VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	CRIMINAL NO. FE-2005-1764
	)	
ALFREDO PRIETO	)	

COMMONWEALTH'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTIONS TO BAR "FUTURE DANGEROUSNESS" AS AN AGGRAVATING FACTOR AND TO APPOINT DR. CUNNINGHAM

COMES NOW the Commonwealth of Virginia, by her Deputy Commonwealth's Attorney and moves this Honorable Court to deny Defendant's Motion to Bar "Future Dangerousness" as an Aggravating Factor as well as Defendant's Motion to Appoint Dr. Cunningham. The Defendant's two Motions should be denied for the following reasons:

I. THE "FUTURE DANGEROUSNESS" AGGRAVATOR AS APPLIED IN VIRGINIA IS NOT UNCONSTITUTIONAL

Virginia's death penalty statutes and procedures have consistently been found to be constitutional. See e.g. Clark v. Commonwealth, 220 Va. 201 (1979), cert. denied, 444 U.S. 1049 (1980); Remington v. Commonwealth, 262 Va. 333 (2001), cert. denied, 535 U.S. 1062 (2002); Wolfe v. Commonwealth, 265 Va. 193, cert. denied, 124 S. Ct. 566 (2003); Bell v. Commonwealth, 264 Va. 172 (2002), cert. denied, 537 U.S. 1123 (2003); Jackson v. Commonwealth, 267 Va. 178 (2004); Morrisette v. . Commonwealth, 264 Va. 386 (2002), cert. denied, 124 S. Ct. 928 (2003); Goins v. Commonwealth, 251 Va. 442, cert. denied, 519 U.S. 887 (1996); Breard v. Commonwealth, 248 Va. 68 (1994), cert. denied, 513 U.S. 971 (1994); Watkins v. Commonwealth, 229 Va. 469 (1985), cert. denied, 475 U.S. 1099 (1986); Stockton v. Commonwealth, 227 Va. 124 (1984); Evans v. Commonwealth, 222 Va. 766 (1981); Briley v. Commonwealth, 221 Va. 563 (1980).

Specifically, the use of "future dangerousness" as an aggravating factor in determining the appropriate sentence in capital murder trials has been held to be constitutional. See Stockton v. Commonwealth, 227 Va. 124 (1984); Giarratano v. Procunier, 891 F.2d 483 (1989); Spencer v. Murray 5 F.3d 758 (1993); Briley v. Bass, 750 F.2d 1238, 1245 (1984)(constitutionality of Virginia's future dangerousness aggravator is "beyond question"); Lovitt v. Commonwealth, 260 Va. 497 (2000).

II. THE PROFFERED TESTIMONY BY DR. CUNNINGHAM IS INADMISSIBLE

The Supreme Court of Virginia has long held that evidence of prison risk assessment is irrelevant and inadmissible on the issue of future dangerousness. Most recently, in Juniper v. Commonwealth, 271 Va. 362, 425 (2006) the Supreme Court of Virginia, once again, held that evidence of future dangerousness is properly limited to the "individual defendant and the specific crime." *Accord*, Cherrix v. Commonwealth, 257 Va. 292, 310, 513 S.E. 2d 642, 653, cert. denied, 528 U.S. 873, 145 L. Ed. 2d 149, 120 S. Ct. 177 (1999) (evidence of conditions inside prison is not relevant to the issue of mitigation of future dangerousness); Burns v. Commonwealth, 261 Va. 307, 340, 541 S.E. 2d 872 (2001) (the only relevant and admissible evidence to rebut future dangerousness is evidence of the defendant's character, criminal record, and the circumstances of the crime itself); Bell v. Commonwealth, 264 Va. 172, 563 S.E. 2d 695 (2002) (trial court properly refused to appoint defendant an expert witness on the subject of prison conditions and security since such evidence is inadmissible even when offered to rebut evidence of future dangerousness). Furthermore, such testimony is irrelevant in light of the fact that the Supreme Court of Virginia has recognized that the evaluation of a defendant's "future danger" is not limited to "prison society." Lovitt, 260 Va. at 517.

Defendant, however, asks this Court to ignore the litany of cases that have consistently held prison risk assessment inadmissible in Virginia capital murder proceedings. Defendant claims that the Virginia Supreme Court's rulings on this issue have somehow made the Virginia death penalty statute unconstitutional. Defendant claims that without expert testimony with regards to prison risk assessment, a defendant is left powerless to rebut any evidence of future dangerousness. This argument ignores the fact that the Commonwealth's evidence is not based on speculative expert testimony, which is otherwise inadmissible, but rather on facts in evidence. The Defendant is free to rebut this evidence either through cross examination or through the presentation of facts of his own. Defendant is not, however, entitled under the Constitution nor any other law to present speculative testimony as to the ultimate issue. Furthermore, the jury will certainly be instructed that the defendant will not be eligible for parole.

With respect to the issue of future dangerousness, the Supreme Court of Virginia has made it quite clear that the focus must be on the particular defendant and the probability that he would commit serious acts of violence. Burns, 261 Va. at 340. Therefore, a social scientists' statistical analysis of the incidence of prison violence is simply not a relevant inquiry in this case. Juniper, 271 Va. at 425. The Defendant does attempt to distinguish Dr. Cunningham's proffered evaluation and testimony in the case at bar from other cases where trial courts denied his appointment and were subsequently upheld by the Supreme Court of Virginia. However the Defendant's proffer merely offers a distinction without a difference. The fact of the matter is that the proffered testimony of Dr. Cunningham in this case is essentially the same statistical speculation which was denied in Porter v. Commonwealth, 276 Va. 203, 243-255 (2008). The Defendant here is clearly seeking to improperly shift the inquiry away from his future

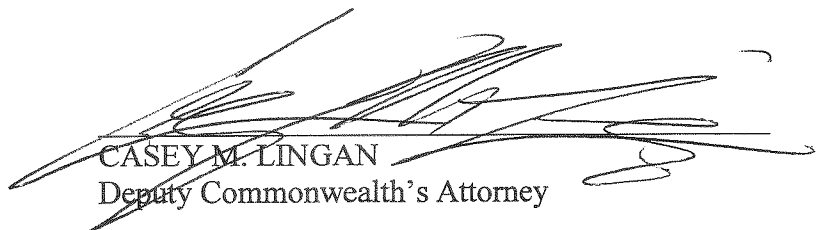
dangerousness and towards a statistical inquiry into the future dangerousness of the general population of prisoners in this country.

Defendant claims that the proffered testimony of Dr. Cunningham can be parsed out into portions that are "specific" to the defendant. However, even the portions of Dr. Cunningham's proposed testimony that are "specific" to Defendant discuss general prison conditions and risk factors. The Defendant justifies this testimony by portraying Dr. Cunningham's work as a scientific calculation of sorts which must take into account all relevant factors. Unfortunately, Dr. Cunningham includes among his relevant factors inadmissible testimony and evidence about general prison conditions and risks. Furthermore, the proffered testimony of Dr. Cunningham is also inadmissible because it offers an opinion on the ultimate issue to be determined by the jury.

CONCLUSION

Wherefore, for the foregoing reasons and for reasons that may be stated in open court, the Commonwealth moves this Honorable Court to deny the Defendant's two motions.

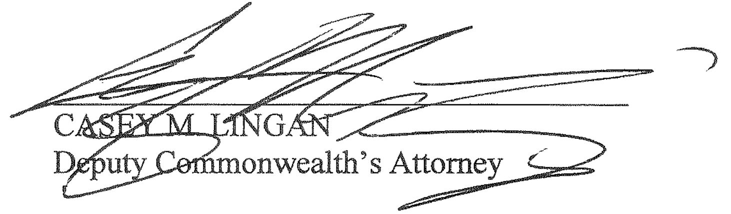
Respectfully Submitted,



CASEY M. LINGAN
Deputy Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response was ~~faxed~~ made available to Peter Greenspun and Jonathan Shapiro, Esq., Counsel for Defendant, on this 18th day of August, 2010.



CASEY M. LINGAN
Deputy Commonwealth's Attorney