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United States v. Jackson 327 F.3d 273 (4th Cir. 2003)

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I. Facts

On December 20, 1994, Richard Allen Jackson ("Jackson") confessed to the kidnapping and murder of Karen Styles ("Styles"). On the morning of October 31, 1994, Styles disappeared from a trail in the Pisgah National Forest near Asheville, North Carolina. A search began, ending in the discovery of Styles's car parked at the head of the trail. Her keys were discovered two-tenths of a mile from the parking lot. Approximately three weeks later, a hunter discovered Styles's nude body duct-taped to a tree. The autopsy performed on Styles's body revealed that she died from a single gunshot to the head. In addition, the autopsy revealed that Styles suffered ten stun-gun wounds, nine of which were in very close proximity to her pubic area.[1]

At the discovery site, investigators collected a duct-tape wrapper, a pornographic magazine, and a spent Remington .22-caliber rifle casing. Sheriff's deputies, recognizing where these materials were purchased, contacted a K-Mart store less than one mile from the scene of the murder. The deputies discovered that four days before the murder, a customer purchased a .22-caliber rifle, a box of Remington .22-caliber rifle ammunition, duct tape, a flashlight, and batteries. A Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Form 4473 revealed that Jackson had purchased the rifle and ammunition.[2]

On December 20, 1994, Jackson gave an interview to the police. The police advised Jackson of his Miranda rights and he voluntarily waived them. When questioned regarding the rifle used in Styles's murder, Jackson related his belief that he needed a lawyer and began to cry, insisting that he did not mean to kill anyone. The Sheriff then informed Jackson that he did not need to say anything more because he had invoked his right to counsel. The Sheriff subsequently obtained a second waiver of Jackson's Miranda rights.[3]

Jackson confessed to duct-taping, raping, and killing Styles. He further related that after shooting Styles once in the head, he returned the gun to K-Mart. Nowhere in his confession did Jackson relate using a stun gun; however, the autopsy performed on Styles's body confirmed she had been shocked once above her left breast and nine times near her vaginal area. Pursuant to a search warrant, sheriffs discovered in Jackson's home and car "a functional stun gun, a

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1. United States v. Jackson, 327 F.3d 273, 279–80 (4th Cir. 2003).
2. *Id.*
3. *Id.* at 280.

flashlight, a black 'Ninja' outfit, a wrapper to an adult magazine, and a partially empty box of .22-caliber rifle bullets."[4]

In North Carolina state court, "Jackson was charged . . . with first-degree murder, first-degree kidnapping, and first-degree rape."[5] The jury found Jackson guilty on all counts.[6] Pursuant to the jury's recommendation, the court imposed a death sentence for the first-degree murder conviction and prison sentences for the other two convictions.[7] On appeal, the Supreme Court of North Carolina reversed Jackson's convictions and ordered a new trial.[8] On March 3, 2000, Jackson pleaded guilty in state court to second-degree murder, first-degree rape, and second-degree kidnapping.[9] Jackson received an aggregate sentence of over thirty-one years with a credit of five years for time served.[10]

On November 6, 2000, Jackson was indicted by a federal grand jury for "using a firearm during and in relation to a crime of violence, specifically murder, kidnapping, and aggravated sexual abuse."[11] The jury returned a verdict of guilty.[12] The jury found unanimously that the Government had proven beyond a reasonable doubt four aggravating factors.[13] These aggravating factors included that Styles's murder was committed during the course of a kidnapping and that Jackson committed the crime in an " 'especially heinous, cruel or depraved manner in that it involved torture or serious physical abuse to Karen Styles.' "[14] Although various jurors found fourteen mitigating circumstances, the jury unanimously found that the aggravating factors outweighed the mitigating factors and it recommended that Jackson be sentenced to death.[15] The district court

4. *Id.*

5. *Id.*

6. *Id.*

7. *Jackson*, 327 F.3d at 280.

8. *Id.* at 281; *see* State v. Jackson, 497 S.E.2d 409, 412 (N.C. 1998) (reversing Jackson's conviction after finding that the police violated Jackson's Miranda right not to be interrogated after he invoked his right to counsel).

9. *Jackson*, 327 F.3d at 281.

10. *Id.* At the time of his plea, Jackson's counsel did not consider the possibility of federal prosecution or advise him of that possibility. *Id.*

11. *Id.*; *see* 18 U.S.C. § 924(j)(1) (2000) (stating that a person who causes the death of another through the use of a firearm shall "be punished by death or by imprisonment for any term of years or for life").

12. *Jackson*, 327 F.3d at 281.

13. *Id.*; *see* 18 U.S.C. § 3592 (2000) (defining the mitigating and aggravating circumstances to be considered in a federal capital prosecution).

14. *Jackson*, 327 F.3d at 281 (quoting the trial court's jury verdict form); *see* 18 U.S.C. § 1201 (2000) (defining the crime of kidnapping); 18 U.S.C. § 3592(c)(6) (establishing that "heinous, cruel, or depraved manner of committing [an] offense" is an aggravating factor to be considered when determining if death is justified).

15. *Jackson*, 327 F.3d at 281; *see* 18 U.S.C. § 3592(a)(1)–(8) (defining the mitigating circumstances to be considered in a federal prosecution).

entered judgment in accordance with the jury's verdict and imposed a sentence of death.[16]

In his appeal to the United States Court of Appeals for the Fourth Circuit, Jackson made several claims.[17] First, Jackson argued that his indictment was defective because it failed to allege "aggravating circumstances necessary for the imposition of the death penalty."[18] Second, Jackson argued that his constitutional rights were violated when the court excluded a prospective juror whose death penalty views would not have impaired his ability to serve as a juror.[19] Next, Jackson contended that the Government should have known that the testimony of one of its witnesses was perjured and, thus, the court should have granted his motion for a mistrial based on prosecutorial misconduct.[20] Finally, Jackson asserted that the district court erred during the sentencing phase of the trial by excluding the testimony of the adoptive parents of his biological sister.[21]

II. Holding

The Fourth Circuit affirmed Jackson's conviction and sentence of death.[22] The Fourth Circuit found that: (1) the district court properly rejected Jackson's claim that the indictment failed to allege the existence of *any* statutory aggravating factors because the indictment did allege that the murder occurred during the commission of another crime, namely kidnapping;[23] (2) Jackson did not preserve for appellate review his claim that *all* of the aggravating factors must be raised in the indictment and his claim failed the plain-error test due to the "overwhelming nature of the evidence against [him]";[24] (3) the district court, which was afforded deference as the trier of fact, did not improperly exclude a juror because of his inability to sign his name to a death verdict;[25] (4) the Government did not act improperly by calling its witness and his testimony did not prejudicially affect

16. *Jackson*, 327 F.3d at 281; *see* 18 U.S.C. § 3593(e) (2000) (stating that the jury shall consider all aggravating and mitigating factors in order to recommend whether the defendant should be sentenced to death); *see also* 18 U.S.C. § 3594 (2000) (stating that "[u]pon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court *shall* sentence the defendant accordingly (emphasis added)).

17. *Jackson*, 327 F.3d at 278–79. On appeal, Jackson raised fourteen issues, only four of which will be addressed in this case note.

18. *Id.* at 279.

19. *Id.* at 278.

20. *Id.* at 278, 296.

21. *Id.* at 278–79.

22. *Id.* at 303.

23. *Jackson*, 327 F.3d at 304.

24. *Id.* at 305 (citing United States v. Cotton, 535 U.S. 625, 633–34 (2002)).

25. *Id.* at 296.

Jackson's rights;[26] and (5) the district court did not abuse its discretion by excluding the testimony of Jackson's sister's adoptive parents because the defense failed to establish the necessary link between the mitigating evidence Jackson sought to admit and Jackson's character or record.[27]

III. Analysis

A. Alleging Any and All Aggravating Factors in the Indictment

1. Any Aggravating Factors

In district court, as well as in his appeal to the Fourth Circuit, Jackson objected to the indictment issued against him because " 'it fail[ed] to allege the existence of *any* of the 16 statutory aggravating factors.' "[28] The majority of the Fourth Circuit panel, agreeing with the district court's ruling, held that the "death occurred during the commission of kidnapping" language in the indictment was sufficient to give notice of the federal aggravating factor "death during commission of another crime."[29] Additionally, in his concurrence, Judge Niemeyer thought that federal aggravating factor six, that the defendant "committed the offense in an especially heinous, cruel or depraved manner in that it involved torture or serious physical abuse to the victim," was sufficiently alleged.[30] In effect, the Fourth Circuit adopted the reasoning of the district court that "[w]hile the language of the indictment is not identical to the language of the notice of

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26. *Id.* at 297.

27. *Id.* at 299.

28. *Id.* at 303.

> The indictment charged that Jackson "[o]n or about October 31, 1994," in the Pisgah National Forest: did unlawfully, knowingly, and intentionally use and carry a firearm, to wit: a .22 caliber rifle, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, to wit: Murder [Title 18 United States Code, Section 111(a)], Kidnapping [Title 18 United States Code, Section 1201(a)(2)], and Aggravated Sexual Abuse [Title 18 United States Code, Section 2241(a)(1)-(2)], in violation of Title 18 United States Code, Section 924(c)(1), and, in the course of such violation and through the use of such firearm, did cause the death of a person, Karen Styles, in violation of Title 18 United States Code, Section 924(j)(1), which killing is a murder as defined in Title 18 United States Code, Section 1111, in that RICHARD ALLEN JACKSON unlawfully killed a human being, Karen Styles, with malice aforethought, by shooting her with the firearm willfully, deliberately, maliciously, and with premeditation, and in the perpetration and attempted perpetration of a felony, to wit: kidnapping and aggravated sexual abuse. All in violation of Title 18 United States Code, Sections 924(c), 924(j), and 7(3).

Id. at 303 n.1.

29. *Jackson*, 327 F.3d at 303–04; *see* 18 U.S.C. § 3592 (2000) (listing the federal aggravating factors justifying the sentence of death). In Jackson's case, 18 U.S.C. § 3592(c)(1) and 18 U.S.C. § 3592(c)(6) were alleged in the indictment. *Jackson*, 327 F.3d at 303–04.

30. *Jackson*, 327 F.3d at 288 (citing 18 U.S.C. § 3592(c)(6)). Note that the Motz and King opinion is the holding of the court.

intent to seek the death penalty, it contains all the elements necessary under the federal death penalty statute to charge a capital crime."[31]

Judge Niemeyer examined the issue of inclusion of the aggravating factors in significantly more detail than did the majority.[32] The majority judges appeared to assume that *Apprendi v New Jersey*,[33] *Ring v Arizona*,[34] and *United States v Cotton*[35] require that the indictment allege at least one statutory aggravating factor before the defendant is death eligible, but that an aggravating factor can be alleged without specifically being identified as an aggravating factor.[36] Although there is no specific reference, the theory pursued seems to be that if a statutory aggravating factor is alleged and found by the trier of fact, other unalleged statutory aggravating factors become true sentencing factors. Presumably, if the alleged statutory aggravating factor is not found, but unalleged statutory aggravating factors are found, the death penalty is unavailable because it would be based on an "element" not alleged in the indictment.[37]

2. *All Aggravating Factors*

Jackson argued that his indictment was defective because it failed to allege *all* aggravating factors submitted to the jury.[38] Because Jackson failed to preserve this issue in the district court, the Fourth Circuit considered his claim using plain-error review.[39] " 'Under that test, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects

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31. *Id.* at 282.

32. *See id.* at 305 n.2 (stating Judge Niemeyer sets forth and relies on cases that were not suggested or argued).

33. 530 U.S. 466 (2000).

34. 536 U.S. 584 (2002).

35. 535 U.S. 625 (2002).

36. *See Jackson*, 327 F.3d at 287 (Niemeyer, J., concurring) (describing the need for an aggravating factor and the core elements of the offense to be present in the indictment); Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000) (holding that any fact that increases the penalty of a crime beyond the corresponding statutory maximum must be submitted to a jury and proven beyond a reasonable doubt); Ring v. Arizona, 536 U.S. 584, 596 (2002) (standing for the proposition that when a finding of at least one aggravating factor is necessary for the imposition of the death sentence, that aggravating factor is an element of the aggravated offense and must be found by a jury as required by the Sixth Amendment); *Cotton*, 535 U.S. at 632 (establishing that failure to allege a sentencing aggravator is plain error).

37. *See Jackson*, 327 F.3d at 286 (Niemeyer, J., concurring) (stating that "because the existence of at least one aggravating factor is necessary to impose the death sentence, the existence of at least one aggravating factor must be alleged in the indictment and *that* aggravating factor must be found by the jury" to expose the defendant to the death penalty (emphasis added)).

38. *Id.* at 304.

39. *Id.*; *see Cotton*, 535 U.S. at 634 (illustrating that when indictment insufficiency is not raised in a timely manner, it is subject to review only for plain error).

substantial rights.' "[40] " 'If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' "[41] The majority of the court, following an analysis similar to that utilized in *Cotton*, assumed without deciding that the indictment's failure to allege *all* of the aggravating factors that were submitted to the jury during the penalty phase of the trial met the first three prongs of the plain-error test.[42] The court, however, decided not to notice Jackson's forfeiture due to the overwhelming evidence against him.[43] Specifically, the Fourth Circuit concluded that the evidence did not "seriously affect[ ] the fairness, integrity, or public reputation of judicial proceedings."[44]

B. Juror Exclusion

During jury selection, a prospective juror, Brian Della-Bianca ("Della-Bianca"), gave several ambiguous answers to questions regarding his views on the death penalty.[45] In an attempt to clarify his views, the court asked additional questions.[46] When asked if he could sign his name to a death verdict, Della-Bianca answered that he could not.[47] Upon hearing this response, the court excused him from jury service.[48] Jackson contended that this excuse was unconstitutional.[49]

The Fourth Circuit applied the standard for improper juror exclusion set forth in *Wainwright v. Witt*.[50] Under this standard, deference must be given to the trial judge who saw and heard the jurors' answers to the questions that they were asked.[51] The Fourth Circuit noted that the record "demonstrates an earnest and extended effort by the district court to ascertain whether Della-Bianca's views on the death penalty would substantially impair his performance as a juror."[52] The

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40. *Jackson*, 327 F.3d at 304 (quoting Johnson v. United States, 520 U.S. 461, 466–67 (1997)) (internal quotation marks omitted).

41. *Id.* (quoting *Johnson*, 520 U.S. at 467).

42. *Id.* at 305; *see Cotton*, 535 U.S. at 631–32 (outlining the plain-error test).

43. *Jackson*, 327 F.3d at 305.

44. *Id.*; *see Cotton*, 535 U.S. at 632–33 (describing the third inquiry into the plain-error test).

45. *Jackson*, 327 F.3d at 295.

46. *Id.*

47. *Id.* at 296.

48. *Id.*

49. *Id.*

50. *Id.*; Wainwright v. Witt, 469 U.S. 412, 424 (1985) (stating that "the standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath' " (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

51. *Jackson*, 327 F.3d at 296 (quoting *Wainwright*, 469 U.S. at 424).

52. *Id.*

court deferred to the district court's opinion and concluded that the juror was not improperly excluded.[53]

C. *Perjured Testimony*

Jackson contended that the district court erred by denying his motion for a mistrial based on prosecutorial misconduct because the Government knew, or should have known, that the testimony of Robert Sartori ("Sartori"), a Government witness who had been an inmate with Jackson, was perjured.[54] Sartori testified at Jackson's trial.[55] Subsequently, Jackson's counsel discovered that two of the six inmates (one of whom was Sartori) who were interviewed as Government witnesses may have lied in their interviews.[56] Jackson's attorneys subpoenaed all correspondence from these potential witnesses.[57] Jackson's counsel then filed a sealed motion to strike Sartori's testimony.[58] The court, without Government objection, sustained the motion and struck Sartori's testimony.[59] Jackson's counsel then moved for a mistrial.[60] The court denied the motion but instructed the jury to disregard Sartori's testimony.[61]

The court explained that Jackson's counsel, after discovering that there may have been fabricated testimony, initially moved only to strike the testimony rather than asking for a mistrial.[62] The court noted that another Government witness's live testimony was the only "new" information presented by Jackson's counsel after the motion to strike was granted and before the motion for mistrial was made.[63] The court had no new information upon which to base a ruling in favor of the defense's motion for mistrial.[64] Further, the court concluded that Jackson's substantial rights were not prejudicially affected by the testimony.[65] Ac-

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53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Jackson*, 327 F.3d at 296.
58. *Id.*
59. *Id.* at 296–97.
60. *Id.* at 297.
61. *Id.*
62. *Id.*
63. *Jackson*, 327 F.3d at 297.
64. *See id.* at 297 (stating that no new relevant information was presented between the granting of the defense's motion to strike and the defense's later motion for a mistrial).
65. *Id.* The court noted that defense counsel cross-examined Sartori vehemently and that the district court ultimately gave a limiting instruction to the jury to disregard Sartori's testimony. *Id.* Additionally, there was other overwhelming evidence that pointed to Jackson's guilt from which the jury could have inferred that Jackson had premeditated his act. *Id.*

cording to the court, evidence of Jackson's guilt, even without considering Sartori's testimony, was "overwhelming."[66]

D. Relevance of Mitigating Factors

Jackson contended that during the sentencing phase of the trial, the district court erred by not allowing the testimony of the adoptive parents of Jackson's biological sister.[67] Jackson alleged that the testimony of his sister's adoptive parents regarding her abnormal behaviors would have led the jury to believe that he manifested behavioral difficulties as well.[68] During sentencing, the factfinder must consider all mitigating evidence and any aspect of the defendant's character that the defendant proffers as a basis for a sentence other than death.[69] The Fourth Circuit held, however, that, absent expert testimony linking Jackson's biological sister's behaviors to behavioral traits Jackson himself exhibited, the testimony was not relevant to mitigation.[70] Jackson's counsel failed to call an expert witness who could have made the testimony relevant.[71] The Fourth Circuit concluded the district court did not abuse its discretion because Jackson failed to establish the relevance of this mitigating evidence.[72]

IV. Application

A. Federal

The United States Supreme Court in *Ring* held that facts that increase a defendant's maximum punishment from life imprisonment to death are elements of a capital offense and must be found unanimously and beyond a reasonable doubt by a jury.[73] Statutory aggravating factors that increase the defendant's possible sentence to death are therefore elements of death eligible capital murder and must be sufficiently alleged in an indictment.[74] The failure of the indictment to allege at least one statutory aggravating factor denies the defendant his Fifth Amendment right to have a grand jury determine whether probable cause exists to indict him for death-eligible capital murder.[75] The imposition of the death

66. *Id.*
67. *Id.* at 299.
68. *Id.*
69. *Jackson*, 327 F.3d at 299 (citing Lockett v. Ohio, 438 U.S. 586, 604 (1978)).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Ring*, 536 U.S. at 609.
74. *See generally id.* at 589 (holding defendants are "entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment").
75. U.S. CONST. amend. V (stating that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury").

penalty without a grand jury finding a statutory aggravating factor violates the historic role of the grand jury as a shield against overreaching prosecutions by the Government.

Jackson presents a difficult problem in that his indictment permitted the inference that an aggravator was alleged. *Jackson* thus serves to illustrate the importance of determining what the statutory and non-statutory aggravators are and assuring that the statutory aggravators appear in the indictment. If the statutory aggravators only appear in the death notice and not in the indictment, then a sentence of death cannot be predicated on an unalleged statutory aggravator. Alleged aggravators are a predicate to a continued death inquiry. Unalleged statutory aggravators therefore become the equivalent of non-statutory aggravators and can only be weighed against mitigators in sentencing. In *Jackson*, the inference survived only because two statutory aggravators were alleged in his indictment and in his death notice and were found beyond a reasonable doubt by a jury.

B. Virginia

1. Aggravating Factors in the Indictment

In Virginia, in contrast with the federal system, defendants cannot rely on the Fifth Amendment to require that aggravating factors be included in indictments.[76] In Virginia there is no federal or state constitutional right to a grand jury. However, Virginia Code section 19.2-217 provides that "no person shall be put upon trial for any felony, unless an indictment or presentment shall have first been found or made by a grand jury."[77] The Supreme Court of Virginia in *Hagwood v. Commonwealth*[78] held that it is "necessary for an indictment to set forth all of the essential elements of the crime and if any of them are omitted it is fatally defective."[79] Because the status of aggravators as elements is a matter of federal constitutional law, the Commonwealth cannot declare that aggravators are not elements.

Implicit in the foregoing analysis is the conclusion that in Virginia an indictment must charge the aggravators that will be submitted to the jury.[80] In

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76. Hurtado v. California, 110 U.S. 516, 535 (1884) (holding that the Fifth Amendment right to "presentment or indictment of a Grand Jury" does not apply to the states); *see* VA. CODE ANN. § 19.2-217 (Michie 2000) (setting forth the state statutory right to a grand jury); Benson v. Commonwealth, 58 S.E.2d 312, 313–14 (Va. 1950) (finding that while the Code prevents the trial of a person on a felony charge except upon an indictment found by a grand jury, this is purely a statutory requirement and is not predicated upon any constitutional guarantee).

77. VA. CODE ANN. § 19.2-217.

78. 162 S.E. 10 (Va. 1932).

79. Hagwood v. Commonwealth, 162 S.E. 10, 12 (Va. 1932).

80. *See Ring*, 536 U.S. at 597 n.4 (stating that the Fifth Amendment Indictment Clause has no bearing on cases originating in the state system because the Fifth Amendment Indictment Clause

Virginia, the two statutory aggravators are vileness and future dangerousness.[81] Virginia Code section 18.2-31 contains the elements of a substantive capital offense in Virginia.[82] In Virginia's statutory scheme, only if a defendant is convicted of capital murder as defined in section 18.2-31 and there is a finding of either or both of the aggravating factors listed in section 19.2-264.2 does the jury have the option of recommending a death sentence. An indictment that merely charges the elements of a section 18.2-31 offense does charge capital murder, but only a sentence of capital life can be imposed in the absence of aggravators.[83] Nonetheless, before concluding that an indictment does not allege aggravating factors, counsel should be aware of the *Jackson* inference theory.[84]

2. *Juror Exclusion*

During jury selection, practitioners should note the consequences of phrasing questions in a way that could potentially eliminate life jurors. During voir dire, the proper question to ask is whether the juror will consider death.[85] Counsel should object to questions from a judge or prosecutor that ask a juror if he or she will vote for death or sign a death verdict.

3. *Perjured Testimony*

Jackson also illustrates the importance of objecting immediately to any potentially perjured testimony. If counsel has information that testimony is perjured, he should not wait until cross-examination to object. Counsel should present this information to the Commonwealth and move to preclude the

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has not been applied to the states through the Fourteenth Amendment).

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

82. VA. CODE ANN. § 18.2-31 (Michie Supp. 2003).

83. Contact the Virginia Capital Case Clearinghouse at (540) 458-8557 for advice on how to deal with an indictment that fails to allege a statutory aggravating factor.

84. In the case of aggravated battery, for example, if the indictment charged all the elements of the section 18.2-31 offense and went on to allege that the offender stabbed his victim eighty times, an argument could be made that a *Jackson*-type inference established that the sub-element of vileness, aggravated battery to the victim, was alleged.

85. *See* Jessie Seiden, Case Note, 16 CAP. DEF. J. 167 (2003) (analyzing Perkins v. Lee, No. 02-25, 2003 WL 21729943, at *1 (4th Cir. July 25, 2003)); Perkins v. Lee, No. 02-25, 2003 WL 21729943, at *9 (affirming the Supreme Court of North Carolina's conclusion that a trial judge did not err in excusing a juror for cause who, when asked if he "would be able or unable to vote for a recommendation of the death penalty," stated that he did not "know whether [he] could vote on the death penalty" because it did not result in a decision that was contrary to established federal law or "result[ ] in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"); *see also* Green v. Commonwealth, 580 S.E.2d 834, 845 (Va. 2003) (holding, in part, that a prospective juror was properly excused when he could not give clear answers to voir dire questions about whether he could hear the evidence and come to a conclusion on whether to impose a death or life imprisonment sentence).

witness before he testifies. If information showing that testimony may be perjured becomes available after the testimony has been given, counsel should immediately move for a mistrial with an alternative motion to strike the questionable testimony and a request for a curative instruction.

4. Mitigating Evidence

Finally, *Jackson* reveals the importance of establishing clearly the relevance to the defendant of all mitigating evidence. Counsel must take care not to lose mitigating evidence because of a failure to show its relevance.[86] In addition, counsel should be equally careful to ensure that the same relevance standards that are applied to the defense are applied to the Commonwealth's evidence for death.[87]

V. Conclusion

Jackson reveals the importance of determining and assuring that statutory aggravating factors appear in the indictment if a defendant is being tried in a Virginia capital case. Without statutory aggravating factors in the indictment, a defendant is only capital-life (as opposed to capital-death) eligible. Additionally, *Jackson* creates a difficult problem for defense teams in federal capital cases because an inference can be made that an aggravating factor, even if not specifically alleged, is present in an indictment. *Jackson* also illustrates problems that may occur at various stages of a trial, including: pre-trial (juror selection issues), at trial (perjured testimony questions), and post-trial (presentation of mitigating evidence) issues.

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86. Failure to show the relevance of mitigating evidence could result in an ineffective assistance of counsel claim. *See* Wiggins v. Smith, 123 S. Ct. 2527, 2535 (2003) (stating that counsel's failure to investigate mitigating evidence was grounds for ineffective assistance of counsel); Williams v. Taylor, 529 U.S. 362, 396 (2000) (finding that defense counsel's failure to discover and present mitigating evidence constituted ineffective assistance of counsel).

87. *See* Vinson v. Commonwealth, 522 S.E.2d 170, 175 (Va. 1999) (illustrating the importance of paying particular attention to the way evidence is phrased and used as defensive mitigation evidence). Defense teams should be alert to the Commonwealth's rebuttal for death and ensure that it is actually evidence that is in rebuttal to the defense's case for life.