

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA

WILLIAM CHARLES MORVA,  
Appellant

)

)

)Record No. 090186; 090187

V.

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COMMONWEALTH OF VIRGINIA ,  
Appellee.

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**PETITION FOR REHEARING**

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**I. This Decision Fails to Take Into Account How the Jury Instructions Framed the Dangerousness Issue**

While the Court has decided many cases limiting how a capital defendant may rebut an allegation of future dangerousness, *see Porter v. Commonwealth*, 276 Va. 203, 247-252, 661 S.E.2d 415, 437-440 (Va. 2008) (listing and explaining cases), this marks the first time that the Court has rejected a request for an *individualized* prison violence risk assessment solely because:

- (a) the assessment would have been anchored in base-rate data concerning the actual prevalence of serious violence in prison; and,
- (b) it would have taken into account known risk-reduction features of the prison in which the defendant would be confined.

Morva, slip op. at 19-22, 27-30. The Court justifies these limitations on the grounds that the "specific language of [Virginia] Code §§19.2-264.2 and 19.2-264.4(C), dictates what evidence is relevant to the future dangerousness inquiry." *Id.* at 26. But, since it is obviously illogical to ignore known base-rates of prison violence and prison security conditions in making an *actual prediction* of whether a specific life-term prisoner is likely to re-offend violently, the only way to understand the Court's categorical exclusion of such considerations is that Virginia's "future dangerousness" aggravating factor actually does not involve a forward-looking risk assessment at all. Rather, an inquiry that considers only the defendant's background, character and record---in isolation from the real-world setting in which he will live the rest of his life---can address only the question of whether he is a person of violent character. There is no other explanation for the Court's statements that "[t]he specific language of [Virginia] Code §§19.2-264.2; and 19.2-264.4(C) dictates what evidence is relevant to the inquiry concerning future dangerousness," and "[t]he relevant evidence concerning a determination of future dangerousness consists of the defendant's history and the circumstances of the defendant's offense." *Morva*, slip op. at 26-27.

Morva will argue below that thus defined, Virginia's "future dangerousness" factor is too vague and open-ended to serve as an Eighth Amendment safeguard against the arbitrary infliction of death. *Cf. Jurek v. Texas*, 428 U.S. 262, 275 (1976) (upholding constitutionality of similarly-worded Texas sentencing factor on the understanding that it required the jury to "predict [the] convicted person's probable future conduct . . . ."). But a more immediate constitutional problem---and one that the Court's opinion fails to address---is no such explanation of the continuing threat factor was given to Morva's jury. On the contrary, at his sentencing hearing, the circuit court instructed the jury as follows:

[T]he Commonwealth must prove beyond a reasonable doubt, and you must find unanimously...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.

J.A. 1689. The jury surely understood this instruction as directing it to undertake a predictive inquiry --- to answer the question of whether Morva would likely commit additional violent crimes if allowed to live. This predictive task undeniably requires consideration of the defendant's future setting in light of his own characteristics and crime, and nothing in the instruction suggests that the jury was to ignore the significance of life-long imprison-

ment. Indeed, the prosecutor reinforced this broad understanding of the “continuing threat” inquiry by arguing that life imprisonment would actually render Morva *more* likely to commit additional violent crimes. JA 2454-56 . It is thus virtually certain that Morva’s jury did not limit its “continuing threat” deliberations to his prior history and the facts of his offense. What the jury did not know was that Morva had been precluded from presenting his own evidence on the “continuing threat” issue. In particular, the jury did not know that the reason for this preclusion was that Morva’s proposed expert proposed to take all relevant circumstances into account in evaluating the magnitude of the risk Morva posed---including the base rate of serious violence in Virginia prisons, and the protective measures available to reduce Morva’s opportunity for violent recidivism in prison. Although the jury heard none of this, it was nevertheless required by its instructions and urged by the prosecution to assess the likelihood that Morva would commit serious acts of violence in the future if sentenced to life imprisonment. The predictable result of this one-sided procedure was a verdict in favor of the prosecution.

In short, the “continuing threat” aggravating factor was presented to the jury as an assessment of the actual violence risk posed by Morva’s continued existence. But on appeal, ignoring both the jury’s instructions

and the prosecution's jury argument, the Court effectively reconfigured this factor as an abstract assessment of Morva's character. While this may explain why the Court finds Dr. Cunningham's proposed expert testimony to be irrelevant to the future dangerousness factor, it creates new constitutional problems under *Cole v. Arkansas*, 333 U.S. 196 (1948) and *Ring v. Arizona*, 536 U.S. 584 (2002).

In *Cole*, the defendants were convicted of one statutory offense, only to have the state supreme court uphold their convictions for a different offense. The Supreme Court reversed, holding that "[t]o conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Id.*, at 202; *Presnell v. Georgia*, 439 U.S. 14, 16 (1978) (same). This principle was transgressed here. At trial, the jury found Morva to pose a "continuing threat" after being instructed to decide that issue based on whether there existed a probability that Morva would commit criminal acts of violence in the future. JA 2549. The Court has now held in effect that the jury's continuing threat verdict can comfortably co-exist with the opposite factual finding---namely, that a sentence of life imprisonment would eliminate any such probability of violence on Morva's part. But had the jury been told that the aggravating factor ac-

tually concerned only the abstract question of Morva's character, rather than the likelihood of the real-life murder and mayhem predicted by the prosecutor's summation, it might well have given greater weight to unrebutted evidence of Morva's mental illness and rejected the dangerousness factor. Moreover, even if the factor had been found, the jurors would surely have accorded it much less weight in their ultimate life-or-death decision, since the continuing threat factor as construed by this Court has little real-world significance. This appellate recasting of the issues that were litigated at Morva's sentencing was fundamentally unfair, and denied him due process under *Cole*.

This Court's reframing of the future dangerousness issue also violates *Ring v. Arizona*. The jury in this case found "a probability that [Morva] would commit criminal acts of violence that constitute a serious threat to society." The jury was not required to independently assess whether Morva was simply a person of violent character, because the circuit court did not tell it to. And if he is now to be subject to the death penalty at least in part on the basis of *that* finding, *Ring* entitled him to have the finding made by a properly instructed jury, rather than by this Court.

## **II. This Decision Undermines the Constitutionality of Virginia's "Future Dangerousness" Aggravating Factor**

The Court's opinion casts doubt on the constitutionality of Virginia's

“continuing threat” aggravating factor. If the factor involves an evaluation of the defendant’s character rather than a probabilistic assessment of risk, it is too vague (and too undefined by the jury’s instructions) to perform its Eighth Amendment function. And if the factor actually did require Morva’s jury to assess the real-world risk associated with life in prison, then the evidentiary restrictions which the Court has discerned in Code § 19.2-264 operated to insulate the Commonwealth’s case from any possible rebuttal. Under either interpretation, the factor violates the Constitution.

**A. If Future Dangerousness is A Character Inquiry, It is Unconstitutionally Vague**

In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Court summarized the function of an aggravating factor as follows:

[I]f a State wishes to authorize capital punishment . . . [i]t must channel the sentencer's discretion by “clear and objective standards” that provide “specific and detailed guidance,” and that “make rationally reviewable the process for imposing a sentence of death.” As was made clear in *Gregg [v. Georgia]*, 428 U.S. 153, 188 (1976), a death penalty “system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.” 428 U.S., at 195, n. 46.

446 U.S. at 427 (footnotes omitted). Virginia’s “continuing threat” aggravating factor is patterned after a Texas provision that the Supreme Court upheld against Eighth Amendment challenge in *Jurek*. But the Supreme

Court understood the *Jurek* factor to involve an actual violence risk assessment, and consonant with that understanding, the Texas courts consistently admit the very sort of expert testimony that was excluded in this case. See Brief of Appellant at 23-26. No other state, by contrast, has ever interpreted its “dangerousness” factor to involve an assessment of the defendant’s character rather than his probable future behavior if he is not executed. So interpreted, Virginia’s “continuing threat” factor cannot be defended against Eighth Amendment challenge, because any sentencer could find virtually every capital murderer to be “dangerous,” if all that is required is that the murderer be a person of dangerous character. *Godfrey, supra*, at 428-429.

To be sure, in *Bell v. Cone*, 543 U.S. 447, 453 (2005), the Court noted that it had declined to invalidate Georgia’s facially broad “vileness” factor in *Gregg v. Georgia*, 428 U.S. 153 (1976), because it presumed that the Supreme Court of Georgia would not adopt “an open-ended construction [of vileness] that is potentially applicable to any murder.” *Id.* But as construed by this Court, Virginia’s future dangerousness aggravator is open-ended, and does potentially apply to any capital murderer. Moreover, to the extent that the bare-bones “continuing threat” instruction that guided the jury in this case provided any direction at all, JA 2407, it misdirected the

jury into trying to perform an actual violence risk assessment and to quantify the actual risk posed by Morva---but without Morva's evidence on that issue.

If a future dangerousness inquiry requires the jury to assess the defendant's character, rather than his likely future behavior, then the jury must be cautioned that it is *not* being asked to assess the defendant's actual future conduct, and that it should not speculate on that subject.<sup>1</sup> At the same time, the Eighth Amendment would require limiting instructions that the jury identify something about the particular murderer being sentenced that plausibly elevates the "dangerousness" of his character above that of other convicted murderers. The effectiveness of such limiting instructions seems doubtful, given the vagueness inherent in the notion of "dangerous character," and the term's manifest applicability to every convicted killer. But it

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<sup>1</sup>Indeed, under such a construction of the continuing threat factor, the circuit court should have barred the Commonwealth's Attorney from warning the jury about Morva's likely future violent behavior, and should have instructed the jury that it was not to speculate that the prison system might be unable to incapacitate him. In declaring irrelevant Dr. Cunningham's proposed testimony about prison security conditions, the Court appears to assume that the Virginia Department of Corrections can safely confine even the most violence-prone inmate. *Morva*, slip op. at 30-31 (acknowledging that prison security measures "would greatly reduce opportunity for serious violence" by Morva as well as by "any other inmate.") If so, the jury should have been so instructed, and thereby prevented from returning a sentencing decision based on a factually groundless fear, energetically cultivated by the Commonwealth's Attorney, that Morva would likely escape or commit murder within the prison system.

suffices to dispose of this case that no limiting instructions were given to Morva's jury. The Court should grant rehearing to consider the important Eighth Amendment issues posed by the Court's holding that the "continuing threat" factor is wholly defined, and the defendant's rebuttal strictly limited, by the language of Code § 19.2-264.4(C).

**B. If Future Dangerousness Involves a Prediction of Future Behavior, This Decision Renders the Commonwealth's Evidence Unrebuttable**

As explained above, this Opinion bars capital defendants from informing juries of the counter-intuitively low base rates of serious violence among the presumptively "dangerous" inhabitants of the Virginia Department of Corrections, from apprizing them of most of the reasons *why* those rates are low, and from using the tools of scientific risk assessment to place the defendant's own level of risk in its proper perspective. These prohibitions hold even where, as here, the Commonwealth argues that the defendant will kill again, inside or outside prison, unless the jury authorizes his execution.

To the extent that the actual future behavior of the defendant remains a relevant consideration for Virginia capital juries, these stringent restrictions on defendants' right to deploy the tools of scientific risk assessment violate the Due Process right of rebuttal that the Supreme Court recognized

in a series of capital cases stemming from *Gardner v. Florida*, 430 U.S. 349, 362 (1977), through *Skipper v. South Carolina*, 476 U.S. 1, 5 n. 1 (1986), to *Simmons v. South Carolina*, 512 U.S. 154 (1994). A defendant's good character evidence cannot effectively rebut a prosecution claim, grounded in the often shocking facts of the capital murder, that he will violently recidivate even in prison. Only risk-assessment evidence grounded in reality and experience can rebut a prosecution claim that not even prison will keep a convicted murderer from killing again. Here, barring Dr. Cunningham's risk assessment testimony denied Morva the opportunity to rebut the assertion that he poses a great risk of violence if imprisoned in the Virginia Department of Corrections for the remainder of his life, and in so doing denied Morva's due process right to present his defense.

### **III. This Decision Appears to Rest On An Erroneous Reading of *Simmons v. South Carolina***

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the Court held that when the prosecution alleges a defendant's dangerousness as a justification for imposing the death penalty, the Due Process Clause protects his right to inform the jury that its "life imprisonment" sentencing alternative carries no possibility of parole. Morva argued that *Simmons* disposed of the Commonwealth's argument that the risk assessment he sought was inadmissible because it would have taken into account facts that are applica-

ble to all capital defendants. Brief of Appellant at 33-34. Since parole ineligibility obviously is not an aspect of any defendant's character, record or offense, Morva argued that *Simmons* does not allow a state to categorically exclude facts that greatly reduce the likelihood of violent recidivism by a given capital defendant solely because those facts also apply to every other capital defendant. *Id.*

Rejecting this argument, this Court distinguished *Simmons* on the grounds that the *Simmons* Court “concluded, based upon evidence in the record, that the jury likely misunderstood the meaning of sentencing the defendant to life in prison,” and that “[t]he Court was particularly focusing upon the fact that the jury was misled as to the sentencing options.” Slip. Op. at 10. Morva respectfully submits that the Court appears to have misapprehended the facts and the holding of *Simmons*. Nowhere in *Simmons* did the Court suggest that the jury had been “misled” as to the defendant's parole ineligibility. Indeed, at *Simmons*' sentencing hearing the prosecution sought and obtained a series of rulings barring any mention of the word “parole,” and never referred to the subject in the jury's presence, while the judge instructed the jury to disregard the entire subject. *Simmons*, at 158-160. It is therefore simply incorrect to say that the record in *Simmons* showed that the jury was “misled” about *Simmons*' parole eligibility. The

*Simmons*' Court did find that *most* capital juries were likely unaware of the abolition of parole in capital cases. *Id.* at 169-70. But nothing in *Simmons* supports this Court's suggestion that *Simmons*' entitlement to a no-parole instruction turned on whether the jury was "misled" regarding the possibility of parole. *Accord, Kelly v. South Carolina*, 534 U.S. 246 (2002) (*Simmons* right-of-rebuttal principle mandated no-parole instruction despite lack of jury question or other evidence of jury confusion about parole).

It is thus clear that *Simmons*' rule of fundamental fairness is not limited to the subject of parole ineligibility. Rather, *Simmons* stands for the proposition that when the prosecution seeks death on the basis of an offender's alleged dangerousness, state law may not prohibit the offender from responding with material facts or evidence---whether unique to him or not--- that show that the actual risk of further violence he poses is actually very low, rather than unacceptably high. The court's error in *Simmons* was not that it allowed the state to mislead the jury on the question of parole, but rather that it allowed the state to present and argue its case for *Simmons*' dangerousness while preventing him from making his full defense. The same error occurred here. Indeed, the prosecution here pressed its unfair advantage in a way that the state in *Simmons* did not. First, the Commonwealth prevailed on the trial judge to bar the nation's foremost re-

searcher on prison violence risk assessment of capital offenders from demonstrating---by methodology whose reliability the Commonwealth has never questioned---that none of the facts of Morva's own case actually increased his risk of further violence in prison. With Morva's rebuttal thus stifled, the Commonwealth invoked one empirically unsupported inference after another to drive home its message, that Morva was highly likely to kill again if sentenced to life rather than death. Thus, the Court's holding in this case contravenes the fundamental due process rule of *Simmons*, as well as the right of all defendants to present their full defense. *Crane v. Kentucky*, 476 U.S. 683 (1986); *Holmes v. South Carolina*, 547 U.S. 319 (2006).

## **CONCLUSION**

The Court should grant rehearing and reverse Morva's sentence of death.

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 5:39A of the Rules of the Supreme Court of Virginia we hereby certify that this Petition for Rehearing exclusive of the Certificate of Compliance, Certificate of Service, and Caption is 3,000 words or less.

Respectfully Submitted,  
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## **CERTIFICATE OF SERVICE**

I hereby certify that I have this 19th day of October, 2009, sent via email a true and complete copy of the foregoing Appellant's Petition for Rehearing to Steven Witmer, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia, 23219 at [switmer@oag.state.va.us](mailto:switmer@oag.state.va.us).

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