Unconsidered Mitigators and Invalid Aggravators in the Penalty Phase: Reconsidering Buchanan v. Angelone

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I. Introduction

Buchanan v. Angelone¹ was a defeat for the Virginia death penalty defense bar. The Court refused to require either general or specific mitigation instructions in the penalty phase. But, as is often the trade of those who make death penalty defense their occupation, this article seeks to glean useful law from an overall defeat, to make lemonade out of this lemon.

The first part looks at the Court's analysis of the sentencing phase instruction utilized by the trial court in Buchanan, how it determined that the rather unclear language sufficed to satisfy the Eighth and Fourteenth Amendments and what steps defense counsel might take to deal with same. The second part explores the validity of eligibility phase aggravators in light of the Buchanan Court's emphasis on the necessity for channeling and limiting jury discretion more extensively in this area.

II. Unconsidered Mitigators

On September 15, 1987, Douglas McArthur Buchanan, Jr. killed his father, step-mother and two half-brothers after arguing with his father over his natural mother's death of breast cancer.² Buchanan was convicted of the capital murder of more than one person as part of the same act or transaction in the Circuit Court of Amherst County.³ At the sentencing phase,

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Buchanan introduced mitigation evidence regarding his mother’s early death from breast cancer, his father’s subsequent remarriage, and his parent’s subsequent attempts to prevent him from visiting his maternal relatives. A psychiatrist also testified that Buchanan was under extreme emotional disturbance at the time of the crime, largely because of stress induced by the manner in which Buchanan’s family had dealt with and reacted to his mother’s death.

A. Buchanan’s Requested Mitigation Instructions

In the sentencing phase of Buchanan’s trial, both the Commonwealth and Buchanan agreed that the court should use Virginia’s pattern capital sentencing instruction to charge the jury. In addition, Buchanan requested the following four jury instructions on particular mitigating factors: (1) no significant history of prior criminal activity; (2) extreme mental or emotional disturbance; (3) significantly impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the law’s requirements; and (4) his age. All were denied. Buchanan also proposed a more

4. Id.
5. Id.
6. The complete instruction was as follows:

You have convicted the Defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or to life imprisonment.

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of [his family] was outrageous or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment.

If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then you shall fix the punishment of the Defendant at life imprisonment.

Buchanan, 118 S. Ct. at 759 n.1 (quoting app. at 73).

7. All four of the requested factors are specifically stated by the Virginia Code to be facts in mitigation of the offense. Virginia Code section 19.2-264.4 states in pertinent part:

Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant’s conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense or (vi) mental retardation of the defendant.


8. Buchanan, 118 S. Ct. at 760 (quoting app. at 75-76).
RECONSIDERING BUCHANAN V. ANGELONE

9. Id. (quoting app. at 74).
14. The majority consisted of Rhenquist, C.J., who delivered the opinion, O'Connor, Scalia, Kennedy, Souter and Thomas, J.J. Breyer, J., filed a dissenting opinion, in which Stevens and Ginsburg, J.J., joined.
15. Buchanan, 118 S. Ct. at 761.

general instruction regarding mitigating evidence, stating that “[i]n addition to the mitigating factors specified in other instructions, you shall consider the circumstances surrounding the offense, the history and background of [Buchanan] and any other facts in mitigation of the offense.” This request too was denied by the court. The jury returned a verdict in favor of the death penalty on the basis of the vileness aggravator and the trial court sentenced Buchanan to death.

The Supreme Court of the United States granted Buchanan’s petition for a writ of certiorari from the denial of federal habeas corpus relief by the United States Court of Appeals for the Fourth Circuit. “This case calls on us to decide whether the Eighth Amendment requires that a capital jury be instructed on the concept of mitigating evidence generally, or on particular statutory mitigating factors. We hold that it does not.” So saying, the majority of the Court in Buchanan’s case dismissed the notion that fuller, clearer explanations to juries of the applicable law in death penalty cases might assist in the pursuit of justice.

In his argument to the Court alleging it was error for the Fourth Circuit to deny him habeas corpus relief, Buchanan asserted that “the trial court violated his Eighth and Fourteenth Amendment right to be free from arbitrary and capricious imposition of the death penalty when it failed to provide the jury with express guidance on the concept of mitigation, and to instruct the jury on particular statutory mitigating factors.” Buchanan’s assertion finds support in Lockett v. Ohio. In Lockett, the Court stated that “the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” Lockett and its
progeny explicitly prohibit states from limiting the sentencer's consideration of any relevant circumstance that could "cause it to decline to impose the death sentence." 18

The majority denied this claim, resting its decision on the dichotomy between the two phases of the capital sentencing process: the eligibility phase and the sentencing phase. Quoting from *Tuilaepa v. California*, 19 the majority stated that the eligibility phase, where "the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent)," 20 is the phase in regard to which "we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition." 21

Virginia's aggravators 22 are eligibility factors of the type referred to in *Tuilaepa*. Thus, the *Tuilaepa* decision's requirement of heightened specificity for eligibility factors applies to Virginia's statutory aggravators.

The majority stated that Buchanan's assertion of the sentencing jury's need for guidance on the concept of mitigation was misplaced, because mitigation is the subject of the selection phase, in which "we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination." 23 Therefore, consideration of mitigating circumstances occurring in the selection phase is to be an open inquiry, requiring none of the guidance so important in the eligibility phase.

**B. Virginia's Penalty Phase Pattern Jury Instruction**

At oral argument before the Court, Buchanan asserted for the first time that the single instruction given was unconstitutionally vague. It follows in its entirety:

22. Virginia Code section 19.2-264.4 states in pertinent part:

The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused, that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

**VA. CODE ANN. § 19.2-264.4(C) (Michie 1995 & Supp. 1998).**

You have convicted the Defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or to life imprisonment.

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of [his family] was outrageous or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment.

If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then you shall fix the punishment of the Defendant at life imprisonment.24

Justice Breyer’s dissent expounded upon Buchanan’s vagueness argument and the majority responded. The majority’s approach here was threefold: first, the instruction did in fact fulfill the requirements of law; second, Buchanan defaulted the issue; and third, any flaw in the instruction was cured by the doctrine of context. The latter two ideas will be addressed first, and then the former.

Buchanan’s default on the issue of the instruction’s vagueness cannot be contested. He did not object to the use of the instruction at trial and never raised it as an issue until oral argument before the Court.25

With respect to the context doctrine, the majority cited to Boyde v. California26 as an exemplary application. The Court stated that in Buchanan, “the entire context in which the instructions were given expressly informed the jury that it could consider mitigating evidence.”27 The majority pointed to two factors as evidence of the correcting context. The first was the fact that there were two days of mitigating evidence presentation. The second factor was the nature of the arguments put forward to the jury by both defense counsel and the prosecutor regarding the mitigating evidence.28

The majority’s use of the context doctrine here raises two questions. First, the Boyde Court, unlike the Buchanan Court, correctly stated the context doctrine, derived from Boyd v. United States,29 as follows: “a single instruction to a jury may not be judged in artificial isolation, but must be

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24. Buchanan, 118 S. Ct. at 760 n.1 (quoting app. at 73).
25. Id. at 762 n.4.
27. Buchanan, 118 S. Ct. at 762.
28. Id.
29. 271 U.S. 104 (1926).
viewed in the context of the overall charge." Thus under *Boyd*, only other instructions can give contextual meaning to an instruction. The majority's attempted use of evidence presented and arguments made as context for the instruction is simply not within the *Boyd* context rule.

Second, the idea that arguments of counsel are an appropriate place for the jury to look in comprehending jury instructions is unusual at best. Though juror knowledge of the legal system may be limited, the average juror is aware that counsel on both sides are partisan. Most likely, jurors take the arguments of counsel with a grain, if not a handful, of salt. But the reverse is true for judges. The average juror correctly perceives the judge's role to be that of disinterested third party, whose only motivation is justice. This argument is mirrored in Justice Breyer's dissent, which cited to *Taylor v. Kentucky* for the notion that "[t]he jury will look to the judge, not to counsel, for authoritative direction about what it is to do with the evidence that it hears."

In stating that the instruction was by itself sufficient to inform the sentencing jury, the majority explained that in the selection phase, the sentencer "may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." However, state law may "shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence."

In reaching its conclusion, the majority applied the standard for analyzing jury instructions utilized by the Court in *Boyd*: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." It is interesting to note that the *Boyd* Court cited to five different standards found in Court precedent for analyzing jury instructions in addition to the one applied in *Boyd*, and did not explicitly rule out further use of any of them. An argument can be made that the *Boyd* Court utilized the wrong standard and therefore that the *Buchanan* majority did so as well. The *Boyd* standard asks whether there is a reasonable likelihood that "the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." In contrast, four of the five standards listed by the *Boyd* Court ask roughly the

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36. *Id.* at 378-80.
37. *Id.* at 380 (emphasis added).
same question: whether reasonable jurors could have understood or misunder-
stood the instruction. The difference is small in wording but large in
meaning. The Boyde standard asks the reviewing court to speculate on the
undisclosed thought processes of the jurors. There is no dependable method
for finding out whether a juror applied an instruction in a manner which
prevented that juror’s consideration of constitutionally relevant evidence.
Assuming good faith on the part of jurors (as the system does, and in fact
must do), even directly asking a juror could not produce an accurate answer
to this inquiry. “Juror number one. Did you apply instruction X in a way
which prevented the consideration of constitutionally relevant evidence?”
Even if juror number one had done so, again assuming good faith, that juror
would not know that he had.

In contrast, the majority of the standards listed in Boyde inquire into
the understanding of the “reasonable juror.” Reasonable conduct is a topic
with which courts are intimately familiar, and this familiarity would allow
a reviewing court to make a more informed judgment as to the effect of a
particular instruction.

In any case, the Buchanan majority found that the instruction did not
violate the Boyde standard. The majority found that it “afforded jurors an
opportunity to consider mitigating evidence” when it referred to “all the
evidence” in paragraph three. This is a curious conclusion in light of the
fact that no mention or description of mitigating circumstances appears
at all in the instruction. This is in contrast to paragraph two, which describes
the aggravating circumstance in some detail: “his conduct in committing the
murders of [his family] was outrageously or wantonly vile, horrible or
inhuman, in that it involved torture, depravity of mind or aggravated
battery . . . .”

Applying a “reasonable juror” standard, there is a very good argument
to be made that the instruction given in Buchanan was vague to the point of
misleading the reasonable juror, defined here as a lay person, or if possessing
a legal background, possessing no familiarity with death penalty law. One
making this argument would be in good company, for it is precisely the
argument that Justice Breyer made in his dissent in Buchanan.

38. The Boyde Court listed the following inquiries as precedential: (1) what “a reason-
able juror could have understood the charge as meaning,” Francis v. Franklin, 471 U.S. 307,
315-17 (1985); (2) “what a reasonable juror ‘could have done and what he ‘would’ have done,”
California v. Brown, 479 U.S. 538, 541-42 (1987); (3) “whether reasonable jurors ‘could have’
drawn an impermissible interpretation from the trial court’s instructions,” Mills v. Maryland,
486 U.S. 367, 375-76 (1988); (4) whether there is a “substantial possibility that the jury may
have rested its verdict on the ‘improper’ ground,” id. at 377; and (5) “how reasonable jurors
‘would have’ applied and understood the instructions,” id. at 389 (White, J., concurring).

40. The entire instruction given by the trial court can be found supra note 6.
41. Buchanan, 118 S. Ct. at 759 n.1.
Paragraph one of the instruction very generally informed the jury of its task in the penalty phase. Paragraph two described the requirement that the state prove the existence of an aggravating factor beyond a reasonable doubt. Justice Breyer asserted that the key problem language lay in paragraph three, which read as follows:

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment.  

A reasonable juror likely would interpret paragraph three as follows. “If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the Defendant at death,” (i.e., if you find that the murder was vile, then you can sentence the defendant to death). Or, “if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment,” (i.e., if find that the murder was not vile, then you have to sentence the defendant to life). It is the stringing together of the two phrases using the conjunction “or” that leads a reasonable juror to interpret the second phrase in light of the meaning of the first. As Justice Breyer put it, “[w]ithout any further explanation, the jury might well believe that whether death is, or is not, ‘justified’ turns on the presence or absence of Paragraph two’s aggravating circumstances of the crime—not upon the defendant’s mitigating evidence about his upbringing and other factors.” This language effectively removes mitigating evidence from consideration by the reasonable juror. Would not a reasonable juror conclude that there was at the very least a presumption that death should be the sentence if one of the aggravators is found? Such an effect would squarely violate the time-tested dictate of Eddings v. Oklahoma that “the sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” If even one juror interprets the instruction to restrict her consideration of any information which might be mitigating, the rule of Eddings is violated.

42. Id.
43. Id.
44. Id.
45. Id. at 764 (Breyer, J., dissenting).
46. 455 U.S. 104 (1982).
48. See Mills v. Maryland, 486 U.S. 367, 375 (1988) (holding that a case must be remanded for sentencing if the sentencer fails to consider all mitigating evidence, regardless
C. Juror Comprehension Data

The guidelines outlined in Boyde, Tuilaepa and Buchanan leave open to further litigation several issues about the relationship of aggravating and mitigating factors. They also highlight the need for defense counsel to develop creative means of communicating mitigation evidence clearly and understandably despite minimal constitutional requirements.

If the "reasonable juror" standard is the appropriate standard, then research on juror comprehension is relevant to the inquiry. A survey of ten scientific studies of jury instruction comprehension between the years of 1978 and 1989 indicated that "[j]urors do not understand a large portion of the judicial instructions delivered to them even when they are pattern instructions."49

However, even better than studies of how the average person understands such instructions would be systematic interviews with actual death penalty trial jurors. Fortunately, such data has begun to be gathered in the last decade, in the Capital Jury Project, an endeavor funded by the National Science Foundation, aimed at gaining a greater understanding of the capital jury experience. Though the massive project is yet to be completed in its entirety, some individual states' interviews have been completed and analyzed. Indeed, the survey of Virginia capital jurors is not yet finished, but the survey of neighboring North Carolina has been completed.

Obviously, Virginia's capital murder penalty phase instructions are not identical to those of any other state, and thus the application of data from its neighboring state will not be one hundred percent accurate for Virginia. However, due to the dictates of the United States Supreme Court, the overall structure of capital murder trials is similar from state to state, and the same people, namely lawyers, write the pattern instructions in each state. The likelihood is high that conclusions from other states are also applicable in Virginia.

North Carolina law applicable to the sentencing phase of a capital murder trial is similar to Virginia law in material respects. Like Virginia, there is a fixed list of aggravators which the jury may consider,50 while according to federal law, in all states there can be no limit on the mitigating

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circumstances which the jury may consider. Also, both states require proof of aggravators beyond a reasonable doubt, while proof of mitigating factors only to the juror’s satisfaction. Finally, jurors must be unanimous in their finding of any aggravating factor, while a unanimity requirement is forbidden in the jurors’ consideration of mitigating factors.

In the North Carolina segment of the Capital Jury Project, data was gathered from interviews with eighty-three jurors who served in capital trials in the state between 1990 and 1994. Juror comprehension levels in the three critical areas described in the above paragraph were shockingly low. Only 36% of the jurors understood that they were restricted to consideration of only those aggravators which were mentioned by the judge. Almost half believed they could consider any factor which they believed “aggravated” the crime. Such a belief is clearly contrary to that which the Buchanan majority described as “the need for channeling and limiting the jury’s discretion” in the eligibility phase. Only 59% were aware that they could consider any evidence they desired as mitigating.

With respect to aggravating factors, juror understanding was fairly good. Two-thirds knew that proof was required beyond a reasonable doubt and three-quarters knew that juror unanimity was required in finding an aggravator. Of course, two-thirds and three-quarters comprehension on the part of jurors would not seem to satisfy the Court’s “deman[d] [for] certainty that the jury’s conclusions rest[ed] on proper grounds.”

Comprehension was worse regarding mitigating factors. Forty-one percent of jurors believed that mitigating circumstances required proof beyond a reasonable

51. See Lockett, 438 U.S. at 604.
55. See Mills v. Maryland, 486 U.S. 367, 375 (1988). The one major difference between the North Carolina and Virginia statutory schemes is that the former is a “weighing” state, while the latter is not. North Carolina law requires the sentencer to state whether “the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.” N.C. GEN. STAT. § 15A-2000(c)(3) (1997). The Virginia Code instructs that if the jury finds either the “future dangerous” aggravator or the “vileness” aggravator, it is free to impose either death or life imprisonment without parole upon the defendant, without any specific “weight” analysis. See VA. CODE ANN. § 19.2-264.4 (Michie 1998). There is no obvious reason why this difference would have any effect upon the valid application of the Capital Juror Project data to Virginia.
58. Luginbuhl & Howe, supra note 56, at 1167.
59. Id.
60. Mills, 486 U.S. at 376.
doubt while 42% believed that juror unanimity was required to find a mitigating factor.\textsuperscript{61}

Commentators have speculated that one of the reasons juror comprehension of key legal points is so low is that capital instructions "typically use complex language, unfamiliar words, one-sentence definitions of terms, and many sentences with multiple negatives."\textsuperscript{62} Interviewees commented that capital jury instructions "are full of legal talk," and "they are very long and complicated."\textsuperscript{63}

\section*{D. Recommendations}

In May 1998, the Model Jury Instructions Committee for Virginia published Virginia Model Jury Instruction 33.125 ("VMJI 33.125"),\textsuperscript{64} a new version of its model penalty phase jury instruction. The instruction is the successor to the instruction given in \textit{Buchanan}.\textsuperscript{65} The only substantive difference between the \textit{Buchanan} instruction and the new VMJI 33.125 that is relevant to this discussion is the addition of four words: "including evidence in mitigation." What would be paragraph three in the \textit{Buchanan} instruction now appears as follows:

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, \textit{including evidence in mitigation}, that the death penalty is not justified, then you shall fix the punishment of the Defendant at: [life imprisonment].\textsuperscript{66}

The additional language is certainly a step in the right direction, and can be viewed as an implicit acknowledgment of the misleading nature of the \textit{Buchanan} instruction. However, there are two reasons why this new version of the instruction may not be enough to insure proper jury understanding of its role. First, it may simply be ignored by trial courts. In \textit{Buchanan}, decided in January 1998, which according to one commentator was after the Model Jury Instructions Committee decided to issue the new model instruction, the Court approved of the \textit{Buchanan} penalty phase instruction, describing it as "a simple decisional tree."\textsuperscript{67} With the United

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\textsuperscript{61.} Luginbuhl & Howe, supra note 56, at 1167. \\
\textsuperscript{62.} \textit{Id.} at 1169. \\
\textsuperscript{63.} \textit{Id.} Interestingly, commentators have observed that the documented instructional ambiguity in North Carolina's instructions "increases the likelihood of the jury returning a verdict of death." \textit{Id.} at 1176. There is no obvious reason to believe that instructional ambiguities in Virginia's instructions have any different effect. \\
\textsuperscript{64.} \textit{VIRGINIA MODEL JURY INSTRUCTIONS, CRIMINAL}, No. 33.125 (1998). \\
\textsuperscript{65.} \textit{See supra} note 6. \\
\textsuperscript{66.} \textit{VIRGINIA MODEL JURY INSTRUCTIONS, CRIMINAL}, No. 33.125 (1998) (emphasis added). \\
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States Supreme Court’s stamp of approval of the “old” instruction, it is questionable whether Virginia trial judges, always sensitive to reversal, will opt to begin using VMJI 33.125, the “new” instruction.

Second, bearing in mind that the data collected by the Capital Jury Project and the conclusions of commentators, adding properly instructive language after misleading language is not the optimal solution. Why not simply replace VMJI 33.125 with an instruction that is comprehensible to the lay reader? According to Virginia statutory law, “[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.” A proposed instruction follows:

Capital Murder—Bifurcated Penalty Trial

Introduction
You have convicted the Defendant of a crime which can be punished by the death penalty. Your job is to decide whether to sentence the defendant to death or to life imprisonment without possibility of parole.

Step 1
Did the Commonwealth prove to all the jurors that beyond a reasonable doubt, the Defendant’s conduct was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to his victims (and/or that it is probable that the Defendant would commit criminal acts of violence in the future, constituting a continuing serious threat to society)? If no, then the Defendant must be sentenced to life imprisonment. If yes, go to Step 2.

Step 2
Each juror must, individually, decide if there are any facts or circumstances which make that juror believe that life imprisonment is the more appropriate punishment for the Defendant. For instance, a juror might

68. In a telling move, the majority itself, in an attempt to justify the language of the Buchanan instruction, translated it into the following simpler language:

The instruction represents a simple decisional tree. The second paragraph states that the Commonwealth must prove the aggravator beyond a reasonable doubt. The third and fourth paragraphs give the jury alternative tasks according to whether the Commonwealth succeeds or fails in meeting its burden. The third paragraph states that “if” the aggravator is proved, the jury may choose between death and life. The fourth paragraph states that “if” the aggravator is not proved, the jury must impose life.

Buchanan, 118 S. Ct. at 762, n.4. The reader should be mindful of the fact that the vast majority of readers of Supreme Court opinions are attorneys, skilled in parsing language. Yet even for this audience, the majority feels it must simplify the language of the instruction in order to effectively communicate the instruction’s comprehensibility to lay readers.

69. VA. CODE ANN. § 19.2-263.2 (Michie 1995).

70. The meaning of this aggravator requires further definition. See infra notes 74-89 and accompanying text. It is suggested herein that the effort to clarify the definition of the “vileness” aggravator be made in a separate, additional instruction. This section of the article is concerned with whether jurors correctly understand the decisional process.
consider any role the victim played in his own demise, the nature of the
Defendant's childhood, any mental or emotional problems the Defen-
dant might have, or any other information the juror thinks is important
to the decision. [Here, defense counsel should tailor the requested in-
struction to the particular mitigating facts in the case.]

Step 3
Each juror must, individually, decide from all the facts and circumstances
whether or not to sentence the Defendant to death or to life imprison-
ment. In order for the Defendant to receive the death penalty, all the
jurors must agree that the death penalty is the appropriate punishment
for this Defendant.

In the event a trial judge refuses to employ the above instruction, there
is a more minor modification to the traditional instruction that might be
accepted. Paragraph three of the Buchanan instruction, and the similar
paragraph in VMJI 33.125, states roughly the same language:

If you find from the evidence that the Commonwealth has proved
beyond a reasonable doubt the [existence of one or both aggravators],
then you may fix the punishment of the Defendant at death or if you
believe from all the evidence that the death penalty is not justified,
then you shall fix the punishment of the Defendant at life imprisonment.71

The use of the word “justified” is problematic. A reasonable juror would
find that the first if-then statement instructs that a death sentence is “justi-
fied” when the Commonwealth proves one or both aggravators by a reason-
able doubt. This juror would likely find the second if-then statement
redundant, because she has already decided whether a death sentence is
justified in addressing the first statement. The second statement could be
more effective if the word “appropriate” is used instead. This would give it
meaning independent of the first statement, requiring the juror to decide
whether the justified action is, in light of all the evidence, actually appropri-
ate.

III. Invalid Aggravators

A careful reading of Buchanan also lends support to an issue familiar to
readers of the Capital Defense Journal, the invalidity of the vileness aggrava-
tor through vagueness and the issue’s applicability in cases where the Com-
monwealth seeks the death penalty under both statutory aggravators.

In one of the 1976 decisions in which the Court reinstated the death
penalty, the Court stated that “where discretion is afforded a sentencing
body on a matter so grave as the determination of 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

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71. Buchanan, 118 S. Ct. at 760, n.1 (quoting app. at 73) (emphasis added).
action.” Further, the state “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.” The Court made clear that this narrowing guidance must occur in the eligibility phase, the phase in which various aggravators must be proven by the state.

A. The Statutory Language of Virginia’s Vileness Factor is Insufficient on Its Face

Part C of Virginia Code section 19.2-264.4 requires that in the penalty phase, the Commonwealth must prove one or both of the Virginia statutory aggravators, either future dangerousness or that the Defendant’s “conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.” Virginia’s vileness factor has never been addressed by the Court. Nevertheless, the issue is controlled by Godfrey v. Georgia, where the Court declared unconstitutional a Georgia statutory aggravator identical to Virginia’s vileness factor. The Court stated that “there is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as outrageously or wantonly vile, horrible and inhuman.”

An unconstitutionally vague aggravator may be saved if a state limits its construction in order to provide “meaningful guidance to the sentencer.” However, the Court has stated that these limiting instructions may themselves be unconstitutionally vague. Of the three “types” of vileness, torture, depravity of mind and aggravated battery, Virginia has attempted to save only the latter two through limiting constructions. In Smith v. Commonwealth, the Virginia Supreme Court defined depravity of mind as “a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.” Needless to say, this definition communicates no more specific or narrow meaning than the term it is meant to clarify. The Smith court’s definition of aggravated battery likewise fails to sufficiently narrow its meaning.

76. 446 U.S. 420 (1980) (plurality opinion).
77. Godfrey, 446 U.S. at 428-29.
court stated that aggravated battery in this context means conduct which is "qualitatively and quantitatively . . . more culpable than the minimum necessary to accomplish an act of murder."82 One can easily imagine a fact pattern involving the minimum necessary to commit murder: one bullet to the head, killing instantly, fired from a concealed position, giving the victim no prior apprehension of danger. Thus construed, anything more than that would be aggravated battery and thus vile, indicating that the factor does not meaningfully narrow the class of defendants. Therefore, Virginia's vileness factor, as construed, remains unconstitutionally vague.83

B. Virginia's Vileness Factor is Unconstitutional as Applied

An examination of three recent Virginia Supreme Court cases demonstrates that, as applied, the vileness factor is unconstitutionally vague. In Reid v. Commonwealth,84 a case wherein the defendant stabbed the victim twenty-two times, the court focused specifically on the act of killing, stating 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."85 In Hedrick v. Commonwealth,86 the court looked beyond the act of killing in order to affirm a death sentence based upon the vileness factor. The court looked beyond the fact that the killing occurred through a single gunshot to the head, and found the torture prong of vileness because of the rape which preceded the killing.87 Finally, the court in Cherrix v. Commonwealth88 affirmed a death sentence based upon the vileness/depravity of mind factor by consideration of events which occurred after the killing incident was entirely over. Clearly, the Virginia vileness factor serves no meaningful narrowing function with respect to the fact finder at trial or the

82. Id.
83. For a more in depth discussion of this issue, see the Virginia Capital Case Clearinghouse Trial Manual, pp. 203-29, available through the Virginia Capital Case Clearinghouse at Washington & Lee University School of Law, Lexington, Virginia 24450.
85. Reid, 506 S.E.2d at 793 (quoting Boggs v. Commonwealth, 331 S.E.2d 407, 421 (Va. 1985)).
Virginia Supreme Court in its reviewing capacity. Therefore, the factor is unconstitutional as applied.\textsuperscript{89} Though the United States Supreme Court has up to this point refused to grant certiorari on this issue, defense counsel would be well advised to continue to raise it, as persistence often pays dividends.\textsuperscript{90}

\section*{C. Sentences Based on A Sole Invalid Aggravator}

The \textit{Godfrey} Court went beyond its condemnation of the Georgia vileness factor however, stating that "failure to instruct the sentencing jury properly with respect to the aggravator does not automatically render a defendant’s sentence unconstitutional."\textsuperscript{91} Therefore, even if defense counsel can convince a reviewing court that the trial court fact finder considered an invalid aggravating factor, that consideration can be cured by appellate review, assuming that the reviewing court itself applies a valid narrowing construction of the aggravator. The Georgia Supreme Court failed this test in \textit{Godfrey}, and as mentioned above, an excellent argument can be made that the Virginia Supreme Court’s attempt at narrowing its vileness factor is also insufficient under \textit{Shell v. Mississippi}.\textsuperscript{92} The Court stated in \textit{Walton v. Arizona}\textsuperscript{93} that "[t]rial judges are presumed to know the law and to apply it in making their decisions. If the [state] Supreme Court has narrowed the definition of the [vileness] aggravating circumstance, we presume that the [state] trial judges are applying the narrower definition."\textsuperscript{94} Applying the Court’s reasoning, because the Virginia Supreme Court has not effectively narrowed the vileness aggravator, we can assume that trial judges are not validly instructing juries, and are not themselves applying a valid vileness aggravator at the required judge-sentencing hearing.

Therefore, in a death penalty case based solely on the vileness aggressor, which has reached a federal court through the review process, defense counsel may properly petition that federal court to remand the case to state court for (1) proper construction of the aggravator, or (2) a new sentencing hearing.

\textsuperscript{89} Although this analysis does not address the “future dangerousness” factor, it is the position of the Virginia Capital Case Clearinghouse that this factor too is unconstitutional as applied. See Alix M. Karl, Case Note, 11 \textit{CAP DEF. J.} 373 (1999) (analyzing Sheppard v. Taylor, 165 F.3d 19 (4th Cir. 1998)).
\textsuperscript{90} See, e.g., Simmons v. South Carolina, 512 U.S. 154 (1994).
\textsuperscript{91} Lambrix v. Singletary, 117 S. Ct. 1517, 1526 (1997).
\textsuperscript{92} 498 U.S. 1 (1990) (stating that limiting instructions themselves may be unconstitutionally vague).
\textsuperscript{93} 497 U.S. 639 (1990).
\textsuperscript{95} Virginia Code section 19.2-264.5 requires that, after a jury imposes a sentence of death on a defendant, the trial judge shall, after consideration of the presentence report, decide whether or not to set aside the verdict. A judge may only do so “upon good cause shown,” meaning that the jury’s decision is more than a recommendation. VA. CODE ANN. § 19.2-264.5 (Michie 1995 & Supp. 1998).
hearing. In a case where the sentence was based upon both aggravators, the situation is a bit more complicated.

D. Weighing Versus Non-weighing States

In Stringer v. Black,96 the Court held that in a weighing state,97 when one of two or more aggravators found by the sentencer is later determined to be invalid, "a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale."98 The Court continued, stating that "[w]hen the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence."99 In Clemons v. Mississippi,100 the Court, addressing the same issue, held that "[a]n automatic rule of affirmance in a weighing State would be invalid under Lockett v. Ohio ... for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances."101

However, in Tuggle v. Netherland,102 the United States Court of Appeals for the Fourth Circuit held that Virginia is a non-weighing state. In such a state, "so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty."103 Despite Tuggle, there are facts which tend to show that Virginia is in practice, and thus in reality, a weighing state. The jury instruction used in Buchanan, discussed in the first part of this article, instructed the sentencer to decide life or death based upon whether the juror "believe[s] from all the evidence" that the death penalty is justified. So, in the selection phase, jurors are asked to look at "all the evidence," consisting of mitigators and aggravators, and decide life or death. Taking a simple and common sense approach, one might ask: How does a juror evaluate these mitigators against these aggravators? Is there any method for doing so other than to compare

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97. A "weighing state" is one in which the death penalty statute instructs the sentencer to weigh the aggravators and mitigators in deciding the sentence. For example, in North Carolina, the sentencer is instructed to state whether "the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found." N.C. GEN. STAT. § 15A-2000(c)(3) (1997).
99. Id.
101. Id.
them in the mind of the juror, or in other words, to weigh them against each other? This common sense hunch is supported by social science: "In everyday life, a common decision strategy is to weigh the pros and cons on a particular issue and then to go with the greater weight of the evidence."\textsuperscript{105} This statement is made in the context of the assertion that when jurors do not fully understand the intricacies of their instructions, they simply revert to a time-tested method for decision making: weighing factors. It is asserted here that when Virginia jurors are confronted with the confusing decision-tree of the penalty phase instruction, they naturally utilize weighing as a decision making technique.

Evidence that even the attorneys and judges think in terms of weighing can be found in the \textit{Buchanan} decision. Without comment of its own, the Court, recounting the pertinent events of the trial, described the (Virginia) prosecutor in the case as stating that "the jury . . . would have to balance the things in petitioner's favor against the crimes he had committed."\textsuperscript{106} Later the Court states that the prosecutor said that "the jury had to weigh that \[mitigating\] evidence against petitioner's conduct . . . ."\textsuperscript{107} In fact, the Court itself, in describing the context in which the jury instructions were given, stated that the (Virginia) "parties in effect agreed that there was substantial mitigating evidence and that the jury had to weigh that evidence against petitioner's conduct in making a discretionary decision on the appropriate penalty."\textsuperscript{108}

Further, the Court's assumed linkage in \textit{Zant v. Stephens}\textsuperscript{109} between non-weighing states and specific jury findings of aggravators is flawed. In fact, North Carolina and Florida, both weighing states, require such a specific finding from the sentencer. North Carolina requires that the foreman of the jury sign a writing which shows "the statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt . . . ."\textsuperscript{110} Florida requires the trial judge to support its determination of sentence by "specific written findings of fact based upon the circumstances in subsection (5) and (6),"\textsuperscript{111} where those subsections are lists of aggravating and mitigating circumstances, respectively.

In any event, whether or not Virginia is in fact a weighing state, there can be no automatic salvage of death sentences by the Virginia Supreme Court. As stated above,\textsuperscript{112} the \textit{Stringer} Court addressed non-weighing states as well as weighing, holding that in the former states, "so long as the sen-

\begin{thebibliography}{112}
\bibitem{105} Luginbuhl & Howe, \textit{supra} note 56, at 1174.
\bibitem{106} \textit{Buchanan}, 118 S. Ct. at 759 (emphasis added).
\bibitem{107} \textit{Id.} (emphasis added).
\bibitem{108} \textit{Id.} at 762-63 (emphasis added).
\bibitem{109} 462 U.S. 862 (1983).
\bibitem{111} FL. STAT. § 921.141(3) (1998).
\bibitem{112} See \textit{supra} note 98 and accompanying text.
\end{thebibliography}
tencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty.”113 However, this statement was qualified by the Court in the very next sentence of the opinion: “Assuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury’s determination, there is no constitutional violation resulting from the introduction of the invalid factor in an earlier stage of the proceedings.”114 Therefore, even in a non-weighing state, when a death sentence is based on more than one aggravator and one aggravator is later found to be invalid, the sentence may not be automatically salvaged, but must at least undergo harmless error review by the state appellate court. In practical terms, harmless error review in the Virginia Supreme Court may look very much like automatic salvage, but at a minimum, this interpretation of Stringer requires the addition of one more step to the process.

E. Recommendations

In addition to the barriers in Buchanan to sentencing jury comprehension of the proper place of mitigation, the problem is exacerbated by the unconstitutional application of aggravators, especially the vileness factor. It is essential that defense counsel continue to press the Virginia courts on this issue, and equally important that counsel federalize the objections and pursue them in federal courts.

It is clear from the foregoing arguments that Virginia is, in practice, a weighing state. In recognition of that reality, in a case where one of two aggravating factors found by a sentencer is later held to be invalid, the proper course of action is remand to the Virginia Supreme Court for determination whether “the evidence supports the existence of the aggravating circumstance as properly defined,”115 or whether, eliminating consideration of the invalid factor altogether, the remaining aggravating circumstance is sufficient to warrant the death penalty.116 In this way, the Virginia Supreme

114. Id. (emphasis added).
116. A further consequence of recognizing that Virginia is in reality a weighing state is the application of Espinosa v. Florida, 505 U.S. 1079 (1992), to the state. Espinosa held that in a weighing state where sentencing authority is placed in two actors rather than one, neither actor may be permitted to weigh invalid aggravating circumstances. Id. at 1082. The Court found that because Florida law requires the trial court to give “great weight” to the jury recommendation, see Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), that if the jury weighed an invalid aggravator, the trial court must be presumed to have done so as well, at least indirectly. Id.

Analogously, Virginia law states that the trial judge, in her post jury-sentence sentencing hearing, may impose a sentence different from the jury only “upon good cause shown.” VA. CODE ANN. § 19.2-264.5 (Michie 1995 & Supp. 1998). The statute’s implicit urging of
Court's habit of automatic salvage for death sentences under improper or lacking limiting constructions will be curtailed. It is of course likely the court will "save" the aggravator on remand, but this extra step will, if nothing else, slow the process. And finally, even if counsel is unable to establish that the "weighing state" requirements of *Stringer* apply to Virginia, counsel may nevertheless legitimately insist that the Virginia Supreme Court apply harmless error review, rather than automatic salvage.

**IV. Conclusion**

*Buchanan v. Angelone* was, on the whole, a loser for Virginia capital defendants. The Court affirmatively stated first that defendants are not entitled to jury instructions on the subject of mitigation or on particular mitigating factors, and second that Virginia's pattern penalty phase instruction, used in Buchanan's sentencing phase, was just fine. On the bright side, however, it brought issues of instruction comprehension to the forefront, possibly (and ironically) contributing to Virginia's new pattern instruction which does at least mention the word mitigation. Defense counsel should take advantage of recent social science evidence that jurors simply do not understand the typical jury instruction, and push for more comprehensible ones. *Buchanan* also involved the controversy over the invalidity of the "vileness" aggravator, and the potential remedies available once counsel have shown it to be so. Though the case seems, at first glance, without redeeming value, it has provided defense counsel direction in two potentially advantageous areas of law.