

No. 08-\_\_\_\_\_

---

**In the Supreme Court of the United States**

**October Term, 2008**

---

**Thomas Alexander Porter,**  
*Petitioner,*

v.

**Commonwealth of Virginia,**  
*Respondent.*

---

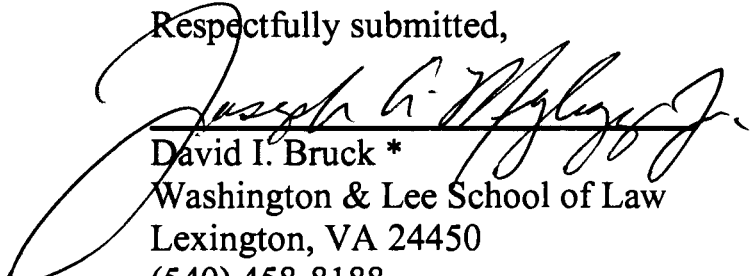
**Motion for Leave to Proceed *In Forma Pauperis***

---

Petitioner Thomas Alexander Porter requests leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. Petitioner was previously granted leave to proceed *in forma pauperis* in the Supreme Court of Virginia.

Respectfully submitted,

Joseph A. Migliozi, Jr.  
Capital Defender for the  
Commonwealth of Virginia  
207 Granby Street, Suite 200  
Norfolk, VA 23510  
(757) 314-2354  
(757) 314-2352 fax  
[jmigliozi@msn.com](mailto:jmigliozi@msn.com)

  
David I. Bruck \*  
Washington & Lee School of Law  
Lexington, VA 24450  
(540) 458-8188  
(540) 458-8580 (fax)  
[bruckd@wlu.edu](mailto:bruckd@wlu.edu)

\* Counsel of Record

No. \_\_\_\_\_

---

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2008

---

THOMAS A. PORTER,  
*Petitioner-Appellant,*

v.

COMMONWEALTH OF VIRGINIA  
*Respondent-Appellee.*

---

On Petition for a Writ of Certiorari to the  
Supreme Court of Virginia

---

**AFFIDAVIT OF THOMAS PORTER**

I am Thomas Porter, and this is my affidavit.

1. I am the petitioner in the case of Porter v. Virginia, a petition for certiorari from a judgment of a state court, and I believe that I am entitled to redress.
2. Because of my poverty, I am unable to pay the costs of this case or to give security therefor, and I believe that I am entitled to proceed *in forma pauperis*.
3. I am presently incarcerated at Sussex I State Prison, Waverly, Virginia, and I am not employed.
4. In the past twelve months, I have not received any income from businesses, professions, or any other source.
5. My cash assets are \$ 27.87.
6. I own no real estate, stocks, bonds, automobiles, or other valuable property.
7. I have no dependents.

8. I understand that a false statement in this affidavit will subject me to penalties for perjury and declare under penalty of perjury that the foregoing is true and correct.

*Thomas A. Porter*

Petitioner Thomas Porter DOC # 374297  
Sussex I State Prison  
24414 Musselwhite Drive  
Waverly, Virginia 23891-1111

Sworn and subscribed to before me on this 4<sup>th</sup> day of February, 2009.

My commission expires: 7/31/12.



*[Signature]*  
\_\_\_\_\_  
Notary Public

No. 08-\_\_\_\_\_

---

**In the Supreme Court of the United States**

**October Term, 2008**

---

**Thomas Alexander Porter,**  
*Petitioner,*

**v.**

**Commonwealth of Virginia,**  
*Respondent.*

---

On Petition for a Writ of Certiorari to the  
Supreme Court of Virginia

---

**Petition for a Writ of Certiorari**

---

Joseph A. Migliozi, Jr.  
Capital Defender for the  
Commonwealth of Virginia  
207 Granby Street, Suite 200  
Norfolk, VA 23510  
(757) 314-2354  
(757) 314-2352 fax  
[jmigliozi@msn.com](mailto:jmigliozi@msn.com)

David I. Bruck \*  
Washington & Lee School of Law  
Lexington, VA 24450  
(540) 458-8188  
(540) 458-8580 (fax)  
[bruckd@wlu.edu](mailto:bruckd@wlu.edu)

\* Counsel of Record

## Capital Case

### QUESTIONS PRESENTED

1. Virginia, contrary to all other jurisdictions that permit consideration of future dangerousness in the penalty phase of a capital case, prohibits defendants from presenting prison risk assessment evidence, which is a generally accepted category of empirical scientific evidence that can show the diminished likelihood an individual defendant will commit future acts of violence in prison.
  - (a) Does Virginia's prohibition violate a capital defendant's Fourteenth Amendment Due Process right to rebut the prosecution's claim of future dangerousness as a basis for considering or for imposing the death penalty?
  - (b) Does Virginia's prohibition violate a defendant's rights under the Eighth Amendment by creating an impermissible risk of factual error and arbitrariness in the sentencer's determination of whether death is the appropriate punishment?
2. Does *Ring v. Arizona* require that capital sentencing juries be provided with a state supreme court's narrowing construction of a statutory aggravating factor, or may the narrowing be performed by the direct appeal court, as this Court held in *Clemons v. Mississippi*?

## TABLE OF CONTENTS

QUESTIONS PRESENTED .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iv
OPINIONS BELOW .....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	1
STATEMENT OF THE CASE .....	2
1. Pretrial and Trial Events .....	2
a. Facts related to Porter’s opportunity to rebut the “continuing threat” aggravating factor.....	2
b. Facts related to the narrowing construction of Virginia’s “continuing threat” aggravating factor.....	7
2. How Petitioner’s Federal Constitutional Claims Were Raised and Denied on Appeal to Virginia’s Highest Court .....	8
REASONS WHY THE WRIT SHOULD BE GRANTED .....	13
1. VIRGINIA’S REFUSAL TO ADMIT SCIENTIFIC PRISON RISK ASSESSMENT TESTIMONY DENIED PETITIONER HIS FEDERAL DUE PROCESS RIGHT TO REBUT THE PROSECUTION’S ALLEGATION OF FUTURE DANGEROUSNESS, AND IT CONFLICTS WITH THE DECISIONS OF OTHER JURISDICTIONS THAT HAVE ADDRESSED THE ISSUE.....	14
a. The holding below conflicts with settled law in other jurisdictions.....	15
b. Virginia’s refusal to admit reliable, scientific risk assessment as rebuttal to prosecution claims of future dangerousness is fundamentally unfair and inconsistent with this Court’s precedents.....	21
c. Virginia’s exclusion of scientific prison risk assessment evidence violates the Eighth Amendment by undermining the reliability of the jury’s ultimate sentencing decision.....	28
2. THE TRIAL COURT’S REFUSAL TO INSTRUCT THE JURY ON THE VIRGINIA SUPREME COURT’S NARROWING CONSTRUCTION OF THE “CONTINUING THREAT” AGGRAVATING FACTOR VIOLATED THE DUE PROCESS AND SIXTH AMENDMENT RULE OF <i>RING v. ARIZONA</i> . .....	30

---

<b>CONCLUSION .....</b>	<b>34</b>
-------------------------	-----------

## TABLE OF AUTHORITIES

### U.S. Supreme Court Cases

<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985) .....	30
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983) .....	21, 24, 25
<i>Bell v. Cone</i> , 543 U.S. 447 (2005) .....	8, 14, 31
<i>California v. Ramos</i> , 463 U.S. 992 (1983) .....	15, 21
<i>Clemons v. Mississippi</i> , 494 U.S. 738 (1990) .....	31
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986) .....	28
<i>Daubert v. Merrell Dow Pharms.</i> , 509 U.S. 579 (1993) .....	18
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977) .....	13, 28
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980) .....	32
<i>Holmes v. South Carolina</i> , 547 U.S. 319 (2006) .....	28
<i>Johnson v. Mississippi</i> , 486 U.S. 578 (1988) .....	30
<i>Jurek v. Texas</i> , 428 U.S. 262 (1976) .....	15, 21
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989) .....	20
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002) .....	8, 14, 31
<i>Shafer v. South Carolina</i> , 532 U.S. 36 (2001) .....	20

<i>Simmons v. South Carolina</i> , 512 U.S. 154 (1994) .....	4, 13, 15, 21
<i>Skipper v. South Carolina</i> , 476 U.S. 1 (1986).....	4, 28
<i>Strickland v. Washington</i> , 466 U.S. 688 (1984) .....	32
<i>Tuggle v. Netherland</i> , 516 U.S. 10 (1995) .....	29
<b>Cases</b>	
<i>Anderson v. Quarterman</i> , 204 Fed. Appx. 402 (5 <sup>th</sup> Cir. 2006) .....	16
<i>Bell v. Commonwealth</i> , 563 S.E.2d 695 (Va. 2002) .....	10, 11, 14
<i>Burns v. Commonwealth</i> , 541 S.E.2d 872 (Va. 2001) .....	4
<i>Cherrix v. Commonwealth</i> , 513 S.E.2d 642 (Va, 1999) .....	14
<i>Coleman v. State</i> , 881 S.W.2d 344 (Tex. Crim. App. 1994) .....	16
<i>Edmonds v. Commonwealth</i> , 329 S.E.2d 807 (Va. 1985) .....	23
<i>Fitzgerald v. State</i> , 61 P.3d 901 (Okla. Crim. App. 2002).....	18
<i>Giarratano v. Commonwealth</i> , 266 S.E.2d 94 (Va. 1980).....	23
<i>Gray v. Commonwealth</i> , 645 S.E.2d 448 (Va. 2007) .....	3
<i>Hanson v. State</i> , 72 P.3d 40 (Okla. Crim. App. 2003).....	18
<i>Matson v. State</i> , 819 S.W.2d 839 (Tex. Crim. App. 1991).....	17
<i>Maxwell v. Quarterman</i> , No. SA 05-CA-884-OG (W.D. Tex. July 30, 2008).....	16

<i>People v. Mertz</i> , 842 N.E.2d 618 (Ill. 2005) .....	20
<i>Perkins v. Quarterman</i> , 254 Fed. Appx. 366 (5 <sup>th</sup> Cir. 2007) .....	16
<i>Porter v. Commonwealth</i> , 661 S.E.2d 415 (Va. 2008) .....	passim
<i>Robinson v. United States</i> , Civ. Act. No. 4:05-CV-756-Y, 2008 WL 4906272 (N.D. Tex. Nov. 7, 2008) .....	19
<i>Savino v. Commonwealth</i> , 391 S.E.2d 276 (Va. 1990) .....	23
<i>Scheanette v. Quarterman</i> , 482 F.3d 815 (5 <sup>th</sup> Cir. 2007) .....	16
<i>Schmitt v. Commonwealth</i> , 547 S.E.2d 186 (Va. 2001) .....	4
<i>Smith v. Commonwealth</i> , 248 S.E.2d 135 (Va. 1978) .....	7, 15, 25, 31
<i>State v. Douglas</i> , 800 P.3d 304 (Or. 2004) .....	17
<i>State v. Rogers</i> , 188 S.W.3d 593 (Tenn. 2006) .....	20
<i>State v. Sparks</i> , 83 P.3d 304 (Or. 2004) .....	17
<i>Stitt v. United States</i> , 369 F. Supp. 2d 679 (E.D. Va. 2005) .....	3
<i>Threadgill v. State</i> , 146 S.W.3d 654 (Tex. Crim. App. 2004) .....	16
<i>United States v. Barnette</i> , 211 F.3d 803 (4 <sup>th</sup> Cir. 2000) .....	3
<i>United States v. Edelin</i> , 180 F. Supp. 2d 73 (D.D.C. 2001) .....	19
<i>United States v. Sampson</i> , 335 F. Supp. 2d 166 (D. Mass. 2004) .....	18
<i>United States v. Taylor</i> , 583 F. Supp. 2d 923 (E.D. Tenn. 2008) .....	19

<i>United States v. Wilson</i> , 493 F. Supp. 2d 491 (E.D.N.Y. 2007).....	18
<i>Wright v. Commonwealth</i> , 427 S.E.2d 379 (Va. 1993).....	23
<b>Statutes</b>	
18 U.S.C. §§ 3591 (2007).....	18
28 U.S.C. § 1257(a) (2007).....	1
OKLA. STAT ANN. § 21-701.10 – 701-12 (2006).....	18
TEX. CODE CRIM. PROC. ANN. ART. 37.071.2(b)(1) (Vernon 2005).....	15
VA. CODE ANN. § 19.2-264.2 (2004) .....	passim
VA. CODE ANN. § 19.2-264.4 (2004) .....	1, 9
<b>Articles</b>	
Conroy, Mary Alice & Daniel C. Murrie, FORENSIC ASSESSMENT OF VIOLENCE RISK: A GUIDE FOR RISK ASSESSMENT AND RISK MANAGEMENT (2007).....	27
Cunningham, Mark D. & T.J. Reidy, <i>Integrating Base Rate Data in Violence Risk Assessments at Capital Sentencing</i> , 16 BEHAV. SCI. & L. 71 (1998).....	3
Cunningham, Mark D. & T.J. Reidy, <i>Violence Risk Assessment at Federal Capital Sentencing: Individualization, Generalization, Relevance, and Scientific Standards</i> , 29 CRIM. JUST. & BEHAV. 512 (2002).....	3, 19
Marquart, James W., Sheldon Ekland-Olson, & Jonathan R. Sorensen, <i>Gazing Into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?</i> , 23 LAW & SOC. REV. 449 (1989) .....	25
Reidy, Thomas J., Mark D. Cunningham & Jonathan R. Sorensen, <i>From Death to Life: Prison Behavior of Former Death Row Inmates in Indiana</i> , 28 CRIM. JUST. & BEHAV. 62 (2001).....	25
Sorensen, Jonathan R. & Rocky L. Pilgrim, <i>An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants</i> , 90 J. CRIM. L. & CRIMINOLOGY 1251 (2000) .....	22, 25

Thomas Porter respectfully petitions for a writ of certiorari to review the judgment of the Virginia Supreme Court.

### **OPINIONS BELOW**

The Virginia Supreme Court's opinion affirming petitioner's convictions and sentence of death is reported as *Porter v. Commonwealth*, 661 S.E.2d 415 (Va. 2008) , and is reprinted at Pet. App. 1a-40a. The Virginia Supreme Court's order denying rehearing is unreported, and is reprinted at Pet. App. 41a-42a.

### **JURISDICTION**

The Virginia Supreme Court entered its judgment on June 6, 2008. It denied Porter's timely petition for rehearing on September 19, 2008. On December 10, 2008, the Chief Justice extended the time in which to file a petition for a writ of certiorari until February 16, 2009. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This case involves the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which provide in pertinent part as follows:

**Amendment VI:** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

**Amendment VIII:** Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**Amendment XIV, Section 1:** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

This case also involves Va. Code §§ 19.2-264.2 and 19.2-264.4, which are reprinted in full at Pet. App. 43a-44a.

## **STATEMENT OF THE CASE**

Petitioner Thomas Porter was charged with capital murder in connection with the shooting death of a Norfolk, Virginia, police officer. Petitioner admitted to the murder, but testified at trial that the crime was a panicked response to what he took to be a life-threatening assault by the victim. The prosecution countered that petitioner actually killed the officer to avoid being arrested and returned to prison for probation and weapons violations. The jury convicted him of capital murder, and the case proceeded to a capital sentencing hearing before the trial jury.

### **1. Pretrial and Trial Events**

#### **a. Facts related to Porter's opportunity to rebut the "continuing threat" aggravating factor.**

Virginia law provides that the death penalty may not be imposed unless the prosecution proves beyond a reasonable doubt either

1. that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or
2. that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

Va. Code § 19.2-264.2. Anticipating that the prosecution would rely at least in part on the first, "continuing threat" aggravating factor in order to persuade the jury to find petitioner eligible for death and to select that sentence, defense counsel moved pretrial for appointment of a nationally renowned forensic psychologist and researcher specializing in capital risk assessment, Mark D. Cunningham, Ph.D., to provide rebuttal testimony on that

issue. JA 930-938.<sup>1</sup> The motion was accompanied by two of Dr. Cunningham's many peer-reviewed articles on prison risk assessments of capital defendants,<sup>2</sup> and by a declaration Dr. Cunningham provided in another Virginia capital case in which the trial court had allowed him to testify, *Gray v. Commonwealth*, 645 S.E.2d 448 (Va. 2007), setting out in detail the scientific bases and methodology of such risk assessments. JA 4728-4747.<sup>3</sup>

These are reprinted at Pet. App. 45a-159a.

In brief, the proffer informed the trial court that any scientifically valid and reliable violence risk assessment takes into account:

- the setting and time span in which the individual's violent conduct will or will not occur (here, life-time confinement in the Virginia Department of Corrections),
- the base rate of serious violence in that setting as reported by the Virginia Department of Corrections, and
- those individual characteristics of the defendant and of his prior record that have been empirically demonstrated to increase or reduce the likelihood of serious violence in a prison setting.<sup>4</sup>

---

<sup>1</sup> JA references are to the Joint Appendix as filed in the Virginia Supreme Court on direct appeal in *Porter v. Commonwealth, supra*.

<sup>2</sup> Mark D. Cunningham & T.J. Reidy, *Integrating Base Rate Data in Violence Risk Assessments at Capital Sentencing*, 16 BEHAV. SCI. & L. 71 (1998), and Mark D. Cunningham & T.J. Reidy, *Violence Risk Assessment at Federal Capital Sentencing: Individualization, Generalization, Relevance, and Scientific Standards*, 29 CRIM. JUST. & BEHAV. 512 (2002).

<sup>3</sup> The exhibits attached to petitioner's motion also revealed Dr. Cunningham to be the author of many peer-reviewed articles based on his research in the field of prison risk assessment, and an unusually well qualified expert. JA 4743-4745. *See also United States v. Barnette*, 211 F.3d 803, 822-825 (4<sup>th</sup> Cir. 2000) (reversing death sentence due to erroneous refusal to allow defendant to recall Dr. Cunningham as surrebuttal witness); *Stitt v. United States*, 369 F. Supp. 2d 679, 695 (E.D. Va. 2005) (finding trial counsel's rejection of Dr. Cunningham as future dangerousness expert in favor of less qualified local psychologist satisfied death-sentenced inmate's burden to show actual adverse effect stemming from counsel's financial conflict of interest; habeas relief granted). At no point in petitioner's case have the prosecution or the Virginia courts questioned either Dr. Cunningham's qualifications or the scientific validity of his risk assessment methodology.

<sup>4</sup> Dr. Cunningham's declaration advised that the factors found by researchers to affect the

The motion also addressed a line of Virginia cases that had rebuffed capital defendants' efforts to present evidence on security conditions within the Virginia Department of Corrections as a means of disproving the "continuing threat" aggravating factor. JA 4715-4718, discussing, *inter alia*, *Schmitt v. Commonwealth*, 547 S.E.2d 186 (Va. 2001) , *Burns v. Commonwealth*, 541 S.E.2d 872 (Va. 2001) , and *Lovitt v. Commonwealth*, 537 S.E.2d 866 (Va. 2000).

Relying on this Court's decisions in *Simmons v. South Carolina*, 512 U.S. 154 (1994) , and *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986) , petitioner argued that, *Burns* and *Lovitt* notwithstanding, the Due Process Clause of the Fourteenth Amendment entitled him to rebut the prosecution's probability-of-future-dangerousness allegation by means of a scientifically valid risk assessment that took into account the self-evidently important fact that, if not executed, his own future would consist of life-long imprisonment in the Virginia Department of Corrections, with no eligibility for parole. JA 4712-4717.

The Commonwealth objected to the appointment of Dr. Cunningham, JA 323-328, 938-939, on the ground that no risk assessment would be admissible under Virginia precedent unless it took into account *only* the defendant's own "history and experience," and avoided any reference to the correctional setting in which he would live out the remainder of his life. JA 314, 939. Defense counsel responded by pointing to Dr. Cunningham's methodology as the expert described it in the *Gray* declaration, and explained that Dr. Cunningham would provide an individualized assessment of the risk

---

likelihood of violent recidivism in prison include an inmate's demographic features, adjustment to prior incarceration, and certain offense and status characteristics. Importantly, his declaration affirmatively noted that, according to researchers, the general heinousness of the capital murder does *not* affect the likelihood of violent recidivism in prison. Pet. App. 74a[JA 4731].

posed by petitioner after reviewing his record and conducting a clinical interview:

... Virginia [law] ... emphasizes that this type of testimony is relevant, as long as it is individualized to [the] defendant.

That's what Dr. Cunningham does.

As he stated in his affidavit [sic], he comes here. He meets with the defendant. He reviews his prior record.

When he gets on the stand to testify . . . if the Commonwealth puts on evidence about the way the defendant acted in the penitentiary . . . and . . . will then argue that he's a future danger based on that, then our only opportunity to rebut is from this type of scientific evidence that shows the probability . . . that he will act this way in the future.

JA 941. However, the trial judge denied the requested appointment after remarking that Dr. Cunningham's proposed testimony was not particular to petitioner because "an expert in his field could take any claims he might make with respect to the prison framework and apply it to an individual." JA 948-949.

Having prevailed on the trial judge to deny petitioner's requested risk assessment, the prosecution subsequently based its future dangerousness claim primarily on the facts of his crime and on his prior record. Its proof on this issue began with a listing of petitioner's 17 prior juvenile and adult misdemeanor convictions and his 10 prior felony convictions. JA 3323-3328, 3359, 4509-4570. It supplemented this evidence with witness testimony about several of petitioner's prior offenses, JA 3361-3421, 3460-3498, but the record shows that most of his prior offenses involved non-violent crimes, many occurred in the course of a single episode (such as the five misdemeanors and one felony car theft that petitioner committed at age 14, JA 4509-4527), and all occurred in free society rather than in a correctional setting. The prosecution also presented evidence of two instances of misconduct in jail and two more in state prison over a period of nearly eight years, JA 3423-

57, 3500-11, only one of which involved a weapon (a mop wringer) and resulted in injuries to another jail inmate. JA 3447-3457. Finally, the prosecution introduced tape recordings of two of petitioner's telephone calls from jail while awaiting trial for capital murder in which he denied his guilt (contrary to his trial testimony) and exchanged remarks with a female acquaintance about aiming for the head during target practice sessions. JA 4573-4575. In closing argument, the prosecutor focused on much of this evidence as proof of petitioner's future dangerousness, JA 4136-4144, but made no attempt to show that any aspect of petitioner's record, offense or post-crime statements had actually been empirically demonstrated to correlate with or predict future violence in prison.

In his own closing argument, defense counsel attempted to fill the gap left by the exclusion of Dr. Cunningham's risk assessment testimony. Counsel began by pointing out that the prosecution had presented evidence of only two disciplinary infractions during the course of petitioner's seven years' incarceration in the Virginia Department of Corrections, and continued:

Now, you need to think about that because your duty here today is to decide whether Thomas Porter is going to spend the rest of his life in the penitentiary without parole or whether you should execute him. And when considering the probability that Mr. Porter would constitute criminal acts of violence that would constitute a serious threat to society, well, this is society.

JA 4168-4169. At that juncture the Commonwealth objected that defense counsel was misstating Virginia law, whereupon the trial judge told the jury that "Society is everything," and then added emphatically, "Everybody, anywhere, anyplace, anytime." JA 4169.

Defense counsel attempted to return to his theme that petitioner's life-long imprisonment could adequately protect society, and stated, "I would submit to you that that's your focus in this case since you're going to decide whether he's going to spend the rest of his life in

the penitentiary or if he's going to be executed.” JA 4170.

Attempting to draw the jury's attention to the statutory language of the continuing-threat aggravating factor, counsel started to ask, “What type of criminal act of violence — ” when the prosecutor again objected on the grounds that counsel’s argument “misstates the Virginia law [concerning] the definition of society.”<sup>5</sup> Outside the jury's hearing, defense counsel pointed out that he was simply urging the jurors to “focus” on prison society in considering whatever risk petitioner might pose in the future, because prison was where he would actually be. The trial judge nevertheless announced that he would give another curative instruction, and with obvious irritation he told jurors:

Virginia law is very clear. Society is everyone, everywhere. You are not required to simply consider what may happen in a penitentiary. You are required to consider society. It's a definitional word. It's not that complex to start with. It means everybody, everywhere, any place, any time. It's pretty simple.

JA 4172. After this rebuke, counsel abandoned any further effort to challenge the existence and weight of the future dangerousness aggravating factor, and instead devoted the rest of his argument to the circumstances of petitioner's background and upbringing.

JA 4172-4208.

**b. Facts related to the narrowing construction of Virginia’s “continuing threat” aggravating factor.**

Defense counsel’s final effort to clarify how jurors were to weigh the continuing threat aggravating factor involved a request for a jury instruction based on the ruling in *Smith v. Commonwealth*, 248 S.E.2d 135 (Va. 1978). *Smith* held that the “probability”

---

<sup>5</sup> The prosecution’s objection was apparently based on *Lovitt*, 537 S.E.2d at 880, in which the Virginia Supreme Court held that Virginia's “dangerousness” aggravating factor was not limited to threats to prison society.

referred to in Va. Code § 19.2-264.2 meant “a likelihood substantially greater than a mere possibility[] that [the defendant] would commit similar crimes in the future.” *Id.* at 149. Petitioner cited *Ring v. Arizona*, 536 U.S. 584 (2002) , and *Bell v. Cone*, 543 U.S. 447, 454 n.6 (2005), in support of his right to this instruction, but the trial court denied it. The court chose instead to instruct jurors in only the bare language of the statute itself. Thus, the instructions which placed the issue of petitioner’s future behavior before the jurors were, in their entirety, as follows:

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following aggravating circumstances.

One, that after consideration of his history and background, there is a probability that he would commit criminal acts of violence, that would constitute a continuing serious threat to society . . . .

JA 4116, 4152. After receiving these instructions, jurors deliberated for some 10 hours over two days before finding the continuing threat factor to have been proven beyond a reasonable doubt and, based on that finding alone, finding petitioner eligible for death. The jury also selected death as the appropriate punishment.

## **2. How Petitioner’s Federal Constitutional Claims Were Raised and Denied on Appeal to Virginia’s Highest Court**

On appeal to the Virginia Supreme Court, petitioner renewed his federal Due Process and Eighth Amendment claims concerning the refusal to appoint a prison risk assessment expert and to provide the jury with a narrowing construction of the “continuing threat” aggravating factor. The court rejected both claims. *Porter*, 661 S.E.2d at 435-442 (2008). The state supreme court’s explanation began with a lengthy discussion of the *Burns* line of cases excluding all “prison security” evidence, which it described as dictated by a statutory directive that the sentencer evaluate the probability of a convicted

defendant's future violent conduct solely "based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused." *Id.* at 437 (*quoting* Va. Code § 19.2-264.4(C)). The court continued,

The plain directive of these statutes is that the determination of future dangerousness is focused on the defendant's "past criminal record," "prior history" and "the circumstances surrounding the commission of the offense." These standards defining the future dangerousness aggravating factor are the basis of our earlier decisions which considered motions for appointment of prison risk experts or the proffer of prison risk evidence.

*Id.*

Turning to the facts of petitioner's case, the state supreme court first criticized Porter's written motion seeking Dr. Cunningham's appointment because it purportedly failed to specify that the expert's risk assessment would be based on facts specific to petitioner, rather than on prison security information and data concerning low rates of violence in prisons generally. *Id.* at 440 ("Porter's Prison Expert Motion for appointment of Dr. Cunningham is notable for an essential, but missing, element. At no place in the motion does he proffer that Dr. Cunningham's statistical analysis of a projected prison environment will focus ... on the particular facts of [his] history and background, and the circumstances of his offense") (*interior quotation and citation omitted*).

Next, the state's highest court discounted Dr. Cunningham's declaration from the *Gray* case furnished in support of his motion. That declaration made clear that Dr. Cunningham's established methodology involves individualized consideration of a wide array of factors particular to the defendant. The court complained, however, that Porter's counsel had not asserted explicitly that Dr. Cunningham would use this methodology and that Porter would obtain the same type of evaluation as Dr. Cunningham had provided in *Gray's* case. "At no place in the Prison Expert Motion, or in his oral argument before the

circuit court, does Porter state that Dr. Cunningham intends to do in his case that which he purported to do in the *Gray* case.”<sup>6</sup> *Id.* at 441. Additionally, invoking its own decisions in *Burns*, *supra*, and *Bell v. Commonwealth*, 563 S.E.2d 695 (Va. 2002) , the court expressed its disapproval of the contents of the *Gray* declaration itself:

Even if we assumed Porter intended his proffer in the Prison Expert Motion to be that Dr. Cunningham would do for Porter what the *Gray* Declaration indicates for Mr. Gray, the tenor of the *Gray* Declaration raises the same issues already discussed with regard to our precedent in *Burns* and *Bell*. Even though Dr. Cunningham has adopted the use of key words like “individualized assessment,” the analysis appears to be of the same genre of the rejected proffers of how security measures in a future incarceration may affect a defendant's ability to commit more violent acts. For example, he states in the *Gray* Declaration that “[b]ecause risk is always a function of context or preventative interventions, increased security measures can act to significantly reduce the likelihood of Mr. Gray engaging in serious violence in prison. Mr. Gray's risk of violence in the face of such increased security measures can also be projected.” Our precedent is clear that such evidence is not relevant either in rebuttal or mitigation as to the future dangerousness factor.

*Porter*, 661 S.E.2d at 441, n.15.<sup>7</sup>

Finally, the court found defense counsel’s statement that Dr. Cunningham’s evaluation *would be* individualized to Porter to have been inadequate:

Porter contends that he made a sufficiently individualized proffer when arguing the Prison Expert Motion before the circuit court. It is true that Porter used some key terms like “individualized testimony” but his entire argument on that point consisted of the following:

This is individualized testimony with regard to Thomas

---

<sup>6</sup> In his petition for rehearing, Porter pointed out that in making this statement, the Virginia Supreme Court had evidently overlooked trial counsel’s explicit statement at the hearing on the motion to appoint Dr. Cunningham that the prison risk assessment sought by the defense was exemplified by Dr. Cunningham’s *Gray* declaration. (JA 941; Rehg. Pet. at 2).

<sup>7</sup> Other than this rejection of Dr. Cunningham’s proposed risk assessment “as mitigation,” the Virginia Supreme Court did not further discuss petitioner’s separate Eighth Amendment claim, which was raised both in his pretrial motion to appoint Dr. Cunningham, JA 4708-4709, and on appeal. *Porter v. Commonwealth*, Brief of Appellant at 33-35.

Porter's future risk in a penitentiary setting.

Dr. Cunningham, as stated in his affidavit. . . will be able to opine in a scientific matter based on an individualized assessment of Mr. Porter, which includes prior behavior while he was incarcerated in the past, to include the 76 unadjudicated bad acts that the Commonwealth has noticed; appraisals of past security requirements while he was incarcerated; and his age; his level of education and comparative review of the statistical data regarding similarly-situated inmates.

The representation on oral argument is simply too vague to have any meaning.

*Id.* at 441-442. The court offered no suggestion as to how Porter, or any other defendant, could provide greater particularized specificity without an already-completed prison risk assessment in his own case. Because the issue arose in connection with an indigent defendant's motion for funds, the state court apparently faulted petitioner for failing to proffer the very evaluation for which he was seeking Dr. Cunningham's appointment.

The court concluded:

Porter's proffer in the Prison Expert Motion fails to address the statutory factors under Code § 19.2-264.2 and 19.2-264.4(C) as being individualized and particularized as to Porter's prior history, conviction record and the circumstances of the crime. As our precedent would render inadmissible the statistical speculation he does offer, Porter has failed to show . . . "particularized need" . . . "In light of the inadmissibility of the evidence that [Porter] sought to introduce through the expert, he also failed to establish how he would be prejudiced by the lack of the expert's assistance." *Bell*, 264 Va. at 201, 563 S.E.2d at 715.

*Porter*, 661 S.E.2d at 442.

Justice Koontz dissented. He concluded that Dr. Cunningham's proffered testimony regarding the question of Porter's future dangerousness was "sufficiently specific and particularized" to have rendered it admissible:

In the affidavit proffered by Porter in support of his motion for Dr.

Cunningham's appointment, Dr. Cunningham explained that his "individualized assessment" evaluated a number of factors in determining whether a particular defendant posed a future danger to society. The affidavit detailed the typical scientific basis and methodology used by the doctor in assessing a particular defendant, including "his age, his level of educational attainment ... other features and characteristics regarding him [and] particularized to him based on demographic features, adjustment to prior incarceration, offense and sentence characteristics, and other factors." It also included information regarding how, if appointed, Dr. Cunningham would determine the setting and time span in which Porter's violent conduct would be likely to occur, the base rate of serious violence in that particular setting, and the individual characteristics and prior record of Porter in relation to the likelihood of serious violence in the prison setting.

*Id.* at 453-454.

Turning to the denial of the narrowing instruction concerning the "continuing threat" aggravating factor, the state supreme court cited only its own decisions upholding similar refusals to clarify for the jury the meaning of the aggravating factor. The state court noted this Court's reference in *Bell v. Cone* to the issue of whether *Ring* now requires that narrowing constructions of vague eligibility factors must be given to the sentencing jury. The court found, however, that this Court "has yet to elaborate on its comment" and, because the state court previously held that Virginia's continuing threat factor was not vague, *Cone* and *Ring* could not require additional jury instructions. *Id.* at 447-448.

In a petition for rehearing, petitioner pointed out that the Virginia Supreme Court had never before held (and the jury in this case was not told) that the statutory references to the defendant's "past criminal record of convictions," Va. Code § 19.2-264.2, and to "the prior history of the defendant or of the circumstances of the offense," Va. Code § 19.2-264(C), actually "defined" the continuing threat aggravating factor itself, rather than merely identifying evidence to be considered in determining its existence. He pointed out that the effect of the state supreme court's ruling was to create an un rebuttable

presumption of future dangerousness based only on evidence concerning the defendant's criminal history and occasional prison misconduct, Rehg. Pet. at 6-10, in violation of his Due Process right to rebut the prosecution's case for death. The court summarily denied rehearing without explanation.

### **REASONS WHY THE WRIT SHOULD BE GRANTED**

Like other jurisdictions that include dangerousness as a basis for imposing the death penalty, Virginia requires jurors to assess the magnitude of the risk that a convicted murderer will commit additional violent crimes in the future if sentenced to life imprisonment without possibility of parole rather than to death. Alone among these jurisdictions, Virginia forbids capital defendants from rebutting the state's case for future dangerousness by using the tools of scientific risk assessment to show that a given defendant's likelihood of violent recidivism in prison is actually very small.

Enforcement of this restrictive rule deprived petitioner of the most reliable and powerful evidence that he could be allowed to live in prison without undue risk to society, and it elevated the prosecution's proof on that issue from doubtful to conclusive. Because Virginia's rule conflicts with that of virtually every other comparable jurisdiction, and violates the bedrock constitutional due process requirement that the accused must have a fair opportunity to rebut any allegation offered to justify his execution, *Gardner v. Florida*, 430 U.S. 349 (1977), *Simmons, supra*, review by this Court is warranted. Without doubt, Virginia will continue depriving defendants of the right of rebuttal unless this Court intervenes.

The unfairness of Virginia's hobbling of a capital defendant's right to rebut evidence of the "continuing threat" aggravating factor is compounded by its concomitant refusal to

inform sentencing jurors of what that factor actually means under state law. Although Virginia has *judicially* narrowed the continuing threat factor through decisions construing a “probability” of future violence to mean a “reasonable probability, i.e. a likelihood substantially greater than a mere possibility,” it allows trial courts to withhold that narrowing construction from the sentencing jury. Petitioner’s case presents in an especially stark form an important and recurring question that this Court noted but had no occasion to answer in *Cone*, 543 U.S. at 454 n.6 (2005), namely, “whether an appellate court may, consistently with *Ring [v. Arizona]*, 536 U.S. 584 (2002) , cure the finding of a vague aggravating circumstance by applying a narrower construction.”

Virginia’s twin restrictions on the facts and the law available to juries engaged in deciding the issue of future dangerousness forces them into a decision-making process that is little better than flipping a two-headed coin. As a result, there is a reasonable probability that if this Court grants review, it will conclude that the decision below requires correction.

**1. VIRGINIA’S REFUSAL TO ADMIT SCIENTIFIC PRISON RISK ASSESSMENT TESTIMONY DENIED PETITIONER HIS FEDERAL DUE PROCESS RIGHT TO REBUT THE PROSECUTION’S ALLEGATION OF FUTURE DANGEROUSNESS, AND IT CONFLICTS WITH THE DECISIONS OF OTHER JURISDICTIONS THAT HAVE ADDRESSED THE ISSUE.**

The decision below extends a line of Virginia cases that have rejected attempts by capital defendants to respond to the prosecution’s dangerousness claims by showing that the highly secure conditions of life-long confinement would minimize whatever risk of future violence such defendants might otherwise pose. *E.g.*, *Cherrix v. Commonwealth*, 513 S.E.2d 642, 653 (Va. 1999); *Burns*, 541 S.E.2d at 893 (2001); *Bell* 563 S.E.2d at 713–14. Until *Porter*, the rationale of all these decisions appeared to be simply that such

institutionally-based “prison-security” evidence, standing alone, was inadmissible because it was not individual to the offender being sentenced. Such an “individualization” requirement for admission of rebuttal evidence in the penalty phase of a capital trial was already in some tension with this Court’s decision in *Simmons*, which held that the Due Process Clause entitles capital defendants to rebut prosecution claims of future dangerousness by informing sentencing juries that their “life imprisonment” sentencing option carries no chance of release on parole. But it might at least have been arguable that Virginia’s rule fell within the states’ broad discretion to admit or exclude post-conviction eventualities in capital cases. *Simmons*, 512 U.S. at 176-177 (O’Connor, J., concurring) ; *California v. Ramos*, 463 U.S. 992 (1983).

The Virginia Supreme Court has now gone much further than it did in *Cherrix, Burns*, or *Bell*; much farther than have the courts of any other American jurisdiction; and much farther than this Court’s due process precedents allow, in curtailing how capital defendants may respond to the prosecution’s “continuing threat” allegations.

**a. The holding below conflicts with settled law in other jurisdictions.**

As the Virginia Supreme Court acknowledged in its first modern death penalty decision, Virginia’s capital sentencing scheme is largely patterned after that of Texas. *Smith* 248 S.E.2d at 146. The “continuing threat” question that Texas law puts to capital sentencing juries, TEX. CODE CRIM. PROC. ANN. ART. 37.071.2(b)(1) (Vernon 2005), is substantially similar to the Virginia aggravating factor involved here. When this Court upheld the constitutionality of future dangerousness as a statutory aggravating factor in *Jurek v. Texas*, 428 U.S. 262, 275 (1976), it did so on the understanding that the factor required the sentencing jury to “predict [the] convicted person's probable future conduct

when it engages in the process of determining what punishment to impose.”

Texas law has proven true to that understanding, placing few if any limitations on capital defendants’ presentation of factual information that is logically relevant to their probable future behavior. Thus, Texas courts for decades have permitted capital defendants to present prison risk assessment testimony that takes into account the prevailing base rates of serious violence in the Texas Department of Corrections. *See, e.g., Perkins v. Quarterman*, 254 Fed. Appx. 366, 371 (5th Cir. 2007) (defense presentation included videotapes on security conditions in TDC, and actuarial violence risk assessment founded on low base rates of violence), *Scheanette v. Quarterman*, 482 F.3d 815, 821-822 (5th Cir. 2007) (defense expert testimony focused on low statistical probability of prison violence); *Maxwell v. Quarterman*, No. SA-06-CA-884-OG, slip op. at 28 (W.D. Tex. July 30, 2008) (noting testimony from Dr. Cunningham on actuarial risk factors and administrative segregation of inmates in the Texas Department of Criminal Justice, as well as other individualized factors specific to defendant); *Anderson v. Quarterman*, 204 Fed. Appx. 402, 406 (5th Cir. 2006) (unpublished) (finding defense counsel acted reasonably in introducing expert testimony that defendant “was dangerous but that [the expert] believed that the security in the Texas prison system would be able to prevent Anderson from committing violent acts in prison”); *Threadgill v. State*, 146 S.W.3d 654, 670-671 (Tex. Crim. App. 2004) (holding that testimony and photographs offered through Texas prison investigator were properly admitted to rebut prison warden’s testimony, offered by defense, “about the prison classification system and controls in place to maintain security and safety within the prison system”); *Coleman v. State*, 881 S.W.2d 344, 358 (Tex. Crim. App. 1994) (noting admission of in-prison risk assessment testimony by defense

criminologist to effect that persons sentenced to death “were no more dangerous than those who received life sentences,” and by a second defense witness who “testified that serious violence is well controlled in prison”); *Matson v. State*, 819 S.W.2d 839, 848, 852-54 (Tex. Crim. App. 1991) (reversible error to exclude actuarial testimony by expert on rehabilitation to effect that 17-year-old offenders like defendant who were facing 30-35 years in prison were categorically at low risk to re-offend). Indeed, petitioner’s research has found no Texas case in which a court seriously questioned the admissibility of prison risk assessment testimony of the kind Porter wanted to present to rebut future dangerousness.

Oregon, another jurisdiction where proof of future dangerousness is a legal prerequisite for imposition of the death penalty, also permits wide-ranging admission of evidence with logical relevance to the defendant’s anticipated conduct in prison. For example, in *State v. Sparks*, 83 P.3d 304 (Or. 2004) , the Oregon Supreme Court upheld admission of testimony and photographs of prison weapons that had been seized from other inmates as proper rebuttal to the defendant’s claim that imprisoning him for life was adequate assurance against violent recidivism. The court explained:

defendant's argument . . . assumes that . . . the challenged photographs solely pertained to the potential dangerousness of *other* prison inmates. To the contrary, that evidence described part of the violent characteristics of the institution in which defendant would be confined in the immediate future. Evidence of that violent institutional environment can assist jurors in understanding whether defendant would face a significant risk in prison of involvement in violent acts against others and, perhaps, the use of weapons that the environment affords. Thus, the state's evidence, properly understood, does pertain to defendant, and helps the jury understand, at least to some degree, the probability that defendant will commit criminal acts of violence in the future.

*See also State v. Douglas*, 800 P.2d 288, 296 (Or. 1990) (recognizing that under Oregon’s

sentencing procedures “an expert might testify that the defendant would not pose a threat to prison society, because of its structured environment, but would pose a threat to society at large, if released.”).

Oklahoma’s capital sentencing statute includes a “continuing threat” aggravating factor, OKLA. STAT. ANN. title 21, §§ 701.10, 701.11, 701.12, and the Oklahoma courts have left the door open to admitting the type of risk assessment testimony excluded here, subject to a showing under the standards of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)., *Hanson v. State*, 72 P.3d 40, 52-3 (Okla. Crim. App. 2003) (reversing in part due to summary exclusion, without *Daubert* determination, of defendant’s proffered risk assessment expert testimony that included an explanation of future dangerousness probability, the scientific literature on the issue, and its application to the defendant); *and see Fitzgerald v. State*, 61 P.3d 901 (Okla. Crim. App. 2002) (no error to exclude Dr. Cunningham’s testimony after defense was authorized to retain him but failed to proffer his risk assessment of the defendant).

Although federal capital sentencing statutes do not include a statutory “continuing threat” factor, the government frequently alleges future dangerousness as a nonstatutory aggravating factor under the Federal Death Penalty Act, 18 U.S.C. §§ 3591, *et seq.* When it does, defendants routinely offer prison risk assessments and federal trial courts routinely admitted them. E.g., *United States v. Wilson*, 493 F. Supp. 2d 491, 507-509 (E.D. N.Y. 2007) (overruling prosecution’s objection to Dr. Cunningham’s rebuttal testimony regarding prison risk assessment); *United States v. Sampson*, 335 F.Supp.2d 166, 226-228 (D. Mass. 2004) (remarking that “[t]estimony such as that presented by Dr. Cunningham is valuable to a jury asked to consider whether a defendant is likely to present a danger in a prison

setting if incarcerated for life. The danger any individual presents is a function not only of that individual, but also of his environment.”). Indeed, one of the articles by Dr. Cunningham that Porter provided to the trial judge in this case was a survey of 18 recent federal capital trials in which the defense presented prison risk assessment testimony from Dr. Cunningham or other qualified experts. Cunningham & Reidy, *Violence Risk Assessment At Federal Capital Sentencing*, *supra* at n.2. Federal courts continue to admit such testimony without challenge. *See, e.g., Robinson v. United States*, Civ. Act. No. 4:05-CV-756-Y, 2008 WL 4906272, at \*6, (N.D. Tex. Nov. 7, 2008) (detailing Dr. Cunningham’s explanation of the techniques of prison risk assessment testimony to a federal capital sentencing jury).

In only two reported cases have federal trial courts excluded Dr. Cunningham’s prison risk assessment testimony, and one of these is the exception that proves the rule. In *United States v. Edelin*, 180 F. Supp. 2d 73 (D.D.C. 2001), the government withdrew its allegation of future dangerousness prior to sentencing, pledging to “assiduously avoid any argument that may refer to defendant Edelin as a future danger to society.” *Id.* at 78. Based on this pledge, the trial court excluded Dr. Cunningham’s proffered “testimony about generalized risk assessment by the Bureau of Prisons, statistical incidence of violent acts within the Bureau of Prisons’ system, and confinement classifications and security levels in the Bureau of Prisons.” *Id.* The *Edelin* court indicated that its ruling would have been different had the government alleged the defendant’s dangerousness and thereby triggered his right to rebut that assertion. *Id.*; *cf. United States v. Taylor*, 583 F. Supp. 2d 923 (E.D. Tenn. 2008) (excluding Dr. Cunningham’s testimony about base rates of prison violence and protective effects of federal prison security conditions as not sufficiently individualized

to the defendant, where prosecution had not specifically alleged that defendant would behave violently in prison).

Other jurisdictions that permit consideration of future dangerousness as a nonstatutory aggravating factor also routinely admit risk assessment testimony of the very kind Virginia excludes. *People v. Mertz*, 842 N.E.2d 618, 645-46 (Ill. 2005) (describing Dr. Cunningham's prison risk assessment testimony); *State v. Rogers*, 188 S.W.3d 593, 603 (Tenn. 2006) (same). Indeed, petitioner's research has revealed no case outside of Virginia, other than *Taylor, supra*, in which a court has refused to admit expert prison risk assessment testimony (when offered to rebut future dangerousness) simply because the factors the expert's methodology took into account included, among other things, the base rates of serious prison violence and the conditions and duration of a convicted murderer's incarceration.

In sum, Virginia's stance on this issue of federal constitutional law is in direct conflict with the overwhelming weight of authority in those state and federal courts where future dangerousness is a prominent feature of the prosecution's case for imposing the death penalty. This Court has not hesitated to review federal constitutional error that is particularly egregious, even if it is largely confined to a single state. *E.g. Penry v. Lynaugh*, 492 U.S. 302 (1989) (reviewing aspect of capital sentencing procedure unique to Texas); *Shafer v. South Carolina*, 532 U.S. 36 (2001) (reviewing state-specific procedure affecting capital sentencing). The fact that Virginia currently accounts for the second-highest number of executions (102) in the modern era of capital punishment is an additional circumstance weighing in favor of review by this Court.

**b. Virginia’s refusal to admit reliable, scientific risk assessment as rebuttal to prosecution claims of future dangerousness is fundamentally unfair and inconsistent with this Court’s precedents.**

This Court has long assumed that prosecution claims of future dangerousness in any given case will be subjected to rigorous adversarial testing. *See, e.g., Simmons*, 512 U.S. at 163-64 (where future dangerousness is at issue, Due Process requires that defendant be permitted to respond by informing jury of his parole ineligibility); *Barefoot v. Estelle*, 463 U.S. 880, 901 (1983) (“We are unconvinced . . . at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case”); *Ramos*, 463 U.S. at 1004 n.19 (1983) (jury instruction on governor’s power to commute life-without-parole sentence is relevant to future dangerousness and not constitutionally impermissible, where state law provides that “defendant may offer evidence or argument regarding the commutation power”).

But the Court has never considered, much less upheld, the constitutionality of a sentencing scheme that narrowly limits the evidence deemed relevant to future dangerousness so as to privilege the proof typically presented by the prosecution (the facts of the crime and the defendant’s prior criminal history) while barring as irrelevant or “too general” whole categories of evidence and scientific research findings tending to show that, crime and prior record notwithstanding, a given defendant’s risk of serious future violence is actually low. Simply put, that is not the kind of sentencing scheme that the Court approved in *Jurek v. Texas*, 428 U.S. 262 (1976). It certainly does not allow the rigorous adversarial testing of the prosecution’s case that the Court recognized as a basic principle in cases like *Simmons*, *Barefoot*, and *Ramos*. There is no principled reason why the type of

“stacking of the deck” on the issue of future dangerousness that occurred in this case is constitutionally tolerable.

Contrary to the bedrock principle recognized in this Court’s precedents, Virginia actively stymies a defendant’s ability and opportunity to answer the prosecution’s allegation that he would pose a continuing threat unless executed. It is one thing to hold, as the Virginia Supreme Court did in *Cherrix*, *Burns*, and *Bell*, that free-floating information about security policies within an institution of the Virginia Department of Corrections may be properly excluded from capital sentencing hearings because that information is totally divorced from any defendant-specific factors. But it is something quite different to prohibit even the most highly qualified expert witness from grounding his assessment of the threat posed by a given capital murderer in facts about the known conditions and statutorily-prescribed duration of his future confinement, informed by scientific research shedding light on what specific aspects of a particular defendant’s character and prior record are associated with increased or decreased risk of serious violent behavior.<sup>8</sup> Importantly, this prohibition is not based on any suggestion that the scientific evidence is inaccurate or unreliable. It is off-limits because it takes into consideration the totality of the

---

<sup>8</sup> Without the benefit of such empirical evidence, jurors notoriously overpredict the likelihood of future dangerousness, as Porter informed the trial court. Jurors who imposed the death penalty in Texas put the average likelihood of a given defendant’s committing another murder at 50 percent, when the observed frequency (i.e., the base rate) of such repeat murders by life-sentenced inmates over the preceding 40 years was actually two-tenths of one percent. JA 4711-4712, citing Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1269 (2000). In two peer-reviewed articles co-authored by Dr. Cunningham, petitioner provided a wealth of data about the extremely low base-rates of serious violence by life-sentenced murderers in jurisdictions throughout the United States, and about research findings that tended to show little or no connection between offenders’ future prison conduct and their prior records outside of prison, the brutality of their capital offense, or their performance on any currently-available psychological tests. JA 4771-4785; 4800-4811.

circumstances affecting future dangerousness rather than just the defendant's prior history and offense.

The Virginia Supreme Court's rejection of Dr. Cunningham's proffered risk assessment testimony in this case is especially troublesome in light of that court's longstanding approval of violence predictions, often presented by prosecution witnesses, that identify no empirical or research basis whatever, no disclosure of the conditions or assumptions under which the predictions are made, and no effort to quantify the magnitude of risk beyond vague terms such as "substantial" or "high." *See, e.g., Wright v. Commonwealth*, 427 S.E.2d 379, 391 (Va. 1993) ("Based upon the examination and Wright's social history, Dr. Centor opined that 'there is a high probability that [Wright] would, in the future, commit acts that are criminal, violent and a danger to society'"); *Savino v. Commonwealth*, 391 S.E.2d 276, 280 (Va. 1990) ("Dr. Centor opined that Savino 'show[ed] signs of future dangerousness in view of his past criminal history so that he would have a high probability of committing criminal acts of violence . . . in the future'"); *Edmonds v. Commonwealth*, 329 S.E.2d 807, 813 (Va. 1985) (psychologist said he found "strong indications that there is a high probability of future dangerousness" based upon defendant's criminal record and statements to police, testimony at the guilt trial, autopsy report, and a two-hour interview); *Giarratano v. Commonwealth*, 266 S.E.2d 94, 101 (Va. 1980) (affirming dangerousness finding based in part on psychiatric testimony that defendant "in his present condition and if incarcerated, would constitute a homicidal threat to himself and to the prison population").

These decisions lead to the indefensible conclusion that if Dr. Cunningham had proposed simply to interview petitioner, to disregard empirical scientific evidence about

factors relevant to violent recidivism, and then offer an opinion based on nothing more than speculation and unsupported intuition concerning the significance of petitioner's record, crime, and clinical interview, his testimony about the defendant's future dangerousness would have been admissible. In *Barefoot, supra*, this Court rejected a federal constitutional challenge to the admission of psychiatric predictions that a convicted murderer would continue to behave violently in the future, despite a professional consensus that such predictions – although presented as “individualized” assessments of capital offenders – were scientifically baseless and usually wrong. Not until Porter's case, however, has any state suggested that *only* such problematic predictions are admissible on the issue of future dangerousness.

The practical effect of Virginia's crabbed view of a capital defendant's right to answer a claim of future dangerousness is to render the prosecution's case virtually un rebuttable whenever it includes a record of prior violent offenses or other misconduct. If, as the state court held in this case, the presence *or absence* of a “probability” of serious future violence must be inferred entirely from the defendant's prior record, history and crime, then the sentencer can no longer take into account most of the actual reasons why the probability that a given offender would commit criminal acts of violence might well differ from his violent past.

Virginia's limitation on the constitutional right of rebuttal effectively mandates that sentencing juries extend the trajectory of the defendant's past criminal conduct and capital offense as a straight line continuing into the future – and come to the inevitable conclusion that the “continuing threat” aggravator has been established. And it does this in the face of a large body of empirical research, much of it summarized in the record of this case,

showing that this trajectory is indisputably counter-factual and that convicted offenders' offense-conduct and non-prison behavior are poor predictors of future in-prison violence. JA 4731, 4781. The actual prevalence of serious violence by imprisoned murderers is far lower than the "continuing threat" predictions of uninformed sentencing jurors. Thomas J. Reidy, Mark D. Cunningham & Jonathan R. Sorensen, *From Death to Life: Prison Behavior of Former Death Row Inmates in Indiana*, 28 CRIM. JUST. & BEHAV. 62 (2001); Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, *supra* at n.8; James W. Marquart, Sheldon Ekland-Olson, & Jonathan R. Sorensen, *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC. REV. 449 (1989).

Ignoring this Court's determination that Due Process affords a defendant the opportunity to "present his own side of the case," *Barefoot*, 463 U.S. at 901, the Virginia Supreme Court based its denial of the petitioner's right of rebuttal on state law. As noted above, the "continuing threat" aggravating factor, as defined by longstanding state law, requires the prosecution to establish "a reasonable probability, i.e. a likelihood substantially greater than a mere possibility, that [a convicted murderer] would commit similar crimes in the future." *Smith*, 248 S.E.2d at 149 (internal quotation marks omitted). And by statute, the prosecution must establish such a probability based only on evidence relating to the defendant's prior history and offense. Va. Code § 19.2-264.2. The Virginia Supreme Court's decision in this case extended the same evidentiary limitation to the defendant's case in rebuttal. Until the decision in *Porter*, neither law nor common sense imposed any such constraint on a defendant's effort to show that it was improbable that he would commit serious violent crimes in the future if his life was spared. Thus, a

psychological risk assessment that took into account the conditions of the defendant's future confinement and the relatively low base rates of serious violence in Virginia's prisons would naturally have been a logical way of demonstrating that society would have little to fear from allowing him to live out his life in prison. And that is how defendants make such a demonstration in other jurisdictions.

Having "defined" the continuing threat aggravator in terms of the *prosecution's* evidence alone, however, Virginia believes it is justified in foreclosing capital defendants from offering such a logically probative response in rebuttal. That the *Porter* majority opinion goes so far is shown by its criticism of Dr. Cunningham's *Gray* affidavit. The court acknowledged that Dr. Cunningham "has adopted the use of key words like 'individualized assessment,'" but complained that his "analysis appears to be of the same genre of the rejected proffers of how security measures in a future incarceration may affect a defendant's ability to commit more violent acts." *Porter*, 661 S.E.2d at 441. As proof, the court pointed to Dr. Cunningham's unremarkable assertions that "[b]ecause risk is always a function of context or preventative interventions, increased security measures can act to significantly reduce the likelihood of Mr. Gray engaging in serious violence in prison," and that "Mr. Gray's risk of violence in the face of such increased security measures can also be projected." *Id.* In short, the state court found that Dr. Cunningham's approach to risk assessment was inadmissible because he proposed to take into account all the relevant circumstances—including what was already known about Porter's future setting—in arriving at his conclusions.

It is important to appreciate that the aspects of Dr. Cunningham's proposed risk assessment that the state court found objectionable are the very ones that mark it as

science rather than conjecture. The Virginia Supreme Court's critique notwithstanding, Dr. Cunningham's declaration simply described the elements of any competent and ethical risk assessment as mental health professionals currently understand that concept. *See, e.g.,* Mary Alice Conroy & Daniel C. Murrie, FORENSIC ASSESSMENT OF VIOLENCE RISK: A GUIDE FOR RISK ASSESSMENT AND RISK MANAGEMENT 235-253 (2007) [hereinafter "Conroy & Murrie"]. Those elements are (1) that the risk assessment is grounded on the historical base rate of serious violence in the relevant setting (the Virginia Department of Corrections) over the relevant time period (the defendant's anticipated life span), and (2) that it individualizes this base rate to the defendant by taking into account those particular characteristics which have been *empirically* demonstrated to lower or raise the risk of violence, rather than characteristics which merely "feel like" they should be relevant to the likelihood of future violent behavior. Conroy & Murrie, *supra*, at 238-248.

There can be little doubt that jurors presented with a claim of future dangerousness will try to estimate the probability that the defendant will commit criminal acts of violence in the prison setting if they impose a life sentence. Nothing in Virginia's jury instructions bars them from giving great weight to the prison setting and answering the "continuing threat" question on that basis. By prohibiting Dr. Cunningham's testimony, Virginia deprived jurors of the tools of modern scientific risk assessment with which to conduct an evidence-based evaluation and reach a reliable conclusion. And in that informational void, the court's instructions left jurors free to rely on speculation, intuition, ingrained beliefs, and personal information (and misinformation) to predict petitioner's probable future behavior.

Even if jurors had been instructed that they could only consider petitioner's capital

offense, history and background in assessing whether the “continuing threat” factor had been proven, and they were not, Virginia would still have violated petitioner’s Due Process rights by applying such a stringent statutory limitation *to the petitioner’s case in rebuttal*. Just as in *Skipper* and *Simmons*, this imbalanced procedure, which gave the jury unconstrained discretion to credit the prosecution’s case while severely limiting the defendant’s ability to respond, violated “the elemental due process requirement that a defendant not be sentenced to death ‘on the basis of information which he had no opportunity to deny or explain.” *Skipper*, 476 U.S. at 5 n.1 (quoting *Gardner*, 430 U.S. at 362). It cannot be reconciled with the basic due process right of a criminal defendant to present his defense. *Crane v. Kentucky*, 476 U.S. 683 (1986) ; *Holmes v. South Carolina*, 547 U.S. 319 (2006).

**c. Virginia’s exclusion of scientific prison risk assessment evidence violates the Eighth Amendment by undermining the reliability of the jury’s ultimate sentencing decision.**

As Justice Koontz observed in his dissenting opinion, petitioner’s death sentence does not rest only on whether the jurors properly found the probability of a continuing threat to have been proven beyond a reasonable doubt, thereby making him *eligible* for a death sentence. It also rests on the *weight* that the jury subsequently assigned to that factor in making the highly discretionary selection decision whether to impose death or life imprisonment. *Porter*, 661 S.E.2d at 452-454. An accurate assessment of the magnitude of risk petitioner posed was consequently an issue of critical importance to both eligibility and selection decisions. Nothing in the court’s jury instructions suggested that jurors should not approach this question in a commonsensical, practical fashion by asking, in effect, “If we let him live out his life in prison, how great is the risk that he will commit

more criminal acts of violence?” But the exclusion of prison risk assessment testimony deprived jurors of petitioner’s strongest and most reliable evidence on that critical quantitative issue.

Virginia’s prohibition of risk assessment evidence effectively allows only the prosecution’s evidence – that is, petitioner’s criminal history, his capital offense, and his occasional prior acts of misconduct in jail and prison – to guide the jury in answering this life-or-death question. By upholding this exclusion, the Virginia Supreme Court replicated the error it committed in *Tuggle v. Netherland*, 516 U.S. 10 (1995). In *Tuggle*, the jury found both of Virginia’s aggravating factors – future dangerousness and vileness. This Court unanimously held that the vileness finding did not eliminate the risk of prejudice from the trial judge’s erroneous refusal to appoint a defense mental health expert to rebut the prosecution’s claim of dangerousness. The reason, this Court explained, was that the evidentiary imbalance may have affected the jury’s ultimate selection of life or death as the appropriate punishment.

The same is true here. Even accepting *arguendo* that Virginia’s narrow redefinition of the continuing threat aggravating factor would have precluded admission of Dr. Cunningham’s expert risk assessment for purposes of rebutting the *existence* of such a threat, the insights derived from scientific risk assessment would certainly have lessened the *weight* that the sentencing jury was likely to assign to that aggravating factor in deciding whether to impose death or life imprisonment. In this sense, an expert risk assessment is mitigating because it can diminish the weight of the evidence on death’s side of the balance. As a result, Virginia’s refusal to allow petitioner to present his expert prison risk assessment evidence needlessly compromised the factual reliability and accuracy of

the jury's sentencing decision, in violation of the Eighth Amendment. *Johnson v. Mississippi*, 486 U.S. 578 (1988) (holding that Eighth Amendment was violated by death sentence imposed by a jury that was allowed to consider materially inaccurate evidence).

Having satisfied the requirements of *Ake v. Oklahoma*, 470 U.S. 68 (1985), petitioner was constitutionally entitled to the prison risk assessment that he requested, and the state courts' determination that such an assessment was categorically irrelevant to either the existence or the weight of the future dangerousness aggravating factor violated his federal constitutional rights under both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

**2. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE VIRGINIA SUPREME COURT'S NARROWING CONSTRUCTION OF THE "CONTINUING THREAT" AGGRAVATING FACTOR VIOLATED THE DUE PROCESS AND SIXTH AMENDMENT RULE OF *RING v. ARIZONA*.**

As noted above, Virginia's future dangerousness aggravating factor requires the prosecution to establish, beyond a reasonable doubt, a "probability" that the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society." Va. Code § 19.2-264.2. The very first appeal brought under this capital sentencing statute presented the Virginia Supreme Court with the claim that this statutory language, standing alone, was unconstitutionally vague and overbroad. In response, the state's highest court provided the following judicial narrowing and clarification of the continuing threat factor:

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*, 248 S.E.2d at 149 (emphasis added) .

Until *Ring, supra*, it was fair to assume that such a narrowing construction of a statutory aggravating factor could be applied in the first instance by an appellate court on direct review of a jury-imposed death sentence. See *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990) (approving 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”). *Ring* has now made clear that statutory aggravating factors are the functional equivalent of offense elements, and they must be found by a jury rather than by a judge (or judges). In *Bell v. Cone*, 543 U.S. at 454 n.6, this Court 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.”

At the sentencing trial in Porter’s case, petitioner argued that *Ring* does indeed now require that any narrowing construction reasonably necessary for the consistent application of a statutory aggravating factor be read to and applied by the jury. JA 539-543, 549-553, 4071-4078). The trial court substantially complied with this request insofar as it concerned the “vileness” factor, and it included in the jury instructions a separate narrowing construction from *Smith* that clarified the meaning of the “depravity of mind” sub-element of vileness. JA 575. But the judge refused petitioner’s parallel request to instruct the jury, also in accordance with *Smith*, 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 576-577, 4100-4101. As this Court has recognized, the parameters of the term “probability” are flexible, making it necessary to

identify boundaries for decisionmakers. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 693 (1984) (specifying that a “reasonable probability” is more than a conceivable possibility but less than a circumstance that is more likely than not to occur).

As a result of the trial court’s refusal to instruct the jury on the narrowed construction, the jury’s future dangerousness finding does not and cannot reflect that its understanding and application of this aggravating factor was the same one specified by the Virginia Supreme Court in *Smith*. As a result, petitioner’s constitutional right to have his eligibility for the death penalty determined *by a jury* was not honored.

The Virginia Supreme Court rejected this argument in the following discussion:

Porter's contention that the language from *Smith* should have been given to the jury rests on his interpretation that the footnote from *Bell* implies that any narrowing of the language of a “vague aggravating” factor provided by a higher court should be given to the jury. *Bell v. Cone*, 543 U.S. at 454 n.6, 125 S. Ct. 847 (emphasis added). While the Supreme Court has yet to elaborate upon its comment in the *Bell* footnote, Porter's argument appears to rest on the presumption that the aggravating factor in question is “vague.” This Court has consistently held that the future dangerousness aggravating factor is not unconstitutionally vague . . . . Accordingly, no additional instructions were needed in order for the jury to properly understand and determine the future dangerousness aggravating factor under the other instructions given to the jury.

*Porter*, 661 S.E.2d at 447-448. But petitioner’s right to a jury instruction containing *Smith*’s explanation of the meaning of the dangerousness factor does not depend on whether the factor is unconstitutionally vague or overbroad but for *Smith* (although petitioner contends that it is, given the inherent ambiguity of the unadorned term “probability”). What matters is simply that the *Smith* Court narrowed the meaning of the factor and thereby defined it in a way that an uninstructed jury cannot. Regardless whether the construction provided in *Smith* was independently compelled by the Eighth Amendment principle of *Godfrey v. Georgia*, 446 U.S. 420 (1980) , the simple fact is that that the *Smith* narrowing construction

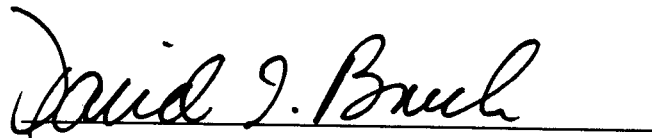
is now part of what the prosecution must prove to render a convicted murderer eligible for the death penalty under Virginia law. As such, *Ring* requires that this construction be made known to, and applied by, the jury. Therefore, the trial court's refusal to instruct the jury on the meaning of the dangerousness factor as construed by *Smith* violated Porter's Sixth Amendment right to have a jury find every fact essential to expose him to the maximum penalty of death. This error cannot, by definition, be corrected on appeal, and it requires that petitioner be resentenced by a properly instructed jury.

The trial judge's refusal to inform the jury of the meaning of the "probability" requirement under Virginia law was especially unfair in this case because it compounded the harm from his refusal to appoint Dr. Cunningham. The net effect of these two errors was to maximize the risk of error in the process by which the jury determined whether petitioner posed a sufficient "continuing serious threat" to warrant his execution. By its terms, Virginia law required the jury to make a probabilistic assessment of the magnitude and seriousness of the risk that petitioner's continued existence would pose to society. In combination, the two rulings challenged here deprived jurors of any reliable factual basis upon which to make this assessment, as well as any legal yardstick for evaluating the skewed factual account they were provided.

CONCLUSION

For the reasons set forth above, and because Virginia clearly intends to replicate these errors in future capital cases, review by this Court is warranted. The Court should grant the writ.

Respectfully submitted,

A handwritten signature in black ink that reads "David I. Bruck". The signature is written in a cursive style and is positioned above a solid horizontal line.

Joseph A. Migliozi, Jr.  
Capital Defender for the  
Commonwealth of Virginia  
207 Granby Street, Suite 200  
Norfolk, VA 23510  
(757) 314-2354  
(757) 314-2352 fax  
[jmigliozi@msn.com](mailto:jmigliozi@msn.com)

David I. Bruck \*  
Washington & Lee School of Law  
Lexington, VA 24450  
(540) 458-8188  
(540) 458-8580 (fax)  
[bruckd@wlu.edu](mailto:bruckd@wlu.edu)

\* Counsel of Record

No. 08-\_\_\_\_\_

---

**In the Supreme Court of the United States**

**October Term, 2008**

---

**Thomas Alexander Porter,**  
*Petitioner,*

v.

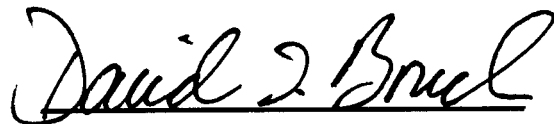
**Commonwealth of Virginia,**  
*Respondent.*

---

**Certificate of Service**

---

I certify that I am a member of the Bar of this Court; that I am counsel for Thomas Alexander Porter; that on February 17, 2009, I caused the foregoing Motion for Leave to Proceed *In Forma Pauperis* and Petition for a Writ of Certiorari to be served by first class mail on Matthew P. Dullaghan, Senior Assistant Attorney General, 900 East Main Street, Richmond, VA 23219, telephone (804) 786-2071.



David I. Bruck  
Washington & Lee School of Law  
Lexington, VA 24450  
(540) 458-8188 (tel), -8580 (fax)  
[bruckd@wlu.edu](mailto:bruckd@wlu.edu)  
*Counsel for Petitioner*

SUNSHINE  
FURNITURE

2001 FEB 17 A.D. 17

ck