

**No. 08-8732**

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IN THE  
SUPREME COURT OF THE UNITED STATES

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THOMAS ALEXANDER PORTER,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent*

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

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PETITIONER'S REPLY BRIEF

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## ARGUMENT IN REPLY

**1. There are no procedural obstacles to review of petitioner's right-of-rebuttal claim.**

Respondent's claim that petitioner failed to present his Due Process and Eighth Amendment claims to the Virginia courts, BIO at 4, is contradicted by the record. Because Virginia's unique rule against scientific prison risk assessment methodology in capital sentencing caused the trial judge to deny petitioner's pretrial motions for funds to secure such an assessment, petitioner's appellate argument necessarily cited *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Porter v. Commonwealth*, Brief of Appellant at 35, Resp. App. 51. But this citation did not convert his underlying claim, as respondent now argues, into one that "simply" alleged error under *Ake*. On the contrary, petitioner's motion to appoint a prison risk assessment expert relied on this Court's right-of-rebuttal decisions, including *Gardner v. Florida*, 430 U.S. 349 (1977), *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986), and *Simmons v. South Carolina*, 512 U.S. 154 (1994), [JA 4712-4718]. He renewed his federal constitutional argument on direct appeal, *Porter v. Commonwealth*, Brief of Appellant at 31-32 (citing *Simmons* and *Lockett v. Ohio*, 438 U.S. 586 (1978)), and 33-34 (citing *Simmons*, *Barefoot v. Estelle*, 463 U.S. 880 (1983), *California v. Ramos*, 463 U.S. 992 (1983), *Jurek v. Texas*, 428 U.S. 262 (1976), and *Beck v. Alabama*, 447 U.S. 625, 632, 638 (1980)). The Virginia Supreme Court addressed his claims on the merits, squarely holding that the trial court's refusal to authorize Dr. Cunningham's risk assessment testimony violated neither the Due Process Clause nor the Eighth Amendment because the testimony would have been inadmissible at petitioner's sentencing hearing whether offered as mitigation or as rebuttal. *Porter v.*

*Commonwealth*, 661 S.E.2d 415, 441-442 (Va. 2008), Pet. App. at 27a-28a.

Respondent's contention that petitioner failed to preserve the federal constitutional claims contained in his petition is frivolous.

Respondent's related effort to downgrade petitioner's claim into one that merely seeks review of a trial judge's discretionary decision regarding appointment of an expert is likewise meritless. The Virginia Supreme Court's extensive discussion makes unmistakably clear that the court upheld the trial judge's denial because it viewed Dr. Cunningham's entire proposed prison risk assessment as irrelevant and inadmissible as a matter of law. It was this constitutionally erroneous holding, and not the exercise of discretion, that determined the Virginia courts' disposition of petitioner's motion for appointment of an expert on prison risk assessment.

**2. The availability of another mental health expert to testify about mitigating factors unrelated to prison risk assessment has no bearing on the issue before the Court.**

Respondent argues for the first time that the trial court's appointment of a Virginia forensic psychologist and a neuropsychologist to assist the defense under Va. Code § 19.2-264.3:1 obviated the need for an expert on prison risk assessment. BIO at 5, 10.<sup>1</sup> The trial judge expressly declined to base his denial of petitioner's risk-assessment request on availability of the two other mental health experts ("I

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<sup>1</sup> Va. Code § 19.2-264.3:1 authorizes appointment of an expert "to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition, including (i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense; (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired at the time of the offense; and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense.

don't ask the question about the additional experts that have already been appointed on any neurological basis. It's an individual request basis, as far as I'm concerned."), Resp. App. 35-36, and then went on to deny the risk assessment that petitioner sought on grounds of its *inadmissibility*, not because some other expert could provide the same evidence. Resp. App. at 36. Nor did respondent argue in its direct appeal brief that Dr. Cunningham's appointment was properly denied because of the availability of petitioner's other court-appointed experts. Brief of Respondent at 14-17. Rather, its argument---and the Virginia Supreme Court's holding---was simply that Dr. Cunningham's testimony was irrelevant and inadmissible. *Id.* Had petitioner attempted to elicit similar prison risk assessment testimony from Dr. Stejskal, the Commonwealth's objection and the Virginia courts' rulings excluding it would have been exactly the same.<sup>2</sup> The issue in this case has nothing to do with the identity or number of the expert witnesses involved, but only with Virginia's categorical rejection of prison risk assessment (which the Virginia Supreme Court denigrates as "statistical speculation," Pet. App 29A, 661 S.E.2d at 442) as a means of confronting and rebutting prosecution predictions of future violence.

**3. Virginia's apparent insistence that an indigent capital defendant cannot establish a particularized need for expert assistance unless he can first proffer a completed assessment by the still-unappointed expert cannot be reconciled with *Ake v. Oklahoma*.**

Respondent's primary argument in opposition to certiorari is that petitioner's motion was properly denied because his proffer did not include Dr. Cunningham's

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<sup>2</sup> While exaggerating Dr. Stejskal's supposed credentials as a "risk-assessor," (none of the handful of references to violence risk assessment in his lengthy resume involve *prison* assessment), the Commonwealth stops short of asserting that the trial court would have allowed Dr. Stejskal to present prison risk assessment testimony after declaring inadmissible the proposed testimony of the nation's leading researcher in the field. BIO 5, 10.

findings and conclusions about petitioner himself. BIO 8-9. But when the proffer was made, Dr. Cunningham had not yet performed a risk assessment of petitioner. Indeed, obtaining such an individualized assessment was the reason for the proffer. While respondent tries to portray this supposed defect as a shortcoming in Dr. Cunningham's methodology, it really just reflects the fact that an indigent defendant cannot normally obtain expert services until the court agrees to pay for them. That is why Dr. Cunningham stated in his *Gray* declaration (offered to illustrate his proposed work in petitioner's case as well) that his projection of violence risk "*will be particularized to [Gray] based on demographic features, adjustment to prior incarceration, offense and sentence characteristics, and other features.*" BIO at 9 (quoting Pet. App. 72a, emphasis in original). Apparently the fatal flaw in this proffer turns out to be that Dr. Cunningham had not completed his assessment before his appointment was requested, much less authorized.

Respondent's approach would turn *Ake v. Oklahoma* on its head. In *Ake*, this Court held that the defendant's history of mental illness and the state's intention to argue his dangerousness at sentencing constituted a sufficient "preliminary showing" to require the appointment of a psychiatrist to assist the defense with respect to both guilt-or-innocence and sentencing issues. The Court did *not* also require *Ake* to demonstrate that the as-yet-unappointed psychiatrist's evaluation would actually provide useful testimony at either stage of his trial. But by disparaging petitioner's risk assessment proffer in this case as a "non-individualized theory," BIO at 10, respondent appears to demand that an indigent capital defendant

in Virginia must somehow furnish an already-completed expert assessment in order to make the “preliminary showing” necessary to justify the expert’s appointment.

Due Process does not permit such a Catch-22. The “preliminary showing” in this case was the prosecution’s statutory allegation of future dangerousness, and its reliance on the facts of the crime and on petitioner’s prior record to establish a “probability that he . . . would commit criminal acts of violence that would constitute a continuing serious threat to society.” Given that petitioner faced a minimum sentence of life without parole, a key question for the jury was whether a prisoner with petitioner’s individual history and characteristics actually *was* likely to commit such criminal acts of violence once incarcerated. This is an empirical question that prison violence risk assessment methodology is designed to help answer, and Virginia’s categorical refusal to allow such evidence as rebuttal to the prosecution’s dangerousness claim presents a substantial question under the Due Process Clause and the Eighth Amendment.

**4. Respondent has failed to identify a single state or federal case from any jurisdiction that adopts Virginia’s prohibition of prison risk assessment methodology in capital sentencing.**

Respondent’s listing of inconsequential distinctions between this case and the many state and federal cases cited in the petition, BIO at 12-19, should not obscure the most important point to emerge from this section of its brief. This is respondent’s failure to cite a single case from any other jurisdiction that treats prison risk assessment testimony with the hostility that Virginia reserves for it. It is true, as respondent points out, that many of the cases petitioner cites do not actually address the admissibility of such testimony, whether offered by Dr. Cunningham or

by other experts. But this merely reflects that in most other jurisdictions, the admissibility of scientific prison risk assessment testimony is not even a matter of serious debate. Because the testimony of Dr. Cunningham and his colleagues is rarely objected to and even more rarely excluded, it typically appears in appellate or federal habeas court opinions only in passing.<sup>3</sup>

**5. Respondent's attempt to evade petitioner's right-of-rebuttal claim by reformulating the "continuing threat" factor ignores the instructions that guided the sentencing jury.**

Finally, respondent suggests that prison risk assessment of the sort that petitioner requested in this case misses the point of Virginia's "continuing threat" aggravating factor. While this argument is by no means clear, it seems to rest at least in part on Virginia case law holding that the jury is not limited to "prison society" in evaluating the continuing threat factor. BIO 14-15. Elsewhere, respondent implies that a special limitation on defendants' right to present prison risk assessment is warranted by some aspect of Virginia's "very specifically worded statute." BIO 12. And respondent also makes a somewhat opaque suggestion that Virginia's continuing threat aggravating factor does not call for an actual risk assessment at all, but rather that "the issue before the jury [is] about the defendant's character; i.e. whether Porter is a dangerous individual." BIO at 10.

This last suggestion---that the "continuing threat" factor requires the jury to evaluate only the defendant's character rather than his actual future behavior---

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<sup>3</sup> A word should be said about respondent's sarcastic reference to "the ubiquitous Dr. Cunningham." BIO at 18. Given that Dr. Cunningham is the country's leading researcher in the field of prison violence risk assessment of life- and long-term inmates, it is hardly surprising that he appears often as a witness in cases where juries are required to make life-and-death decisions on the basis of their assessments of the magnitude of such risk of violent recidivism.

would, if correct, call into question the constitutionality of the continuing threat factor itself, since it would no longer operate like the Texas “special issue” from which it was derived. See Cert. Pet. at 15-16. In any event, it is a sufficient answer to all of respondent’s efforts to redefine Virginia’s continuing threat factor that the instructions that guided the jury on this point, in their entirety, were 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.) The natural understanding of these instructions is that they required the jury to determine simply whether petitioner was likely to violently re-offend if allowed to live. Given the breadth of the continuing threat instructions, respondent cannot credibly insist now that the entire issue of in-prison risk assessment was “irrelevant” because the jury’s sole concern—both in determining the existence of the future dangerousness factor, and in deciding how much weight to accord it once found—was the relatively abstract (and vague) one of petitioner’s character.

The same is true of the Virginia Supreme Court’s insistence that the continuing threat aggravating factor is actually *defined* by the statutory directive that the sentencer consider “the defendant’s ‘past criminal record,’ ‘prior history’ and ‘the circumstances surrounding the commission of the offense.’” *Porter, supra*, 661 S.E.2d at 437. Whatever the merit of this proposition as a description of the evidence that Virginia law permits the *prosecution* to adduce on this issue, it cannot in fairness limit the evidence with which a defendant is permitted to *rebut* the

continuing threat aggravating factor. As far as a sentencing jury is concerned, either a defendant will likely commit more violent crimes if he is sentenced to life imprisonment without parole, or he will not. Because he will be in prison until he dies, the actual magnitude of the risk of in-prison violence posed by his continued existence is an issue of irreducible importance. Common sense dictates that the answer to this question must take into account every relevant circumstance. That is what Dr. Cunningham's proposed risk assessment was designed to do, and Virginia's unique prohibition of such testimony warrants review and correction by this Court.

#### CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, the Court should grant the writ.

Respectfully submitted,

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

**October Term, 2008**

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*Petitioner,*

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

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**Certificate of Service**

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I certify that I am a member of the Bar of this Court; that I am counsel for Thomas Alexander Porter; that on March 31, 2009, I caused the foregoing reply to the Commonwealth's brief in opposition 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.



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