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Virginia Capital Case Clearinghouse Verdict Forms, Second Edition

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Virginia Capital Case Clearinghouse Verdict Forms, Second Edition

The culmination of a capital case occurs when the trial judge instructs the jury and it retires to its room to decide the defendant's fate. The verdict forms are concrete and tangible "road maps" for the jury to use during deliberations. The Virginia Capital Case Clearinghouse has revised the Clearinghouse's recommended verdict forms for capital defense practitioners.

Virginia Code Section 19.2-264.4.D contains the statutory verdict forms. Those verdict form were disapproved in *Powell v Commonwealth*.¹ The Model Jury Instruction Committee revised the verdict forms in light of *Powell*. The new Model Jury Instruction verdict forms are appended as Instruction Nos. P33-130A through P33-130G.

The new model verdict forms are an improvement, but are still inadequate. First, each contains a reference to "having considered all the evidence in mitigation" and thus implies that the defendant bears a burden of production as to mitigation evidence. If defendant fails to produce mitigation, the jury may conclude that death is the appropriate sentence. The court in *Powell* stated: "In a capital murder trial, the trial court must give the jury verdict forms providing expressly for the imposition of a sentence for life and a fine of not more than \$100,000 when the jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt."² The court's language does not require that the verdict forms make reference to mitigating evidence presented by the defendant. Second, the new verdict forms do not require that the vileness sub-elements be found unanimously.

The verdict forms, designated Alternative # 1 through Alternative # 10 and dated August 10, 2001, are recommended by the Clearinghouse. THESE SUPERSEDE THE VERDICT FORMS FOUND AT 13 CAP. DEF. J. 105-07 (2000) AND ALL OTHER VERDICT FORMS PREVIOUSLY DISTRIBUTED BY THE CLEARINGHOUSE. An earlier version of these verdict forms, including the unanimity requirement on the vileness sub-elements, were pre-approved in *Commonwealth v Riner*, No. F00-265, Wise County Circuit Court (first degree verdict precluded actual use), and were used in *Commonwealth v Hairston*, Nos. CR001 through CR008, City of Martinsville Circuit Court.

In particular, note that the future dangerousness verdict forms refer only to the defendant's "prior history." This is the precise language of Section

1. *Powell v Commonwealth*, 552 S.E.2d 344 (Va. 2001) (superseding the opinion found at 261 Va. 512, 544 S.E.2d 679 dated April 20, 2001).

2. *Id.*

264.4.C and the statutory verdict forms in Section 19.2-264.4.D. Although *Edmonds v Commonwealth*³ holds that the circumstances surrounding the offense can be used to prove future dangerousness, this is the General Assembly's statutory language. Further, the life verdict forms do not state that the punishment was unanimously determined; the death verdict forms do state that the punishment was unanimously determined. The language precisely tracks the statutory verdict forms in Section 19.2-264.4.D.

Guidelines for verdict form selection:

- A. Future dangerousness only argued/ no mitigation evidence presented: Alternative # 1 (strike EITHER and OR and the reference to vileness), Alternative # 3, Alternative # 8.
- B. Vileness only argued/ no mitigation evidence presented: Alternative # 1 (strike EITHER and OR and reference to future dangerousness), Alternative # 4, Alternative # 9.
- C. Both aggravators argued/ no mitigation evidence presented: Alternative # 1, Alternative # 2, Alternative # 8, Alternative # 9, Alternative # 10.
- D. Future dangerousness only argued/ mitigation evidence presented: Alternative # 1 (strike EITHER and OR and reference to vileness), Alternative # 5, Alternative # 8.
- E. Vileness only argued/ mitigation evidence presented: Alternative # 1 (strike EITHER and OR and reference to future dangerousness), Alternative # 6, Alternative # 9.
- F. Both aggravators argued/ mitigation evidence presented: Alternative # 1, Alternative # 5, Alternative # 6, Alternative # 7, Alternative # 8, Alternative # 9, Alternative # 10.

3. *Edmonds v. Commonwealth*, 329 S.E.2d 807 (Va. 1985).

**Verdict Form
(Alternative # 1)**

Commonwealth
v.

Case No. _____
Date: _____

We, the jury, having found the defendant guilty of capital murder
AND
having considered all the evidence in aggravation
AND
having found that the Commonwealth failed to prove beyond
a reasonable doubt

EITHER

that there is a probability that he would commit criminal acts of
violence that would constitute a continuing serious threat to
society

OR

that his conduct in committing the offense is outrageously or
wantonly vile, horrible or inhuman,

fix his punishment at:

imprisonment for life

OR

imprisonment for life and a fine of \$ _____
(fine must be not more than \$100,000).

[Circle the punishment selected by the jury].

FOREPERSON

MEMORANDUM

STATUTE: § 19.2-264.4.

CASES: *Powell v Commonwealth*, 261 Va. 512, 552 S.E.2d 344 (2001).
Bailey v Commonwealth, 259 Va. 723, 529 S.E.2d 570 (2000).
Atkins v Commonwealth, 257 Va. 160, 510 S.E.2d 445 (1999).
Justis v Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980).

**Verdict Form
(Alternative # 2)**

Commonwealth
v.

Case No. _____
Date: _____

We, the jury, having found the defendant guilty of capital murder
AND
having considered all the evidence in aggravation
AND
having found unanimously and beyond a reasonable doubt after consideration
of his prior history that there is a probability that he would commit criminal
acts of violence that would constitute a continuing serious threat to society
AND
having found unanimously and 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 _____;

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

fix his punishment at:

imprisonment for life
OR
imprisonment for life and a fine of \$ _____
(fine must be not more than \$100,000).

[Circle the punishment selected by the jury].

FOREPERSON

MEMORANDUM

STATUTE: § 19.2-264.4.

CASES: *Apprendi v New Jersey*, 530 U.S. 466 (2000).
Richardson v United States, 526 U.S. 813 (1999).
Powell v Commonwealth, 261 Va. 512, 552 S.E.2d 344 (2001).
Bailey v Commonwealth, 259 Va. 723, 529 S.E.2d 570 (2000).
Atkins v Commonwealth, 257 Va. 160, 510 S.E.2d 445 (1999).
Justus v Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980).
Smith v Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978).

**Verdict Form
(Alternative # 3)**

Commonwealth
v. _____

Case No. _____
Date: _____

We, the jury, having found the defendant guilty of capital murder
AND
having considered all the evidence in aggravation
AND
having found unanimously and beyond a reasonable doubt after
consideration of his prior history that there is a probability that he
would commit criminal acts of violence that would constitute a con-
tinuing serious threat to society,

fix his punishment at:

imprisonment for life
OR
imprisonment for life and fine of \$ _____
(fine must be not more than \$100,000).

[Circle the punishment selected by the jury].

FOREPERSON

MEMORANDUM

STATUTE: § 19.2-264.4.

CASES: *Powell v Commonwealth*, 261 Va. 512, 552 S.E.2d 344 (2001).
Bailey v Commonwealth, 259 Va. 723, 529 S.E.2d 570 (2000).
Atkins v Commonwealth, 257 Va. 160, 510 S.E.2d 445 (1999).
Justis v Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980).
Smith v Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978).

**Verdict Form
(Alternative # 4)**

Commonwealth
v.

Case No. _____
Date: _____

We, the jury, having found the defendant guilty of capital murder
AND
having considered all the evidence in aggravation
AND
having found unanimously and beyond a reasonable doubt that his
conduct in committing the offense is outrageously and 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 _____;

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

fix his punishment at:

imprisonment for life
OR
imprisonment for life and a fine of \$ _____
(fine must be not more than \$100,000).

[Circle the punishment selected by the jury].

FOREPERSON

MEMORANDUM

STATUTE: § 19.2-264.4.

- CASES:** *Apprendi v New Jersey*, 530 U.S. 466 (2000).
Richardson v United States, 526 U.S. 813 (1999).
Powell v Commonwealth, 261 Va. 512, 552 S.E.2d 344 (2001).
Bailey v Commonwealth, 259 Va. 723, 529 S.E.2d 570 (2000).
Atheirs v Commonwealth, 257 Va. 160, 510 S.E.2d 445 (1999).
Justus v Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980).
Smith v Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978).

**Verdict Form
(Alternative # 5)**

Commonwealth
v.

Case No. _____
Date: _____

We, the jury, having found the defendant guilty of capital murder
AND
having considered all the evidence in aggravation
AND
having found unanimously and beyond a reasonable doubt after
consideration of his prior history that there is a probability that he
would commit criminal acts of violence that would constitute a con-
tinuing serious threat to society
AND
having considered the evidence in mitigation of the offense, fix his
punishment at:

imprisonment for life
OR
imprisonment for life and a fine of \$ _____
(fine must be not more than \$100,000).

[Circle the punishment selected by the jury].

FOREPERSON

MEMORANDUM

STATUTE: § 19.2-264.4.

CASES: *Powell v Commonwealth*, 261 Va. 512, 552 S.E.2d 344 (2001).
Bailey v Commonwealth, 259 Va. 723, 529 S.E.2d 570 (2000).
Atkins v Commonwealth, 257 Va. 160, 510 S.E.2d 445 (1999).
Justis v Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980).
Smith v Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978).

**Verdict Form
(Alternative # 6)**

Commonwealth
v. _____

Case No. _____
Date: _____

We, the jury, having found the defendant guilty of capital murder
AND
having considered all the evidence in aggravation
AND
having found unanimously and beyond a reasonable doubt that his
conduct in committing the offense is outrageously and 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 _____;

[Foreperson 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, fix his
punishment at:

imprisonment for life
OR
imprisonment for life and a fine of \$ _____
(fine must be not more than \$100,000).

[Circle the punishment selected by the jury].

FOREPERSON

MEMORANDUM

STATUTE: § 19.2-264.4.

CASES: *Apprendi v New Jersey*, 530 U.S. 466 (2000).
Richardson v United States, 526 U.S. 813 (1999).
Powell v Commonwealth, 261 Va. 512, 552 S.E.2d 344 (2001).
Bailey v Commonwealth, 259 Va. 723, 529 S.E.2d 570 (2000).
Atheirs v Commonwealth, 257 Va. 160, 510 S.E.2d 445 (1999).
Justis v Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980).
Smith v Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978).

Verdict Form
(Alternative # 7)

Commonwealth
v. _____

Case No. _____
Date: _____

We, the jury, having found the defendant guilty of capital murder
AND
having considered all the evidence in aggravation
AND
having found unanimously and beyond a reasonable doubt after
consideration of his prior history that there is a probability that he
would commit criminal acts of violence that would constitute a con-
tinuing serious threat to society
AND
having found unanimously and beyond a reasonable doubt after
consideration of his prior history 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 _____;

[Foreperson 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, fix his
punishment at:

- imprisonment for life
- OR
- imprisonment for life and a fine of \$ _____
(fine must be not more than \$100,000).

[Circle the punishment selected by the jury].

FOREPERSON

MEMORANDUM

STATUTE: § 19.2-264.4.

- CASES:
- Apprendi v New Jersey*, 530 U.S. 466 (2000).
 - Richardson v United States*, 526 U.S. 813 (1999).
 - Powell v Commonwealth*, 261 Va. 512, 552 S.E.2d 344 (2001).
 - Justus v Commonwealth*, 220 Va. 971, 266 S.E.2d 87 (1980).
 - Smith v Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978)
 - Atkins v Commonwealth*, 257 Va. 160, 510 S.E.2d 445 (1999).
 - Bailey v Commonwealth*, 259 Va. 723, 529 S.E.2d 570 (2000).

**Verdict Form
(Alternative # 8)**

Commonwealth

v.

Case No. _____

Date: _____

We, the jury, having found the defendant guilty of capital murder
AND
having found unanimously and beyond a reasonable doubt after
consideration of his prior history that there is a probability that he
would commit criminal acts of violence that would constitute a con-
tinuing serious threat to society

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

FOREPERSON

Verdict Form
(Alternative # 9)

Commonwealth
v.

Case No. _____
Date: _____

We, the jury, having found the defendant guilty of capital murder
AND
having found unanimously and 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 _____;

[Foreperson 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.

FOREPERSON

MEMORANDUM

- CASES: *Apprendi v New Jersey*, 530 U.S. 466 (2000).
Richardson v United States, 526 U.S. 813 (1999).
Jones v United States, 526 U.S. 227 (1999).

**Verdict Form
(Alternative # 10)**

Commonwealth

v.

Case No. _____

Date: _____

We, the jury, having found the defendant guilty of capital murder
AND

having found unanimously and beyond a reasonable doubt after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society

AND

having found unanimously and 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 _____;

[Foreperson 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.

FOREPERSON

MEMORANDUM

STATUTE: § 19.2-264.4.

CASES: *Apprendi v New Jersey*, 530 U.S. 813 (2000).

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

Jones v United States, 526 U.S. 227 (1999).