IN THE
SUPREME COURT OF VIRGINIA

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Record Nos. 082464 and 082465

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ALFREDO ROLANDO PRIETO,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

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# BRIEF OF THE COMMONWEALTH

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## STATEMENT OF THE CASE

In 2007, a jury in the Circuit Court for Fairfax County found Alfredo Prieto guilty of the capital murder of Rachel Raver in the commission of, or subsequent to, rape, Virginia Code § 18.2-31(e); rape, § 18.2-61; capital murder of Rachel Raver and Warren Fulton, III, as part of the same act or transaction, § 18.2-31(g); two counts of use of a firearm in the commission of a murder, § 18.2-53.1; and grand larceny of a vehicle, § 18.2-95. (JA 68-70). Due to juror misconduct, the court declared a mistrial during the sentencing phase. (JA 7610-11).

A second Fairfax County jury found Prieto guilty on February 6, 2008. (JA 8985-90, 12924-26, 12494-97). In a separate sentencing proceeding, the jury sentenced Prieto to death for each of the capital murders he committed. (JA 8991-93, 16177-79, 16187-89). The jury sentenced Prieto to imprisonment for life, and to terms totaling 26 years, for the remaining convictions. (JA 8994-97, 16179-80, 16187-89).

On May 23, 2008, the circuit court entered final judgment. (JA 16381-83).

By orders dated December 17, 2008, this Court certified the record in the capital murder cases and consolidated the appeal with the appeals of convictions for the non-capital offenses.

## QUESTIONS PRESENTED[1]

I. Has Prieto waived assignments of error not briefed?

II. Should this Court rely on precedent disposing of previously decided issues?

III. Did the trial court err in declaring a mistrial for manifest necessity?

IV. Did the trial court err in following the statutory procedures for determining mental retardation?

V. Did the trial court err in denying certain relief for the loss of evidence which Prieto alleged violated his due process rights?

VI. Did the trial court err in allowing the jury to consider the capital murder charges?

VII. Did the trial court err in using the verdict form mandated by statute?

VIII. Did the trial court abuse its discretion in its rulings concerning the admissibility of Prieto's prior conviction for capital murder?

IX. Did this Court err in denying Prieto's motion to exceed the page limit?

X. Should this Court uphold Prieto's death sentence pursuant to the sentence review required by § 17.1-313?

## STATEMENT OF FACTS

Rachel Raver and Warren Fulton were dating each in 1988 in Fairfax County, Virginia. They were last seen alive by their friend and family on December 3, 1988.

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[1] The Commonwealth has restated the Questions Presented to accurately state the issues Prieto actually argues to this Court.

On December 6, 1988, Raver's partially nude body was discovered in outdoors in a field in Fairfax County, Virginia. (JA 10684-85, 10733). The body about 40 or 50 feet from the road. (JA 10692). Fulton's clothed body was found about 100 feet away. (JA 10709, 10712). Raver's clothing was found about halfway between the two bodies. (JA 10712). The position of the Raver's body suggested that she had struggled. (JA 10720).

The police detected some liquid "glistening" about halfway up both of Raver's thighs. (JA 10854, 10894). They collected samples from each thigh, packaged them, and delivered them to the state laboratory. (JA 10854-55).

A wound identification expert (JA 10981) explained that the abrasions on Raver's body were not animal wounds, but rather the result of pushing or pulling on her body. (JA 10982). He described the wounds as evidence of movement, 'with a weight bearing on top of her." (JA 11946).

The Medical Examiner determined that Raver had been killed by a single penetrating gunshot wound that entered her lower left back and continued to her front in a downward trajectory. (JA 10752). The bullet injured Raver's backbone, punctured her small intestine, and went through the right iliac vein, near her pelvis. (*Id.*). The wound would have been painful, and death would have taken "some minutes." (JA 10753).

Fulton also died of a single penetrating gunshot wound which entered his left mid-back and traveled to his front in a downward trajectory. The bullet injured Fulton's rib, went through his vertebra and aorta, penetrated his lungs, diaphragm, and liver, and lodged in his abdomen. (JA 10754). The Medical Examiner recovered the bullets from both bodies, packaged them, and delivered them both to the Fairfax County Police. (JA 10756).

The Medical Examiner also recovered evidence samples on swabs from inside Raver's mouth, vagina, and anus. (JA 10780-81). The Medical Examiner combed Raver's pubic hair in order to collect any foreign material or hair. (JA 10793). She also collected known head hair samples from both victims. (JA 10807). The evidence was sealed and delivered to the Fairfax County Police. (JA 10794).

Julien Mason, a forensic scientist and firearms and tool mark examiner for the Virginia Department of Forensic Science, examined the bullets recovered from the victims. (JA 11425-29). Both were semi-jacketed .38 or .357 caliber bullets, and both were fired from the same weapon. (JA 11433, 11624). Mason concluded that the bullets had been fired from a revolver. (JA 11435, 11443).

James Mowatt, now an instructor with Department of Homeland Security, was a homicide investigator with the Fairfax Police Department in 1988. (JA 11052-53). Because the state laboratories were not yet performing DNA analysis, Mowatt delivered the biological evidence to Lifecodes Laboratory in Valhalla, New York. (JA 11069). He did not deliver the oral swabs because the state serologist reported that the oral swabs from Raver showed no evidence of seminal fluids. (JA 11046, 11154, 11348). The serologist also concluded that blood found on Raver's fingernail was "insufficient for further analysis." (JA 11168-69, 11348).

A forensic scientist at Lifecodes extracted DNA from the swabs. Only Raver's DNA profile was observed on the anal swab. (JA 11249, 11252-53). The vaginal and thigh swabs contained DNA profiles which did not match either Raver or Fulton, but which matched each other. (JA 11250-51). Mowatt received the evidence back from Lifecodes and kept it, sealed, in the homicide evidence locker until he delivered it the police department property section. (JA 11123-25).

A New York City police officer found Raver's car on December 5, 1988. It had been abandoned, stripped, and trashed. (JA 11127). Because it had been used as a dumpster on the streets of New York

(JA 11144), the police decided not to process it for evidence. (JA 11149-50).

In 1988, Alicia Hernandez was Alfredo Prieto's girlfriend. (JA 11398). The couple lived in Manassas in 1988 and moved to Arlington in 1989. (JA 11399-11401). While living in Arlington, Hernandez saw Prieto cleaning a gun which she recognized as a revolver he kept under their mattress. (JA 11401-02). She had seen Prieto with the same gun while they were living in Manassas. (*Id.*). In 1988, Tulio Sanchez had employed Prieto to cut grass along the Dulles Toll Road. (JA 11413). The murder scene was just south of the Dulles Toll Road, about 6 miles east of Route 28. (JA 11054, 11102; cf. JA 11941, 12106).

In 1999, Detective Murphy delivered some of the biological evidence from the murders to the Virginia state laboratory. (JA 11302). Carol Palmer, a DNA expert with the state laboratory, examined the evidence as part of a review of "cold cases." (JA 11522). She determined that the DNA profile from the vaginal swabs was foreign to Raver and did not match the known profile for Fulton. (JA 11528-30). She determined that the DNA profiles from the thigh and vaginal swabs were "similar." (JA 11533).

In 2005, Detective Murphy obtained a search warrant for a buccal swab of the defendant, which he submitted for DNA analysis. (JA 11304-

05, 11339-40). Prieto's DNA profile could not be eliminated as the contributor to the DNA profile identified on the swabs recovered from Raver's vagina. (JA 11535). That profile would be expected to occur only once in one quadrillion persons (1:1,000,000,000,000,000) in the Hispanic population. (JA 11536). Prieto's DNA profile also could not be eliminated as the contributor to the DNA profile identified on the thigh swabs; however, Palmer did not report any probabilities for that sample. (JA 11537).

Myron Scholberg, a hair and fiber examiner, found only two foreign hairs in the evidence, both from the pubic combing: one head hair and one head hair fragment. (JA 11792, 11806-07, 11838-39). He determined that both were of Negroid origin. (JA 11795).

Charles Linch, also a hair and fiber examiner, examined 25 head hairs from Prieto so that he could account for variation in the sample in his examination. (JA 11953). Linch found pigmentation characteristic of Negroid hairs in some of the sample, estimating "about half and half" Mongoloid and Negroid characteristics. (JA 11954).

At sentencing, the Commonwealth introduced evidence of Prieto's prior convictions including: a drive-by shooing of three people on or about August 25, 1984 (JA 12866-75); an escape committed on or about August

16, 1985 (JA 12681-65); and a series of crimes committed on or about September 2, 1990, in California, including the rape and the murder of a fifteen-year-old girl, two attempted murders, two additional rapes, three kidnappings, two robberies, two attempted robberies, and possession of a firearm by a felon. (JA 12876-900). The murdered fifteen year-old was found in a remote, open field. She was partially unclothed, lying on her back with her legs spread apart, and died from a single gunshot wound. (JA 13457-59).

Prieto also raped and murdered Veronica Jefferson, a young professional woman, in Arlington, Virginia. On May 11, 1988, her naked body was discovered on the grounds of an elementary school. (JA 13068). Prieto's DNA profile matched the profile identified on the vaginal swabs. (JA 13226). That profile occurs only once in one billion persons in the Hispanic population. (*Id.*). Jefferson died from a single gunshot wound to her chest. (JA 13136).

The jury learned that Raver had graduated from George Washington University in May, 1988, (JA 11290) and was planning to start law school. (JA 12579), and that Raver's father slipped into dementia after her death. (JA 12581). It learned that Fulton was a student at George Washington University and captain of the baseball team. (JA 13432-33). Fulton's

younger brother had to withdraw from his medical studies for several years as result of the trauma from his brother's murder. (JA 13438). Eight family members detailed their years of loss and suffering after the murders. (JA 12577-98, 13263-83, 13383-87, 13421-43).

Prieto presented testimony from six family members to describe his difficult upbringing in El Salvador. Prieto moved to California as a teenager and became involved with gangs.

Dr. Ricardo Weinstein testified that Prieto was mentally retarded. (JA 12742). Dr. Pablo Stewart testified that Prieto suffered from post-traumatic stress disorder as result of his experiences in El Salvador. (JA 12952). Dr. James Merikangas testified that Prieto suffered from brain damage affecting his right frontal lobe (JA 14564), resulting in reduced impulse control. (JA 14424). Dr. Leigh Hagan testified for the Commonwealth that Prieto was not mentally retarded, as defined by the Virginia statute. (JA 14724).

At the conclusion of the evidence, the jury found that Prieto had not proven that he was mentally retarded and sentenced him to death.

## ARGUMENT

### I. PRIETO HAS WAIVED HIS ASSIGNMENTS OF ERROR WHICH HE HAS NOT BRIEFED.

Prieto acknowledges that he has failed to "fully brief" his Assignments of Error 1, 2, 3, 5, 7-12, 16, 19-21, 23-24, 44, 47-59, 62-66, 70-74, and 76-77 (Appellant's Brief at 1) ("Br. 1"). In fact, he failed to present any argument with respect to them. In addition, despite referencing them in his argument headings and his "Questions Presented," Prieto also fails to present any argument with respect to his Assignments of Error 4, 17-18, 22, 25-28, 30-32, 34-35, 38-41, 45-46, 60-61, 69, 75, 78, and 80-81.[2]

All of those Assignments of Error therefore have been waived. *See Muhammad v. Commonwealth*, 269 Va. 451, 531, 619 S.E.2d 16, 62 (2005), *cert. denied*, 547 U.S. 1136 (2006); *Wolfe v. Commonwealth*, 265 Va. 193, 207, 576 S.E.2d 471, 479, *cert. denied*, 540 U.S. 1019 (2003). *See also Burns v. Commonwealth*, 261 Va. 307, 318, 541 S.E.2d 872, 880, *cert. denied*, 534 U.S. 1043 (2001) (assignments of error not briefed are waived even where trial record contains written argument addressing same issue).

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[2] Put otherwise, Prieto presents argument only with respect to some or all of Assignments of Error 6, 13-15, 29, 33, 36-37, 42-43, 67-68, 79, and 82.

## II. PRIETO PRESENTS NO REASON FOR THIS COURT TO OVERRULE PRECEDENT PREVIOUSLY DECIDING ISSUES HE RAISES.

Prieto makes a variety of arguments concerning issues of law decided adversely to him in previous decisions of this Court. Prieto advances no sufficient reason for this Court to overrule its precedents.

In Argument III.A.3.a., citing Assignments of Error 67 and 69,[3] Prieto argues that the failure to provide jury instructions further defining the term "future dangerousness" violates the United States Constitution and the Constitution of Virginia. This Court rejected that argument in *Lovitt v. Commonwealth*, 260 Va. 497, 508, 537 S.E.2d 866, 874 (2000), *cert. denied*, 534 U.S. 815 (2001) (citing cases). Prieto misconstrues this Court's holding in *Smith v. Commonwealth* to say that this Court "was presented with a claim that this statutory language, standing alone, was unconstitutionally vague" and therefore adopted a narrowing construction. (Br. 35). In fact, this Court found that the term was not vague. *Smith v. Commonwealth*, 219 Va. 455, 477, 248 S.E.2d 135, 148 (1978), *cert. denied*, 441 U.S. 967 (1979).

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[3] Prieto's Argument III.A.3.a cites but does not address assignment 69.

In Argument III.A.3.b., citing Assignments of Error 17, 41, and 68,[4] Prieto argues that the failure to provide jury instructions further defining the term "depravity of mind" violates the United States Constitution and the Constitution of Virginia. This Court rejected this argument in *Tuggle v. Commonwealth*, 228 Va. 493, 515, 323 S.E.2d 539, 553 (1984), *vacated on other grounds*, 471 U.S. 1096 (1985), *aff'd*, 230 Va. 99, 334 S.E.2d 838 (1985), *cert. denied*, 478 U.S. 1010 (1986) (citing cases). Moreover, this Court specifically has affirmed that "the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) does not require jury instructions on the definitions of the composite parts of Virginia's vileness aggravator." *Elliott v. Warden*, 274 Va. 598, 627, 652 S.E.2d 465, 488-89 (2007).

In Argument V, citing Assignments of Error 15, 18, and 46,[5] Prieto argues, but only in a conclusory manner, that Virginia's statutes are unconstitutional. Rather than presenting principles of law, legal arguments and authority in his brief, the defendant attempts to incorporate by reference the arguments presented in his pleading below. (Br. 42, citing JA 707-750). This Court has held that such a practice is impermissible.

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[4] Prieto's Argument III.A.3.b. cites but does not address assignments 17 or 41.

[5] Prieto's Argument V cites but does not address assignments 18 or 46.

*Muhammad v. Commonwealth*, 269 Va. at 531, 619 S.E.2d at 62. His argument thus is waived on appeal. In addition, Prieto simply restates his allegations in summary form, without citation to any authority. Those assignments accordingly are waived. *See Powell v. Commonwealth*, 267 Va. 107, 135, 590 S.E.2d 537, 554, *cert. denied*, 543 U.S. 892 (2004).

The only case Prieto cites is *Furman v. Georgia*, 408 U.S. 238, 284 (1972) (Br. 49), deliberately ignoring the fact that *Furman* is not controlling over statutes enacted since that decision to address the defects found by *Furman*. This Court repeatedly has held that Virginia's capital murder and capital murder sentencing statutes are constitutional. *See Juniper v. Commonwealth*, 271 Va. 362, 388-89, 626 S.E.2d 383, 401, *cert. denied*, 549 U.S. 960 (2006).

Prieto advances no reason for this Court to revisit these decisions.

## III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLARING A MISTRIAL FOR MANIFEST NECESSITY. (Appellant's Argument II.; Assignment of Error 6).

Prieto objects to the trial court's declaration in his first trial of a mistrial for manifest necessity. He claims that the trial court instead should have declared that the jury was unable to reach a verdict and applied § 19.2-264.4(E) to impose life sentences for his capital murder convictions.

Section 8.01-361 authorizes the trial judge to "discharge the jury when it appears that they cannot agree on a verdict or that there is a manifest necessity for such discharge." "In determining whether manifest necessity exists, a trial court is vested with broad discretion." *Smith v. Commonwealth*, 239 Va. 243, 267, 389 S.E.2d 871, 884, *cert. denied*, 498 U.S. 881 (1990) (*citing Turnbull v. Commonwealth*, 216 Va. 328, 335, 218 S.E.2d 541, 546 (1975). Prieto ignores the finding of the trial court that his first jury was tainted, not by an inability to agree on mental retardation, but rather by juror misconduct.

In Prieto's first trial, the trial court ordered that the jury would decide mental retardation before hearing evidence on sentencing. (JA 2888-89). After the jury began deliberation on mental retardation, the trial court received two letters (JA 7528): one from the foreman stating that it appeared that the jury would be unable to reach a unanimous decision (JA 3521) and one from Juror Davico that he was being "pressured." (JA 3522). Davico asked the trial court, "Please end this deliberation." (*Id.*). Before the lunch break, the trial court gave the jury a modified *Allen* charge. (JA 7550-53). After lunch, Juror Davico did not return to the jury room but delivered a second letter to the trial judge. (JA 7589). Davico disavowed his vote on the guilt phase:

> Furthermore, I want to make sure the Court knows that my vote in the first deliberation is not guilty on all charges except for rape of Ms. Raver. Since I don't believe the prosecution has proved that Defendant is guilty of capital murder charges, I kindly ask the Court to immediately dismiss me."

(JA 7594, 3523). The trial court found that Davico's failure to follow the instructions constituted clear misconduct. (JA 7600-01.) The court also found that it could not substitute any of the alternate jurors at that point because by statute they had been discharged once deliberations had begun. (JA 7600). In light of that finding, the trial court ruled it had no alternative but to declare a mistrial for manifest necessity. (JA 7602-03, 7610-11).

The trial court did not declare a "hung" jury. It properly found that the panel had ceased to function as a jury even before it returned the guilt stage verdicts due to one juror's misconduct. The trial court was left with an incomplete jury to continue deliberations. A jury of eleven obviously was insufficient to hear the sentencing phase of the trial and a mistrial was the only alternative permitted by law.

Prieto cites three cases from different states which he claims would bar retrial after a jury deadlocks on mental retardation. None of the cases involved a deadlocked jury: all were interlocutory appeals of pre-trial, procedural rulings. Moreover, *State v. Jiminez*, 924 A.2d 513 (N.J. 2007),

did not deal with deadlock at all, but with statutory construction. Likewise, *State* v. *Flores,* 135 N.M. 759, 93 P.3d 1264 (2004), merely construed its own state statute requiring a separate hearing to determine mental retardation, prior to the sentencing phase. *See* NMSA § 31-20A-2.1 (C); 93 P.3d at 1271. Finally, *Blonner v. State,* 127 P.3d 1135 (Okla. Crim. App. 2006), established a detailed procedure that state law would require in future capital cases where the issue of mental retardation is raised, in the absence of a statute. None of those cases follow the procedural or factual situation that occurred here. Prieto's jury never failed to agree on a penalty pursuant to § 19.2-264.4(E). The mistrial based on manifest necessity was declared due to the misconduct of one juror. The circuit court therefore did not abuse its discretion in empanelling a new jury.

## IV. THE TRIAL COURT PROPERLY REJECTED PRIETO'S MOTIONS TO DETERMINE MENTAL RETARDATION OUTSIDE THE STATUTORY PROCEDURES. (Appellant's Argument III.C.; Assignments of Error 4, 13-14, 45, 50, and 66).[6]

Prieto objected to the trial court's denial of his motion to determine prior to trial whether he was mentally retarded. The trial court correctly

[6] Prieto's Argument III.C. cites but does not address assignments 4, 45, 50, or 66.

denied that motion, finding that such procedure was "clearly precluded by the statute." (JA 8353). The statutory procedure is clear:

> In any case in which the offense may be punishable by death and is tried before a jury, the issue of mental retardation, if raised by the defendant in accordance with the notice provisions of subsection E of § 19.2-264.3:1.2, shall be determined by the jury as part of the sentencing proceeding required by § 19.2-264.4.

Va. Code § 19.2-264.3:1.1(C). Prieto cites *United States v. Hardy*, 2008 U.S. Dist. LEXIS 29996 (E.D. La. Apr. 10, 2008) (unpub.), but *Hardy* noted that the federal statute was silent as to the timing of such a hearing. *Id.* Further, the fact that the Fifth Circuit does not require that mental retardation be decided by a jury (Br. 44) is irrelevant because the Virginia statute does make such a requirement.

Prieto also objected to the trial court's denial of his motion to "bifurcate" the penalty phase of his trial to create a separate proceeding to determine whether he was mentally retarded. But the clear language of the statute, that it "shall be determined by the jury as part of the sentencing proceeding required by § 19.2-264.4," not prior to sentencing, § Va. Code § 19.2-264.3:1.1(C), demonstrates the correctness of the trial court's ruling.

Prieto's only argument for ignoring the statute is his assumption that the jury will be confused if it also hears evidence of vileness and future

dangerousness. (Br. 45-46). However, that argument is one to be addressed by the General Assembly, not by this Court. The General Assembly determined that an evaluation for mental retardation is required to include "multiple sources of information, including clinical interview, psychological testing and educational, correctional and vocational records" as well as the defendant's "educational, social service, medical records, prior disability assessments, parental or caregiver reports, and other collateral data." Va. Code § 19.2-264.3:1.1(B). The assessment thus most appropriately should include all the evidence of the "circumstances surrounding the offense [and] the history and background of the defendant" that the Commonwealth will show in the sentencing phase, and more. *Cf.* Va. Code § 19.2-264.4.

Prieto argues that the jury instructions "compounded" the problems, but says only that the trial court "refused" to instruct them preliminarily that mental retardation is an "absolute" bar to the death penalty and that the final jury instructions "failed to adequately provide" that it was such a bar. (Br. 46).[7] Prieto's argument is refuted by the record. The trial court gave the following preliminary instruction:

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[7] Prieto makes reference to his argument in the trial court with respect to preliminary instructions to the jury. (Br. 46). Prieto cannot rely on incorporated arguments he made below but elected not to make in his brief

> If you find that the Defendant is mentally retarded he can not be sentenced to death, and you will proceed to sentence the Defendant to life in prison without the possibility of parole, and if you deem it appropriate, a fine.

(JA 10640). Prior to sentencing, the trial court's first substantive instruction to the jury was that Prieto must be given a life sentence, or a life sentence with a fine, if they found that he was mentally retarded. (JA 15977). The same requirement was repeated in the written instructions given to the jury (JA 8920) and in the capital murder verdict form for each count. (JA 8991, 8992).

The trial court committed no error in its decision to follow the mandate of § 19.2-264.3:1.1(C).

## V. THE TRIAL COURT DID NOT ERR IN DENYING PRIETO'S MOTIONS FOR RELIEF ALLEGING THAT THE LOSS OF EVIDENCE VIOLATED HIS DUE PROCESS RIGHTS. (Appellant's Argument I.A.; Assignments of Error 22, 25, 27, 30-32, 34, 36-38, and 79-82).[8]

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in this Court. These arguments are waived. *See Muhammad*, 269 Va. at 531, 619 S.E.2d at 62.

[8] Prieto's Argument I.A. cites but does not address assignments 22, 38, 80, 81, 82. In addition, Prieto simply restates assignments of error 25, 27, 30, 31, 32, and 34 in summary form, without citation to any authority. Those assignments accordingly are waived. *Powell*, 267 Va. at 135, 590 S.E.2d at 554.

Prieto alleges that the loss of certain hair evidence, which he speculates was exculpatory, violated his due process rights. He states that the trial court erred in failing to remedy the violation by granting an instruction allowing the jury to infer that the lost evidence would have been "unfavorable to the Commonwealth's position." (Br. 14) (JA 8892).

After Scholberg completed his report on December, 14, 1988, he retained the hairs for a time, pending receipt of any known hairs from a suspect. (JA 11351). The hairs were returned to the police property room on August 9, 1990. (JA 11880). After Prieto was identified as a suspect, Detective Murphy retrieved the envelopes marked as containing the unknown hairs from the police evidence room and submitted them for further analysis, delivering them to the state laboratory on September 21, 2005. (JA 11856). He first learned that the envelopes were empty in a telephone call from the laboratory on September 23, 2005. (JA 11861).

The Fairfax County Police Department searched its evidence room from top to bottom, four times, in an effort to find or account for the missing slides and hair. (JA 11863-64). They could not. (*Id.*). Murphy asked the laboratory personnel to search their facility, and, after searching, they also found nothing. (JA 11864).

Scholberg was the last person to examine the hairs before they were discovered to be missing in 2005. (JA 11879). Carol Palmer, a DNA expert with the Virginia Department of Forensic Science, did receive packages labeled as hair samples in 2000, but did not open them. (JA 11557, 11864). When she received the packages from Murphy in 2005, she forwarded them, unopened, to Charles Linch, a hair and fiber examiner. (JA 11566). She was unaware that the packages were empty until Linch contacted her. (*Id.*) She confirmed that her laboratory also searched for the samples, but without success. (JA 11558).

The United States Supreme Court has held that, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Youngblood v. Arizona*, 488 U.S. 51, 58 (1988). Prieto's argument to this Court relies almost exclusively on his interpretation of the case that *Youngblood*, supplanted. *See California v. Trombetta*, 467 U.S. 479 (1984).[9]

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[9] At trial, Prieto did not rely on *Youngblood*, or *Trombetta*, to argue that the jury be instructed for an inference adverse to the Commonwealth. (JA 12179). The Commonwealth established that the analogous "missing witness" instruction is never authorized for either side in a criminal case. (JA 12174-75). *See Schmitt v. Commonwealth*, 262 Va. 127, 145, 547 S.E.2d 186, 198 (2001), *cert. denied*, 534 U.S. 1094 (2002), citing *Russell v. Commonwealth*, 216 Va. 833, 836-37, 223 S.E.2d 877, 879 (1976).

Prieto argues that, under *Trombetta*, it is sufficient if "the exculpatory nature of the evidence was 'apparent' before its loss"[10] and the defendant "could not obtain comparable evidence by other reasonable means." (Br. 10-11). The language Prieto takes from *Trombetta* did not define a due process violation; rather, it defined the limited range of evidence to which such a duty could apply. *See* 467 U.S. at 489. In other words, it explains "materiality" in this context. *Cf. id.* at 489 n. 8. Finding that neither condition was met, *Trombetta* needed no further analysis to find that there was no due process violation. *Id.* at 489.

In *Youngblood*, the Court was concerned that "the likelihood that the preserved materials would have enabled the defendant to exonerate himself appears to be greater than it was in *Trombetta*." 488 U.S. at 56. The Court found that the standard for finding a violation should be "bad faith." 488 U.S. at 57. Because there was no bad faith in Prieto's case, he

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[10] Prieto's argument that police knew the hair evidence to be exculpatory before it was lost rests on the investigative use the police made of the hair evidence, years before identifying Prieto as a suspect (Br. 11-12); however, those investigations only showed that the police believed that the hair evidence would *inculpate* the murderer. Prieto's assertions that the police "believed a co-assailant was involved" (Br. 12) are not supported by his citation to the joint appendix: Murphy's testimony instead states that the police considered that the "Negroid" hair "could have been a cast off hair," and that they were investigating where Raver might have "picked it up." (JA 11881).

could not demonstrate a violation below, or here. *See Lovitt v. Warden*, 266 Va. 216, 239-42, 585 S.E.2d 801, 814-16 (2003), *cert. denied*, 541 U.S. 1006 (2004).

Even so, Prieto misstates the facts to exaggerate his claim that his defense was prejudiced. He complains that he "could have relied upon Mr. Scholberg's report to demonstrate that the hairs had Negroid characteristics." (Br. 12). But Prieto in fact *did* rely on the report, and argued to the jury not only the characteristics, but that the hairs *were* Negroid, "contributed by someone who is either African or of African-American heritage." (JA 12424). Prieto says that there was confusion created by references to "Hispanic" hair, but Scholberg's own testimony clarified the issue. (JA 11827-28).[11]

Prieto complains that the loss of the hair prevented him from "refuting the allegations by the Commonwealth that Scholberg's analysis was incorrect" (Br. 12), without identifying anywhere that the Commonwealth made such an argument. The Commonwealth's only argument to the jury

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[11] The trial court found that the lost hairs were head hairs. (JA 12028; JA 1898). Prieto, however, has pointed to no case where head hairs were material to guilt or innocence of rape. *See, e.g.*, *Jackson v. Commonwealth*, 267 Va. 178, 186, 590 S.E.2d 520, 524 (foreign *pubic* hairs used to prove rape), *cert. denied*, 543 U.S. 891 (2004).

was that the transiency of hair made the analysis irrelevant, because "Scholberg can't tell you how it got there." (JA 12450).

Prieto also argues that Linch's answer to Prieto's own question was "factually unsupported," "speculative," and "non-responsive." (Br. 14). When asked generally about thorough examinations, Linch stated that he might, in some circumstances, have "mistakenly thought it was from a black person." (JA 12003). Prieto, however, did not object to the same statement during direct. (JA 11991). *See also* Tr. Jan 31, 2008, pp. 122-23 ("if these hairs were found individually just a piece of one of the heavy pigmented ones, I might could make the error and call it a Negroid hair").

The trial court found that Prieto's question was "really difficult to understand," that Prieto was in fact inviting Linch to criticize Scholberg, and that Linch instead was critical of himself. (JA 12004). The trial court properly instructed the jury, without objection, that the answer was stricken. (JA 12007).

The trial court specifically found that there was no bad faith on the part of the investigators, or prosecutors (JA 12176), and Prieto did not dispute the finding. (JA 12179: "assuming that the Commonwealth isn't at fault"). Such a finding of fact by the trial court is entitled to deference.

*Lovitt v. Warden*, 266 Va. at 241, 585 S.E.2d at 815-16. Under *Youngblood*, the circuit court's decision was not error.

VI. THE EVIDENCE WAS SUFFICIENT TO PROVE CAPITAL MURDER. (Appellant's Argument I.B.; Assignments of Error 26, 28-29, 33, 35, and 38-39).[12]

Prieto's argument misstates the evidence that he acted alone in murdering Rachel Raver and Warren Fulton. He argues that the Commonwealth "did not introduce any evidence to support its theory" but then inconsistently admits that the "only" relevant evidence was: proof that his DNA was found on vaginal swabs of Raver; testimony that he had access to a revolver; and testimony that he was familiar with the area where their bodies were found. (Br. 15). He also ignores the other evidence, even though it was detailed by the trial court in overruling his motions. (JA 11751, 12025-26).

"The issue upon appellate review is 'whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Maxwell v. Commonwealth*, 275 Va. 437, 442, 657

[12] Prieto's Argument I.B. cites but does not address assignment 35. In addition, Prieto simply restates assignments 26, 28, 38, and 39, without citation to any authority. Those assignments accordingly are waived. *Powell v. Commonwealth, supra*.

S.E.2d 499, 502 (2008) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). The trial court detailed the overwhelming evidence (JA 12025-26) negating any inference of another assailant:

- Prieto's DNA was the only foreign DNA found (JA 11250-51, 11533, 11535, 11537);
- Both victims were killed by a single shot, in the back, fired from one revolver (JA 10752, 10754, 11624, 11433, 11624);
- Raver's car, when last seen, had room left for only one driver and two passengers (JA 11287, 11374);
- The head hairs found in the pubic combing could have been transferred from a third person (JA 11584, 10951) , either to Raver directly or first to Prieto, from a third person;[13]
- The Negroid characteristics of the hair did not mean it came from a black person because some Hispanic hairs have the same characteristics, allowing the inference that they might be Prieto's own hair (JA 11580, 11671);
- The use of a revolver in the commission of the crimes made it plausible that Prieto abducted the two victims by himself; and
- The utter absence of any other evidence even arguably suggesting the presence of a second assailant.

Prieto relies heavily on *Cheng v. Commonwealth*, 240 Va. 26, 343 S.E.2d 599 (1990), and *Rogers v. Commonwealth*, 242 Va. 307, 410

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[13] The court noted four possible transferences: the bathroom at the bar in D.C., where Raver used a public stall on December 3, 1988 (JA 11297); the communal washing machine shared by the 25 residents of Raver's apartment complex (JA 11884, 11364), "general" transference, or from the assailant. (JA 11670).

S.E.2d 621 (1991). However, in both cases, there was ample evidence of the presence, and involvement, of another person at the murder, and the only issue was the relative role each played. Prieto can point to no similar evidence that another person even was present in his case.

The only reasonable inference was that whoever committed the rape was also the murderer, and that the same assailant also stole the car. As the Court described, "it would be beyond the power of coincidence" that there was a separate theft of the car. (JA 11638).

The evidence supports exactly the sequence of events argued by the Commonwealth (JA 11713-19): the victims were intercepted by a single armed assailant, Prieto, who commandeered their car from the single open rear seat and ordered them to the vacant field. He shot Fulton first, nearest to the road, and the wound and position of Fulton's body are consistent with his first being ordered to kneel down. (JA 11716; 10741, 10754).

Raver realized what lay ahead and moved away. Prieto ordered her to undress at gunpoint: nothing else explains her undressing and piling her clothes in the field, 50 feet from her dead boyfriend. She began to undress but then still tried to run, and Prieto shot her to stop her. The angle of the shot and the clothing stains are consistent with her being shot while fleeing

from Prieto. Prieto turned her over and raped her, lying on top of her, consistent with the bruising, the blood evidence, and the autopsy. Prieto later abandoned the car, consistent with its being discovered far from the scene of his crimes.

Prieto fails to establish that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

## VII. THE TRIAL COURT DID NOT ERR IN USING THE VERDICT FORM MANDATED BY STATUTE. (Appellant's Arguments III.A.1. and III.A.2.; Assignments of Error 17, 20-22, 25, 26, 41-43, 60, 61, 67-69, 75, and 78).[14]

Prieto objected to the trial court's decision to use the sentencing verdict form expressly provided and mandated by § 19.2-264.4 rather than the form he proposed. He argues that the statutory form is defective both under *Powell* v. *Commonwealth*, 261 Va. 512, 552 S.E.2d 344 (2001), *Morrisette v. Warden*, 270 Va. 188, 613 S.E.2d 551 (2005), *cert. denied*, 546 U.S. 1225 (2006), and *Ring v. Arizona*, 536 U.S. 584 (2002). However, the precedent relied upon demonstrates that this Court has never held that Virginia's statutory verdict form is constitutionally lacking.

[14] Prieto's Argument III.A. cites but does not address assignments 17, 20-22, 25, 26, 41, 43, 60, 61, 67-69, 75, and 78.

Until *Powell*, there was no confusion in Virginia law: settled precedent from this Court held for years that the statutory penalty phase verdict form was both constitutional and correct. *See Roach v. Commonwealth*, 251 Va. 324, 336, 468 S.E.2d 98, 105, *cert. denied*, 519 U.S. 951 (1996); *Stewart v. Commonwealth*, 245 Va. 222, 244-45, 427 S.E.2d 394, 408-09, *cert. denied*, 510 U.S. 848 (1993); *Mueller v. Commonwealth*, 244 Va. 386, 412-13, 422 S.E.2d 380, 396-97 (1992), *cert. denied*, 507 U.S. 1043 (1993).

In *Roach*, the defendant argued that the statutory verdict form was unconstitutional because the jury allegedly was not given the option of sentencing him to life imprisonment even after proof of his future dangerousness, and Roach had proffered a verdict form expressly addressing this option by setting out separate finding options for finding aggravating circumstances and imposing death or life imprisonment. This Court held expressly: "[W]e find no error in the trial court's refusal to substitute Roach's proposed verdict form for the statutory sentencing verdict form." *Roach*, 251 Va. at 336, 468 S.E.2d at 105.

In *Mueller*, this Court ruled: "We hold that [the statutory] sentencing form, *in conjunction with Instruction A*, fully apprised the jury of its sentencing options. The structure of the form did not, as contended by

Mueller, favor any of the options presented. Further, since the jury was told in Instruction A that it could choose the penalty of life imprisonment, even if it found either or both aggravating factors, the information concerning the option of life imprisonment was complete." *Mueller*, 244 Va. at 413, 422 S.E.2d at 397 (emphasis added).

Federal courts reviewing Virginia cases also have upheld the statutory verdict form and corresponding sentencing instruction against all constitutional challenges. In *Buchanan v. Angelone*, 522 U.S. 269, 277 (1998), the Supreme Court determined that the pattern instruction describing the statutory verdict form fully set forth the sentencing options and "[t]he jury was thus allowed to impose a life sentence even if it found the aggravating factor proved." *Id.* Significantly, Chief Justice Rehnquist's opinion for the Court rejected the dissent's theory that the instruction might be read as limiting a life sentence to circumstances where an aggravating circumstance is not found, and declared that "the dissent's theory *does not make sense."* *Id.* at 277, n.4 (emphasis added).

In a subsequent case, the Supreme Court continued to reject the exact, same argument now advanced by Prieto, even when made by another Justice about the statutory verdict form:

> Justice Stevens' arguments concerning the lack of a jury verdict form stating that the jury finds one or both aggravating

> circumstances and sentences the defendant to life imprisonment *miss the mark. The life sentence verdict forms do not suggest that a prerequisite for their use is that the jury found no aggravating circumstances.*

*Weeks v. Angelone*, 528 U.S. 225, 235 n.4 (2000) (emphasis added).

In *Buchanan*, the Supreme Court correctly described the pattern jury instruction and corresponding verdict form as presenting a "simple decisional tree." *Buchanan*, 522 U.S. at 277 n.4. Prieto's jury received a single capital murder sentencing verdict form for each conviction which gave the jury all of the sentencing options in *Buchanan*'s "simple decisional tree" in a single document.

Rather than requiring the jury to select from among a variety of separate alternative finding forms, the two-part verdict form used below followed the statutory verdict form model mandated by the Code of Virginia. Moreover, the form used below corresponded exactly to the trial court's sentencing instruction. The jury was instructed to the same paragraph for each capital verdict form, which provided *only* the options of life imprisonment or life imprisonment and a fine, *either* in the absence of any finding of an aggravating factor *or* "if you find that the Commonwealth has proven beyond a reasonable doubt one or both of the aggravating circumstances and you nevertheless find that the appropriate sentence is life or life and a fine." (JA 15984-8, 8953).

The trial court correctly instructed the jury and provided it with a form which fully comported with those correct instructions, as required by *Atkins v. Commonwealth*, 257 Va. 160, 178-79, 510 S.E.2d 445, 456-57 (1999). It was fully able to give effect to whichever verdict it chose, as the Supreme Court recognized in *Buchanan* and *Weeks*.

This Court's opinion in *Powell* did not require that the jury be given separate findings for each sentencing option as opposed to a verdict form following the statutory model mandated by § 19.2-264.4(D):

> [T]he 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 of the 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. However, even that concern was voiced in *Powell* only *after* this Court already had found that "the trial court erred in permitting the Commonwealth to amend the indictment for capital murder. Thus, Powell's conviction for capital murder under the amended indictment cannot stand." 261 Va. at 535, 552 S.E.2d at 357. Only after that holding did the Court proceed to discuss "other issues that may have relevance to any trial on remand for the murder offense and the

issues raised by the appeal of Powell's convictions for the non-capital offenses." *Id.*

This Court remanded Powell's case "for a new trial on a charge of no greater than first degree murder for the killing of Stacey Reed, if the Commonwealth be so advised." *Id.* at 546, 552 S.E.2d at 363. The Court's discussion of the verdict form clearly was neither the basis for its decision to reverse the conviction nor necessary to the trial on remand. It was, rather, *dicta*. Indeed, the Court openly recognized that the verdict form discussion was unnecessary in the case that was being decided, and candidly and expressly rendered its advisory opinion only as "instructive to future capital murder trials." *Id.* at 541, 552 S.E.2d at 361. Significantly, the Court's suggestion in *Powell*, that the use of a verdict form following the statutory format could under-inform or confuse a jury about its sentencing options, merely expressed the same view of the verdict form expressly rejected in *Weeks v. Angelone*.

*Powell* relies upon a statement in *Atkins* that the jury had been "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." *Powell*, 261 Va. at 542, 552 S.E.2d at 361-62, *quoting Atkins*, 257 Va. at 179, 510 S.E.2d at 457. The error in *Atkins*, however, was a

failure to submit a necessary part of the *statutory verdict form*. That error made it impossible for the jury to return the verdict sought by the defendant. *Id.* *Atkins* did not address a risk of confusing the jury, or as restated later in *Morrisette*, a demand that the verdict form and the other instructions given to the jury "explicitly correspond." 270 Va. at 202, 613 S.E.2d at 562.

Moreover, *Morrisette* was a habeas case involving only the issue of ineffective assistance of counsel. Morrisette did not argue that the trial court had erred; rather, he argued that his trial counsel was ineffective for not objecting to a verdict form which he alleged did not conform to the dicta in *Powell*. This Court quoted its prophylactic statement in *Powell* and held that Morrisette's attorney should have objected to any form lacking that language. 270 Va. at 203, 613 S.E.2d at 563. *Morrisette* did not find that the trial court erred in using such a form, and its analysis did not require it to do so. Accordingly, its statement that it overruled *Roach* and *Mueller* "to the extent, if any" that those decisions were inconsistent with *Powell* cannot qualify the role of that precedent outside a claim of ineffective assistance. *Id.* at 202, 613 S.E.2d at 562.

This Court observed that Morrisette's trial occurred[15] in the interval after *Powell* was published on June 8, 2001, but before the General Assembly re-enacted the statute in 2003. 270 Va. at 195 n. 4, 613 S.E.2d at 558 n. 4. It mentioned the Warden's argument "that the General Assembly, in post-*Powell* legislation, has rejected any changes in the statutory verdict form suggested by our decision in *Powell*." 270 Va. at 198, 613 S.E.2d at 560. It did not expressly address the argument. Indeed, because the legislation post-dated Morrisette's trial, a discussion of the argument would have been irrelevant to the issue of Morrisette's counsel's alleged ineffectiveness under the law as it stood at his trial.

In the 2003 Session of the General Assembly, the legislature amended the statutory verdict form mandated by § 19.2-264.4(D) to add the explicit option of a life sentence and a monetary fine, as *Powell* had suggested. *See* 2003 Va. Acts cc. 1031 (approved Apr. 29, 2003) and 1040 (approved May 1, 2003). But the legislature otherwise *reenacted* the statutory verdict form as it had existed *before Powell*.

Instead of adopting *Powell*'s suggestion that the form should specify separate findings for a life sentence when the jury found an aggravating

[15] Morrisette was tried in August, 2001. 270 Va. at 188, 613 S.E.2d at 553.

circumstance, the General Assembly instead mandated that the verdict form remain as originally enacted.

The General Assembly's action in accepting one part of *Powell*'s change in the verdict form but rejecting the Court's further suggested changes has demonstrated beyond cavil the legislature's preference. By its action, the General Assembly abrogated that part of *Powell* which suggested changing the statutory form as now argued by Prieto.

> In ascertaining legislative intent, we presume that the General Assembly, when enacting new laws, is fully aware of the state of existing law relating to the same general subject matter. *United Masonry, Inc. v. Riggs National Bank*, 233 Va. 476, 480, 357 S.E.2d 509, 512 (1987); *Cape Henry v. Natl. Gypsum*, 229 Va. 596, 600, 331 S.E.2d 476, 479 (1985). The General Assembly is not only presumed to have been aware of the capital murder statutes in effect in 1994, but is also presumed to have been aware of our decisions construing them. *Charles v. Commonwealth*, 270 Va. 14, 19, 613 S.E.2d 432, 434 (2005) (*citing Waterman v. Halverson*, 261 Va. 203, 207, 540 S.E.2d 867, 869 (2001)).

*Gillespie v. Commonwealth*, 272 Va. 753, 758-59, 636 S.E.2d 430, 432-33 (2006). "When the General Assembly acts in an area in which one of its appellate courts already has spoken, it is presumed to know the law as the court has stated it and to acquiesce therein, and *if the legislature intends to countermand such appellate decision it must do so explicitly*." *Weathers v. Commonwealth*, 262 Va. 803, 805, 553 S.E.2d 729, 730 (2001) (emphasis added).

Manifestly, the legislature's adoption of one part of *Powell* and repeated rejection of another part is precisely such an explicit countermand. When the legislature has spoken, "[c]ourts are not permitted to add language to a statute nor are they 'permitted to accomplish the same result by judicial interpretation.' " *Burlile v. Commonwealth*, 261 Va. 501, 511, 544 S.E.2d 360, 365 (2001), *quoting, Harbor Cruises, Inc. v. Commonwealth*, 217 Va. 458, 461, 230 S.E.2d 248, 250 (1976). The legislature rejected any broader effect to *Powell*, and the trial courts were thereafter clearly required to use the statutorily mandated form.

In Prieto's case, the trial court instructed the jury that the sentencing options for capital murder were death, life imprisonment, or life imprisonment and a fine of a specific amount not more than $100,000. The court's written sentencing instruction explained that the Commonwealth was required to prove at least one of two aggravating circumstances before the penalty could be fixed at death. It explicitly explained to the jury the sentencing options if it found either, both or no aggravating circumstances. (JA 8924-27, JA 15978-83). The trial court's instructions correctly state Virginia law and petitioner never has contended otherwise.

The two capital murder verdict forms given in this case follow the statute exactly. (JA 8992-93).[16] The trial court nevertheless acknowledged the need for the jury to understand, clearly, that it had the option of sentencing the defendant to life, even if it found one or both aggravators to be present. Thus, just as in *Mueller*, the trial court expressly instructed the jury that it had the option of fixing a life sentence, even after finding aggravating circumstances. However, unlike *Mueller*, Prieto's trial court gave further explicit instructions as to how the jury should use the verdict form to do so:

> You are instructed that even if you find the Commonwealth has proven beyond a reasonable doubt one or both of the aggravating circumstances, you are never required to sentence the Defendant to death.
>
> Rather, despite your findings, you may, if you choose, sentence him to life in prison without the possibility of parole with or without a fine.
>
> In other words, with regard to either or both verdict forms Number 2 and 3, if you find the Commonwealth has proven beyond a reasonable doubt one or both of the aggravating circumstances and you find that the appropriate sentence is death, you would use the first paragraph on verdict Form 2 and verdict Form 3, number 3, respectively.

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[16] The forms given to the jury substituted "Alfredo Prieto" where the statutory form states "the defendant," omitted reliance on an "aggravated battery to the victim," at the Commonwealth's request, (JA 15722-23), and added "(please choose one)" immediately prior to the options for a life sentence, or a life sentence with a fine. (JA 16136). Prieto never has objected to those minor changes.

> Alternatively, there are two circumstances in which you would use the second paragraph on verdict form 2 and verdict form number 3.
>
> One, if you find that the Commonwealth has proven beyond a reasonable doubt one or both of the aggravating circumstances and you nevertheless find that the appropriate sentence is life or life and a fine or, two, if you find that the Commonwealth has failed to prove beyond a reasonable doubt at least one of the aggravating circumstances.

(Instruction J, JA 15984-85; 8953).

Reading the instructions as a whole, as the jury was obliged to, the verdict forms provided to Prieto's jury conformed exactly to the instructions, as required by *Atkins*, and provided a means for the jury to exercise each of the sentencing options, as discussed in *Powell* and *Morrisette*. (JA 16852).

Prieto speculates that his jury was confused by the verdict forms. Prieto's jury, however, was not timid in demanding further explanations from the court at every stage of the proceedings, submitting at least sixteen written notes. (JA 8963-77, 8981-83). It is inconceivable that they would not have made a similar inquiry if any of them was in fact puzzled in the least by the verdict forms. The trial court found specifically that, "in light of Instruction J, the jury could not have been confused or conflicted about its options." (JA 16853). *See Buchanan*, 522 U.S. at 278 (not likely jury would disregard evidence and argument of counsel and misread instruction and verdict form). Prieto's out-of-context misreading of the

verdict form, in isolation from the trial court's written and spoken instructions, overlooks the "commonsense understanding of the instructions in the light of all that has taken place at the trial." *Boyde v. California*, 494 U.S. 370, 381 (1990). A strained interpretation of the verdict form to exclude the option of a life sentence after finding no aggravating circumstances simply cannot be reconciled with this record.

Because neither this Court nor the Supreme Court of the United States ever has found constitutional error in Virginia's statutory verdict form, any error by the trial court in not following the suggestion in *Powell* that another form be used could only be non-constitutional error. For such error, "[i]f, when all is said and done, the conviction is sure that the error did not influence the jury, or had but slight effect, the verdict and the judgment should stand." *Clay v. Commonwealth*, 262 Va. 253, 260, 546 S.E.2d 728, 731-32 (2001) (adopting standard of *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)); *accord*, *Atkins v. Commonwealth*, 272 Va. 144, 154, 631 S.E.2d 93, 98 (2006). Clearly, any such error in this case would not be grounds to reverse the judgment.

Prieto argues that the verdict form does not require unanimity as to the aggravating factors found by the jury. However, this Court consistently has held that such unanimity is not required:

> We rejected a similar contention in *Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983), *cert. denied*, 465 U.S. 1109 (1984). In *Coleman*, as in the present case, "the trial court, without objection, gave the jury an instruction stating the verdict form specified in Code § 19.2-264.4D." *Id.* at 53, 307 S.E.2d at 876. The jury returned a verdict "in the exact language of the verdict form, fixing Coleman's punishment at death." Id. We concluded that "[i]t [was] readily apparent that the jury based its sentencing verdict on both statutory alternatives." *Id. Accord, Clark v. Commonwealth*, 220 Va. 201, 213, 257 S.E.2d 784, 791-92 (1979), *cert. denied*, 444 U.S. 1049 (1980) (trial court did not err "in following the language of [Code § 19.2-264.4(D)] in instructing the jury").

*Hoke v. Commonwealth*, 237 Va. 303, 315, 377 S.E.2d 595, 602, *cert. denied*, 491 U.S. 910 (1989); *Briley v. Bass*, 584 F. Supp. 807, 819 (E.D. Va.) ("jury's verdict is not required to be unanimous as to the aggravating factors relied upon"), *aff'd*, 750 F.2d 1238 (4th Cir. 1984), *cert. denied*, 470 U.S. 1080 (1985).

*Ring* does not change the analysis. *Ring*'s "tightly delineated" holding was that "the Sixth Amendment required jury findings on the aggravating circumstances." *Ring*, 536 U.S. at 597 n.4. The Court held that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' ... the Sixth Amendment requires that they be found by a jury." *Id.* at 609. In a Virginia capital murder sentencing proceeding, however, the jury finds the statutory

aggravating circumstances in accordance with all Sixth Amendment requirements. *See* Va. Code § 19.2-264.4.

Prieto's reliance on *Richardson v. United States*, 526 U.S. 813 (1999), is unavailing because the case dealt not with a constitutional question but only with a matter of federal statutory construction. *Richardson* distinguished between the factual elements of a crime and the means of proving each element. While a criminal jury must find each element unanimously, it "need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." 526 U.S. at 817.

Where the statute, and the statutorily mandated verdict form, both express in the disjunctive the aggravating circumstances required to be found before imposing death, they merely state alternate means of proof. Neither "future dangerousness" nor "vileness" is defined as an element under the statute. The language of § 19.2-264.4(C) instead defines "several possible sets of underlying brute facts [that] make up [the] particular element." *Richardson*, 526 U.S. at 817. *See Cheng*, 240 Va. at 37, 393 S.E.2d at 605 (where a statute casts several acts in the disjunctive, each is independently sufficient). *Ring* cannot require more

than the state statute demands. Prieto is not entitled to a verdict form which would require any more.

VIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS RULINGS CONCERNING THE ADMISSIBILITY OF PRIETO'S PRIOR CONVICTION FOR CAPITAL MURDER. (Appellant's Argument III.B.; Assignment of Error 43).

Prieto argues that the trial court erred in deciding to admit the record of his prior conviction of capital murder, including the sentence of death. The objection was raised prior to opening statements for the penalty phase. (JA 12507-14). The trial court overruled his objection. (JA 12514). The trial court's ruling was correct.

The issue has been resolved squarely by this Court:

> In *Bassett v. Commonwealth*, 222 Va. 844, 858, 284 S.E.2d 844, 853 (1981), we were presented with the precise question presented by this appeal, but in the context of a capital murder case. There, we held that the sentences imposed as a result of the defendant's prior convictions might properly be admitted at the penalty phase of a capital murder trial, observing: "The sentence reflects the gravity of the offense and the offender's propensity for violence." *Id.*

*Gillespie v. Commonwealth*, 272 Va. at 759, 636 S.E.2d at 433 (2006). *See also LeVasseur v. Commonwealth*, 225 Va. at 593-94, 304 S.E.2d at 660; *Stamper v. Commonwealth*, 220 Va. 260, 277, 257 S.E.2d 808, 820 (1979), *cert. denied*, 445 U.S. 972 (1980). Indeed, in *Bassett*, this Court

approved the use of the trial transcript to prove "the circumstances surrounding the offense" as authorized by § 19.2-264.4B. *Bassett v. Commonwealth*, 222 Va. 844, 858, 284 S.E.2d 844, 853 (1981), *cert. denied*, 456 U.S. 938 (1982).[17]

Prieto nevertheless argues that a different rule should apply where the prior sentence is a death sentence because the jury might trivialize its decision and impose a death sentence with less deliberation if it knows that there already is a prior death sentence. (Br. 41). There is no evidence that Prieto's jury disregarded its duty. Moreover, Prieto's speculation ignores the more likely possibility that a jury would be *less* inclined to impose death in the case before it if it knows that the defendant is under a separate sentence of death.

Prieto's reliance on *Atkins v. Commonwealth*, 272 Va. 144, 631 S.E.2d 93 (2006), is misplaced. Atkins faced trial on mental retardation, and the jury knew that its decision would affect his ultimate sentence. His

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[17] *Bassett* does not limit the Commonwealth to sentences imposed before the current offense, as claimed by Prieto. Prieto cites the wrong portion of the opinion. This Court's finding, that Bassett's "predisposition to commit another crime upon release from custody" was a relevant circumstance, is found in its explanation that the statute was not vague. 222 Va. at 851-52, 284 S.E.2d at 849. Its ruling on the admissibility of his prior sentences, and indeed of the transcript of his prior trial, was categorical: "The sentence reflects the gravity of the offense and the offender's propensity for violence." *Id.* at 858, 284 S.E.2d at 853.

existing sentence of death was in the same case which was before the jury. The risk of prejudice there had nothing to do with the weight a jury might give to his criminal record because his existing sentence in the same case was not part of his criminal history. Rather, the opinion reflected the concern that the jury might have been unduly influenced, and deferred to the conclusion of another jury that had already decided that same case. "In other words, the jury knew that, if it found Atkins mentally retarded, it would in effect be nullifying another jury's verdict to sentence Atkins to death." *Id.* at 158, 631 S.E.2d at 100. Prieto's jury was not called upon to make as similar determination.

The trial court did not err in admitting Prieto's prior sentence.

## IX. PRIETO'S "PAGE LIMIT" ARGUMENT STATES NO GROUNDS FOR REVERSAL. (Appellant's Argument VI.; No Assignment of Error).

Prieto objects to this Court's ruling denying his motion to exceed the fifty page limit specified under Rule 5:26(a). The alleged "error" does not challenge any ruling by the trial court, nor could it call into question the validity of the proceedings below. It therefore presents no proper issue for an appeal. The argument was not assigned as error and therefore would

be barred. *See Sheppard v. Commonwealth*, 250 Va. 379, 391, 464 S.E.2d 131, 139, *cert. denied*, 516 U.S. 997 (1995); Rule 5:22.

X. PRIETO'S SENTENCE OF DEATH WAS NOT IMPOSED ARBITRARILY OR UNDER THE INFLUENCE OF PASSION OR PREJUDICE AND IS NOT DISPROPORTIONATE. (Appellant's Argument IV.; Assignments of Error 40 and 82).

Prieto offers no argument in support of his claim of "arbitrary factors" other than to reiterate his "triggerman" claim, to accuse the Commonwealth's attorney of making an improper argument by asking for justice,[18] and to rely on "the myriad of above-described issues" alleged elsewhere in his brief. (Br. 47). For the same reasons that each of those claims has no merit in its own right, none of them constitutes an "arbitrary" factor.

Prieto offers no argument in support of his claim of "passion or prejudice." Prieto was indicted in the plain language of the statute. Skilled appointed attorneys represented him who raised an extensive array of pre-trial arguments on his behalf. Prieto requested and was appointed a private investigator (JA 845), a DNA expert (JA 3071, 8020-21), two mental

[18] Prieto's Argument IV simply repeats this Assignment of Error, number 40, without making any argument in support of it. It is therefore waived. *See Powell v. Commonwealth, supra*.

health experts to assist with mitigation (JA 844, 8828), and a rebuttal expert regarding prison conditions. (JA 8830). His counsel obtained the services of two additional mental health experts, Dr. Merikangas and Dr. Eyer, to testify on his behalf. A jury of impartial citizens was empanelled to determine the case. Counsel zealously represented him at all stages of trial, offering mitigation evidence from five witnesses on mental health, six family members, and seven other witnesses, covering over six days of testimony. The Commonwealth proved his guilt by overwhelming evidence, properly admitted. There simply is no arbitrary factor at play in Prieto's case. Nothing in the record suggests that the sentence was based on, or influenced by, any passion or prejudice.

Prieto offers no argument to support the balance of his last assignment of error, that the trial court erred by "imposing a sentence that "is excessive or disproportionate to the penalty imposed in similar cases." The rule expressed in § 17.1-313(C) is well-established: "whether juries in this jurisdiction generally approve the supreme penalty for comparable crimes, considering both the crime and the defendant." *Wolfe*, 265 Va. at 226, 576 S.E.2d at 490; *Hedrick v. Commonwealth*, 257 Va. 328, 342, 513 S.E.2d 634, 642, *cert. denied*, 528 U.S. 952 (1999). As this Court properly has observed, the state-law proportionality review is not to "insure complete

symmetry among all death penalty cases," but rather to "identify and invalidate the *aberrant* death sentence." *Orbe v. Commonwealth*, 258 Va. 390, 405, 519 S.E.2d 808, 817 (1999), *cert. denied*, 529 U.S. 1113 (2000) (emphasis added).

Prieto's death sentences were based on a finding of future dangerousness or vileness, after conviction of capital murder in the commission of a rape and of capital murder of more than one person as part of the same transaction. His death sentence is not "aberrant." This Court's decisions confirm that sentencing bodies in the Commonwealth regularly impose the death penalty for crimes comparable to Prieto's, and Prieto has not offered circumstances that would distinguish his case from those in which a death sentence was upheld.

While this Court considers all capital murder cases presented to it for review, in order to give particular consideration to victims murdered during the commission of rape, *see Jackson v. Commonwealth*, *supra*, 267 Va. 178, 590 S.E.2d 520 (2004); *Roach v. Commonwealth*, *supra*, 251 Va. 324, 468 S.E.2d 98 (1996); *Beavers v. Commonwealth*, 245 Va. 268, 427 S.E.2d 411, *cert. denied*, 510 U.S. 859 (1993); *Yeatts v. Commonwealth*, 242 Va. 121, 410 S.E.2d 254 (1991), *cert. denied*, 503 U.S. 946 (1992); and *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491, *cert. denied*, 488 U.S. 871

(1988). In order to give particular consideration to victims murdered as part of the same act, *see Gray v. Commonwealth*, 274 Va. 290, 645 S.E.2d 448 (2007), *cert. denied*, 128 S. Ct. 1111 (2008); *Juniper v. Commonwealth*, *supra*, 271 Va. 362, 626 S.E.2d 383 (2006); *Hudson v. Commonwealth*, 267 Va. 29, 590 S.E.2d 362 (2004); *Zirkle v. Commonwealth*, 262 Va. 631, 553 S.E.2d 601 (2001).

## CONCLUSION

This Court should affirm the judgment of the circuit court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 20, 2009, the required copies of this brief were hand delivered to the Clerk's Office of this Court for filing, and three copies of the foregoing brief were mailed to **Jonathan Shapiro,** Esquire, GREENSPUN, SHAPIRO, DAVIS & LEARY, P.C., 3955 Chain Bridge Road, Second Floor, Fairfax, Virginia 22030; and to **Michael A. Siem**, Esquire, FISH AND RICHARDSON, P.C., Citigroup Center, 52nd Floor, 153 East 53rd Street, New York, New York 10022; counsel for the appellant.

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