
In The
Supreme Court of Virginia

RECORD NOS. 082464, 082465

ALFREDO R. PRIETO,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

4. The Court erred in denying Mr. Prieto's request for an additional expert to testify on the issue of mental retardation.¹

6. The Court erred in denying Mr. Prieto's motion to bar a re-trial and impose a life sentence.

13. The Court erred in failing to bifurcate the penalty phase from the mental retardation issue.

14. The Court erred in failing to determine the issue of mental retardation prior to trial.

15. The Court erred in denying Mr. Prieto's motion to declare the Virginia death penalty statutes unconstitutional, and to prohibit the imposition of the death penalty, on grounds the Virginia death penalty statutes violate the Virginia and United States Constitutions.

17. The Court erred in denying motion that Virginia's vileness predicate is so arbitrary and unclear that it is unconstitutional.

18. The Court erred in not excluding evidence of unajudicated acts.

22. The Court erred in sustaining the Commonwealth's attorney's objection to Mr. Prieto's attorney's question to Officer John Halley, as follows: "[C]ould [there] have been other trace evidence which could reveal who the assailants in this case were in a head hair, but that would be lost in this one?"

25. The Court erred in allowing Gerald Murphy to testify that the apartment complex he shared with Rachael Raver had a community

¹ On December 29, 2008, Mr. Prieto filed a request for additional pages for this brief. However, this Court denied his request on January 8, 2009. As such, Mr. Prieto was forced not to fully brief the Assignments of Error (the "AOE") Nos. 1, 2, 3, 5, 7-12, 16, 19-21, 23-24, 44, 47-59, 62-66, 70-74, and 76-77, even though he does not wish to waive them, and believes them to have merit. (JA 17024-032). Since this denial occurred during the appeal, it is not subject to the AOE; however, it is addressed in this brief in Section VI.

laundry room, as the testimony was irrelevant and invited the jury to improperly speculate that the hair was the result of her washing laundry.

26. The Court erred in allowing Tulio Sanchez to testify that Mr. Prieto sometimes worked near Dulles Airport because it invited the jury to speculate that Mr. Prieto was familiar with Hunter Mill Road.

27. The Court erred in allowing Charles Linch to testify about the “transiency of hair” because he was not qualified as an expert on this subject.

28. The Court erred in allowing Alicia Hernandez to testify to witnessing Mr. Prieto cleaning a gun, as its prejudicial effect outweighed its probative value.

29. The Court erred in denying Mr. Prieto’s motion to strike the capital murder counts, rape count, use of a firearm in the commission of a felony counts, and grand larceny count for insufficient evidence.

30. The Court erred in allowing the Commonwealth’s attorney to ask Myron Scholberg about the length of the hairs recovered from the pubic combings of Rachael Raver because the Commonwealth lost the evidence and the witness could not answer the question.

31. The Court erred in allowing the Commonwealth’s attorney to ask Myron Scholberg about how he cannot exclude the possibility that the hairs in V2 were of Hispanic origin, as the question was misleading to the jury because Mr. Prieto’s hair was not classified as Hispanic, but as Mongoloid/Caucasian.

32. The Court erred in allowing the Commonwealth’s attorney to ask Charles Linch about whether one could conclude that hair that had “dense, dark pigmentation” was Negroid if that is all the information about the hair one had, as the question’s prejudice outweighed its probative value.

33. The Court erred in failing to strike the death penalty at the close of the Commonwealth’s case-in-chief because the Commonwealth failed to prove Mr. Prieto was the triggerman.

34. The Court erred in not granting Mr. Prieto's request for a mistrial based on Charles Linch's answer ("... if I just had a short piece, or dark ones, I may have mistakenly thought it was from a black person.").

35. The Court erred in adopting the "principal-in-the-first-degree" language in the "triggerman" jury instruction.

36. The Court erred in not granting Mr. Prieto's instruction G, which related to the "missing evidence."

37. The Court erred in denying Mr. Prieto's motion to bar the death penalty because the Commonwealth had lost evidence crucial to Mr. Prieto's defense.

38. The Court erred in denying Mr. Prieto's motion to bar the Commonwealth's attorney from arguing the following "points" to the jury during his closing argument, as they have no basis but a speculative basis: (a) that any of the unknown hairs were from a female, from Mr. Prieto, from a Hispanic individual, or from an individual who was not a suspect; (b) that the "missing hair" was from transference, and was not related to the killings; (c) that the quality of the "missing hair" was insufficient for further forensic analysis; (d) that the gun to which Mr. Prieto allegedly had access was the gun that killed Rachael Raver and Warren Fulton; and (e) that Mr. Prieto was familiar with Hunter Mill Road since he allegedly worked near Dulles Toll Road in the past.

39. The Court erred in not sustaining counsel for Mr. Prieto's objection to the Commonwealth's attorney's characterization of Alicia Hernandez's testimony during his closing argument.

40. The Court erred in not striking the Commonwealth's attorney's "request for justice" plea during its (rebuttal) closing argument.

41. The Court erred in denying Mr. Prieto's motion to strike the vileness theory of the death penalty.

42. The Court erred in failing to give the penalty verdict form Mr. Prieto's attorneys provided and instead provided an erroneous verdict form.

43. The Court erred in overruling Mr. Prieto's objections to the Commonwealth's attorney presenting Mr. Prieto's records of conviction in California, with the death sentence displayed, to the jury.

45. The Court erred in overruling Mr. Prieto's objection to the Commonwealth's attorney cross-examining Dr. Stewart with regard to the Virginia standard for mental retardation.

46. The Court erred in denying Mr. Prieto's motion to exclude evidence related to Mr. Prieto's alleged unadjudicated criminal misconduct.

50. The Court erred in overruling Mr. Prieto's objection to the Commonwealth's attorney presenting rebuttal evidence with regard to the issue of mental retardation prior to the conclusion of Mr. Prieto's affirmative mental retardation case.

60. The Court erred in not instructing the jury that the sub-factors required for a finding of death, including vileness and future dangerousness, have to be unanimous.

61. The Court erred in denying counsel for Mr. Prieto's proposed instruction "J", which properly instructed the jury that a death sentence is never mandatory, and that a life sentence may still be imposed even where a jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt.

66. The Court erred in refusing counsel for Mr. Prieto's proposed instruction "C", which provided a definition of the standard deviation to the jury.

67. The Court erred in refusing counsel for Mr. Prieto's proposed instruction "H", which provided a definition of future dangerousness to the jury.

68. The Court erred in refusing counsel for Mr. Prieto's proposed instruction "K", which provided a definition of vileness to the jury.

69. The Court erred in its response to jury note #1, which asked "Your Honor, regarding the first aggravating circumstance: 'constitute a continuing serious threat to society'; are we to consider that he is already

never likely to leave prison or should we consider the possibility of him walking the street as a free man?”

75. The Court erred in denying Mr. Prieto’s motion for a new trial and motion to set aside the jury verdict.

78. The Court erred in not setting aside the jury verdict or granting a new trial because the Court erroneously refused to instruct the jury, pursuant to *Powell v. Commonwealth*, 261 Va. 512 (2001) and *Morrisette v. Warden of Sussex I State Prison*, 270 Va. 188 (2005), that a life sentence may still be imposed even where a jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt.

79. The Court erred in not dismissing the charges against Mr. Prieto because the Commonwealth lost exculpatory evidence, *i.e.*, hair recovered from the pubic combings of Rachael Raver.

80. The Court erred in not precluding the Commonwealth from arguing that the missing hair recovered from the pubic combings of Rachael Raver might have been Mr. Prieto’s hair.

81. The Court erred in not instructing the jury that the missing hair recovered from the pubic combings of Rachael Raver was from a black person and was sufficient for DNA analysis, which might have identified its actual donor.

82. The Court erred in imposing the sentence of death, as it was imposed under the influence of passion, prejudice, and/or another arbitrary factor, and is excessive or disproportionate to the penalty imposed in similar cases.

QUESTIONS PRESENTED

1. Did the Circuit Court err in failing to dismiss the charges against Mr. Prieto because the Commonwealth had lost exculpatory evidence? (AOE Nos. 22, 25, 27, 30-32, 34, 37, 38, and 79-82).

2. Did the Circuit Court err in failing to preclude the Commonwealth from seeking a capital murder charge against Mr. Prieto because it had lost exculpatory evidence? (AOE Nos. 22, 25, 27, 30-32, 34, 37, 38, and 79-82).

3. Did the Circuit Court err in failing to dismiss the charges against Mr. Prieto because the Commonwealth's evidence was insufficient to establish beyond a reasonable doubt that Mr. Prieto was the "triggerman"? (AOE Nos. 26, 28-29, 33, 35, 36, and 38-39).

4. Did the Circuit Court err in failing to preclude the Commonwealth from seeking a capital murder charge against Mr. Prieto because the Commonwealth's evidence was insufficient to establish beyond a reasonable doubt that Mr. Prieto was the "triggerman"? (AOE Nos. 26, 28-29, 33, 35, and 38-39).

5. Did the Circuit Court err in finding juror misconduct in *Prieto I* and declaring a mistrial? (AOE No. 6).

6. Did the Circuit Court err in using jury verdict forms that violate the Virginia Supreme Court's precedent and Mr. Prieto's right to Due Process? (AOE Nos. 17, 41-43, 60, 61, 67-69, 75, and 78).

7. Did the Circuit Court err in admitting Mr. Prieto's records of conviction in California, with the death sentence displayed, to the jury? (AOE No. 43).

8. Did the Circuit Court violate Mr. Prieto's constitutional rights in failing to properly adjudicate the issue of mental retardation? (AOE Nos. 4, 13-14, 45, 50, and 66).

9. Did the Circuit Court err in denying Mr. Prieto's motion to declare the Virginia death penalty statutes unconstitutional, and to prohibit the imposition of the death penalty, on grounds the Virginia death penalty statutes violate the Virginia and United States Constitutions? (AOE Nos. 15 and 18).

10. Was Mr. Prieto's death sentence excessive and/or disproportionate considering the crime, Mr. Prieto, and the evidence admitted at trial and, thus, constitutes reversible error? (AOE Nos. 40, and 82).

STATEMENT OF THE CASE

Alfredo Prieto appeals his convictions and death sentences resulting from the fatal shootings of Rachael Raver and Warren Fulton III on December 4, 1988.² A Fairfax grand jury indicted Mr. Prieto on November 21, 2005, for two counts of capital murder, one count of rape, two counts of use of a firearm in the commission of a felony, and one count of grand larceny. The Fairfax County Circuit Court, Dennis J. Smith, C.J., initially tried Mr. Prieto before a jury, beginning on June 5, 2007, (“*Prieto I*”), which ended in Judge Smith improperly declaring a mistrial based on alleged juror misconduct. Mr. Prieto was retried by a jury in the Fairfax Circuit Court, Randy I. Bellows, J., beginning on January 22, 2008. That jury convicted Mr. Prieto on February 6, 2008, and recommended the death penalty on both counts of capital murder on March 3, 2008 pursuant to VA. CODE ANN. § 19.2-264.4. The Circuit Court sentenced Mr. Prieto to death on May 23, 2008 and denied Mr. Prieto’s motion to set aside his sentence of death and grant a new trial on September 18, 2008. Mr. Prieto timely filed his notice of appeal with this Court on November 24, 2008. (JA 17003-005). His appeal challenges his convictions and death sentences.

² For clarity, the Appellant refers to himself as “Mr. Prieto” or as “the Defendant” and refers to the Appellee as “the Commonwealth.” Citations to the record are to the Joint Appendix, *i.e.* (JA __).

STATEMENT OF FACTS³

This Court should provide Mr. Prieto with a new trial or, at minimum, a new sentencing hearing, because the Circuit Court committed several prejudicial errors including, but not limited to: (1) failing to dismiss the charges or preclude the death penalty because the Commonwealth lost exculpatory evidence (JA 8407-08, 8429-30); (2) failing to dismiss the charges or preclude the death penalty because the evidence was insufficient to establish that Mr. Prieto was the “triggerman” (JA11693-70, 11757-58); (3) improperly declaring a mistrial in *Prieto I* (JA 7649); (4) using verdict forms that violated this Court’s precedent and Mr. Prieto’s right to Due Process (JA 8992-993); (5) admitting Mr. Prieto’s records of conviction in California, with the death sentence displayed, to the jury (JA 12498, 12507, 12514); (6) failing to properly adjudicate the issue of mental retardation consistent with Mr. Prieto’s constitutional rights (JA8355); (7) imposing the disproportionate sentence of death; and (8) failing to declare the Virginia death penalty statutes unconstitutional (JA 8355-56).

³ In addition to this Statement of Facts, Mr. Prieto has set forth the relevant facts throughout this brief.

ARGUMENT

I. The Circuit Court Committed Numerous Prejudicial Errors, Which Require Reversal Of Mr. Prieto’s Convictions And Death Sentences. (AOE Nos. 22, 25-27, 28-32, 33-39, And 79-82).

A. The Commonwealth Violated Mr. Prieto’s Constitutional Rights Because It Lost Exculpatory Evidence. (AOE Nos. 22, 25, 27, 30-32, 34, 36-38, And 79-82).

The evidence at trial established that at least one person other than Mr. Prieto had been involved in the homicides. Investigators gathered “pubic combings”⁴ from Ms. Raver, which included a complete head hair and a head hair fragment, both of which the Commonwealth’s hair examiner, Myron Scholberg classified as “characteristically Negroid”, in 1988.⁵ (JA 11792-804, 11795). Mr. Scholberg testified that the full Negroid head hair was sufficient to conduct a comparison to determine whether the hair came from Mr. Prieto or a third party. (JA 11795-97).

Based on Mr. Scholberg’s 1988 report and his 2008 trial testimony, as well as the testimony of Charles Linch, the Commonwealth’s hair examiner in 2005, the hairs could not have been Mr. Prieto’s because his

⁴ In connection with the investigation of suspected sexual assaults, police investigators collect samples as part of a Physical Evidence Recovery Kit (“PERK”). (JA 10757). The PERK includes, *inter alia*, swabs of the vaginal canal and pubic combings, which collect any foreign hair present. (JA 10758, 10791).

⁵ Additionally, in 1988, investigators collected unidentified hairs found (1) on Mr. Raver’s sweater, (2) on her chest and abdomen, and (3) on a swab of Ms. Raver’s vagina. (JA 11170-71, 11788-89).

hair does not have Negroid characteristics.⁶ (JA 11954, 11799). After the Commonwealth allegedly matched Mr. Prieto's DNA with evidence from the crime, the police re-submitted the hair evidence to the lab. Detective Murphy⁷ testified that, after identifying Mr. Prieto as a suspect, the police sent envelopes that should have contained the hairs from the crime scene and delivered them to the police lab. (JA 11855-65). However, when Mr. Linch opened the envelopes, the hairs were missing. *Id.* Therefore, this evidence was lost, which means Mr. Scholberg's 1988 report is the only evidence that establishes the hairs' characteristics. *Id.*

1. Due Process requires this Court to reverse Mr. Prieto's convictions, or at a minimum, commute Mr. Prieto's sentence to life without parole.

Due Process guarantees Mr. Prieto the right to obtain exculpatory evidence and imposes upon the Commonwealth a duty not to destroy or lose exculpatory evidence. *See California v. Trombetta*, 467 U.S. 479, 485 (1984); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Commonwealth violates Due Process when it loses or destroys evidence, and the exculpatory nature of the evidence was "apparent" before its loss. *See*

⁶ Hairs can have either Caucasian, Negroid, or Mongoloid racial characteristics or a combination of two of these. (JA 11579).

⁷ Detective Robert J. Murphy, Homicide Division, Cold Case Squad, Fairfax County Police Department, was assigned to this case in 1998. (JA 11301, 11853).

Trombetta, 467 U.S. at 489; *Olszewski v. Spencer*, 466 F.3d 47, 55-57 (1st Cir. 2006). This is true even if the defendant cannot demonstrate any bad faith by the Commonwealth. *Id.* Since this lost evidence had apparent exculpatory value, Mr. Prieto merely must show that he could not obtain comparable evidence by other reasonably available means. See *Trombetta*, 467 U.S. at 488-89.

a. The lost hairs had apparent exculpatory value.

Lost evidence identifying an alternative suspect has apparent exculpatory value. See generally *Miller v. Angliker*, 848 F.2d 1312, 1316 (2d Cir. 1988); *United States v. Elliott*, 83 F. Supp. 2d 637, 643 (E.D. Va. 1999). Here, the hairs are exculpatory because they implicate another perpetrator as the “triggerman.”⁸

Even the police recognized the exculpatory import of the hairs because they confined their investigation to black men prior to identifying

⁸ Contrary to what the Commonwealth argued at trial, there was no other explanation for the Negroid hairs being present on Ms. Raver’s pubic area. Ms. Raver was not in a relationship with anyone other than Mr. Fulton. (JA 11285). They could not have transferred to Ms. Raver’s pubic area when the underpants she wore were washed in a shared washing machine or dried in a shared dryer because, on the night of her disappearance, Ms. Raver wore brand new underpants that Mr. Fulton had given to her that evening. (JA 11288-89). The Commonwealth based that argument on the improperly admitted testimony of Gerald Murphy, Ms. Raver’s roommate, that the apartment complex he shared with Ms. Raver had a community laundry room, which invited the jury to speculate that the hair was the result of her washing laundry. (JA 11363-64).

Mr. Prieto as a suspect in 2005. For example, the police asked Ms. Raver's parents whether she had any black acquaintances, and they analyzed blood samples of a series of black suspects. (JA 11881). After the police identified Mr. Prieto as suspect, they again directed their attention to the hairs because they believed a co-assailant was involved. *Id.* Further analysis of the lost hairs easily could have supported Mr. Prieto's theory that he was not the "triggerman," and, as such, the hairs are exculpatory.⁹

b. The lost hairs have no substitute.

Mr. Prieto could not obtain comparable evidence by any means because the lost hairs have no substitute. Mr. Prieto could have relied upon Mr. Scholberg's report to demonstrate that the hairs had Negroid characteristics. However, he was prevented from testing the DNA from the hairs and refuting the allegations by the Commonwealth that Mr. Scholberg's analysis was incorrect.¹⁰ The only way Mr. Prieto could have countered these arguments was with the lost hairs. More importantly, if the

⁹ Virginia courts have dismissed charges when the lost evidence had far less exculpatory value than the lost hairs. See *e.g. Commonwealth v. Belcher*, 14 Va. Cir. 197, 197-98 (1988).

¹⁰ Mr. Linch testified that perhaps Mr. Scholberg mistakenly construed the missing hairs as Negroid because Mr. Linch believed that an examiner could mistakenly conclude that a single hair with "dark, dense, clumped pigmentation" was Negroid. (JA 11954-91).

Commonwealth had not lost the hairs, Mr. Prieto could have submitted them for DNA analysis, and linked a third party to the crimes.¹¹

The loss of the other hairs not subject to Mr. Scholberg's 1988 report completely precluded Mr. Prieto from obtaining any information about them. Again, if Mr. Prieto had these hairs then he could have performed further testing, including DNA analysis and hair comparison tests, which could have contributed significantly to his theory that he was not the "triggerman."

2. Fundamental fairness requires that Mr. Prieto obtain relief.

Since the exculpatory evidence has no substitute, the only way to "guarantee, as much as is humanly possible," that Mr. Prieto's death sentence was not "imposed out of whim, passion, prejudice, or mistake," is to commute Mr. Prieto's sentence to life without parole or grant him a new sentencing hearing. *See generally* VA. CODE. ANN. § 19.2-270.4:1; and *Lovitt v. Warden*, 266 Va. 216, 243, 585 S.E.2d 801, 816 (2003).

3. The Circuit Court erred in denying Mr. Prieto any alternative relief.

As explained above, the Circuit Court erred in allowing the Commonwealth to introduce the testimony of Mr. Lynch because it

¹¹ People possess two types of DNA: nuclear DNA and mitochondrial DNA. Mitochondrial DNA analysis could have conclusively excluded the possibility that the hairs were Mr. Prieto's, and may have identified the donor of the hairs. (JA 11795, 11906-10, 11916-18).

challenged Mr. Scholberg's categorization of the hair as having a Negroid donor. (JA 11954-591). Similarly, the Circuit Court erred in allowing the Commonwealth to question Mr. Scholberg extensively about his lack of recollection of the length of the missing hairs.¹² (JA 11806-24). These errors allowed the jury to speculate that the lost hairs did not have Negroid characteristics, and were fundamentally unfair since the Commonwealth had lost this exculpatory evidence. And the unfair prejudice that resulted from this testimony far outweighed its relevance.¹³

At a minimum, the Circuit Court should have instructed the jury that it could draw an adverse inference against the Commonwealth because it had lost the hairs. See VA. CODE ANN. § 19.2-265. The U.S. Supreme Court has sanctioned such instructions in similar circumstances. *Arizona v. Youngblood*, 488 U.S. 51, 59-60 (1988) (Stevens, J., concurring).

¹² The Circuit Court also erred in allowing the Commonwealth to question Mr. Scholberg about whether the hairs were of "Hispanic" origin because hairs cannot have "Hispanic" characteristics, only Caucasian, Negroid and Mongoloid. (JA 11824-27, 11579-80).

¹³ Mr. Linch's testimony infected the trial with at least two other serious errors. First, the Circuit Court erred in not declaring a mistrial because Mr. Linch testified that, if he "just had a short piece, or dark ones, I may have mistakenly thought it was from a black person," as this testimony was factually unsupported. That answer was speculative, non-responsive, and yet un rebuttable because the Commonwealth lost the hairs. (JA 12003-006). Second, the Circuit Court erred in allowing Mr. Linch to testify about the "transiency of hair" because he was not qualified as an expert on that subject. (JA 11580-84).

B. The Evidence Fails To Support A Finding That Mr. Prieto Was The “Triggerman.” (AOE Nos. 26, 28-29, 33, 35, And 38-39).

The Commonwealth did not introduce any evidence to support its theory that Mr. Prieto was the “triggerman,” which is the necessary predicate for the death sentence in Virginia. The only evidence allegedly tying Mr. Prieto to the murders was: (1) DNA on vaginal swabs of Ms. Raver (JA 11250, 11528, 11535); (2) improperly admitted testimony that Mr. Prieto had access to a gun (JA 11402); and (3) improperly admitted testimony that Mr. Prieto was familiar with Hunter Mill Road because he allegedly worked near Dulles Toll Road in the past. (JA 11411-14).¹⁴ Therefore, these errors require reversal of Mr. Prieto’s convictions and sentence.

In seeking to sentence Mr. Prieto to death, the Commonwealth had to prove beyond a reasonable doubt that he was a principal in the first degree. See VA. CODE ANN. § 18.2-18.2. To be a principal in the first degree, he must be the “immediate perpetrator” in the death. *Muhammad v.*

¹⁴ The Circuit Court compounded these errors when it allowed the Commonwealth to argue to the jury during its closing argument that: (1) the gun to which Mr. Prieto allegedly had access was the gun that killed Rachael Raver and Warren Fulton; and (2) that Mr. Prieto was familiar with Hunter Mill Road since he allegedly worked near Dulles Toll Road in the past. (JA 12351-352, 12456-457). The record does not support either suggestion, and they merely invited the jury to impermissibly speculate. (AOE Nos. 38(d-e)).

Commonwealth, 269 Va. 451, 554-5, 619 S.E.2d 16, 34 (2005). Evidence that Mr. Prieto was present at the crime scene, or even that he aided or encouraged the murders, is insufficient to establish that Mr. Prieto was the “triggerman.” *Cheng v. Commonwealth*, 240 Va. 26, 43, 343 S.E.2d 599, 608 (1990). Since there was no evidence that Mr. Prieto was the “immediate perpetrator” in the deaths of Ms. Raver or Mr. Fulton, the jury should not have considered the capital murder charges.

This Court has reversed convictions on identical grounds. *Id.*; see also *Rogers v. Commonwealth*, 242 Va. 307, 410 S.E.2d 621 (1991). In *Cheng*, John Cheng was convicted of capital murder and sentenced to death. 240 Va. at 26, 343 S.E.2d at 599. This Court characterized the evidence in *Cheng* as follows:

The evidence shows that Cheng “masterminded” the criminal plan. He expressed an intent to commit robbery. He directed his accomplices to obtain the “sawed-off” shotgun. He was seen talking with Lui on the evening Lui was last seen alive. He possessed a .32 caliber semi-automatic pistol – the type of weapon used to kill Lui. Additionally, Cheng made incriminating statements to Officer Kwan. Clearly, the evidence is sufficient to support a finding that Cheng was a principal in the second degree to capital murder.

Id. at 43, 343 S.E.2d at 608. Despite this ample evidence that *Cheng* was a principal in the second degree, this Court concluded it was insufficient to support a finding that Mr. Cheng was actually the “triggerman,” holding:

The crucial question, however, is whether all the circumstances ...are sufficient to prove beyond a reasonable doubt that Cheng actually fired the fatal shots. ...

The evidence, at most, creates a strong suspicion that Cheng was the “triggerman.” As previously stated, however, suspicion of guilt, no matter how strong, is insufficient to sustain a criminal conviction. Accordingly, we hold that the evidence is insufficient to support Cheng’s conviction of capital murder.

Id. (internal citations omitted).

Similarly, in *Rogers*, the defendant was convicted and sentenced. 242 Va. at 307, 410 S.E.2d at 621. The evidence showed that Mr. Rogers was seen outside the victim’s house between 6:30 and 6:45 p.m. *Id.* at 310, 410 S.E.2d at 623. At about 6:40 p.m., a neighbor living in the adjoining duplex unit heard the victim “hit the floor” in her dining room. *Id.* at 311, 410 S.E.2d at 623. The neighbor went next door to offer help, but the door was locked. *Id.* The neighbor and another individual then went to Mrs. Beasley’s house, finding the back screen door open on what was a cold night. *Id.* at 311, 410 S.E.2d at 624. As they entered the house, they encountered the defendant putting on his coat and leaving. *Id.* The defendant said, “[y]ou just step right on out of here. She’s been taken care of, and she’s going to be all right, and she don’t need you.” *Id.* Nevertheless, the neighbors proceeded to enter the house, finding the victim naked on the floor with a knife stuck in her back. *Id.* at 312, 410

S.E.2d at 624. The neighbor testified that she saw no one but the defendant in the house, and heard no other noises. *Id.*

When questioned by the police, the defendant first denied any knowledge of the crime. *Id.* at 314, 410 S.E.2d at 625. Later, he claimed that he had seen an acquaintance, Malcolm, breaking into the house, and that Malcolm later told him that he had robbed and stabbed the victim. *Id.* Still later, the defendant told the police that he had robbed and raped the victim, but that he had not stabbed her and did not know who did. *Id.* at 315, 410 S.E.2d at 625. Later still, he claimed that he and Malcolm had broken into the house to rob the victim. *Id.* He acknowledged raping her with a third person named “Hillbilly”, but denied stabbing her. *Id.* at 316, 410 S.E.2d at 626. Hillbilly was described as having a star tattoo at the corner of his eye and a marijuana plant tattoo on his left arm. *Id.* The defendant claimed that Hillbilly and Malcolm ran from the house before he did, and that, upon leaving the house, he encountered the neighbors. *Id.* The Commonwealth proved that a man named David Stull had been in prison with the defendant. *Id.* at 316, 410 S.E.2d at 627. Mr. Stull had both tattoos described by the Mr. Rogers, but he was in prison at the time of the murder. *Id.*

As it did in *Cheng*, this Court held that the evidence was insufficient to establish that Mr. Rogers was the “triggerman,” finding:

Whatever theory is adopted by the Commonwealth, we hold that the evidence is insufficient, as matter of law, to prove that the defendant actually stabbed the victim.... As we have said, all necessary circumstances must be consistent with guilt, must be inconsistent with innocence, and must exclude every reasonable hypothesis of innocence. We conclude that the Commonwealth's evidence failed to establish beyond a reasonable doubt that Rogers was the so-called "triggerman" and that he wielded the knife. Stated differently, the Commonwealth has failed to exclude Troy Malcolm as the perpetrator.

Id. at 319, 410 S.E.2d at 628.

Unlike the defendants in *Cheng* and *Rogers*, Mr. Prieto did not admit to the crimes, nor did any witness place him at the scene of the crime.

Rather, unlike the defendants in *Cheng* and *Rogers*, Mr. Prieto has powerful, objective evidence that someone else was involved in the murders of Ms. Raver and Mr. Fulton: the lost hairs. Therefore, Mr. Prieto's convictions and death sentences require reversal.

II. The Circuit Court Erred In Declaring A Mistrial In *Prieto I* And In Allowing The Commonwealth To Seek The Death Penalty In *Prieto II*. (AOE No. 6).

In *Prieto I*, the Circuit Court bifurcated the issue of mental retardation from the other sentencing phase issues. (JA 2888-889). During the jury's deliberations, the jury informed the Circuit Court that they could not reach a unanimous verdict on the issue of mental retardation. (JA 7528). Since the jury had deadlocked on the appropriate sentence for Mr. Prieto in *Prieto I*,

the Circuit Court should have sentenced him to life without parole, and barred the Commonwealth from retrying Mr. Prieto.¹⁵

A. The Jury In *Prieto* I Was Hung.

During the jury’s deliberations on the issue of mental retardation, the Circuit Court informed Mr. Prieto and the Commonwealth that there were two comments from the jury:

... The two questions are, one comment from Mr. Clements, who I believe is the foreman, “We have been unable to get a unanimous decision. It appears that we will be unable to.”

And the second one is by Mr. Davico; he said,

“I feel that I am being pressured by my fellow jurors to go along with their decision. I am the only one different from the rest. My decision at this time is firm and final ... Please end this deliberation.”

(JA 7528). Even though it was plain that the jury had deadlocked on the issue of mental retardation, the Circuit Court proceeded to give the jury a charge pursuant to *Allen v. United States*, 164 U.S. 492 (1896) (“*Allen* charge”). Judge Smith’s reasoning was as follows:

Then, again, this is the twentieth day of trial. Never mind, just totally forget, because we need to totally forget any economic expense, the emotional toll on everyone involved in the case is substantial.

¹⁵ See VA. CODE ANN. § 19.2-264.4(E) (“In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.”).

The government has the right to have this matter concluded, the Defendant has the right to have this matter concluded, and I think today it's important that we make this jury give every effort towards doing that.

(JA 7549). However, the *Allen* charge was unwarranted because Juror Davico had informed the Circuit Court that his decision was “firm and final,” and even urged the Court to “end the deliberation,” as it had “crossed the line into peer pressure.” (JA 7528). Forcing Juror Davico to deliberate further amounted to forcing him to succumb to the peer pressure he plainly faced from the other eleven jurors.

In *Prieto I*, the Circuit Court concluded that Juror Davico was a “rogue” juror because he had not followed the *Allen* charge. Whether or not Juror Davico followed this charge is, at best, uncertain, but, in any event, of no moment to this appeal because the jury was hung and Judge Smith should have sentenced Mr. Prieto to life without parole.

B. Mental Retardation Is A Sentencing Phase Issue.

The Circuit Court in *Prieto I* bifurcated the issue of mental retardation from the other sentencing phase issues and acknowledged that the sentencing phase is an umbrella, under which a number of issues fall, including the issue of mental retardation. (JA 2889).

The Circuit Court in *Prieto II* also acknowledged that mental retardation is a sentencing phase issue, stating:

I read the plain meaning of the statute ... to mean that the mental retardation should be part of the penalty phase of the trial.

... So the mental retardation issue will be heard as part of the penalty phase. I both believe that that is what is required by statute, and furthermore, to the extent it's a discretionary decision by the Court, I believe that it is appropriate that it be part of the same proceeding.

... During the two phases of the trial, there's going to be guilt and innocence and then there's going to be penalty. The penalty will include the mental retardation phase.

(JA 8320-21). In fact, the Commonwealth agreed that mental retardation is a penalty phase issue. (JA 8319-20).

C. Virginia Law Required The Circuit Court To Sentence Mr. Prieto To Life Without Parole And It Should Have Barred The Commonwealth From Retrying Mr. Prieto To Capital Murder.

Mental retardation is a bar to a death sentence. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); VA. CODE ANN. § 19.2-264.3:1.1. If any juror concludes that a defendant is mentally retarded, then that jury never can reach a unanimous vote for death. VA. CODE ANN. § 19.2-264.4. And if there is no unanimity for death, then there can be no death sentence. *Ring v. Arizona*, 536 U.S. 584 (2002).

While this issue is one of first impression in Virginia, three other states have barred a re-trial if, as in *Prieto I*, the jury deadlocks on the issue of mental retardation. *New Jersey v. Jimenez*, 924 A.2d 513, 515 (2007)

(holding that, if a single juror finds the defendant has met his burden of proving mental retardation by a preponderance of the evidence, then that defendant is not eligible to receive a penalty of death); *Blonner v. Oklahoma*, 127 P.3d 1135, 1142 (2006) (holding that, in the event the jury in the mental retardation trial is unable to reach a verdict, the case would proceed as a non-capital case); *New Mexico v. Flores*, 93 P.3d 1264, 1271 (2004) (holding, among other things, that a jury hung on the issue of mental retardation precluded the verdict of death).

Virginia's statutes require the same result. Under VA. CODE ANN. § 19.2-264.4, if a capital jury deadlocks on a sentencing phase issue, the trial judge must sentence the defendant to life in prison. If one or more, but less than 12 jurors, finds the defendant mentally retarded, then the capital jury has deadlocked on a sentencing phase issue, and a life sentence must result. Given Juror Davico's steadfast and unyielding belief that Mr. Prieto was mentally retarded, the jury in *Prieto I* could not reach a unanimous verdict on the proper sentence for Mr. Prieto. Hence, the Circuit Court should have sentenced him to life in prison and barred the Commonwealth from retrying Mr. Prieto for capital murder.

III. Mr. Prieto's Death Sentence Requires Reversal. (AOE Nos. 4, 13-14, 17, 41-43, 60, 61, 67-69, 75, And 78).

A. The Verdict Forms Violated State Law And Prieto's Right To Due Process Of Law. (AOE Nos. 17, 41-43, 60, 61, 67-69, 75, And 78).

The Circuit Court in *Prieto II* provided the jurors with penalty phase verdict forms that gave them two options with respect to each of the capital murder convictions.¹⁶ Specifically, Verdict Form No. 2 stated:

We, the jury on the issue joined, having found Alfredo Prieto guilty of the willful, deliberate, and premeditated killing of Rachael Raver in the commission of or subsequent to rape and that 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 or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed _____, foreman,

Or

We, the jury on the issue joined, having found Alfredo Prieto guilty of the willful, deliberate and premeditated killing of Rachael Raver in the commission of or subsequent to rape and

¹⁶ The Circuit Court provided the jurors with a total of seven penalty phase verdict forms. Verdict Form No. 1 addressed the issue of mental retardation. (JA 8991). Verdict Form No. 2 addressed the capital murder conviction for the killing of Rachael Raver in the commission of or subsequent to rape. (JA 8992). Verdict Form No. 3 addressed the capital murder conviction for the killing of Rachael Raver and Warren Fulton III, as part of the same act or transaction. (JA 8993). Verdict Form No. 4 through Verdict Form No. 7 addressed the sentence for Mr. Prieto's lesser felony convictions. (JA 8994-97). Only Verdict Forms Nos. 2 and 3 are at issue in this claim.

having considered all the evidence in aggravation and mitigation of such offense, fix his punishment at (i) imprisonment for life or (ii) imprisonment for life and a fine of \$ _____.

Signed _____, foreman.

(JA 8992). Verdict Form No. 3 was virtually identical to Verdict Form No. 2 except that it referenced the conviction of capital murder based upon the killing of Ms. Raver and Mr. Fulton as part of the same act or transaction instead of the capital murder conviction based upon the rape of Ms. Raver.

(JA 8993).

- 1. Verdict Form Nos. 2 and 3 are defective under *Powell* and *Morrisette* and require reversal. (AOE Nos. 20-22, 25, and 26).**

Verdict Form Nos. 2 and 3 are defective under *Powell v. Commonwealth*, 261 Va. 512, 552 S.E.2d 344 (2001), and *Morrisette v. Warden*, 270 Va. 188, 613 S.E.2d 551 (2005), because they failed to give the jurors the option of finding one or both aggravating factors, and nonetheless imposing a life sentence. To the contrary, Verdict Form Nos. 2 and 3 created the impression that, if the Commonwealth had proved one or both aggravating factors, then the only appropriate sentence would be death.

This was the very defect requiring reversal in *Powell* and *Morrisette*. In those cases, this Court held that the verdict forms must clearly indicate that the jurors may find one or both aggravating factors and nonetheless

opt for a life sentence, and that it is not enough for the Circuit Court merely to instruct the jurors as to this fact:

The issue is not whether the jury was provided with the means to discharge its obligation. If that were the only goal, it could be achieved by providing the jury with a generic form and advising the jury to fill in the particulars of the sentence from the instructions. Rather, the issue is whether the jury is likely to be confused where it is instructed that it may impose a sentence other than death if it finds one or both aggravating factors have been proven beyond a reasonable doubt, but receives verdict forms that do not expressly state that the jury is allowed to fix a sentence of life imprisonment even though one or both aggravating factors are present.

Powell, 261 Va. at 545, 552 S.E.2d at 363. Thus, this Court held that the

Powell verdict forms were defective:

Accordingly, we hold that in a capital murder trial, the trial court must give the jury verdict forms providing expressly for the imposition of a sentence of imprisonment 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.

Id.

Notably, in *Prieto II*, before the Circuit Court provided the jury with the defective verdict forms, Mr. Prieto proffered verdict forms based upon the Model Jury Instructions, which, consistent with *Powell* and *Morrisette*, expressly permitted the jury to find one or both aggravating factors, and still return a life verdict. (JA 15655). In rejecting Mr. Prieto's preferred forms, the Circuit Court adopted the Commonwealth's argument that the statutory

verdict forms are “mandatory” and that “the proper way to do it is to follow the Code.” (JA 15654-655). The Circuit Court reasoned: “I don’t think there’s any question that we have to use the words of the Code.” (JA 15655).

In so concluding, the Circuit Court acknowledged the jury must be given three “life” sentencing options – *i.e.*, a finding of mental retardation; a finding that one or both aggravating factors had been proven; and a finding that no aggravating factors had been proven – and specifically acknowledged that the form Mr. Prieto proffered “recognize[d] those choices.” (JA 15661). Nevertheless, the Circuit Court rejected Mr. Prieto’s forms, stating: “I don’t have any question that the language in the statute is mandatory, I don’t have any flexibility in that at all.” *Id.* Importantly, while recognizing that the verdict forms selected would not “address the third possibility which is the aggravating factors exist but you choose life”, (JA 15679), the Circuit Court indicated its belief that he could “fix it with instructions that I give the jury.” (JA 15683).

The Circuit Court’s rejection of the forms Mr. Prieto preferred, and its refusal to amend the statutory form to include all lawful sentencing options, violated this Court’s precedent, including *Powell, Morrisette*, and *Atkins v. Commonwealth*, 257 Va. 160, 510 S.E.2d 445 (1999). In *Atkins*, the Court

held that, “when the principle of law is materially vital to [the] defendant in a criminal case, it is reversible error for the trial court to refuse a defective instruction instead of correcting it and giving it in the proper form.” *Atkins*, 257 Va. at 178, 510 S.E.2d at 456 (citing *Whaley v. Commonwealth*, 214 Va. 353, 355-56, 200 S.E.2d 556, 558 (1973); accord *Bryant v. Commonwealth*, 216 Va. 390, 392-93, 219 S.E.2d 669, 671-72 (1975)).

The Court stated: “Clearly, it is materially vital to the defendant in a criminal case that the jury have a proper verdict form.” *Atkins*, 257 Va. at 178, 510 S.E.2d at 456. Accordingly, because “[it] submitted a proper verdict form. . .there can be no question that the trial court, while having the discretion to elect between the two forms proffered to it, had the duty to give the jury a proper verdict form.” *Id.* This Court concluded:

The trial court’s use of the Commonwealth’s form resulted in the jury receiving a verdict form which was incomplete and which did not comport with the correct statement of law given to the jury by the trial court in its first instruction. We need go no further in our analysis to determine whether the jury in fact was left with the impression, contrary to the trial court’s instruction, that it was required first to find that at least one of the aggravating factors was present. The jury was presented with a confusing situation in which the trial court’s instructions and the form the jury was given to use in discharging its obligations were in conflict.

Id. at 179, 510 S.E.2d at 457. Similarly, here, the Circuit Court’s rejection of the verdict form Mr. Prieto proffered, and its failure to amend its own

form, resulted in the jury receiving an incomplete form that did not comport with the correct statement of relevant law contained in the jury instructions.

When Mr. Prieto again raised this issue in a post-trial motion to set aside the verdict, the Circuit Court acknowledged that the penalty phase verdict form it used “does not square” with this Court’s decisions in *Powell* and *Morrisette*, and that its use was “error.” (JA 17010). Even though the Circuit Court acknowledged its plain error, it refused to set aside the verdict. Essentially, it believed its error was harmless because it later instructed the jury properly. This holding has four flaws.

First, this Court has held that the penalty phase verdict form must “contain a separate paragraph expressly stating” the sentencing option of life despite the existence of statutory aggravating factors. See *Powell*, 261 Va. at 545, 552 S.E.2d at 363. Verdict Form Nos. 2 and 3 did not provide the jury with the option of sentencing Mr. Prieto to life. In *Powell*, this Court recognized that “[t]he issue is not whether the jury was provided with the means to discharge its obligation.” *Id.* Thus, the Circuit Court’s instruction to the jury that it should utilize the second paragraph on Verdict Form Nos. 2 and 3 if it found aggravating factors, but agreed upon a life sentence, is irrelevant because the actual verdict forms did not provide with the jury with that option.

Second, in *Morrisette*, this Court held that the use of verdict forms that are identical to those used in this case creates “a reasonable probability that . . . the result of the proceeding would have been different.” *Morrisette*, 270 Va. at 204, 613 S.E.2d at 563. In *Morrisette*, the petitioner’s substantive verdict form claim was procedurally defaulted, and the precise issue before this Court was whether defense counsel was constitutionally ineffective for failing to object to penalty phase verdict forms that omitted the *Powell* option. *Morrisette*, 270 Va. at 203, 613 S.E.2d at 563. This Court ruled that the failure to object was ineffective assistance of counsel, vacated the death sentence, and remanded the case for a new penalty hearing. *Id.* at 204, 613 S.E.2d at 563. However, here, Mr. Prieto need not satisfy the prejudice standard, and the Commonwealth bears the burden to prove beyond reasonable doubt that the error was harmless. *Pitt v. Commonwealth*, 260 Va. 692, 695, 539 S.E.2d 77, 78 (2000). Logically, an error that creates a reasonable probability of a different outcome in the post-conviction context never can be harmless in the context of a direct appeal.

Third, this Court in *Atkins* held that it was “materially vital to the defendant in a criminal case that the jury have a proper verdict form.” *Atkins*, 257 Va. at 178, 510 S.E.2d at 456. Thus, it is obvious that the

denial of a “materially vital” verdict form never can constitute harmless error.

Fourth, it is a violation of Due Process and the Eighth Amendment’s prohibition against cruel and unusual punishment to require a capital jury in the penalty phase to negate an aggravating factor to give effect to mitigating evidence. *See Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Penry*, the defendant presented evidence of his mental retardation and of the abuse that he suffered as a child, arguing that these facts reduced his moral culpability. *Id.* at 308-09. However, the jury’s only means of giving effect to this mitigating evidence was to vote “no” on the special issue (*i.e.*, aggravating factor) that he committed the crime “deliberately.” *Id.* at 312-13. The U.S. Supreme Court noted that, “a juror who believed that Penry’s retardation and background diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime ‘deliberately.’” *Id.* at 323.

Similarly, following the Circuit Court’s instructions, the jury in this case could only give effect to Mr. Prieto’s mitigating evidence by declining to find that the Commonwealth had proven any aggravating factor beyond a reasonable doubt. This forced the jury to ignore its own findings that the

crime was vile and/or that the defendant was a future danger, even if it believed that they had been proven beyond a reasonable doubt, in order to impose a life sentence. This Court repeatedly has held that capital sentencing juries must be given verdict forms that permit them to expressly find aggravating factors and still impose a life sentence. This Court should follow its own precedent, set aside the death sentence in this case, and order a new sentencing hearing.

2. Verdict Form Nos. 2 and 3 and the Court's related instructions regarding the sub-factors required for a finding of death are defective under *Ring v. Arizona* and require reversal of Mr. Prieto's death sentence. (AOE Nos. 42, 60, and 68).

Verdict Form Nos. 2 and 3 and the Court's instruction, were defective under *Ring*, 536 U.S. at 584, as the jury was not required to find that the sub-factors for a finding of death, including vileness and future dangerousness, have to be unanimous. (JA 8992, 8993, 15754-57).

In *Ring*, the U.S. Supreme Court 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 by a jury. In Virginia, a defendant who has been convicted of capital murder cannot be sentenced to death unless, and until, a jury finds either or both of two statutory aggravators, vileness and future dangerousness. Since these aggravators

increase the maximum punishment that a defendant may face, they necessarily are elements under *Ring* and, as such, require jury unanimity.

Virginia's use of aggravating factors parallels Arizona's use of those factors, making them elements within the meaning of *Ring*, and like the Arizona statute in *Ring*, a death sentence cannot be imposed in Virginia unless, and until, an aggravating fact is found by a jury beyond a reasonable doubt. Under the Virginia Code:

A sentence of death shall not be imposed unless the court or jury shall. . . find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

VA. CODE ANN. § 19.2-264.2. Under this provision, Virginia's two aggravating factors – future dangerousness and vileness – must be established by the prosecution before a defendant may be sentenced to death. That is, prior to finding future dangerousness or vileness, the maximum punishment that a capital defendant faces is life imprisonment. If a jury does not find one of these factors, “the defendant shall be sentenced to imprisonment for life.” VA. CODE ANN. § 19.2-264.4(A). Therefore, the finding of an aggravating factor increases the maximum punishment that the defendant may face. Moreover, because Virginia's vileness

aggravating factor is directly analogous to the second aggravator found by the trial judge in *Ring*, it is evident that the Supreme Court's rationale in that case controls here.

The rationale of *Ring* mandates that, under the Virginia statutory capital sentencing scheme, future dangerousness and vileness are elements of capital punishment that must be submitted to a jury and proven beyond a reasonable doubt, in order for the scheme to be constitutional. Further, *Richardson v. United States*, 526 U.S. 813, 824 (1999), holds that when alleged crimes are relied on as elements of a greater offense, the jury must unanimously agree that each crime has been proven beyond a reasonable doubt before such crimes can be used to convict of the greater offense. Therefore, because the sentencing verdict form did not require jury unanimity on at a least one aggravating element before death-eligibility was established, it was defective.

The Circuit Court expressly rejected *Ring* and *Richardson*, relying instead on *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979). (JA 15669-671). In *Clark*, this Court expressly stated:

He says that the form authorized the jury to impose a penalty of death if it found the defendant's conduct involved depravity of mind or aggravated battery to the victim. In essence, defendant claims that the verdict of the jury should reflect unanimity as to which factor it finds.

The verdict returned by the jury against the defendant complies with the language of the statute. We have heretofore pointed out that the verdict of the jury, both as to guilt and as to penalty, must be a unanimous verdict. The circumstances under which punishment can be fixed at death are clearly set forth in the statute, and the trial court committed no error in following the language of the statute in instructing the jury.

In construing similar statutes involving aggravating factors and the phrases at issue here, courts have treated these factors as one unit.

Id. at 213, 257 S.E.2d at 791-92.

Clark directly conflicts with *Ring* and, therefore, the Circuit Court's reliance on *Clark* requires reversal of Mr. Prieto's death sentence.

3. The Circuit Court erred in denying Mr. Prieto's requested jury instructions on the issues of future dangerousness and vileness. (AOE Nos. 41, and 67-69).

a. Future dangerousness (AOE Nos. 67 and 69).

Future dangerousness requires that a jury find, beyond a reasonable doubt, a "probability" that a defendant "would commit criminal acts of violence that would constitute a continuing threat to society." VA. CODE ANN. § 19.2-264.2. In the very first Virginia capital appeal brought under the current statutory scheme, this Court was presented with the claim that this statutory language, standing alone, was unconstitutionally vague and overbroad under *Godfrey v. Georgia*, 446 U.S. 420 (1980). In response, this Court narrowed the dangerousness factor as follows:

If the defendant has been previously convicted of “criminal acts of violence,” i.e., serious crimes against the person committed by intentional acts of unprovoked violence, there is a reasonable “probability,” i.e. a likelihood substantially greater than a mere possibility, that he would commit similar crimes in the future. Such a probability fairly supports the conclusion that society would be faced with a “continuing serious threat.”

Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978).

Until *Ring*, 536 U.S. at 584, it was fair to assume that this Court could apply *Smith*'s narrow construction of the dangerousness factor on direct appeal from death sentences imposed by Virginia juries. See *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990) (approving of appellate court's reformation of capital sentence based on an invalid aggravating factor because “the Sixth Amendment does not require that a jury specify the aggravating factors that permit the imposition of capital punishment.”). However, *Ring* now has made clear that statutory aggravating factors are the functional equivalent of offense elements, and as such must be found by a jury rather than by a judge (or judges). In *Bell v. Cone*, 543 U.S. 447 (2005), the U.S. Supreme Court explicitly noted, but had no occasion to decide, the question of “whether an appellate court may, consistently with *Ring*, cure the finding of a vague aggravating circumstance by applying a narrower construction.” *Id.* at 454 n.6.

Here, it is even more clear that there was a requirement for an instruction as Juror #1 specifically asked for one stating: “Your Honor,

regarding the first aggravating circumstance: ‘constitute a continuing serious threat to society’; are we to consider that he is already never likely to leave prison or should we consider the possibility of him walking the street as a free man?” (JA 16143). The Circuit Court, however, declined to follow this Court’s precedent, and refused Mr. Prieto’s request to instruct the jury that the probability referred to in § 19.2-264.2 means “a likelihood substantially greater than a mere possibility that [the defendant] would commit similar crimes in the future.” (JA 16143-156). As a result, the jury’s dangerousness finding does not, and cannot, reflect that its understanding of the dangerousness factor was the same one specified in *Smith*. The effect is that the Circuit Court did not honor Mr. Prieto’s right to have his eligibility for the death penalty determined by a jury.

Mr. Prieto’s right, under *Ring*, to a jury instruction containing *Smith*’s explanation of the dangerousness factor does not depend on whether the factor would be unconstitutionally vague or overbroad, but for *Smith*. Although Mr. Prieto contends that it would be, what matters is simply that *Smith* narrowed the meaning of the factor, and thereby defined it in a way that an uninstructed jury could not. When this Court construes a statute, its construction becomes part of the law of Virginia, and, in the case of a criminal statute, a narrowing construction becomes an essential element of

the offense. Regardless of whether the construction provided in *Smith* was independently compelled by the Eighth Amendment holding of *Godfrey v. Georgia*, 446 U.S. 420 (1980), the fact is that that construction is now part of what the Commonwealth must prove to render a convicted murderer eligible for the death penalty under Virginia law, and as such, *Ring* implicitly requires that this construction be made known to, and applied by, the jury. Therefore, the Circuit Court's refusal to instruct the jury on the meaning of the dangerousness factor as construed by *Smith* violated Mr. Prieto's Sixth Amendment right to have a jury find every fact essential to expose him to the maximum penalty of death. This error cannot be corrected on appeal, and it requires that Mr. Prieto be re-sentenced by a properly instructed jury.

b. Vileness (AOE Nos. 17, 41 and 68).

"Vileness" is indicated by "torture," "aggravated battery," or "depravity of mind." VA. CODE ANN. § 19.2-264.2. In *Smith*, this Court clarified that "depravity of mind" is "a degree of moral turpitude and psychological debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." *Smith*, 219 Va. at 478, 248 S.E.2d at 149. Mr. Prieto requested that the Circuit Court instruct the jury on what "depravity of mind" means in Virginia, but it declined to instruct the jury. (JA 8954). For

the reasons set forth in Section III(A)(3)(a), *supra*, the Circuit Court's refusal to properly instruct the jury requires reversal.

B. The Circuit Court Erred In Admitting Mr. Prieto's Records Of Conviction In California, With The Death Sentence Displayed, To The Jury. (AOE No. 43).

During the sentencing phase, the Commonwealth moved to introduce certified copies of two records, Commonwealth's Exhibits 3S (JA 17088-276) and 3S-1 (JA 12876-12900), of Mr. Prieto's capital murder conviction from California (JA 12499), which showed that he had been sentenced to death. (JA 12507). The admission of Mr. Prieto's previous death sentence was irrelevant and undermined the jury's obligation to consider Mr. Prieto's mitigating evidence.

Atkins v. Commonwealth, 272 Va. 144, 157-58, 631 S.E.2d (2006) presents a similar situation. In *Atkins*, this Court reversed the finding that the defendant was not mentally retarded because the jury had been told that Mr. Atkins had previously been sentenced to death. *Id.* at 157-58, 631 S.E.2d at 100. While, unlike here, *Atkins* involved the same crime, this Court's rationale is germane: telling the jury that a prior jury has already imposed death undermined the fairness of the proceedings.

The California death sentence was not relevant to prove "that there is a probability that the defendant would commit criminal acts of violence that

would constitute a continuing serious threat to society[,]" VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4. Under *Smith*, it is the nature of the conduct and acts represented by a prior conviction, not the sentence, which forms the basis for a prediction that the defendant probably would be violent in the future, and which therefore are the foundation for the admissibility of such conviction. 219 Va. at 478, 248 S.E.2d at 149.

The holding in *Smith*, that the defendant's prior criminal conduct is relevant to a determination of future dangerousness, was relied on by the Commonwealth to support admissibility of the California death sentence. (JA 12507-544, JA 12668-694). The Commonwealth also cited *Bassett v. Commonwealth*, 222 Va. 844, 284 S.E.2d 844 (1981) for this proposition. (JA 12507-544, JA 12668-694). However, the holding in *Bassett* was not a blanket approval of admission of prior sentences in a capital sentencing proceeding on the theory that they are part of the defendant's history. *Bassett* held that the defendant's prior sentence and release on parole were relevant to show his continued propensity for violence because the act of murder for which he was then being sentenced occurred after he served the prior sentence and was released. 222 Va. at 851-52, 284 S.E.2d at 849. Mr. Prieto's alleged conduct occurred before he was even tried for the California offense, and he has been continuously incarcerated

since being convicted and sentenced to death in California. Therefore, under *Smith* and *Bassett*, Mr. Prieto's California death sentence has no relevance to the issue of his propensity, if any, for violence in the future.

Further, admitting the actual sentence of death imposed in California, violated Mr. Prieto's Eighth Amendment rights by seemingly reducing the jury's choice to the relatively trivial one of whether the Commonwealth of Virginia or the State of California should be the jurisdiction to execute Mr. Prieto. This evidence thus short-circuited the jury's deep sense of moral responsibility that jurors must have over the life and death decision and violated Mr. Prieto's Eighth Amendment rights. See *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (holding that a capital jury has a constitutional duty to render a reasoned, moral decision as to whether death is an appropriate sentence for a particular defendant); cf. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (holding that a prior death sentence was not federal constitutional error).

C. The Circuit Court Violated Mr. Prieto's Constitutional Rights In Failing To Properly Adjudicate The Issue Of Mental Retardation. (AOE Nos. 4, 13-14, 45, 50, And 66).

Mr. Prieto has a constitutional right both to have all mitigating evidence considered, as well as to have his mental retardation claim heard completely on the merits. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). In

failing to: (a) bifurcate the penalty phase; (b) allow a pre-trial decision regarding the question of mental retardation; or (c) properly instruct the jury as to mental retardation, the Circuit Court did not provide the jury the constitutional tools by which it could avoid an arbitrary and capricious decision, as required by the U.S. Constitution.

In capital cases, the U.S. Supreme Court mandates that states afford Due Process to defendants through the structure of the trial and through adequate instructions to the jury in order to “minimize the risk of wholly arbitrary and capricious action.” *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). Courts must allow the jury to hear relevant evidence, but exclude irrelevant evidence that might improperly influence the jury’s decision. *Id.* For these reasons, the U.S. Supreme Court has implicitly condemned combining the guilt and penalty phases, since “much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question.” *Id.* at 190.

For example, evidence of vileness and future dangerousness are irrelevant to whether a murder was committed with malice aforethought, but undoubtedly would influence the jury if presented during the guilt phase of the trial. Moreover, since jurors have minimal experience in sentencing,

careful instructions, without more, cannot always cure this problem. “Trial lawyers understandably have little confidence in a solution that admits the evidence and trusts to an instruction to the jury that it should be considered only in determining the penalty and disregarded in assessing guilt.” *Gregg*, 428 U.S. at 191.

To address this problem, the U.S. Supreme Court has endorsed a bifurcated system: “The obvious solution . . . is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction.” *Id.* (citations omitted); *see also id.* (“When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a [bifurcated system] is more likely to ensure the elimination of [constitutional deficiencies in procedure.]”).

This logic applies to the determination of mental retardation. Mental retardation, unlike other mitigating factors, is a *per se* bar to execution. *Atkins*, 536 U.S. at 304. A determination of mental retardation requires an analysis of the defendant’s underlying cognitive abilities, personal history, IQ scores, and the like. Evidence as to a defendant’s future dangerousness, and the vileness of the crime have no place in an assessment of mental retardation, and can only serve to unfairly prejudice

the jury as to the evaluation of mental retardation, as described in *Gregg*. The only prophylactic procedure that can protect a defendant's constitutional rights in this regard is a bifurcated hearing on the question of mental retardation.

The Circuit Court could have employed two mechanisms to protect Mr. Prieto's rights in this regard, and Mr. Prieto objects to the Circuit Court's failure to utilize either mechanism. First, the Circuit Court could have made a pretrial determination of mental retardation. (JA 8351-55). Second, the Circuit Court could have mandated a bifurcated penalty proceeding. (JA 8304-24). Providing Mr. Prieto with a pretrial hearing on mental retardation would have been proper because it would have saved significant time and resources, *see generally United States v. Hardy*, No. 94-381, 2008 WL 1743490, at *2-3 (E.D. La. Apr. 10, 2008) (slip copy), and, most importantly, it would have protected Mr. Prieto's constitutional rights. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *United States v. Webster*, 392 F.3d 787, 792 (5th Cir. 2004) (holding that under *Apprendi* and *Ring*, a jury is not required to find the absence of mental retardation). This procedure is compatible with Virginia's scheme for criminal punishment. VA. CODE ANN. § 19.2-264.3 (providing that after a jury has determined the question of guilt, then "a

separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty.”).

Contrary to what the Commonwealth countered at trial, bifurcating the penalty phase is not barred by the statute. VA. CODE ANN. § 19.2-264.3. To the extent the statute is read to bar bifurcation, it is unconstitutional, as applied. *Id.* Similarly, while a defendant has a right not to have irrelevant and prejudicial sentencing-related evidence considered during the guilt phase, he also has the “right to have the sentencer consider and weigh relevant mitigating evidence.” *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 250 (2007). This right “would be meaningless unless the sentencer was also permitted to give effect to its consideration in imposing sentence.” *Id.*

The jury in *Prieto II* could not give full, “meaningful” effect to the evidence for several reasons. First, the Circuit Court failed to bifurcate the penalty phase to determine the question of mental retardation separately from, and prior to, the introduction of evidence on the issues of future dangerousness and vileness. (JA 8320). As a result, the jury was influenced improperly by irrelevant evidence. Second, the jury could not properly process the mental retardation evidence because the jury was awash with information guided by confusing and contradictory instructions.

The scope and breadth of the information presented during the penalty phase was voluminous. The evidence with regard to mental retardation took up trial days of testimony, and closing statements were extremely complicated as to these concepts alone. (JA 8315-16).

The jury instructions not only failed to cure these problems, but also compounded them. The instructions failed to adequately provide that mental retardation was an absolute bar to execution; combining the sentencing phase issues left the jury with confusing, and thus insufficient guidance. Also, the Circuit Court refused to instruct the jury preliminarily that a finding of mental retardation is an absolute bar to the death penalty. (JA 10608-18). Therefore, Mr. Prieto's death sentence requires reversal or he should be granted a new sentencing hearing.

IV. The Sentence Of Death Is Excessive And Disproportionate Considering The Crime, The Evidence Admitted At Trial And The Mitigation Evidence Introduced During The Penalty Phase. (AOE Nos. 40, And 82).

Under VA. CODE ANN. § 17.1-313(C)(2) (2006), the Court shall consider and determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." The test of proportionality to be applied is whether "juries in this jurisdiction generally approve the supreme penalty

for comparable or similar crimes.” *Lewis v. Commonwealth*, 267 Va. 302, 312, 593 S.E.2d 220, 226 (2004) (citations omitted).

Here, the evidence failed to establish that Mr. Prieto was the “triggerman.” See section I(B), *supra*. And, this Court has reversed two death sentences, when the Commonwealth failed to establish that the defendant was the “triggerman.” *Cheng*, 240 Va. at 26, 343 S.E.2d at 599; *Rogers*, 242 Va. at 307, 410 S.E.2d at 621. In addition to the paucity of evidence, the Commonwealth’s improper demand for justice in its closing argument (JA 12458-459), as well as the myriad of above-described issues, render Mr. Prieto’s death sentence excessive and disproportionate under the circumstances.

V. The Circuit Court Erred By Refusing To Consider The Constitutional Propriety Of Virginia’s Death Penalty. (AOE Nos. 15, 18, And 46).

The death penalty in Virginia, as set forth in VA. CODE ANN. §§ 19.2-264.2 through 19.2-264.5 and 17.1-313, violates reasonable interpretations of Due Process and Equal Protection pursuant to the United States and Virginia Constitutions for several reasons. As argued to the Circuit Court numerous times before, there are several reasons why the Virginia death penalty is unconstitutional. (See *generally* JA 707-750, 8355-356).

Virginia's statutory law fails to adequately direct the jury as to how it should evaluate the statutory aggravating factors of vileness and future dangerousness or mitigating factors so as to prohibit the arbitrary or capricious imposition of the death sentence. This violates at least the Eighth and Fourteenth Amendments to the United States Constitution, and Sections 9 and 11 of Article I of the Virginia Constitution.

The Eighth and Fourteenth Amendments are also violated because Virginia's law allows evidence of unadjudicated criminal acts, with no minimum standard of proof, in proving the statutory aggravating factor of future dangerousness and hearsay to be considered in the post-sentence report. Virginia's statute is also unconstitutional because a sentence of death may be set aside upon a showing of good cause. This discretionary review and lack of a standard further violates the Eighth and Fourteenth Amendments. Even the appellate review procedures laid out in Virginia's statutes are unconstitutional since the Virginia Supreme Court is not required to conduct proportionality and passion/prejudice review consistent with the Eight Amendment and other federal and state constitutional provisions.

Yet, the Circuit Court, in denying the opportunity for meaningful review of the system, prevented Mr. Prieto from mounting an attack upon a

system of punishment that is fraught with flagrant constitutional error. (JA 8356).

Post-*Furman* legislation has failed to address the systemic flaws that continue to plague the application of the death penalty in the United States. Although the legislation has attempted to address the problems of jury discretion in capital sentencing, these new statutes produced the same unconstitutional results. Is there a factual basis to support the proposition that Virginia's capital punishment system is decidedly less error-prone than every other death penalty state or that the Virginia trial and review process, both state and federal, less flawed? When errors go undetected or ignored, innocent or undeserving people die. Surprisingly, the system continues to be plagued by weaknesses that call into question the propriety of permitting the application of the death penalty in modern society by a system so fraught with error, discrimination, and unreliability. *Furman v. Georgia*, 408 U.S. 238, 284 (1972).

Legislation following *Furman* and the evolution of death penalty jurisprudence has failed to mend the inherent constitutional deprivations and violations that continue to plague the system. Rather, the application of the death penalty in the courtroom today continues to suffer from the

same flaws, which existed three decades ago with the major difference being that more money is spent on the same flawed process.

VI. This Court Erred In Denying Mr. Prieto's *Motion For Extension Of Page Limit*.

This Court erred in denying Mr. Prieto's *Motion for an Extension of Page Limit*, which he hereby incorporates by reference. Mr. Prieto's counsel has a constitutional duty to provide effective assistance to him on this appeal, and their ability has been impeded due to this Court's pre-set page limits. See, e.g., *Douglas v. California*, 372 U.S. 353, 356-57 (1963); *Evitts v. Lucey*, 469 U.S. 387, 392 (2005). The Supreme Court of Virginia Appellate Rules Advisory Committee has recognized the propriety of this argument by recommending an increase in page limits by 100 pages for capital appeals. See Committee Report and Revised Rules at 33-34 (June 9, 2008 Draft).

CONCLUSION

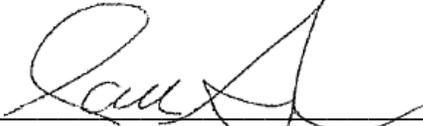
For the foregoing reasons, Mr. Prieto respectfully requests that this honorable Court reverse his convictions and dismiss the case, or, set aside his sentence of death, or in the alternative, grant him a new trial.

Respectfully submitted,

ALFREDO R. PRIETO

By Counsel

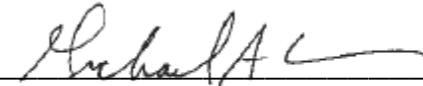
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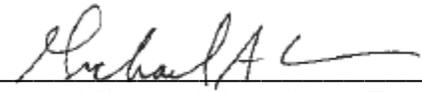
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CERTIFICATE

I hereby certify that Rule 5:26(d) of the Supreme Court of Virginia has been complied with, and that pursuant to the Rule, on this 26th day of January, 2009, twelve (12) paper copies and one (1) electronic copy of the Brief of Appellant and Appendix have been filed with the Clerk of the Supreme Court of Virginia by hand-delivery, and that three (3) paper copies of the same have been hand delivered to Counsel for Appellee:

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