim twenty-two times, inflicting at least four fatal wounds.⁵⁰ The court noted that “[t]he number or nature of the batteries inflicted upon the victim is the essence of the test whether the defendant’s conduct was outrageously or wantonly vile, horrible or inhuman in that it involved . . . an aggravated battery.”⁵¹ In *Whitley v. Commonwealth*,⁵² choking the victim with his hands, strangling the victim with a rope, and cutting her jugular vein, along with the insertion of umbrellas into the victim’s vaginal and anal cavities constituted evidence of aggravated battery to the victim sufficient for a finding of vileness.⁵³ The Supreme Court of Virginia has stated that “[a] death sentence based upon vileness is not supported by the evidence where the victim died almost instantaneously from a single gunshot wound.”⁵⁴ Yet the court has found vileness based on aggravated battery to the victim when the defendant rapidly shot the victim in the head six times at close range.⁵⁵ The court also found aggravated battery to the victim when the defendant shot a police officer at least six times and the officer immediately lost consciousness, dying within minutes.⁵⁶ The court upheld a finding of vileness based on aggravated battery to the victim when the victim died from one gunshot, but the defendant had abducted, robbed and raped her.⁵⁷

d. Defining Vileness

The Instructions should be amended to explain fully the meaning of the statutory sub-elements of the vileness predicate. Unfortunately, there are no clear “definitions” of the sub-elements which sufficiently guide juries in distinguishing between factual situations in which a sentence of death is warranted and situations in which life imprisonment is the appropriate sentence. The Instructions already include language in addition to the sub-

49. Reid v. Commonwealth, 506 S.E.2d 787, 788-89 (Va. 1998).

50. *Id.* at 792.

51. *Id.* at 793 (quoting Boggs v. Commonwealth, 331 S.E.2d 407, 421 (Va. 1985)) (internal quotation marks and citations omitted).

52. 286 S.E.2d 162 (Va. 1982).

53. Whitley v. Commonwealth, 286 S.E.2d 162, 164-65, 171 (Va. 1982).

54. Peterson v. Commonwealth, 302 S.E.2d 520, 525 (Va. 1983) (citing *Godfrey v. Georgia*, 446 U.S. 420 (1980)).

55. Gray v. Commonwealth, 356 S.E.2d 157, 173, 180 (Va. 1987). For a discussion of the relative vileness of murders involving a single gunshot wound compared with murders involving multiple wounds, and the arbitrariness of the distinction between the two, see Banghart, *supra* note 12, at 86-87.

56. Weeks v. Commonwealth, 450 S.E.2d 379, 383, 391 (Va. 1994).

57. Hedrick v. Commonwealth, 513 S.E.2d 634, 640 (Va. 1999) (upholding a sentence of death based upon findings of vileness and future dangerousness).

element of "aggravated battery to the victim."⁵⁸ The Instructions define this sub-element as "aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder."⁵⁹ Language from past cases may be helpful in fashioning jury instructions on the aggravated battery sub-element in cases with analogous factual situations.⁶⁰ The Instructions should be amended to reflect the definition of "depravity of mind" as that which is shown by "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation."⁶¹ The Instructions should also be amended to give jurors more guidance regarding the sub-element of "torture." Perhaps a common-law definition of "torture" such as "inflict[ion] of intense pain to body or mind for purposes of punishment, or to extract a confession or information, or for sadistic pleasure" should also be inserted into model jury instructions 33.122 and 33.125.⁶²

2. *The Elevation of the Vileness "Sub-Elements" and the Requirement of Unanimity*

The three factors, or "sub-elements," embedded in the vileness predicate – torture, depravity of mind and aggravated battery – are not currently considered "elements" of vileness subject to a burden of proof beyond a reasonable doubt and a requirement that juries unanimously agree on their presence.⁶³ While a capital murder jury relying upon the vileness predicate must find that the Commonwealth has proved "vileness" beyond a reasonable doubt, it is not required to agree upon the presence of a specific sub-element, nor must the Commonwealth prove any particular sub-element beyond a reasonable doubt.⁶⁴ Recent United States Supreme Court decisions suggest, however, that proof beyond a reasonable doubt and unanimity as to at least one of the three sub-elements may be constitutionally required.⁶⁵

58. See VA. MODEL JURY INSTRUCTIONS CRIMINAL No. 33.122 (Lexis Law Publishing 1999); see also Appendix A to this article for a jury instruction defining aggravated battery to the victim.

59. *Id.*; see also VA. MODEL JURY INSTRUCTIONS CRIMINAL No. 33.125 (Lexis Law Publishing 1999).

60. See *supra* Part III(A)(1)(c).

61. See *Smith v. Commonwealth*, 248 S.E.2d 135, 149 (Va. 1978); see also Appendix A to this article for a jury instruction defining depravity of mind.

62. See BLACK'S LAW DICTIONARY 1490 (6th ed. 1990), Instructions Nos. 33.122, 33.125; see also Appendix A to this article for a jury instruction defining torture.

63. See VA. CODE ANN. § 19.2-264.2 (Michie 2000); Banghart, *supra* note 12, at 98-100.

64. See Banghart, *supra* note 12, at 98-100.

65. For a more complete discussion of why the "Sub-Elements" of Virginia's vileness predicate are separate elements and the requirement that juries unanimously find the presence of the elements of the vileness predicate, see Banghart, *supra* note 12, at 98. See generally Calvert, *supra* note 22 (discussing recent Supreme Court decisions and the rationale for

In *Richardson v. United States*⁶⁶ the Court held that when a federal statute requires a jury to find “a continuing series of violations” the jury must be in unanimous agreement that the defendant “committed each of the individual ‘violations’ necessary to make up that ‘continuing series’” in order to find the defendant guilty of violating the statute.⁶⁷ Rather than finding that a “series of violations” was one element of the crime, the Court ruled that the language “series of violations” referred to the individual acts that comprised the series, thereby making each separate act a necessary element of the crime.⁶⁸ The “violations” in *Richardson* are analogous to the sub-elements of Virginia’s vileness predicate. The sub-elements of torture, depravity of mind, and aggravated battery to the victim should be seen as alternate elements, and the jury should be required to conclude unanimously that at least one sub-element is present before it can impose a sentence of death predicated upon a finding of vileness.

Another recent United States Supreme Court decision which lends credence to the argument that the Constitution requires the vileness sub-elements to be treated as elements of the vileness predicate is *Apprendi v. New Jersey*.⁶⁹ In *Apprendi*, the Court held that the Fourteenth Amendment requires 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.”⁷⁰ Although at first glance *Apprendi* may seem inapplicable to Virginia’s capital sentencing scheme, wherein the “prescribed statutory maximum” is death, the principles of the case can be construed as applicable when there is no sentencing “range” at issue but rather a stark choice between a sentence of life incarceration and a sentence of death.⁷¹ If a defendant’s constitutional rights are violated by basing an increase in his term of incarceration upon facts which are not proven beyond a reasonable doubt, surely those same Fourteenth Amendment rights are violated by predicating a sentence of

elevating the vileness “factors” to “elements” and requiring that they be found unanimously by capital sentencing juries).

66. 526 U.S. 813 (1999).

67. *Richardson v. United States*, 526 U.S. 813, 815 (1999) (holding that in order to convict a defendant of engaging in a series of violations the jury must unanimously find the specific violations which make up the series).

68. *Id.* at 818-24.

69. *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2362-63 (2000) (holding provision of New Jersey’s hate crime statute which allowed trial court to enhance defendant’s sentence beyond the prescribed statutory maximum without proof of the enhancing facts beyond a reasonable doubt unconstitutional).

70. *Id.* at 2362-63.

71. See VA. CODE ANN. § 19.2-264.4 (Michie 2000); see also Calvert, *supra* note 22.

death (a far more drastic and final sentence than any term of years) upon evidence which is not subjected to proof beyond a reasonable doubt.⁷²

3. *Suggested Amendment of the Virginia Model Jury Instructions*

The suggested amendments of the pertinent portion of Virginia Model Jury Instruction 33.125 are set forth in brackets as follows:

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than \$100,000.00. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt the following aggravating circumstance: That his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman in that it involved [at least one of the following elements:]⁷³

[(a)] torture [as shown by infliction of intense physical or mental pain for purposes of punishment, extracting information, or sadistic pleasure,]⁷⁴ [or]

[(b)] depravity of mind [as shown by a degree of moral turpitude and psychical debasement beyond the ordinary level of moral turpitude and psychical debasement taken into account by the ordinary legal definition of malice and premeditation,]⁷⁵
or

(c) aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.⁷⁶

[You must unanimously find that the Commonwealth has proven one or more of the above-named elements beyond a reasonable doubt. You must unanimously agree as to which element[s] the Commonwealth has proven beyond a reasonable doubt.]⁷⁷

If you find from the evidence that the Commonwealth has proved [at least one element of]⁷⁸ that circumstance beyond a reasonable doubt, then you may fix the punishment at death.

... Any decision you make regarding punishment must be unanimous.

72. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (stating that "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two").

73. See *supra* Part III(A)(2).

74. See *supra* Part III(A)(1)(a).

75. See *supra* Part III(A)(1)(b).

76. See *supra* Part III(A)(1)(c).

77. See *supra* Part III(A)(2).

78. See *supra* Part III(A)(2).

B. Future Dangerousness

1. Future Dangerousness Evidence

Virginia Code section 19.2-264.2 states in pertinent part that:

In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society⁷⁹

Section 19.2-264.4 allows evidence of "the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense" to be introduced in the penalty phase of a capital murder case in which the Commonwealth intends to prove the future dangerousness of the defendant.⁸⁰ The Supreme Court of Virginia has noted that section 19.2-264.4 "does not restrict the admissible evidence to the record of convictions," and the court ruled in *Poyner* that it was not error to admit evidence of prior unadjudicated criminal conduct.⁸¹ The current version of the Instructions states that the Commonwealth must prove beyond a reasonable doubt that "after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society."⁸²

2. Raising the Standard of Proof for Prior Unadjudicated Bad Acts

In *Pruett v. Commonwealth*⁸³ the Supreme Court of Virginia stated that "evidence of prior criminal acts of violence, whether adjudicated or not, is relevant to a determination of future dangerousness."⁸⁴ In *Walker v. Commonwealth*,⁸⁵ the Supreme Court of Virginia rejected the defendant's argu-

79. VA. CODE ANN. § 19.2-264.2 (Michie 2000). For an extensive discussion of the future dangerousness predicate, see Jason J. Solomon, *Future Dangerousness: Issues and Analysis*, 12 CAP. DEF. J. 55 (1999).

80. VA. CODE ANN. § 19.2-264.4(B) (Michie 2000).

81. See *Peterson v. Commonwealth*, 302 S.E.2d 520, 526 (Va. 1983) (affirming death sentence based on a finding of future dangerousness, and ruling that the pendency of an appeal of a prior conviction does not affect the admissibility of evidence of that conviction); *Poyner v. Commonwealth*, 329 S.E.2d 815, 827-28 (Va. 1985) (upholding sentences of death and ruling that it was not error to admit into evidence a videotape showing defendant's confession to the two murders for which he was on trial, plus three additional murders).

82. VA. MODEL JURY INSTRUCTIONS CRIMINAL Nos. 33.122, 33.125 (Lexis Law Publishing 1999).

83. 351 S.E.2d 1 (Va. 1986).

84. *Pruett v. Commonwealth*, 351 S.E.2d 1, 12 (Va. 1986) (affirming sentence of death and approving admission of evidence of prior unadjudicated criminal conduct).

85. 515 S.E.2d 565 (Va. 1999).

ment that "without a positive connection of the evidence to the defendant by some standard of proof, the evidence does not meet the test of relevancy."⁸⁶ The court stated that "[w]hether the evidence produced establishes the ultimate fact at issue must, of course, be tested by some standard of proof."⁸⁷ In *Walker*, the ultimate issue of fact which the Commonwealth was required to prove beyond a reasonable doubt was whether Walker would pose a threat to society in the future.⁸⁸ The court rejected the argument that "each piece of evidence offered to prove the ultimate issue of fact must itself also be tested by some standard of proof," stating that each piece of evidence is "tested by the credibility or weight the fact finder chooses to give it."⁸⁹ In effect, the Commonwealth can introduce evidence of prior crimes, claim that the defendant committed those crimes, and use the evidence of those crimes as proof that the defendant poses a threat of future dangerousness to society. Yet the Commonwealth is not held to any standard of proof with regard to such evidence. The jury is left to decide what "credibility or weight" to give such evidence.⁹⁰

Recent United States Supreme Court decisions suggest that the individual prior bad acts introduced by the Commonwealth should be subject to a standard of proof beyond a reasonable doubt.⁹¹ Applying the rationale set forth above in Part III-A-2 of this article for applying the *Apprendi v. New Jersey* standard to evidence introduced in the penalty phase of a capital murder trial and keeping in mind that death is the ultimate punishment a society can impose, the Commonwealth should be required to prove beyond a reasonable doubt that a defendant committed prior unadjudicated bad acts which the Commonwealth introduces as evidence of future dangerousness.⁹²

3. *The Relevance of Parole and Prison Life Evidence*

The Instructions now include Instruction number 33.126, which provides that "[t]he words 'imprisonment for life' mean imprisonment for life without possibility of parole."⁹³ Due to the fact that capital murder

86. *Walker v. Commonwealth*, 515 S.E.2d 565, 571 (Va. 1999).

87. *Id.*

88. *Id.*

89. *Id.*

90. *See id.* For more discussion of the proof of future dangerousness by unadjudicated acts of criminal conduct, see Solomon, *supra* note 79, at 63-66.

91. *See supra* Part III(A)(2). For a more thorough discussion of the *Apprendi* standard, see Calvert, *supra* note 22.

92. *See supra* Part III(A)(2) (setting forth the rationale for requiring proof beyond a reasonable doubt of evidence of statutory aggravating factors); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (noting that "the penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); *see also* Calvert, *supra* note 22.

93. VA. MODEL JURY INSTRUCTIONS CRIMINAL No. 33.126 (Lexis Law Publishing

defendants sentenced to life in prison for crimes committed after January 1, 1995, are never eligible for parole⁹⁴ the entire context of the future dangerousness inquiry is transformed.⁹⁵ Arguably, the "society" to which the defendant may or may not "constitute a continuing serious threat" is no longer society at large, but instead the society within the prison in which the defendant will spend the remainder of his days.⁹⁶ Although the Supreme Court of Virginia has held that prison life evidence is inadmissible as mitigation evidence, such evidence is relevant and should be admissible as evidence in rebuttal of the Commonwealth's evidence of future dangerousness.⁹⁷ The Instructions, therefore, should reflect the context in which the defendant's potential future dangerousness is to be judged. Evidence of the structure of prison life, as well as security and safety procedures, should be admitted to show that the defendant will have fewer opportunities and less potential for committing dangerous acts in the prison society.⁹⁸

4. *Suggested Amendment of the Model Jury Instructions*

In light of the issues discussed above, the suggested amendments to the pertinent portion of Virginia Model Jury Instruction 33.125 are set forth in brackets as follows:

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than \$100,000.00. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt the following aggravating circumstance:

1999). For a discussion of the relevance of prison life evidence to cases in which future dangerousness is at issue, see Solomon, *supra* note 79, at 71-73.

94. See VA. CODE ANN. § 53.1-165.1 (Michie 2000) (abolishing parole for offenders convicted of a felony occurring on or after January 1, 1995); VA. CODE ANN. § 53.1-40.01 (Michie 2000) (geriatric parole is not available to inmates convicted of a class one felony, committed on or after January 1, 1995).

95. See VA. CODE ANN. § 19.2-264.2 (Michie 2000); see also Solomon, *supra* note 79, at 70-71.

96. See § 19.2-264.2; see also *Simmons v. South Carolina*, 512 U.S. 154, 166 n.5 (1994) (noting that "the fact that a defendant is parole ineligible does not prevent the State from arguing that the defendant poses a future danger. The State is free to argue that the defendant will pose a danger to others in prison . . .").

97. See *Cherrix v. Commonwealth*, 513 S.E.2d 642, 653 (Va. 1999) (upholding death sentence based on findings of future dangerousness and vileness, and holding that prison life evidence does not concern the history or experience of the defendant and thus is not relevant mitigation evidence); *Walker v. Commonwealth*, 515 S.E.2d 565, 574 (Va. 1999) (holding that evidence of prison life is not mitigating evidence).

98. Attorneys may contact the Virginia Capital Case Clearinghouse to obtain a form motion for the admission of prison life evidence.

That, after consideration of his history and background [including prior convictions and prior crimes which the Commonwealth has proven beyond a reasonable doubt], there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to [the] society [of the prison in which he will be incarcerated].⁹⁹

Any decision you make regarding punishment must be unanimous.¹⁰⁰

Additionally, counsel should always proffer Instruction 33.126, the "life means life" instruction, in conjunction with the proposed instruction on future dangerousness.¹⁰¹ Counsel should also request a "death not required" instruction.¹⁰²

IV. Consequences to Defendants of Proposing Handcrafted Jury Instructions

The proffering of the jury instructions suggested above raises serious questions regarding the consequences to a defendant of the use of such instructions. Does a defendant waive his objections to the constitutionality of Virginia's statutory death penalty scheme by proffering such instructions? This author could find no reported authority in Virginia for the proposition that a capital defendant waives his objections to the constitutionality of the capital sentencing scheme by proffering handcrafted instructions.¹⁰³ However, common sense indicates that if such instructions are accepted, in whole or in part, by the trial court the defendant will not be permitted to object to the constitutionality of the aspect of the sentencing scheme that was "cured" by his proffered instructions. A defendant who does not object to a jury instruction at trial waives his right to object to that instruction.¹⁰⁴ A defendant whose proffered instruction is accepted will not object to that instruction being given to the jury, and thus will have waived any objection

99. See *supra* Part III(B).

100. See VA. MODEL JURY INSTRUCTIONS CRIMINAL No. 33.125 (Lexis Law Publishing 1999).

101. VA. MODEL JURY INSTRUCTIONS CRIMINAL No. 33.126 (Lexis Law Publishing 1999). See *supra* Part III(B)(3).

102. In *Commonwealth of Virginia v. Tice*, the judge for the Circuit Court for the City of Norfolk instructed the jury in part as follows: "I want you to know that nothing in these instructions nor in the law requires you to sentence this defendant to death, no matter what your findings may be." *Commonwealth of Virginia v. Tice*, Cr. Nos. 98-2980-00 and 98-2980-01 (Tr. at 1045) (Feb. 14, 2000) (unreported decision).

103. Further, Code § 19.2-263.2 expressly permits defendants to offer jury instructions "which constitut[e] an accurate statement of the law." VA. CODE ANN. § 19.2-263.2 (Michie 2000).

104. See *Hubbard v. Commonwealth*, 59 S.E.2d 102, 109 (Va. 1950) (noting that a defendant waives his objection to improper remarks of counsel if he does not promptly request a curative instruction).

to that portion of the statutory sentencing scheme which was "cured" by instructing the jury according to the defendant's statement of the law. For instance, if a trial court accepts a defendant's proffered instruction limiting the consideration of future dangerousness to the defendant's future dangerousness in prison the defendant may have waived his objection to the constitutionality of the future dangerousness predicate insofar as the objection relates to the jury's consideration of defendant's future dangerousness to society at large.¹⁰⁵

Counsel should be prepared to proffer alternate jury instructions.¹⁰⁶ In the event that the trial court rejects one of the proposed instructions, counsel should present the court with an alternate version of the instruction. For instance, if the court rejects the model instruction on vileness suggested by this article,¹⁰⁷ ruling that the sub-elements are not elements which must be proven by the Commonwealth beyond a reasonable doubt and found unanimously by the jury, counsel should submit an alternate version of the instruction which includes at least the definitions of the sub-elements.¹⁰⁸ If the trial court rejects both proffered instructions, defendant's objections to the constitutionality of the vileness predicate will be preserved.¹⁰⁹ If the court uses the instruction which gives the definitions of the sub-elements, but does not elevate the sub-elements to elements requiring proof beyond a reasonable doubt and unanimity, the defendant's objections to the constitutionality of the vileness predicate regarding the standard of proof and unanimity will be preserved.¹¹⁰

V. Conclusion

This article has proposed reforms of the Virginia Model Jury Instructions Criminal.¹¹¹ The proposed instructions and accompanying explanations are intended to guide counsel in fashioning their own jury instructions for use in the penalty phase of capital trials. The proposed instructions consist of the law of Virginia as declared by the Supreme Court of Virginia, as well as interpretations of the law that have not yet been expressly ac-

105. See *supra* Part III(B)(4).

106. Counsel should also offer alternative verdict forms. For examples of alternative verdict forms proffered and accepted by a trial judge in a Virginia capital case, see Appendix B to this article.

107. See *supra* Part III(A)(3).

108. See *supra* Part III(A)(3).

109. See *Atkins v. Commonwealth*, 510 S.E.2d 445, 456 n.8 (Va. 1999) (noting that "where a party proffers an alternative instruction that is a correct statement of the law, this, without more, will be adequate to preserve for appeal a challenge to the instruction actually given") (internal citations omitted).

110. See *id.*

111. VA. MODEL JURY INSTRUCTIONS CRIMINAL (Lexis Law Publishing 1999).

cepted or rejected by the court. Jurors in capital cases should be provided with instructions that maximize their ability to distinguish circumstances in which the death penalty should be imposed from circumstances in which it is not warranted.¹¹²

112. See *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980).

APPENDIX A
INSTRUCTIONS APPROVED FOR
COMMONWEALTH V. CHARLES DOUGLAS RINER

The Honorable Robert Stump of the Circuit Court of Wise County, Virginia, approved the following instructions, along with Instructions 33.122 and 33.126, in the case of the Commonwealth of Virginia v. Charles Douglas Riner:¹¹³

D-P11 [capital murder sentencing]

To find vileness you must find beyond a reasonable doubt that the crime as committed by the defendant involved torture as defined in instruction D-P6, or evidenced depravity of mind as defined in instruction D-P7, or constituted an aggravated battery as defined in instruction D-P8. You must agree unanimously which of these elements supports your finding of vileness. If you cannot agree unanimously on one of the vileness elements, then you cannot find that the defendant's conduct was vile.

To find future dangerousness you must find beyond a reasonable doubt, after consideration of the defendant's history and background, that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt future dangerousness as an aggravating circumstance, then you may fix the punishment of the defendant at death. But if you nevertheless believe from all the evidence, including evidence in mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant at:

- (1) Imprisonment for life; or
- (2) Imprisonment for life and a fine of a specific amount, but not more than \$100,000.00.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt vileness as an aggravating circumstance and proved beyond a reasonable doubt the presence of one of the elements of vileness, namely, torture, depravity of mind, or aggravated battery, then you may fix the punishment of the defendant at death. But if you nevertheless believe from all the evidence, including evidence in mitigation, that the

113. Riner was not convicted of capital murder. Thus, the approved capital murder sentencing instructions were never given to the jury.

death penalty is not justified, then you shall fix the punishment of the defendant at:

- (1) Imprisonment for life; or
- (2) Imprisonment for life and a fine of a specific amount, but not more than \$100,000.00.

If the Commonwealth has failed to prove beyond a reasonable doubt future dangerousness or vileness and one of the vileness elements, then you shall fix the punishment of the defendant at:

- (1) Imprisonment for life; or
- (2) Imprisonment for life and a fine of a specific amount, but not more than \$100,000.00.

Any decision you make regarding punishment must be unanimous.

D-P6 [definition of torture]

Torture means the infliction of intense pain to the body or mind for purposes of punishment, or to extract a confession or information, or for sadistic pleasure.

D-P7 [definition of depravity of mind]

Depravity of mind means a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.

D-P8 [definition of aggravated battery]

Aggravated battery is a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder. The number or nature of the batteries inflicted upon the victim is the essence of the test whether the defendant's conduct constitutes an aggravated battery.

APPENDIX B
ALTERNATIVE VERDICT FORMS

The following alternative verdict forms were approved for use in the case of the Commonwealth of Virginia v. Charles Douglas Riner.¹¹⁴

Verdict Form (Alternative #1)

We, the jury, on the issue joined, having found the defendant guilty of capital murder and having unanimously found beyond a reasonable doubt after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society,

and

having unanimously found beyond a reasonable doubt that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved

torture _____;

depravity of mind _____;

aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder _____;

[Foreman must initial one or more of the above elements only if found beyond a reasonable doubt and unanimously agreed upon]

and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

FOREMAN

114. Riner was not convicted of capital murder. Thus, these verdict forms were never given to the jury.

Verdict Form (Alternative #2)

We, the jury, on the issue joined, having found the defendant guilty of capital murder and having unanimously found beyond a reasonable doubt after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

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Verdict Form (Alternative #3)

We, the jury, on the issue joined having found the defendant guilty of capital murder and having unanimously found beyond a reasonable doubt that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved

torture _____;

depravity of mind _____;

aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder _____;

[Foreman must initial one or more of the above elements only if found beyond a reasonable doubt and unanimously agreed upon]

and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

FOREMAN

Verdict Form (Alternative #4)

We, the jury, on the issue joined, having found the defendant guilty of capital murder and having considered all the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

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Verdict Form (Alternative #5)

We, the jury, on the issue joined, having found the defendant guilty of capital murder and having considered all the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life and a fine of \$ _____ (fine must be not more than \$100,000.00).

FOREMAN

CASE NOTES:

United States Supreme Court
