

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS ALEXANDER PORTER,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to review Porter's claim that the Constitution mandates that a defendant must be allowed to present evidence at sentencing which the state supreme court has ruled is irrelevant under the state statute, where Porter failed to present his claim to the state court, and where this claim presents no compelling reason for review?
2. Should this Court grant certiorari to review Porter's claim that *Ring v. Arizona* mandates that a jury must be provided with additional instructions further defining a statutory aggravating factor which the appellate courts have held not to be ambiguous, where this claim presents no compelling reason for review?

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STATEMENT OF THE CASE

I. Proceedings

On June 6, 2006, Thomas Alexander Porter was indicted in the Circuit Court for the City of Norfolk, Virginia, for: the capital murder of Norfolk Police Officer Stanley Reaves, Virginia Code § 18.2-31(6); use of a firearm in the commission of a murder, § 18.2-53.1; and grand larceny of a firearm, § 18.2-95. The Circuit Court granted Porter's unopposed motion for a change of venue.

From February 26 through March 7, 2007, a jury in Arlington County, Virginia, tried Porter for his crimes, finding him guilty of all charges. In a separate sentencing proceeding concluding on March 14, 2007, the jury sentenced Porter to death for the capital murder he committed, finding beyond a reasonable doubt 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 that he would commit criminal acts of violence that would constitute a continuing serious threat to society. *See* Va. Code § 19.2-264.4(C). The jury sentenced Porter to 22 years imprisonment for the remaining convictions. On July 14, 2007, the trial court held a post-verdict hearing at which it imposed the sentences which had been fixed by the jury.

On June 6, 2008, the Virginia Supreme Court affirmed Porter's convictions and sentences. *Porter v. Commonwealth*, 661 S.E.2d 415 (Va. 2008). Porter filed his certiorari petition in this Court on February 17, 2009, and it was placed on the docket on the same day.

II. Facts

The Virginia Supreme Court found the following facts regarding Porter's crimes:

At approximately 3:30 p.m. on October 28, 2005, Porter and Reginald Copeland traveled in Porter's Jeep to the Park Place apartment complex located at 2715 DeBree Avenue in the City of Norfolk to inquire about purchasing marijuana. Porter was carrying a concealed, nine-millimeter Jennings semi-automatic pistol. The two men entered the apartment of Valorie Arrington, where several people were present, including Valorie and her daughters, Latoria and Latifa; Valorie's cousins, Monica Dickens and April Phillips; Valorie's sister, Monique Arrington, also known as Monika; and Monique's daughter, Lamia.

Once inside, Porter began arguing with the women, brandishing his gun, and threatening that he might shoot one of them if provoked. Copeland left the residence, but Porter remained behind, locking the door so Copeland could not reenter. After being locked out of Valorie's apartment, Copeland walked away from the apartment complex and happened upon three uniformed police officers a block away, including Norfolk Police Officer Stanley Reaves. Copeland reported Porter's behavior to Officer Reaves and directed him to Valorie's apartment.

Officer Reaves drove his police cruiser to the front curb of the apartment building, parked the car, and walked across the grass towards the sidewalk leading from the street to the apartment door. As Officer Reaves approached the apartment, Porter left Valorie's apartment and began walking away. Officer Reaves confronted Porter, grabbed Porter's left arm, and instructed him to take his hands out of his pockets. Porter then drew his concealed weapon from his pocket and fired three times, killing Officer Reaves. Porter took Officer Reaves' service pistol and then fled in his Jeep.

Porter, 661 S.E.2d at 419-20.

The Virginia Supreme Court found the following facts justifying the death sentence:

During the penalty stage of the proceedings, the Commonwealth presented evidence in aggravation, which included Porter's prior convictions of misdemeanor carrying a concealed weapon in 1994, felony robbery and use of a firearm during the commission of a felony in 1994, misdemeanor disturbing the peace, misdemeanor assault and battery and misdemeanor threatening a police officer and resisting arrest in 1996, felony possession of heroin, felony possession of a firearm with drugs, and felony possession of a firearm by a convicted felon in 1997, misdemeanor assault and battery in 1997, and misdemeanor obstruction of justice in 2005. The Commonwealth presented evidence of several incidents while Porter was incarcerated, including altercations between Porter, fellow inmates, and prison guards. The Commonwealth also introduced audiotapes of portions of

two telephone conversations between Porter and an unidentified female recorded during Porter's incarceration, which the Commonwealth introduced because they "are directly relevant to the issue of the defendant's lack of remorse" and included Porter bragging that he was a "good shot."

The Commonwealth also introduced the testimony of Officer Reaves' wife and sister, and each described the devastating impact of Officer Reaves' death upon his extended family. Porter presented mitigation evidence which included testimony of his mother and sister as to his childhood, family life and educational background.

The jury's verdict found "unanimously and beyond a reasonable doubt, after consideration of his history and background, that there is a probability that he . . . would commit criminal acts of violence that would constitute a continuing serious threat to society," and sentenced Porter to death. After receipt of the presentence report, the circuit court confirmed the jury's verdict and sentenced Porter to death for the capital murder of Officer Reaves.

Porter, 661 S.E.2d at 224-25. Regarding the appointment of experts and the admission of expert testimony, the Virginia Supreme Court found as follows:

... The circuit court also granted Porter's motion to appoint William J. Stejskal, Ph.D., as a mitigation expert "to evaluate the Defendant and to assist the defense in accordance with the provisions of *Code § 19.2-264.3:1*." Similarly, the circuit court granted Porter's motion and appointed Bernice Anne Marcopulos, Ph.D., ABPP-Cn, as a clinical neuropsychologist expert to assist the defense. ...

On January 5, 2007, Porter filed a "Motion for Appointment of Expert on Prison Risk Assessment and to Introduce Evidence on Prison Violence and Security" ("Prison Expert Motion"), requesting that the circuit court appoint Dr. Mark Cunningham as "an expert on the assessment of the risk of violence by prison inmates and, in particular, the risk of future dangerousness posed by the Defendant if incarcerated in a Virginia penitentiary for life." The court heard arguments on the motion and determined that the other experts already appointed "are going to be able to talk about [Porter's] background, his social history and things relating to that." The circuit court noted that [the Virginia Supreme Court] "has consistently upheld the denial of use of public funds for such an expert, as it's not considered to be . . . proper mitigation evidence; therefore not relevant to capital sentencing" and denied the motion. Porter also filed a motion challenging the constitutionality of Virginia's execution protocols for lethal injection and electrocution, which the court denied.

Porter, 661 S.E.2d at 222-23.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

I. Porter Failed To Present His Question To The State Court.

Porter asks whether Virginia's alleged prohibition on "prison risk assessment evidence" during the sentencing phase violates his Fourteenth Amendment right to "rebut" the prosecutor's evidence of "future dangerousness" and his Eighth Amendment right to mitigate the weight of that evidence. However, the Supreme Court of Virginia made no such categorical ruling and Porter never asked the state court to decide whether there should be such a categorical rule.

Instead, the question he presented and argued in the Supreme Court of Virginia was simply that the trial court erred in denying his pre-trial motions seeking the appointment of Dr. Cunningham, a "prison risk assessment expert," pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985), and *Husske v. Commonwealth*, 476 S.E.2d 920 (Va. 1996), *cert. denied*, 519 U.S. 1154 (1997). (Resp. App. 50, 51). The Virginia Supreme Court held only "that the circuit court did not abuse its discretion in denying the Prison Expert Motion" because Porter failed to make a proffer that Dr. Cunningham would testify to any sort of assessment of Porter's individualized risk for violence, and instead simply relied upon general studies of risks for general populations of inmates. *Porter*, 661 S.E.2d at 442.

At the time Porter's motion was argued, the trial court already had appointed, pursuant to Virginia Code § 19.2-264.3:1, both the licensed clinical psychologist he had requested, William J. Stejskal, Ph.D., (Resp. App. 10) and the neuropsychologist he had requested, Bernice Anne Marcopulos, Ph.D. (Resp. App. 11). In response to the motion to appoint Dr. Cunningham, the Commonwealth objected that Porter had not shown any "particularized need" for such further expert assistance, as required under state law, and that the evidence as proffered was not

admissible in Virginia. (Resp. App. 12-16). The trial court denied Porter's motion for that third mental health expert. (Resp. App. 37-38).

The trial court found that the Commonwealth's evidence in aggravation would be "the defendant's personal history and acts," that the Commonwealth would not be using any expert, and that Porter already had "experts that are going to be able to talk about his background, his social history and things relating to that." (Resp. App. 37).¹ According to Dr. Stejskal's resume, submitted by Porter, Dr. Stejskal also had expertise in risk assessments. (Resp. App. 6-7).² Moreover, even under *Ake*, Porter did not have "a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." 470 U.S. at 83. But, for reasons known only to Porter, he chose not to use Dr. Stejskal's testimony in the penalty phase. In particular, Porter never offered any risk assessment evidence from his court-appointed expert.

In the appeal below, the Virginia Supreme Court discussed the law governing the appointment of experts:

Our decision in *Husske v. Commonwealth*, 476 S.E.2d 920 (Va. 1996), established the basis upon which a circuit court reviews the request of an indigent defendant for the appointment of an expert witness to assist in his defense. We described

¹ Virginia Code § 19.2-264.3:1(A) provides as follows: "Upon (i) motion of the attorney for a defendant charged with or convicted of capital murder and (ii) a finding that the defendant is financially unable to pay for expert assistance, the court shall appoint one or more qualified mental health experts appointed under Virginia Code § 19.2-264.3:1 are "to evaluate the defendant and 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."

² Porter represented to the Supreme Court of Virginia that "the trial court expressly declined to hold (948-950), that any other appointed mental health expert possessed the requisite expertise in this area." (Resp. App. 50). Porter's reference to the Joint Appendix does not support his representation, *see* Resp. App. 36-38, and, as noted, Dr. Stejskal's own resume demonstrated his expertise in the area of risk assessment.

and applied the *Husske* analysis in *Commonwealth v. Sanchez*, 597 S.E.2d 197 (Va. 2004), which guides our review in the case at bar.

In *Husske v. Commonwealth*, 476 S.E.2d 920 (Va. 1996), this Court noted that an indigent defendant is not constitutionally entitled, at the state's expense, to all the experts that a non-indigent defendant might afford. 476 S.E.2d at 925. All that is required is that an indigent defendant have "an adequate opportunity to present [his] claims fairly within the adversary system." *Id.* (quoting *Ross v. Moffitt*, 417 U.S. 600 (1974)).

In *Husske* we held that

an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is "likely to be a significant factor in his defense," and that he will be prejudiced by the lack of expert assistance.

476 S.E.2d at 925 (citation omitted). In that context, we specified that a defendant seeking the assistance of an expert witness "must show a particularized need" for that assistance. *Id.*

It is the defendant's burden to demonstrate this "particularized need" by establishing that an expert's services would materially assist him in preparing his defense and that the lack of such assistance would result in a fundamentally unfair trial. *Id.*; accord *Green v. Commonwealth*, 580 S.E.2d 834, 840 (Va. 2003). We made clear in *Husske* and subsequent cases that "mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided." 476 S.E.2d at 925 (internal quotation marks omitted). Whether a defendant has made the required showing of particularized need is a determination that lies within the sound discretion of the trial court.

[*Sanchez*,] 597 S.E.2d at 199.

Porter attached several documents to the Prison Expert Motion including his curriculum vitae and a "Declaration" which had been filed in a separate capital murder case, *Gray v. Commonwealth*, 645 S.E.2d 448 (Va. 2007), *cert. denied*, 128 S. Ct. 1111 (2008) (the "Gray Declaration"). However, at no place in the Prison Expert Motion does Porter represent that Dr. Cunningham's evidence as to him would be of the same nature as in the Gray Declaration.

Porter, 661 S.E.2d at 435-36. As seen in this opinion, the Virginia Supreme Court addressed no categorical rule regarding the inadmissibility of risk assessment evidence which had been developed properly with regard to an individual defendant.

Indeed, there was nothing unusual or novel about the Virginia Supreme Court's decision. As is the case in most jurisdictions, the defendant is entitled to "the basic tools of an adequate defense," not "all assistance that a non-indigent defendant may purchase." *Husske*, 476 S.E.2d at 925 (regarding a DNA expert). To support a request for an expert, a defendant must demonstrate a "particularized need" for assistance. "Mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided." *Id.*; see also *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) (ballistics experts properly denied when request based only on general statements that assistance would be beneficial). With respect to mental health experts, Virginia provides more than *Ake* requires. See Va. Code § 19.2-264.3:1(A) (see footnote 1, *supra*). A capital defendant need do no more than ask for such an expert to obtain such services, and *Porter* in fact received the services of two such experts simply upon his request.

The Supreme Court of Virginia correctly affirmed the trial court's finding that Dr. Cunningham's proffer was insufficient under state law to support the appointment of yet a third mental health expert. It found that *Porter*'s motion "primarily focused on criticizing prior decisions of [the Virginia Supreme Court] regarding prison risk assessment experts and lauding the virtues of various statistical modes of analysis to project rates of prison inmate violence." 661 S.E.2d at 436. Although *Porter* does not challenge this, the Supreme Court of Virginia noted that its own precedent excluded as irrelevant mere prison condition evidence, expert or otherwise. See *Burns v. Commonwealth*, 541 S.E.2d 872 (Va.), cert. denied, 534 U.S. 1043 (2001); *Cherrix v. Commonwealth*, 513 S.E.2d 642 (Va.), cert. denied, 528 U.S. 873 (1999).

After it answered Porter's criticism of its precedents, the Supreme Court of Virginia based its specific decision upholding the denial of a third expert on "the actual proffer of Dr. Cunningham's proposed evidence so as to measure that proffer against those factors." *Id.* at 440. The Supreme Court of Virginia rejected both of Porter's arguments for appointment of Dr. Cunningham, for the same reasons it had rejected the same arguments in *Bell v. Commonwealth*, 563 S.E.2d 695, 714 (Va. 2002), *cert. denied*, 537 U.S. 1123 (2003):

We rejected Bell's argument and found the circuit court committed no abuse of discretion in denying his motion for appointment of an expert because the proffered evidence was both (1) improper rebuttal evidence for the same reasons as in *Burns*, and (2) not relevant for mitigation because the proffered evidence, like Porter's evidence, was not "peculiar to a defendant's character, history and background." *Id.* [563 S.E.2d at 714.] Thus, "Bell failed to show a 'particularized need' for this expert." 563 S.E.2d at 715. So has Porter.

Porter, 661 S.E.2d at 440-41. Finding that Porter's proffer was not "individualized and particularized as to Porter's prior history, conviction record and the circumstances of the crime" and that "the statistical speculation he does offer" would be inadmissible, the Virginia Supreme Court held that the proffer was insufficient under *Husske* and "that the circuit court did not abuse its discretion in denying the Prison Expert Motion." *Id.* at 442. That judgment involves no issue of federal law, much less the question Porter now asks this Court to answer.

The Supreme Court of Virginia also did not hold that Porter's proffer was insufficient because it included "base rates," but rather because it included nothing else. Porter proffered nothing that mitigated his sentence; in fact, his submission of Dr. Cunningham's declaration from the *Gray* case³ did not even proffer anything that mitigated Gray's own sentence. *Porter*, 661 S.E.2d at 441 n. 15. Porter argued that Dr. Cunningham would detail individual characteristics of the defendant, but he then never did so in either Porter's or Gray's case. Dr. Cunningham's unsigned declaration from the *Gray* case stated only that his general data "will

³ See *Gray v. Commonwealth*, 645 S.E.2d 448 (Va. 2007), *cert. denied*, 128 S. Ct. 1111 (2008).

be particularized to [Gray] based on demographic features, adjustment to prior incarceration, offense and sentence characteristics, and other factors.” (Pet. App. 72A) (emphasis in original).

The Virginia Supreme Court found that “[n]othing in Porter’s motion is a proffer of an ‘individualized’ or ‘particularized’ analysis of Porter’s ‘prior criminal record,’ ‘prior history,’ his prior or current incarceration, or the circumstances of the crime for which he had been convicted.” *Porter*, 661 S.E.2d at 440. That finding was clearly correct because the “proffer in the motion was that Dr. Cunningham would testify as to a statistical projection of how prison restrictions could control an inmate (situated similarly to what he would project Porter to face) in a likely prison setting.” *Id.*

Porter’s certiorari petition does not identify any portion of his motion for appointment which proffers any opinion individualized or particularized as to Porter. He relies only on his conclusory representations to the trial court that Dr. Cunningham “will be able to opine in a scientific matter [*sic*] based on an individualized assessment of Porter” (Resp. App. 21), and that he had implied that Dr. Cunningham would opine as he did in a declaration from *Gray*. (Resp. App. 29) (Pet. 10-11). As noted, the Supreme Court of Virginia found that the un-individualized declaration in *Gray* was not proper mitigation evidence.

The judgment of the Virginia Supreme Court was based upon the undisputed, fact-bound record of the trial court’s findings with respect to Porter’s motion for the appointment of Dr. Cunningham:

Well, I have to venture to conclude an expert in his field could take any general claims he might make with respect to the prison framework and apply it to the individual.

That doesn’t make it particular.

It just means that he’s sort of saying this guy here will be in this particular situation. What we’re really talking about from Dr. Cunningham is, you know,

are the prisons generally violent places? Are they generally the kind of places where you can expect people to be allowed to act up?

That's very general testimony.

(Resp. App. 36-37). The Virginia Supreme Court's finding of no abuse of discretion certainly involved no federal issue. And Porter does not contest the fact that testimony about the security of a prison is simply irrelevant to the issue before the jury about the defendant's character; *i.e.*, whether Porter is a dangerous individual – the issue in Virginia's statutory aggravating factor – is a separate matter from the irrelevant question of whether a prison can keep such a dangerous person from committing crimes.

Porter's Question in this Court assumes some sort of rule of preclusion never made by the state courts. His arguments fail to address the state-law issue of abuse of discretion which he actually argued in the Supreme Court of Virginia. Where a petitioner's claim was "neither pressed nor passed upon" in the state court, this Court consistently has held that it will not consider it. *See Clark v. Arizona*, 548 U.S. 735, 765 (2006), citing *Kentucky v. Stincer*, 482 U.S. 730, 747, n. 22 (1987), and *Illinois v. Gates*, 462 U.S. 213, 217-224 (1983).

Even if the state-law issue of abuse of discretion could be reviewed by this Court, the Court would have to refuse to take Porter's case because there so clearly was no such abuse here. This Court never has held that a state is required to fund an expert who would provide only the sort of non-individualized theory which Dr. Cunningham was prepared to give, especially where the trial court already had provided the defendant with a risk-assessor whom the defendant chose not to use. In *Lockett v. Ohio*, 438 U.S. 586, 604, (1978), this Court held that "the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis in

original). The Court's holding in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), was simply the complement: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Id.* at 113-114. The evidence found to be relevant in *Eddings* was exactly within the scope of *Lockett*: evidence of the defendant's youth, difficult family history, and emotional disturbance. *Eddings*, 455 at 115-16. Porter proffered no such evidence from Dr. Cunningham.

Likewise, in *Skipper v. South Carolina*, 476 U.S. 1 (1986), this Court held that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison" is relevant exactly because it "is itself an aspect of his character that is by its nature relevant to the sentencing determination." 476 U.S. at 7. Skipper's proffer of specific evidence of his own character was found to be exactly within the scope of *Lockett* and *Eddings*. *Id.* at 4-5.⁴ Again, Porter proffered no such evidence from Dr. Cunningham.

In *Gardner v. Florida*, 430 U.S. 349 (1997), this Court identified the critical failing as the absence of an "opportunity for petitioner's counsel to challenge the accuracy or materiality" of a pre-sentence report, relied upon by the court in imposing the death sentence, but which never had been disclosed. *Id.* at 356. The plurality opinion decided a precise question, that the defendant "was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." 430 U.S. at 362. Porter's proffer from Dr. Cunningham did not "deny or explain" any evidence introduced by the prosecution.

⁴ In his concurrence, Justice Powell would have held that the result followed from this Court's cases allowing a defendant to "rebut evidence and argument used against him," citing *Gardner v. Florida*, 430 U.S. 349 (1997). 476 U.S. at 9. The majority acknowledged *Gardner* as an additional basis for its ruling. *Id.* at 14 n. 2.

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), this Court held that “truthful information of parole ineligibility allows the defendant to ‘deny or explain’ the showing of future dangerousness.” *Id.* at 169. No such circumstances are in Porter’s case: the jury properly was instructed about parole ineligibility. (Resp. App. 39, 44, 46).

Porter argues that “all other jurisdictions that permit consideration of future dangerousness in the penalty phase of a capital case” would not bar his “prison risk assessment evidence.” (Pet. i). He asserts that, “[a]lone 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.” (Pet. 13). However, nothing in the record, any decision of the Virginia Supreme Court, or any case law cited supports this sweeping generalization.

Porter discusses only three jurisdictions with a statute similar to Virginia: Texas, Oklahoma, and Oregon. He cites only one case from each of two other States, Illinois and Tennessee, and five cases prosecuted under federal law: but all seven cited cases were decided under statutes which Porter admits do not include “future dangerousness” as a statutory aggravating factor. (Pet. 18, 20). None of those cases, therefore, are applicable to Virginia, which has the statutory aggravator and has a body of state law interpreting that very specifically worded statute.

Of the seven Texas cases cited by Porter, the first four are federal habeas cases, but those four opinions discuss no state rule for admissibility of risk assessment evidence; the admissibility of such evidence was not at issue in any claim in those habeas petitions. The opinions simply

observe that certain risk evidence exists in the record.⁵ And notably, half of the federal habeas cases that Porter cites specifically note that the expert relied upon particular individual characteristics of the defendant. *See Scheanette*, 482 F.3d at 821; *Perkins v. Quarterman*, 254 Fed. Appx. 366, 371 (5th Cir. 2007), *cert. denied*, 128 S.Ct. 2503 (2008). As shown, Dr. Cunningham proffered no such individualized assessment of Porter.

The three Texas state cases provide no better support. *Threadgill v. State*, 146 S.W.3d 654, 670-671 (Tex. Crim. App. 2004), affirmed the admission of photographs to rebut the defendant's evidence, not of risk assessment, but of prison conditions generally. The decision did not address whether the defendant's evidence had been proper in the first place, and Porter does not challenge the rule in Virginia that prison condition evidence is irrelevant to Virginia's statutory aggravating factor.

The holding in *Coleman v. State*, 881 S.W.2d 344 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1096 (1995), also did not deal with the admissibility of risk assessment evidence. Rather, it simply found that a reference, in existing risk assessment testimony, to defendants who had been released after having been sentenced to death, provided a reasonable basis for the prosecutor to allude to the prospect of release. 881 S.W.2d at 358.

Matson v. State, 819 S.W.2d 839, 848, 852-54 (Tex. Crim. App. 1991) is a waiver case. It held that the State's failure properly to object at trial conceded any question over the

⁵ Indeed, one federal habeas case cited by Porter suggests that such "risk assessment" evidence is not mitigating, but rather aggravating, evidence. In *Scheanette v. Quarterman*, 482 F.3d 815 (5th Cir. 2007), the defendant's expert "testified that there was an 18.8% chance that Scheanette would commit acts of violence in prison, which was just over the standard base rate of 16.4% for all individuals serving life sentences for murder." 482 F.3d at 821. The State cited that figure in its closing argument as evidence of a "probability that the defendant would commit criminal acts of violence," as required by Texas law, and argued that the defendant's own expert gave the jury "the answer to the [future dangerousness] question." *Id.* Despite Porter's refrain of the critical need for an expert to rely on such base rates in a risk assessment analysis, his own proffer from Dr. Cunningham failed to identify any rate applicable to his case.

qualification of the expert, and that its argument on appeal “impliedly concedes, as it does not contest, the relevant, mitigating aspects” of the risk evidence. 819 S.W. at 851-52. The holding of *Matson* simply overruled the State’s objection to the form of the questions posed to the expert. *Id.* at 852-53. Porter’s backhanded claim that he “has found no Texas case in which a court seriously questioned the admissibility of prison risk assessment testimony” (Pet. 17) glosses over the fact that he has not cited one case which establishes such admissibility, under a statute like Virginia’s which has been defined by the state court.

Porter cites two cases from Oregon; however, neither dealt with the admissibility of risk assessment evidence. (Pet. 17-18) The admissibility of the prosecution’s photographs, weapons, and testimony tending to prove a generally violent prison environment was at issue in *State v. Sparks*, 83 P.3d 304 (Or.), *cert. denied*, 543 U.S. 893 (2004). But that challenged evidence was offered only in rebuttal to the defendant’s claim that his imprisonment assured against any future violence. Once again, the decision did not address whether the defendant’s argument had been proper in the first place, much less whether it would have been relevant to a statute like Virginia’s statute.

State v. Douglas, 800 P.2d 288 (Or. 1990), offers only dicta that “an expert might testify that the defendant would not pose a threat to prison society.” 800 P.2d at 296. The actual holding was different: it found error in granting an instruction on the possibility of release on clemency because no such testimony was offered. Whatever an expert “might” testify, in *Douglas* there was *no evidence* making any distinction between the threats of violence in prison or while at large. *Id.*

Sparks and *Douglas* are inapposite to Virginia’s statute for another reason. The Virginia Supreme Court has held that Virginia’s statute demands an assessment of violence in society as a

whole, as opposed to prison society, and without respect to how the defendant may or may not be restrained by particular prison conditions. See *Lovitt v. Commonwealth*, 537 S.E.2d 866, 879 (Va. 2000), *cert. denied*, 534 U.S. 815 (2001). Porter does not challenge that state rule.

Porter mischaracterizes *Hanson v. State*, 72 P.3d 40 (Okla. Crim. App. 2003), as having “left the door open to admitting” his desired evidence. (Pet. 18) But that case expressly refused “any invitation to speculate regarding this evidence’s admissibility,” and simply directed the trial court to allow the defendant first to attempt to satisfy the threshold requirements of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). 72 P.3d at 52, 53. The other Oklahoma case he cites, like the Virginia Supreme Court in *Porter*, in fact upheld the trial court’s refusal to allow Dr. Cunningham to testify because he failed to proffer that he had “performed risk assessment on [the defendant] or how he would testify regarding such an assessment.” *Fitzgerald v. State*, 61 P.3d 901, 904-05 (Okla. Crim. App. 2002), *cert. denied*, 538 U.S. 951 (2003). *Fitzgerald* in turn relied upon *Hooker v. State*, 887 P.2d 1351, 1367, *cert. denied*, 516 U.S. 858 (1995), which also upheld the trial court’s ruling, just as in *Porter*, that an expert is “properly prohibited from testifying to opinions not individualized to the defendant or his crime.” *Id.* at 905 n. 12. *Accord*, *Hanson v. State*, 72 P.3d at 52.

The federal prosecutions cited by Porter are no more pertinent. In *United States v. Wilson*, 493 F. Supp. 2d 491 (E.D. N.Y. 2007), the prosecution made the same objection as was made in Porter’s case, “that Dr. Cunningham’s testimony is not sufficiently tailored to Wilson to be admitted in the penalty phase of this case.” 493 F. Supp. 2d at 508. The district court acknowledged “the well-reasoned cases supporting this argument,” citing *Schmitt v. Kelly*, 189 Fed. Appx. 257, 264 (4th Cir.), *cert. denied*, 549 U.S. 1028 (2006), *United States v. Johnson*, 223 F.3d 665 (7th Cir. 2000), and *United States v. Edelin*, 180 F. Supp. 2d 73 (D.D.C. 2001). *Id.* It

held, however, that each of those cases found the challenged evidence to be inadmissible as proof of a defense mitigating factor, and determined that Dr. Cunningham would not be testifying in mitigation but rather to rebut future dangerousness in prison. Based solely on that distinction, the district court allowed Dr. Cunningham to testify “about federal prisons in general.” *Id.*

That district court decision does not discuss the relevancy of such evidence to a specific statute such as Virginia’s statute. Indeed, as Porter acknowledges, *Wilson* dealt with a statute which did not require the prosecution to prove “future dangerousness” or a “continuing threat” of violence. (Pet. 18). *See* 18 U.S.C. § 3592. A court’s analysis of a defendant’s proffer as “rebuttal” to an aggravator which is not defined by statute simply is not relevant to the analysis required under the Virginia statute. And, as shown, the Virginia statute requires an assessment not of how violent the defendant will be in prison, but rather in society as a whole. *See Lovitt*, 537 S.E.2d at 879.

The other case cited by Porter as an example of the federal courts “routinely” admitting such risk assessments, *United States v. Sampson*, 335 F. Supp. 2d 166 (D. Mass. 2004), *aff’d*, 486 F.3d 13 (1st Cir. 2007), *cert. denied*, 128 S.Ct. 2424 (2008), in fact held that Dr. Cunningham would *not* be allowed “to offer an opinion as to whether Sampson presented a future danger.” 335 F. Supp. 2d at 226. Instead, Dr. Cunningham testified as an expert only on the general procedures of the federal Bureau of Prisons. *Id.* at 226-27.

Further, in *Robinson v. United States*, Civ. Act. No. 4:05-CV-756Y, 2008 U.S. Dist LEXIS 90879, 2008 WL 4906272 (N.D. Tex. Nov. 7, 2008), a habeas case, prison risk evidence was mentioned only in the case narrative. 2008 U.S. Dist LEXIS 90879 at *17. As with the

federal habeas cases from Texas, the opinion discusses no standard for admissibility, nor was the admissibility of the risk evidence the subject of a claim in the habeas petitions.

Porter is correct that the prosecution avoided relying on future dangerousness in *United States v. Edelin*, 180 F. Supp. 2d 73 (D.D.C. 2001); however, the district court's ruling excluding Dr. Cunningham's proffered testimony was based on more than the prosecution's discretion. The district court, like Porter's trial court, also found that Dr. Cunningham's general testimony about risk assessment is not the sort of evidence contemplated by *Skipper*, that it bore "no relation" to "any aspect of the defendant's character" or "any other proper mitigation evidence." 180 F. Supp. 2d at 76. It noted the distinction drawn in cases such as *United States v. Johnson*, 223 F.3d 665 (7th Cir. 2000), *cert denied*, 534 U.S. 829 (2001):

A mitigating factor is a factor arguing against sentencing *this* defendant to death; it is not an argument against the death penalty in general. See *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 n. 12, (1978) (plurality opinion). The argument that life in prison without parole, especially if it is spent in the prison's control unit and thus in an approximation to solitary confinement, sufficiently achieves the objectives aimed at by the death penalty to make the latter otiose is an argument addressed to legislatures, not to a jury.

Johnson, 223 F.3d at 675. Moreover, the court in *Edelin* did not hold that its decision would have been different but for the prosecution's discretion; rather, in dicta, it noted only "that if the Government's evidence and argument rose to such a level that defendant Edelin's 'future dangerousness' were an *inescapable* conclusion to be drawn by the jury, that would present the Court with a situation where defendant Edelin's right to rebut may be triggered." 180 F. Supp. 2d at 78 (emphasis original).

Likewise, *United States v. Taylor*, 583 F. Supp. 2d 923 (E.D. Tenn. 2008), citing *Edelin*, ultimately excluded Dr. Cunningham's testimony for exactly the same reason that the Supreme Court of Virginia found Porter's proffer to be insufficient:

Lastly, because Dr. Cunningham's disallowed testimony could be given verbatim in any capital case in the country without changing a single word, it runs afoul of what the Supreme Court said should be the foundation of capital sentencing: an individualized inquiry. *Jones v. United States*, 527 U.S. 373, 381 (1999). Testimony regarding hundreds or thousands of prisoners in groups, in many unidentified prisons, in circumstances that the jury could never know precisely, would run the risk of the jury losing sight of its obligation to focus on the individual before it, the defendant, his character or record, and the circumstances of the offenses. Individualized sentencing of a capital defendant is one of the most important decisions the jurors will ever make in their own lives and testimony regarding generalities of prison invites the jury to make decisions based upon group characteristics and assumptions. This presentation, as the Seventh Circuit said in *Johnson*, could be directed to Congress to convince it there is no need for the death penalty, rather than to a jury.

Taylor, 583 F. Supp. 2d at 942-43 (E.D. Tenn. 2008).

The last two state cases cited by Porter also do not support his argument that Virginia stands alone. Both *People v. Mertz*, 842 N.E.2d 618, 645-46 (Ill. 2005), and *State v. Rogers*, 188 S.W.3d 593, 603 (Tenn. 2006), simply recite the presence of risk assessment evidence in the record. Neither case presents any question over its admissibility, nor does Porter identify any standard for such evidence.

Porter argues that his 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." (Pet. 20). Of course, neither *Taylor* nor the Supreme Court of Virginia held that either. In both cases, and in others cited by Porter, the ubiquitous Dr. Cunningham was not allowed to testify, not because of what his proffer included, but because of what it omitted: evidence particularized to the individual defendant.

Porter incorrectly argues that “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.” (Pet. 13). If by “a given defendant,” he means only defendants in general, in average circumstances, unconnected to the particulars of the present case, he is no longer describing any kind of “assessment.” He is instead complaining of evidence of mere prison conditions. If, on the other hand, he means “a given defendant” to imply assessment of a defendant’s specific characteristics, he did not present that question to the state court.

As conceded by Porter’s own petition, Virginia allows expert opinion on “future dangerousness.” (Pet. 24). In reliance on this Court’s decision in *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Supreme Court of Virginia long has upheld the admissibility of such opinion evidence. See *Edmonds v. Commonwealth*, 329 S.E.2d 807, 813 (Va.), cert. denied, 474 U.S. 975 (1985). In addition, the Supreme Court of Virginia does “not dispute that [the defendant’s] ‘future adaptability’ in terms of his disposition to adjust to prison life is relevant to the future dangerousness inquiry.” *Porter*, 661 S.E.2d at 439, quoting *Bell v. Commonwealth*, 563 S.E.2d at 714.

Porter argues that requiring “individualization” of a defendant’s rebuttal evidence is “in some tension” with *Simmons*. (Pet. 15). However, he points to no place in his case where the Supreme Court of Virginia discussed, much less imposed, such a requirement for rebuttal evidence: all of its references were to Porter’s proffer of supposed mitigation evidence. Of course, in *Simmons* itself, the inmate’s lack of parole eligibility was specifically established by testimony based on his individual circumstances. 512 U.S. at 158-59.

Porter says that *Simmons* is a broad entitlement “to rebut any allegation offered to justify his execution.” (Pet. 13). But this Court has refused to extend the *Simmons* rule even to instances where the defendant became eligible for parole only days after he was sentenced. See *Ramdass v. Angelone*, 530 U.S. 156 (2000). It certainly has not entertained the novel proposition to extend its limited rule to other types of evidence altogether.

Porter’s proposed rule would require a significant expansion of the actual holding of *Simmons*, as well as those in *Gardner* and Justice Powell’s concurrence in *Skipper*. This Court always has focused on the defendant’s opportunity to “deny or explain” specific evidence: the suggestion that the defendant might be released on parole; the contents of an undisclosed presentence report; or whether the defendant behaved while in jail.

As Porter admits, the prosecutor in his case “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.” (Pet. 6). As the Virginia Supreme Court found in Porter’s case:

Burns contended he should be allowed to rebut that evidence with witnesses echoing the rejected evidence in *Lovitt*, and similar to Porter’s proffer, “that his opportunities to commit criminal acts of violence in the future would be severely limited in a maximum security prison.” ... We held the circuit court did not err in rejecting the proffered evidence because “Burns’ evidence was not in rebuttal to any evidence concerning prison life” from the Commonwealth. *Id.*

* * *

[T]he Commonwealth in this case neither proposed nor introduced any evidence concerning Porter’s prospective life in prison, but limited its evidence on the future dangerousness aggravating factor to the statutory requirements represented by Porter’s “prior criminal record and unadjudicated criminal acts. Thus [Porter’s] evidence was not in rebuttal to any evidence concerning prison life.”

Porter, 661 S.E.2d at 436, 440,

This judgment involved no conflict among the circuits or other state supreme courts. It was a very state-statute specific, fact-based ruling, ultimately about the discretion of the trial court to deny the appointment of yet another risk assessment expert. It involved no federal issue in need of resolution.

II. The State Court's Decision That No Additional Instructions Were Needed In Order For The Jury To Properly Understand And Determine The Future Dangerousness Aggravating Factor Presents No Compelling Issue Of Federal Law, Much Less A Compelling Reason To Grant Certiorari.

Porter argues that the failure to provide jury instructions further defining the term "future dangerousness" violates the United States Constitution and the Constitution of Virginia. The Supreme Court of Virginia rejected this argument in *Lovitt v. Commonwealth*, 537 S.E.2d at 874, citing *Smith v. Commonwealth*, 248 S.E.2d 135, 148-49 (Va. 1978), *cert. denied*, 441 U.S. 967 (1979). Porter argued that *Smith v. Commonwealth* dealt "with a claim that this statutory language, standing alone, was unconstitutionally vague and overbroad" and therefore the state court adopted a narrowing construction. (Pet. 30). In fact, the Supreme Court of Virginia found that Virginia's statutory future dangerousness aggravator was not vague. *Smith*, 248 S.E.2d at 148. *Accord*, *Spencer v. Murray*, 5 F.3d 758, 764 (4th Cir. 1993), *cert. denied*, 510 U.S. 1171 (1994); *Giarratano v. Proconier*, 891 F.2d 483, 490 (4th Cir. 1989), *cert. denied*, 498 U.S. 881 (1990). The Virginia Supreme Court, moreover, specifically rejected Porter's state law interpretation of *Smith*:

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. [447,] 454 n.6 [(2005)] (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. *Juniper [v. Commonwealth]*, 626 S.E.2d [383,] 401

[(Va.), *cert. denied*, 549 U.S. 960 (2006)]; *Winston v. Commonwealth*, 604 S.E.2d 21, 29 (Va. 2004), *cert. denied*, 546 U.S. 850, (2005); *Jackson v. Commonwealth*, 590 S.E.2d 520, 535-36 (Va.), *cert. denied*, 543 U.S. 89 (2004). 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 447-48. Nothing in *Smith* or any later case supports Porter's assertion that the Supreme Court of Virginia in fact "narrowed" the statutory future dangerousness aggravator term for any other reason. Porter's jury was instructed fully with the plain language of the statute. (Resp. App. 40-41, 47).

Porter cites *Ring v. Arizona*, 536 U.S. 584 (2002), in his Question Presented and in his argument heading, but present no separate argument regarding this case, relying instead on his arguments to the trial court. (Pet. 31). The Virginia Supreme Court found that Porter's reliance on *Ring* was misplaced. It had "previously determined that Virginia's statutes regarding the imposition of the death penalty do not suffer from the same issues that were addressed in *Ring* because the aggravating factors are submitted for the jury to determine." *Porter*, 661 S.E.2d at 447, citing *Muhammad v. Commonwealth*, 619 S.E.2d 16, 39 (Va. 2005), *cert. denied*, 547 U.S. 1136 (2006). Porter give this Court no reason why the Virginia Supreme Court's clearly correct finding involves any error or issue of federal law in need of resolution.

Porter demonstrates no compelling reason for this Court to grant certiorari to review this interpretation of a state court case by the Virginia Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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