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# “Continuing Threat” to Whom?: Risk Assessment in Virginia Capital Sentencing Hearings

Jessica M. Tanner\*

## I. Introduction

In 1989 a Virginia jury sentenced Dennis Wayne Eaton to death for the capital murder of a state trooper.<sup>1</sup> His death sentence rested entirely on a finding, beyond a reasonable doubt, that if not sentenced to death “there [was] a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society.”<sup>2</sup> Despite the jury’s determination that Eaton would be violent again, he was by all accounts a model death-row inmate. At the time of his execution in 1998, Eaton’s prison record showed only one minor rule violation and not even a hint of violent behavior.<sup>3</sup> Had the jury known, at the time of his sentencing, that the next eight years of Eaton’s life would include a virtually spotless prison record, it is unlikely that they would have found, beyond a reasonable doubt, that he would pose a *serious threat* of violence to others. In other words, it is highly probable that Dennis Eaton was sentenced to death by mistake.

The Dennis Eaton story is not unusual. Although capital jurors regularly determine that capital offenders will be violent again if not sentenced to death, these predictions almost never come true.<sup>4</sup> In fact, jurors substantially overestimate the prevalence of serious violence in prison.<sup>5</sup> The importance of these

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1. Eaton v. Commonwealth, 397 S.E.2d 385, 387, 390 (Va. 1990).

2. *Id.* at 398; see VA. CODE ANN. § 19.2-264.2 (Michie 2004) (setting forth Virginia’s statutory aggravating factors, one of which must be found by a capital jury beyond a reasonable doubt prior to the imposition of a sentence of death).

3. In November 1993 Eaton failed to enter his cell in a timely manner as instructed. Telephone interview with Ross S. Haines, counsel for Dennis Eaton (Mar. 2, 2005).

4. See *infra* notes 49–63, 118–20 and accompanying text (noting the actual prevalence of homicide and assaultive behavior in prison).

5. See *infra* notes 54–56 and accompanying text (discussing a Texas study in which capital jurors grossly over-estimated the likelihood that capital offenders would commit future acts of violence).

predictive errors is clear in a state like Virginia, which relies heavily on future dangerousness determinations in capital sentencing.<sup>6</sup>

This article will look at how future dangerousness findings are made in Virginia to see if these predictive errors can be avoided. The article first surveys basic risk-assessment tools available to assist jurors in making future dangerousness determinations and contrasts this assessment with what actually occurs in Virginia capital sentencing hearings. Next, because of the limitations of the currently admissible future dangerousness evidence in Virginia—particularly extrapolations from prior conduct in free society and clinical predictions by mental health experts—the article suggests that the capital sentencing proceeding in Virginia raises constitutional concerns. Those concerns can be minimized if juries are provided with certain core information regarding the nature of prison life and the statistical prevalence of prison violence. With this evidence, and assisted by informed mental health expert testimony, jurors can make a more reliable determination that a particular defendant will be violent in prison. The goal is to develop a capital sentencing proceeding that makes what happened to Dennis Eaton the exception rather than the rule.

## *II. Violence Risk Assessment in Capital Sentencing in Virginia*

Virginia's capital sentencing scheme includes only two statutory aggravating circumstances, vileness and future dangerousness.<sup>7</sup> The future dangerousness inquiry asks capital jurors to decide whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society."<sup>8</sup> The naive observer walking into a Virginia courtroom prior to a capital sentencing, and knowing only this statutory language, would assume that the sentencing jury was about to make a prediction regarding the probability that this defendant would be violent again if not sentenced to death. Specifically, our observer would surely suppose that to equip the jury adequately to assess the chance that the defendant would actually commit serious violent crimes, the evidence would provide the answers to at least the following questions. Where will the defendant be incarcerated? Under what conditions? How effectively has this type of incarceration prevented recurrences of violence in the past? The process of answering these questions

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6. See VA. CODE ANN. § 19.2-264.2 (Michie 2004) (setting forth Virginia's two statutory aggravating factors, vileness and future dangerousness, one of which must be found by a capital jury beyond a reasonable doubt in order for the death penalty to be imposed).

7. See *id.* (prohibiting a jury from imposing a sentence of death in a capital murder case unless it finds "a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman").

8. *Id.*

and determining the likelihood of future violent behavior is what social scientists term "risk assessment."<sup>9</sup>

#### A. Four Questions of Consequence

The naive observer's questions are among the inquiries that John D. Monahan, a leading expert in the risk-assessment field, posited as critical to any risk determination.<sup>10</sup> Monahan argued that the accuracy and precision of violence risk assessment increased with the consideration of certain fundamental questions.<sup>11</sup> Applying this framework to risk assessment in capital cases, forensic psychologists Mark D. Cunningham and Thomas J. Reidy distilled Monahan's inquiries to four questions that frame an assessment of the likelihood of future danger: What type of violence? Of what severity? At what time? In what context?<sup>12</sup>

In Virginia, statutory language and the 1995 abolition of parole have substantially narrowed these inquiries. First, the future dangerousness aggravating factor specifies that the future violence must be both "criminal" and "serious."<sup>13</sup> This specification of violence type is important because mild incidents of violence generally occur with much greater frequency than severe violence.<sup>14</sup> Further, because capital offenders are no longer eligible for parole or geriatric release, the violence must be committed behind prison walls.<sup>15</sup> Thus, the type and severity of violence with which the inquiry is concerned is, as a practical matter, confined to serious institutional violence. As Monahan pointed

9. See Dale E. McNiel et al., *Risk Assessment, in 14 TAKING PSYCHOLOGY AND LAW INTO THE TWENTY-FIRST CENTURY* 147 (James R. P. Ogloff ed., 2002) (defining risk assessment as "the process of understanding hazards to minimize their negative consequences").

10. JOHN D. MONAHAN, *PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES*, 145-59 (1981).

11. *Id.*

12. Mark D. Cunningham & Thomas J. Reidy, *Integrating Base Rate Data in Violence Risk Assessments at Capital Sentencing*, 16 *BEHAV. SCI. & L.* 71, 74-76 (1998).

13. VA. CODE ANN. § 19.2-264.2 (Michie 2004).

14. Cunningham & Reidy, *supra* note 12, at 74; see Randy K. Otto, *On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretations of the "Dangerousness" Literature*, 18 *LAW & PSYCHOL. REV.* 43, 52-53 (1994) (stating that the "adoption of broader definitions of violence results in higher accuracy rates").

15. See VA. CODE ANN. § 18.2-10(a) (Michie 2004) (authorizing punishment of death or life imprisonment for Class 1 felonies committed by offenders above the age of sixteen who are not determined to be mentally retarded); VA. CODE ANN. § 18.2-31 (Michie 2004) (listing the offenses that constitute capital murder and therefore, are punishable as a Class 1 felonies); VA. CODE ANN. § 53.1-40.01 (Michie 2002) (prohibiting geriatric release for Class 1 felons convicted of offenses committed on or after January 1, 1995); VA. CODE ANN. § 53.1-165.1 (Michie 2002) (providing that "[a]ny person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense").

out, “[o]ne cannot even hope to predict what has not been defined. Some specification of a criterion . . . is essential if prediction is to succeed.”<sup>16</sup>

Second, Virginia’s abolition of parole implicitly defined the relevant time period as the capital life term, the natural life of the capital life inmate.<sup>17</sup> Future dangerousness risk assessments take time period into account because research has consistently demonstrated that rates of violence decrease with the age and maturation of the inmate and with the length of incarceration.<sup>18</sup> For example, a 1996 comparative study of Missouri capital and noncapital murder inmates found that younger inmates committed a greater number of assaultive disciplinary infractions and that the rate of those infractions tended to decrease with the passage of time.<sup>19</sup>

Finally, the Virginia General Assembly has indirectly specified the environment into which a life-sentenced capital offender is placed.<sup>20</sup> Given that no capital murderer can ever be paroled, the relevant context is Virginia’s maximum security prisons.<sup>21</sup> Notably, studies have shown that rates of serious criminal violence in prison are much lower than in the general community, particularly when rates are adjusted to mirror the prison population in terms of gender, age, and ethnicity.<sup>22</sup> This discrepancy between the rates of violence in prison and

16. MONAHAN, *supra* note 10, at 58 (emphasis omitted). “Although ultimately it is the jury’s role to determine what exactly constitutes acts of criminal violence, at a minimum it would seem that examiners should clarify the types of outcomes to which they are referring when describing the likelihood of ‘future violence.’” John F. Edens et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is it Time to “Disinvent the Wheel?”* 29 LAW & HUMAN BEHAV. 55, 76 (2005).

17. Because capital defendants are not eligible for parole, they are effectively sentenced to die in prison. See VA. CODE ANN. § 53.1-165.1 (eliminating parole for defendants convicted of felony offenses committed on or after January 1, 1995). *But see* Lovitt v. Commonwealth, 537 S.E.2d 866, 878 (Va. 2000) (rejecting the defendant’s “death in prison” closing argument because defendants sentenced to life without parole are eligible for executive clemency).

18. Cunningham & Reidy, *supra* note 12, at 82–86; Mark D. Cunningham & Thomas J. Reidy, *Don’t Confuse Me with the Facts: Common Errors in Violence Risk Assessment at Capital Sentencing*, 26 CRIM. JUST. & BEHAV. 20, 31–32 (1999) (citing Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552, 565 (1983) (stating that “[t]he empirical fact of a decline in the crime rate with age is beyond dispute”)); *see also* Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1256 (2000) (noting “an inverse relationship between sentence length or time served and disciplinary infractions” and stating that the same correlation applies to studies of assaultive behavior). “As in free society, age has been found to be the major determinant of rule-violating behavior in prison.” *Id.* at 1257.

19. Jonathan R. Sorensen & Robert D. Wrinkle, *No Hope for Parole: Disciplinary Infractions Among Death-Sentenced and Life-Without-Parole Inmates*, 23 CRIM. JUST. & BEHAV. 542, 550 (1996).

20. See VA. CODE ANN. § 53.1-165.1 (eliminating parole for defendants convicted of felony offenses committed on or after January 1, 1995).

21. For a brief introduction to the corrections institutions in Virginia by security level see VIRGINIA DEPARTMENT OF CORRECTIONS, INSTITUTIONAL ASSIGNMENT CRITERIA (2005), at <http://www.vadoc.state.va.us/facilities/institutions/insti-security.htm> (last visited Mar. 19, 2005).

22. Cunningham & Reidy, *supra* note 18, at 25.

community results because factors that correlate to a risk of violence in society at large do not necessarily correlate in the same manner to a risk of violence in prison.<sup>23</sup> For example, as many as 47% of state prison inmates are serious violent felons and as many as 75% suffer from Antisocial Personality Disorder (ASPD).<sup>24</sup> Accordingly, based solely upon defendants' histories of violence in the community and the very high incidence of ASPD among prison inmates, a correspondingly high rate of prison homicide might be predicted.<sup>25</sup> In fact, however, murder rates in prison are far below that in the community at large.<sup>26</sup>

Quite simply, putting "violent" people in prison makes them, on average, much less violent, at least if violence is defined as the actual probability of violent conduct (as opposed to an inchoate tendency to become violent under future circumstances that will never in fact occur). As a National Institute of Corrections study noted, "the placement of the inmate in a more secure environment . . . served to suppress the inmate's expected misconduct record."<sup>27</sup> That finding supports the commonsense proposition that the supervision, isolation, structure, and severe restrictions of prison life limit rates of violence within the prison institution.<sup>28</sup> In addition, preventative measures such as lock down, isolation, and shackled movement reduce and counter the opportunity for violence toward others.<sup>29</sup> In short, context matters because institutional violence is necessarily related to the conditions of incarceration.<sup>30</sup> Individuals "are never dangerous in toto."<sup>31</sup> For these reasons, it would be an error to assume that acts of serious

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23. *Id.*

24. Cunningham & Reidy, *supra* note 12, at 75; Cunningham & Reidy, *supra* note 18, at 25.

25. See McNiel et al., *supra* note 9, at 149–50 (discussing the association between mental disorder and violence and concluding that "the current prevailing view in psychology is that there is a statistically significant relationship between violence and mental illness, but that the size of the association is modest"). As this article discusses, the security features of prisons are designed to, and do, minimize the risk that inmates with mental disorder will commit violent acts while incarcerated.

26. Sorensen & Pilgrim, *supra* note 18, at 1256 (citing Wendy P. Wolfson, *The Deterrent Effect of the Death Penalty upon Prison Murder*, in *THE DEATH PENALTY IN AMERICA* 159 (Hugo A. Bedau ed., 3d ed. 1982)).

27. JACK ALEXANDER & JAMES AUSTIN, U.S. DEP'T OF JUSTICE, *HANDBOOK FOR EVALUATING OBJECTIVE PRISON CLASSIFICATION SYSTEMS* 76 (1992), <http://www.nicic.org/library/-010675>.

28. Cunningham & Reidy, *supra* note 18, at 25.

29. *Id.* at 32–33; see Cunningham & Reidy, *supra* note 12, at 77–78 (noting studies that indicate that increased restriction, supervision, and isolation negate aggressive behavior).

30. Edens et al., *supra* note 16, at 79.

31. Cunningham & Reidy, *supra* note 12, at 75 (quoting HAROLD V. HALL & RONALD S. EBERT, *VIOLENCE PREDICTION: GUIDELINES FOR THE FORENSIC PRACTITIONER* 10 (2d ed. 2002)).

violence as seen in society will also be observed in the community that lives behind bars.<sup>32</sup>

### B. *The Critical Role of Base Rates*

Informed by the above considerations, the same observer might pose another question: how often *do* capital murderers commit serious acts of violence once they get to prison? The answer to this question is a risk assessment tool called the base rate.<sup>33</sup> The base rate is the statistical prevalence or frequency of a particular behavior over a set period of time.<sup>34</sup> For example, if one in one hundred prison inmates takes literacy courses in prison, the statistical prevalence of participation is 1%. Monahan described this statistical tool as “the most important single piece of information necessary to make an accurate prediction.”<sup>35</sup>

Assessments conducted by the automobile insurance industry provide a useful illustration of the application of base rates to risk determinations.<sup>36</sup> Insurance companies engage in estimations of risk to determine the probability that an individual will cause damage to his/her insured automobile.<sup>37</sup> First, a company identifies the characteristics of the relevant population—say, seventeen-year-old males.<sup>38</sup> The company then looks at this group’s history of accidents to determine how much seventeen-year-old males have cost them in the past.<sup>39</sup> From that information it determines a base rate or historic percentage of accident costs for that group, say \$700 per month per person.<sup>40</sup> That base rate is then adjusted for context.<sup>41</sup> For example, seventeen-year-old males who drive in a city may have cost the company more than have seventeen-year-old males who drive in a rural community.<sup>42</sup> Finally, the base rate might be adjusted slightly to take into account individual characteristics of the person insured (such as scholastic achievement) and individual preventative measures (such as participation in driver’s education).<sup>43</sup> Without base rates, insurance companies

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32. Cunningham & Reidy, *supra* note 18, at 25.

33. MONAHAN, *supra* note 10, at 60 (emphasis omitted).

34. Cunningham & Reidy, *supra* note 12, at 73.

35. MONAHAN, *supra* note 10, at 60.

36. Record at 62–64, *United States v. Beckford* (E.D. Va. 1997) (No. 3:96CR66) (on file with author).

37. *Id.* at 62.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 62–63.

42. Record at 62–63, *Beckford* (No. 3:96CR66) (on file with author).

43. *Id.* at 64.

could not accurately assess the likelihood that a particular driver will incur damage resulting in cost to the company.

The same procedural framework can be applied to estimate the probability of violence in prison.<sup>44</sup> The evaluator first determines with what frequency capital offenders are violent in a particular prison environment.<sup>45</sup> The resulting percentage, the base rate, is then adjusted for specific context.<sup>46</sup> For example, the rate might be adjusted for the level of prison security or isolation.<sup>47</sup> Finally, as in the insurance example, the base rate is particularized or adjusted for individual characteristics such as age, history of prior adjustment to prison life, and the nature of any previous incidents of violence in prison.<sup>48</sup>

Empirical studies provide some indication of the yearly rate of assaultive behavior and repeat murder in prison. For example, in 1996, Jonathan Sorensen and Robert Wrinkle reported that 80% of murderers imprisoned in Missouri committed zero acts of violence over a fifteen-year period, regardless of whether they were sentenced to death, life without parole, or life with the possibility of parole.<sup>49</sup> Other studies indicate that the yearly rate of repeat murder in prison is 0.002 or less.<sup>50</sup> This result does not change when capital life inmates and death-sentenced capital murderers are placed in the same prison population or when the inmates studied are death-sentenced offenders whose sentences have been commuted to life imprisonment.<sup>51</sup> A 2000 study by Sorensen and Pilgrim of capital murder defendants in Texas found that over a forty-year period, the

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44. *Id.* at 63–65.

45. *Id.* at 63.

46. *Id.* at 64.

47. *Id.*

48. Record at 65, *Beckford* (No. 3:96CR66) (on file with author); see Cunningham & Reidy, *supra* note 12, at 87–91 (discussing the individualization of base rates and concluding that individualization is appropriate only when conducted conservatively and when reliable indicators are present to support a conclusion “that the individual varies significantly from the comparison group”). A number of risk-assessment methodologies incorporate individualized base rate data. *Id.* at 73–74. In 1981 Monahan recommended approaching risk assessment by establishing a base rate and then performing a conservative individualization of that rate. *Id.* at 73 (citing MONAHAN, *supra* note 10). Ralph C. Serin and Nancy L. Amos proposed a “decision tree” approach to risk assessment that involved four steps including the determination of a base rate estimate and a conservative revision of that rate based upon individual characteristics of the defendant. *Id.* at 74 (citing Ralph C. Serin & Nancy L. Amos, *The Role of Psychopathy in the Assessment of Dangerousness*, 18 INT’L J. L. & PSYCHIATRY 231, 231–38 (1995)).

49. Cunningham & Reidy, *supra* note 18, at 24 (discussing Sorensen & Wrinkle, *supra* note 19, at 542–52).

50. Sorensen & Pilgrim, *supra* note 18, at 1256 (citing Wolfson, *supra* note 26, at 168).

51. *Id.* (citing Sorensen & Wrinkle, *supra* note 19, at 548; James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 19–21 (1989)) (finding that, among the inmates studied, “most serious infractions were one-time events or situations”).



likelihood of a repeat murder by a life-sentenced capital murderer was 0.2% or one in 500.<sup>52</sup> The risk of assaultive behavior over the same forty-year period was approximately 16%, or one in seven.<sup>53</sup>

Another smaller Texas study followed 155 inmates against whom the prosecution presented expert predictions of future dangerousness.<sup>54</sup> Eight of the 155 inmates, or 5%, engaged in seriously assaultive behavior.<sup>55</sup> Thirty-one inmates, or 20%, had no disciplinary record at all.<sup>56</sup> The remaining 75% percent committed infractions that did not rise to the level of serious assaults.<sup>57</sup> One such inmate, Noble Mays, was executed on April 6, 1995, for a 1979 murder.<sup>58</sup> After the sentencing jury determined that he presented a probability of serious future violence "beyond a reasonable doubt," Mays spent fourteen years on death row.<sup>59</sup> During that time, he did not receive a single disciplinary infraction for assaultive behavior.<sup>60</sup>

These data illustrate an important but generally overlooked point: the observed rates of in-prison murder and assault are drastically lower than those predicted by capital jurors. In the same Texas study described above, Sorensen and Pilgrim reported the results of interviews conducted with Texas capital jurors.<sup>61</sup> Jurors who sentenced defendants to death gave a median estimate of 85% percent for the likelihood that the defendant would commit a violent crime and 50% for the likelihood that the defendant would commit another homicide

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52. Sorensen & Pilgrim, *supra* note 18, at 1269.

53. *Id.* Studies of prison violence have also determined that generally, a small group of chronic offenders accounts for a comparatively large percentage of disciplinary infractions. *See, e.g.,* Marquart & Sorensen, *supra* note 51, at 20 (finding that 7.4% of the *Furman* commutes for whom records were available were involved in more than half of the total rule violations).

54. TEX. DEFENDER SERVICE, DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS xiii–xiv (2004), <http://www.texasdefender.org/publications.htm> (last visited Mar. 19, 2005).

55. *Id.* at 23.

56. *Id.* Because expert predictions of future dangerousness were made in each of these 155 capital cases, these same results indicate that the mental health expert testimony was wrong 95% of the time. *Id.*

57. *Id.* "[A]lthough violent acts that appeared to result in injury were rare, the occurrence of 'minor' types of disciplinary infractions was comparatively commonplace." Edens et al., *supra* note 16, at 63. However, it is unlikely that "capital jurors would believe that their charge to identify inmates who would engage in 'serious acts of criminal violence' should encompass those inmates" who engage in minor rule violations. *Id.*

58. TEX. DEFENDER SERVICE, *supra* note 54, at 32.

59. *Id.*

60. *Id.* Low base rates of violence among commuted capital offenders "contradict the frequently made argument that the only reason death row inmates are nonviolent is that they hope to receive a reprieve because of their good behavior." Edens et al., *supra* note 16, at 63.

61. Sorensen & Pilgrim, *supra* note 18, at 1269.

if sentenced to life imprisonment.<sup>62</sup> The corresponding estimates by jurors who sentenced defendants to life imprisonment were 50% and 25%.<sup>63</sup> As demonstrated, their estimates exaggerate the actual observed rate of such violent behavior by as much as 100 times.

### III. Future Dangerousness in Virginia: What Jurors Hear and Do Not Hear at Capital Sentencing

Given the disparity between juror predictions and actual rates of prison violence, the naive observer, sitting in the public section of a Virginia courtroom, would expect to learn about the nature of prison confinement and statistical base rates of prison violence as the proceedings sought to quantify the risk posed by the convicted murderer. But our observer would be in for a surprise. The sentencing proceeding that would play out before him would look nothing like the risk assessment inquiry just described.

The Supreme Court of Virginia has mandated a markedly different approach to answering the question whether “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society.”<sup>64</sup> In a series of capital cases, the Supreme Court of Virginia has anchored the dangerousness inquiry almost entirely to the circumstances surrounding the charged offense and the defendant’s criminal record as well as any prior unadjudicated misconduct.<sup>65</sup> In doing so, the court has rejected as irrelevant evidence regarding the nature of prison life and prison security for capital life inmates.<sup>66</sup>

#### A. What Virginia Juries May Consider on the Issue of Future Dangerousness

The Supreme Court of Virginia set the tone for the admissibility of evidence to prove a defendant’s future dangerousness in *Smith v. Commonwealth*.<sup>67</sup> The court noted that the purpose of the future dangerousness provision was “to

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62. *Id.*

63. *Id.* Even when capital inmates have been released from prison, studies suggest that the likelihood of repeat murder ranges from 0.1 to 7%, significantly lower than juror expectations for recidivism in highly structured and secured prison environments. *Id.* at 1254–55.

64. VA. CODE ANN. § 19.2-264.2 (Michie 2004); see *infra* Part III.A–B (discussing the future dangerousness inquiry in Virginia, including that evidence which is admitted and that which is rejected as irrelevant).

65. See *infra* Part III.A (analyzing the cases in which the Supreme Court of Virginia has substantially limited the future dangerousness determination to consideration of the circumstances of the offense and prior history of the defendant).

66. See *infra* Part III.B (discussing the Supreme Court of Virginia’s treatment of prison life evidence, including testimony by corrections experts, penologists, and prison inmates).

67. *Smith v. Commonwealth*, 248 S.E.2d 135 (Va. 1978).

focus the fact-finder's attention on *prior* criminal conduct."<sup>68</sup> Building on that assertion, the court concluded that certain types of backward-looking evidence were properly admissible and sufficient to prove future dangerousness.<sup>69</sup> In *Smith*, for example, the court determined that the existence of prior criminal offenses alone was sufficient to create a reasonable likelihood that the capital defendant would commit future violent acts.<sup>70</sup> Accordingly, the court upheld *Smith's* sentence based upon a prior criminal conviction for forcible rape, bolstered by expert testimony that he might commit violent acts in the future.<sup>71</sup>

In dictum, the *Smith* court also suggested that " 'the circumstances surrounding the commission of the offense of which [the defendant] is accused' " would alone support a finding of future dangerousness.<sup>72</sup> More recently, the court explicitly held that circumstances surrounding the offense can provide sufficient grounds to support a future dangerousness finding.<sup>73</sup> Taking the next logical step, the court in *Frye v. Commonwealth*<sup>74</sup> expanded its consideration of prior behavior to include unadjudicated acts of criminal conduct.<sup>75</sup> The court looked to Virginia Code section 19.2-264.4 and concluded that the statutory language contemplated the use of a defendant's " 'prior

68. *Id.* at 149 (emphasis added).

69. *Id.*

70. *Id.*

71. *Id.* at 150–51; *see also* *Clark v. Commonwealth*, 257 S.E.2d 784, 789–90 (Va. 1979) (finding that the defendant's lack of remorse and prior felony conviction for "conspiracy to distribute controlled drugs" supported a finding of future dangerousness).

72. *Smith*, 248 S.E.2d at 149 n.4 (quoting VA. CODE ANN. § 19.2-264.4(C) (Michie Supp. 1978)).

73. *Edmonds v. Commonwealth*, 329 S.E.2d 807, 813 (Va. 1985); *see also* *Wolfe v. Commonwealth*, 576 S.E.2d 471, 485 (Va. 2003) (stating that the defendant's acts in the crime for which he was on trial were sufficient to support the jury's future dangerousness finding); *Roach v. Commonwealth*, 468 S.E.2d 98, 112 (Va. 1996) ("[T]his Court has recognized that the facts and circumstances surrounding the capital murder alone may be sufficient to support a finding of 'future dangerousness.'"); *Murphy v. Commonwealth*, 431 S.E.2d 48, 53 (Va. 1993) (finding that the facts and circumstances surrounding a planned murder for hire were sufficient to support the trial court's finding of future dangerousness). *See generally* Jason J. Solomon, *A Quarter Century of Death: A Symposium on Capital Punishment in Virginia since Furman v. Georgia: Future Dangerousness: Issues and Analysis*, 12 CAP. DEF. J. 55, 59–63 (1999) (discussing the proof of future dangerousness by circumstances surrounding the commission of the offense).

74. 345 S.E.2d 267 (Va. 1986).

75. *Frye v. Commonwealth*, 345 S.E.2d 267, 283 (Va. 1986); *see also* *Pruett v. Commonwealth*, 351 S.E.2d 1, 11–12 (Va. 1986) (supporting the notion that unadjudicated acts of criminal conduct are relevant to the determination of a defendant's future dangerousness); *Poyner v. Commonwealth*, 329 S.E.2d 815, 828 (Va. 1985) (rejecting the defendant's challenge to the admission of prior unadjudicated acts because the statutory scheme did not "restrict the admissible evidence to the record of convictions"). *But see* *Solomon*, *supra* note 73, at 64–65 (arguing that this evidence introduces uncertainty because "there is no way to know whether the alleged conduct ever occurred" and "even if the alleged criminal conduct is proven to have occurred, there is no requirement that the Commonwealth prove that the defendant did it").

history' ” and not just his prior criminal *convictions*.<sup>76</sup> Accordingly, prior unadjudicated acts—in *Frye* a purported prison escape plan for which the defendant had never been tried or convicted—are properly admissible to show that a defendant will pose a continuing serious threat to society in the future.<sup>77</sup>

### B. *What Virginia Juries May Not Consider in Assessing Future Dangerousness*

In 1995 the Virginia General Assembly abolished parole for Class 1 felons, which includes those convicted of capital murder.<sup>78</sup> Thus, the capital offender in Virginia today faces two possible sentences: death or life without the possibility of parole.<sup>79</sup> If not sentenced to death, the defendant is effectively sentenced to die in prison. Accordingly, the only society to which the defendant might realistically pose a future threat is prison society.<sup>80</sup> Recognizing this fundamental shift in the future dangerousness inquiry, Virginia capital defendants have sought to introduce evidence, both as mitigation and in rebuttal to the prosecution's allegations of dangerousness, that they would not pose a danger to the prison society in which they would spend the remainder of their natural lives.<sup>81</sup> Virginia has rejected such evidence on both fronts.<sup>82</sup>

76. *Frye*, 345 S.E.2d at 283 (quoting VA. CODE ANN. § 19.2-264.4(C)); see VA. CODE ANN. § 19.2-264.4(C) (Michie 2004) (stating that the death penalty “shall not be imposed unless the Commonwealth shall prove 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 of which he is accused*” that he would pose a future danger to society or that “his conduct in committing the offense was outrageously or wantonly vile”).

77. *Frye*, 345 S.E.2d at 283. Under Virginia Code section 19.2-264.3:2, the Commonwealth must inform a defendant that it will present evidence of unadjudicated criminal acts at sentencing. VA. CODE ANN. § 19.2-264.3:2 (Michie 2004). However, “[t]his limitation has no effect on the standard of proof, nor does it create any bar to admission unless the Commonwealth fails to inform the defendant of its intention.” Solomon, *supra* note 73, at 64–65 n.64; see, e.g., Walker v. Commonwealth, 515 S.E.2d 565, 572 (Va. 1999) (rejecting the argument that unadjudicated acts of criminal conduct must be proven to have occurred beyond a reasonable doubt).

78. VA. CODE ANN. § 53.1-165.1 (Michie 2002). The General Assembly also eliminated geriatric parole for all Class 1 felons. VA. CODE ANN. § 53.1-40.01 (Michie 2002). As a result, defendants convicted of capital murder for offenses committed after January 1, 1995, are ineligible for parole as a matter of law.

79. See VA. CODE ANN. § 19.2-264.4(A) (Michie 2004) (providing that when a sentence of death is not recommended by a capital jury, the defendant shall be sentenced to life imprisonment).

80. VA. CODE ANN. § 53.1-40.01, 165.1.

81. See *infra* notes 83–103 and accompanying text (analyzing the cases in which the Supreme Court of Virginia rejected defendants' proffers of prison life evidence).

82. Other capital jurisdictions have considered and permit the introduction of prison life evidence such as that currently excluded in Virginia. See, e.g., *United States v. Barnette*, 211 F.3d 803, 821 (4th Cir. 2000) (admitting testimony by Dr. Mark Cunningham, a forensic psychologist and risk assessment expert, that Barnette presented a low risk of committing further violent acts in prison); *United States v. Peoples*, 74 F. Supp. 2d 930, 932–33 (W.D. Mo. 1999) (finding that evidence of prison security statistics is admissible to challenge future dangerousness); *People v.*

In *Cherrix v. Commonwealth*,<sup>83</sup> the court upheld the exclusion of “prison life” evidence offered in mitigation under the Eighth Amendment.<sup>84</sup> Specifically, Cherrix proffered the testimony of a penologist, a criminologist, a sociologist, Virginia corrections officials, and an inmate serving a life sentence to show that he would not pose a danger in prison.<sup>85</sup> The trial court refused to admit any of the testimony.<sup>86</sup> On appeal, Cherrix relied on *Skipper v. South Carolina*<sup>87</sup> in which the United States Supreme Court concluded that the exclusion of evidence that the defendant had adjusted well to pretrial incarceration violated the Eighth Amendment.<sup>88</sup>

In rejecting this argument, the Virginia court relied upon footnote twelve of the United States Supreme Court’s opinion in *Lockett v. Ohio*.<sup>89</sup> After establishing a general Eighth Amendment requirement that capital sentencing juries consider any relevant evidence proffered by the defense as a basis for a sentence less than death, the *Lockett* Court added that “[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant’s character, prior record, or the circumstances of his offense.”<sup>90</sup> The Supreme Court of Virginia interpreted this footnote to mean that any evidence not relating directly to the “defendant’s character, prior record, or the circumstances of his offense” may properly be excluded.<sup>91</sup> The court found that the proffered evidence regarding the “general nature of prison life,”

Gallego, 802 P.2d 169, 186 (Ca. 1990) (allowing Dr. Craig Haney to testify regarding the prison security the defendant would face if sentenced to life without parole); *Pye v. State*, 505 S.E.2d 4, 15 (Ga. 1998) (Fletcher, J., concurring) (noting that if the State presents an argument about the defendant’s threat to prison guards, sentencing will include witnesses to testify on such evidence as “the defendant’s probable behavior in prison, and corrections personnel to testify about security in prisons holding inmates serving sentences of life or life without parole”); *cf. State v. Thibodeaux*, 750 So. 2d 916, 929 (La. 1999) (rejecting a defendant’s objection to the State’s prison life evidence because “the defense first introduced detailed information about prison life through its ‘corrections expert’”).

83. 513 S.E.2d 642 (Va. 1999).

84. *Cherrix v. Commonwealth*, 513 S.E.2d 642, 653 (Va. 1999); *see* U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality) (establishing an Eighth Amendment right that capital juries must be able to consider, as mitigating evidence, any evidence or circumstances of the accused’s character or record that could result in a sentence less than death).

85. *Cherrix*, 513 S.E.2d at 653.

86. *Id.*

87. 476 U.S. 1 (1986).

88. *Cherrix*, 513 S.E.2d at 653; *see Skipper v. South Carolina*, 476 U.S. 1, 8–9 (1986) (concluding that the exclusion of evidence of pretrial incarceration behavior violated *Lockett*).

89. *Cherrix*, 513 S.E.2d at 653; *see Lockett*, 438 U.S. at 604 n.12 (stating that “[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant’s character, prior record, or the circumstances of his offense”).

90. *Lockett*, 438 U.S. at 604 n.12.

91. *Cherrix*, 513 S.E.2d at 653.

as opposed to the specific evidence of the defendant's own prior jail behavior in *Skipper*, did not pertain to the defendant's history and experience and therefore, was inadmissible as mitigation evidence.<sup>92</sup>

Faced with the court's rejection of the Eighth Amendment mitigation argument, defendant William Burns argued on appeal from a capital sentence that evidence regarding prison life in a maximum security prison should be admissible to rebut the Commonwealth's claim of future dangerousness.<sup>93</sup> The court gave three reasons for rejecting Burns's claim.<sup>94</sup> First, the court relied on its decision in *Cherrix* that evidence of the "general nature of prison life" is not relevant to the individualized analysis required by the determination of a particular defendant's future danger to society.<sup>95</sup> Because the statutory language focused "not [on] whether Burns *could* commit criminal acts of violence in the future but whether he *would*," the court concluded that only evidence regarding Burns's own history and circumstances of his offense was properly admissible.<sup>96</sup> Second, the court rejected Burns's claim that "his proffered evidence should have been admitted to dispel the misconception that prison life includes such features as weekend furloughs, conjugal visits, and unrestricted work privileges."<sup>97</sup> The court held that evidence of general prison life did not rebut any corresponding evidence offered by the prosecution because the Commonwealth had offered only evidence of the defendant's criminal acts and unadjudicated conduct.<sup>98</sup>

Finally, the court in *Burns v. Commonwealth*<sup>99</sup> noted that it had previously rejected the claim that the abolition of parole limited the statutory definition of "society" to *prison* society, citing its earlier decision in *Lovitt v. Commonwealth*.<sup>100</sup>

92. *Id.*; see *Walker*, 515 S.E.2d at 574 (relying on *Cherrix* to prohibit testimony of the Chief of Operations for the Virginia Department Corrections to attest to the nature of life imprisonment in a maximum security facility without parole).

93. *Burns v. Commonwealth*, 541 S.E.2d 872, 892 (Va. 2001).

94. *Burns*, 541 S.E.2d at 893–94.

95. *Id.*

96. *Id.* This characterization fails to acknowledge that the two inquiries are interdependent. See Sarah M. Braugh, *Inconsistencies in Virginia Capital Jurisprudence*, 14 CAP. DEF. J. 1, 14–15 (2001) (discussing the flawed logic of the *Burns* court's distinction between "could" and "would"). The determination of whether a defendant would pose a serious threat in the future necessarily depends upon whether he would actually have the opportunity to commit violent acts. *Id.*

97. *Burns*, 541 S.E.2d at 893.

98. *Id.* This determination by the Supreme Court of Virginia suggests that the defense can offer in rebuttal only that evidence which is directly opposite to that offered by the Commonwealth. For example, if the Commonwealth presented only circumstantial evidence to prove the identity of the defendant, the defendant could likewise offer only circumstantial evidence in rebuttal. Such a result would impermissibly hamper the presentation of the defense.

99. 541 S.E.2d 872 (Va. 2001).

100. *Id.* at 893; see *Lovitt*, 537 S.E.2d at 878–79 (rejecting the argument that the society in

In *Lovitt*, the defendant argued that “the only relevant ‘society’ for the jury’s consideration of his ‘future dangerousness’ was prison society.”<sup>101</sup> Purporting to engage in a plain meaning interpretation of Virginia Code section 19.2-264.2, the court pointed out that the statutory language, “would constitute a continuing serious threat to society,” did not include words that limited the determination of dangerousness to prison society in the case of the parole-ineligible defendant.<sup>102</sup> Rather than “rewrite the statute to restrict its scope” so as to accommodate Lovitt’s assertion, the court instead read the statute to permit the Commonwealth to prove beyond a reasonable doubt that a defendant posed a “probability” of serious violence to a community into which he would never, in fact, be released.<sup>103</sup>

Notably, the court’s rationale in *Lovitt* is at odds with its reasoning in *Yarbrough v. Commonwealth*<sup>104</sup> and *Fishback v. Commonwealth*.<sup>105</sup> In *Yarbrough*, the Supreme Court of Virginia mandated that, upon the defendant’s request, the trial court must instruct the jury that life imprisonment means life without parole.<sup>106</sup> The court determined that, “without this knowledge the jury may erroneously

section 19.2-264.2 is limited to prison society). *But see* *Morris v. State*, 940 S.W.2d 610, 613 (Tex. Crim. App. 1996) (recognizing that “society” encompasses prison society in addition to free society).

101. *Lovitt*, 537 S.E.2d at 879.

102. *Id.*

103. *Id.* The court concluded, therefore, that prison life evidence was inadmissible and that evidence of Lovitt’s behavior while incarcerated for prior convictions was sufficient to uphold the jury’s determination that Lovitt would pose a threat to others in the future. *Id.*; *see also* *Bell v. Commonwealth*, 563 S.E.2d 695, 713 (Va. 2002) (relying on *Cherrix* and *Burns* and affirming the denial of an expert “to assess [the defendant’s] likelihood of being a future danger in prison, and to testify concerning the correctional systems used in a maximum security prison to manage inmates and prevent acts of violence”); *Schmitt v. Commonwealth*, 547 S.E.2d 186, 199 (Va. 2001) (following *Burns* and rejecting evidence of prison life and security features of a maximum security prison). *See generally* Sarah M. Braugh, *supra* note 96, at 14 (arguing that “it is error to interpret ‘society’ as encompassing both prison and non-prison populations” in light of the abolition of parole in Virginia and because the court’s interpretation of sections 19.2-264.2 and 19.2-264.4, as encompassing prison and non-prison society, results in a conflict with sections 53.1-165.1 and 53.1-40.01 of the Virginia Code). *See* VA. CODE ANN. § 53.1-40.01 (Michie 2002) (prohibiting geriatric release for Class 1 felons convicted of offenses committed on or after January 1, 1995); VA. CODE ANN. § 53.1-165.1 (Michie 2002) (providing that “[a]ny person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense”).

104. 519 S.E.2d 602 (Va. 1999).

105. *Fishback v. Commonwealth*, 532 S.E.2d 629, 633 (Va. 2000); *see Yarbrough v. Commonwealth*, 519 S.E.2d 602, 616 (Va. 1999) (holding that Virginia capital defendants should receive an instruction concerning their parole ineligibility regardless of the whether the charged death-qualifying aggravator is vileness or future dangerousness).

106. *Yarbrough*, 519 S.E.2d at 616; *see* VA. CODE ANN. § 19.2-264.4(A) (Michie 2004) (codifying the *Yarbrough* rule and providing that, upon the defendant’s request, the jury will be instructed that the defendant shall not receive parole if sentenced to life in prison for a crime committed after January 1, 1995).

speculate” on that which is not subject to speculation, the possibility of parole, and accordingly impose a sentence of death.<sup>107</sup> The court elaborated on this rationale in *Fishback*, which extended the requirement of a no-parole instruction to non-capital felony sentencing proceedings.<sup>108</sup> While imposing an obligation to inform juries of the abolition of parole, the *Fishback* court considered and rejected the Commonwealth’s corollary request for a corresponding instruction to the jury that defendants charged with non-capital felonies *could* reduce their sentences by earning “good time.”<sup>109</sup> The court held that such good-time instructions would invite pure speculation because at the sentencing proceeding, the jury would never have a factual basis upon which to assess the likely effect of possible future good behavior.<sup>110</sup> Such speculation, the court concluded, would not advance the desirable goal of “truth in sentencing.”<sup>111</sup>

In reaching this conclusion, the court contrasted good time with the issue of parole involved in *Yarbrough*.<sup>112</sup> Specifically, the court noted that for those defendants convicted of felony offenses committed after January 1, 1995, the abolition of parole “leaves no room for speculation by a jury as to what might occur thereafter during the executive department’s administration of the sentence imposed” because “[t]he executive branch no longer has the discretion to grant or deny parole.”<sup>113</sup> Thus, unlike the provisions for good behavior, the court explicitly acknowledged that the capital life term is statutorily fixed and definite to the extent that it would “def[y] reason” and “truth in sentencing” not to instruct the jury of the defendant’s parole ineligibility.<sup>114</sup> Despite this reasoning, the same court in *Lovitt* interpreted section 19.2-264 to contemplate the capital inmate’s release into a society other than prison society.<sup>115</sup> That interpretation, taken together with the court’s rejection of prison life evidence, reintroduced jury speculation that runs counter to the court’s own “truth in sentencing” rationale.

### C. Evidence Not Yet Considered by the Supreme Court of Virginia

Unlike the factually grounded risk assessment described in *Part II*, the future dangerousness inquiry actually conducted by Virginia capital jurors consists

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107. *Yarbrough*, 519 S.E.2d at 615–16 (emphasis omitted).

108. *Fishback*, 532 S.E.2d at 634 (Va. 2000).

109. *Id.* at 634–35.

110. *Id.* at 634.

111. *Id.* at 632.

112. *Id.* at 633.

113. *Id.*

114. *Fishback*, 532 S.E.2d at 633.

115. *Lovitt*, 537 S.E.2d at 879; see *supra* notes 100–03 and accompanying text (discussing the *Lovitt* court’s rejection of a claim that the abolition of parole limited the statutory definition of society to prison society).



primarily of an extrapolation from the circumstances of the murder and from the offender's prior criminal conduct.<sup>116</sup> Absent objective information to the contrary, Virginia jurors, like the jurors interviewed in Texas, would likely predict a high rate of prison violence.<sup>117</sup> In fact, however, prison violence data, as reported by the Virginia Department of Corrections, do not support such an inference.<sup>118</sup> In 2003 the Department of Corrections statistical summary showed, per thousand inmates, only 1.2 assaults on inmates requiring medical attention and 0.5 assaults on staff requiring medical attention.<sup>119</sup> The corresponding rates for prior years were 0.7 and 0.2 for 2002, 0.6 and 0.1 for 2001, and 0.9 and 0.03 for 2000.<sup>120</sup> As yet, the Supreme Court of Virginia has not ruled on the admissibility of such base rate evidence to provide a real-world foundation for capital juries' assessments of the likelihood of future violence by capital murderers.<sup>121</sup>

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116. See *supra* Part III.A (analyzing the Supreme Court of Virginia's future dangerousness jurisprudence in which the court substantially limited the future dangerousness analysis to the circumstances of the offense and the defendant's prior history).

117. See *supra* notes 61–63 and accompanying text (discussing a Texas study in which capital jurors grossly over-estimated the likelihood that capital offenders would commit future acts of violence).

118. VIRGINIA DEPARTMENT OF CORRECTIONS, ANNUAL STATISTICAL SUMMARIES (2000–2003), at <http://www.vadoc.state.va.us/resources/statistics/default.htm> (last visited Mar. 19, 2005).

119. VIRGINIA DEPARTMENT OF CORRECTIONS, ANNUAL STATISTICAL SUMMARY 6 (2003), [http://www.vadoc.state.va.us/resources/statistics/research/new-statsum/FY03\\_StatSummary.pdf](http://www.vadoc.state.va.us/resources/statistics/research/new-statsum/FY03_StatSummary.pdf) (last visited Mar. 19, 2005).

120. VIRGINIA DEPARTMENT OF CORRECTIONS, ANNUAL STATISTICAL SUMMARY 6 (2002), [http://www.vadoc.state.va.us/resources/statistics/research/new-statsum/FY02\\_StatSummary.pdf](http://www.vadoc.state.va.us/resources/statistics/research/new-statsum/FY02_StatSummary.pdf) (last visited Mar. 19, 2005); VIRGINIA DEPARTMENT OF CORRECTIONS, ANNUAL STATISTICAL SUMMARY 6 (2001), [http://www.vadoc.state.va.us/resources/statistics/research/new-statsum/FY01\\_StatSummary.pdf](http://www.vadoc.state.va.us/resources/statistics/research/new-statsum/FY01_StatSummary.pdf) (last visited Mar. 19, 2005); VIRGINIA DEPARTMENT OF CORRECTIONS, ANNUAL STATISTICAL SUMMARY 6 (2000), [http://www.vadoc.state.va.us/resources/statistics/research/new-statsum/FY00\\_StatSummary.pdf](http://www.vadoc.state.va.us/resources/statistics/research/new-statsum/FY00_StatSummary.pdf) (last visited Mar. 19, 2005).

121. Although base rate data has not been tested in the Supreme Court of Virginia, its admissibility, as an evidentiary matter, is reasonably certain. In 1993 the Virginia General Assembly enacted Virginia Code section 8.01-401.3, adopting Federal Rule of Evidence 702, which states that, "If scientific, technical, or other specialized knowledge will assist the [juror] to understand the evidence . . . , a witness qualified as an expert . . . may testify . . . if (1) the testimony is based upon sufficient facts . . . , (2) the testimony is the product of reliable . . . methods, and (3) the witness has applied the . . . methods reliably to the facts." FED. R. EVID. 702; see VA. CODE ANN. § 8.01-401.3 (Michie 2004) (adopting the language of Federal Rule of Evidence 702); see also Mark D. Cunningham and Thomas J. Reidy, *Violence Risk Assessment at Federal Capital Sentencing: Individualization, Generalization, Relevance, and Scientific Standards*, 29 CRIM. JUST. & BEHAV. 512, 517–33 (2002) (analyzing issues of reliability and relevancy with respect to the admissibility of actuarial risk assessments in federal capital sentencing proceedings).

#### IV. The Case for Actuarial Risk Assessment at Capital Sentencing

##### A. The Limitations of Expert Testimony Absent Risk Assessment Tools

It would not be accurate, however, to argue that the Commonwealth has never relied upon actual predictions of future danger to secure sentences of death. In fact, Virginia courts have routinely admitted the testimony of mental health professionals to aid the jury in its efforts to predict defendants' future acts of violence.<sup>122</sup> In contrast to the quantitative assessments described above, however, mental health experts have typically engaged in risk assessments by relying primarily on subjective clinical assessments centered around the individual client interview.<sup>123</sup> Based upon that interview, a review of the client's file and record, a comparison to similar cases, and a literature review, a professional evaluator derives an estimate of risk.<sup>124</sup>

In the late 1970s, researchers began to question the ability of mental health experts to predict future dangerousness accurately.<sup>125</sup> Monahan surveyed the "first generation" of risk assessments and concluded that psychiatrists and psychologists correctly predict future violence in only one out of every three cases.<sup>126</sup> The work of Monahan and numerous other researchers led to a widespread conclusion among the mental health and legal communities that mental health professionals cannot reliably predict dangerousness.<sup>127</sup> Although later works have reassessed and challenged the methodological limitations of the first generation researchers' conclusions, the relevant literature generally supports the notion that early clinical risk assessment techniques were, at best, slightly better than chance at predicting future violence.<sup>128</sup>

122. See *infra* notes 152–59 and accompanying text (discussing a number of Virginia cases in which the Commonwealth relied upon the testimony of clinical forensic psychologists to predict future dangerousness).

123. Alexander Scherr, Daubert & Danger: The "Fit" of Expert Predictions in Civil Commitments, 55 HASTINGS L. J. 1, 15–16 (2003); see Caroline M. Mee & Harold V. Hall, *Risky Business: Assessing Dangerousness in Hawaii*, 24 U. HAW. L. REV. 63, 90–93 (2001) (dividing the history of risk assessment development into six stages and pointing to the mid-1990s as the time for the development of pure actuarial measures followed by two additional stages of refinement).

124. Scherr, *supra* note 123, at 15–16.

125. See Otto, *supra* note 14, at 46 n.10 (listing early studies that examined the accuracy of mental health predictions of violence).

126. *Id.* at 46 (citing MONAHAN, *supra* note 10).

127. *Id.* at 48–49. For a modern look at the medical ethics of predictions of future violence, see Thomas Grisso & Paul S. Appelbaum, *Is it Unethical to Offer Predictions of Future Violence?*, 16 LAW & HUM. BEHAV. 621 (1992) and Thomas R. Litwack, *On the Ethics of Dangerousness Assessments*, 17 LAW & HUM. BEHAV. 479 (1993). See also Paul S. Appelbaum, *The Parable of the Forensic Psychiatrist: Ethics and the Problem of Doing Harm*, 13 INT'L J. L. & PSYCHIATRY 249, 250–51 (1990) (suggesting that the ethical principles guiding forensic psychiatrists are necessarily different from those followed by their clinical colleagues).

128. See Otto, *supra* note 14, at 51–63 (describing the methodological limitations of the first

Nonetheless, in 1983, against the backdrop of the first generation research, the United States Supreme Court decided *Barefoot v. Estelle*.<sup>129</sup> *Barefoot* upheld against Eighth Amendment challenge the admission of predictive expert testimony regarding dangerousness for consideration in the sentencing phase of a capital trial.<sup>130</sup> The evidence produced at sentencing in *Barefoot* consisted of Barefoot's prior criminal record (two prior convictions for unlawful possession of firearms and two convictions for prior drug offenses), evidence of his escape from a New Mexico jail, several character witnesses, and finally, the testimony of Drs. John Holbrook and James Grigson, both psychiatrists.<sup>131</sup> Neither psychiatrist had personally examined Barefoot.<sup>132</sup> Nonetheless, Dr. Grigson testified that regardless of whether Barefoot was in society at large or in prison, there was a "'one hundred percent and absolute' chance that [he] would commit future acts of criminal violence."<sup>133</sup>

The Court recognized the potentially unreliable nature of this and similar predictive testimony.<sup>134</sup> Nevertheless, the Court maintained that, through effective cross-examination, "[p]sychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but as generally so unreliable that it should be ignored."<sup>135</sup> Thus, the Court presumed the ability of the adversarial process to sort reliable from unreliable expert testimony.<sup>136</sup>

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generation research and discussing a "second generation" of research, which suggested that "mental health professionals have some ability to assess risk and make predictions of violence (i.e., they do better than chance)"; see also *id.* at 63 ("[W]hereas first generation research suggested that perhaps one out of three people predicted to [commit violent acts] will actually . . . do so, more recent studies suggest that one out of every two people predicted to be violent would go on to engage in some kind of legally relevant, violent behavior."); Lisa M. Dennis, *Constitutionality, Accuracy, Admissibility: Assessing Expert Predictions of Future Violence in Capital Sentencing Proceedings*, 10 VA. J. SOC. POL'Y & L. 292, 305–06 (2002) (discussing a "second wave" of clinical research on violence prediction that eliminated many of the methodological errors of the early clinical predictions).

129. *Barefoot v. Estelle*, 463 U.S. 880 (1983).

130. *Id.* at 905–06.

131. *Id.* at 917–19 (Blackmun, J., dissenting).

132. *Id.* at 917.

133. *Id.* at 919. Texas prosecutors regularly relied on the testimony of Dr. Grigson. Alan Berlow, *The Wrong Man*, THE ATLANTIC MONTHLY, Nov. 1, 1999, at 66–78, 1999 WLNR 4438848. Grigson became known as "Dr. Death" because his expert prediction of future dangerousness contributed to 115 deaths in 124 capital cases. *Id.* In 1977 Grigson testified at the trial of Randall Dale Adams where he stated, "[T]here is no question in my mind that Adams is guilty" and "He will kill again." *Id.* Adams, who was exonerated and released in 1989, "wasn't guilty then and hasn't been in trouble since." Hugh Aynesworth, *Texas "Dr. Death" Retires after 167 Capital Case Trials*, THE WASHINGTON TIMES, Dec. 2003, <http://www.washtimes.com/national/20031220-113219-5189r.htm>.

134. *Barefoot*, 463 U.S. at 897–98.

135. *Id.* at 898.

136. *Id.* at 900–01. Justice Blackmun, dissenting, recognized an inherent limitation on the ability of defense counsel to neutralize erroneous expert testimony through cross-examination.

For the following reasons, the adversarial process cannot adequately mitigate the effects of unreliable future dangerousness testimony in Virginia. Because Virginia does not permit the introduction of prison life evidence, and as yet has not ruled on the admissibility of base rate data, the defendant must resort to a battle of the clinical experts. Accordingly, the jury must face a choice between crediting the Commonwealth's expert, who claims to have detected a high probability of future violence toward others, and the defense expert, who claims otherwise.<sup>137</sup> If the jury gives credence to the Commonwealth's expert testimony, they risk sentencing to death a capital murderer who may or may not become a model prison inmate. On the other hand, if the jury relies upon the testimony of the defense expert, they risk the possibilities that the Commonwealth's predictions will materialize and the defendant will murder again. Weighing those risks, jurors will naturally tend to discount the expert testimony of the defense. In other words, jurors will err in favor of execution.

Despite widespread criticism of predictive testimony of the sort offered in *Barefoot*, violence risk assessment errors continue at capital sentencing.<sup>138</sup> First, without reference to base rate and contextual data, risk assessments are subject to what researchers call "illusory correlation."<sup>139</sup> Illusory correlation results "when an observer reports that a correlation exists between classes of events which are not correlated, or correlated to a lesser degree, or are correlated in the

*Barefoot*, 463 U.S. at 916 (Blackmun, J., dissenting). Blackmun pointed out that

when a person's life is at stake—no matter how heinous his offense—a requirement of greater reliability should prevail. In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself.

*Id.*; see Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCHOL. PUB. POL. & L. 267, 267, 305 (2001) (concluding that "jurors are more influenced by clinical opinion expert testimony than by actuarial expert testimony" and that the adversarial process fails to counter this bias); Edens et al., *supra* note 16, at 81 (arguing that, because poor expert testimony is obscured by "guise of science," "mental health professionals should assume the responsibility to self-censor from proffering conclusions that are empirically and ethically questionable") (citing John F. Edens et al., *Psychopathy and the Death Penalty: Can the Psychopathy Checklist-Revised Identify Offenders who Represent "a Continuing Threat to Society"?*, 29 J. PSYCHIATRY & L. 433 (2001)).

137. Methodological errors in violence prediction also limit the defense team in a less visible manner. Often, a court appointed mental health expert for the defense will state that he cannot testify regarding future dangerousness because, based upon the defendant's record, he has concluded that the defendant will pose a threat of violence. As discussed below, such determinations are fraught with error. See *infra* notes 138–50 and accompanying text (discussing the limitations of expert testimony that does not rely on risk assessment tools).

138. Cunningham & Reidy, *supra* note 18, at 23; see Edens et al., *supra* note 16, at 81 (summarizing the previously discussed study of 155 Texas inmates and noting that "only 5% of capital defendants predicted by experts to constitute 'continuing threats to society' in fact committed subsequent serious acts of violence in prison over a relatively long follow-up period").

139. Cunningham & Reidy, *supra* note 12, at 76.

opposite direction to that reported."<sup>140</sup> For example, it would seem to make sense that the defendant who has committed a more severe or more violent crime "on the street" would pose a greater risk of violence to others once imprisoned. In fact, however, severity of offense is a surprisingly unreliable predictor of violent behavior in prison.<sup>141</sup> As reported in one National Institute of Corrections publication, "the severity of the instant offense has rarely been found to be a very useful predictor of disciplinary adjustment."<sup>142</sup>

In a 1990 study by Robert P. Cooper and Paul D. Werner, two groups of correctional professionals used demographic and biographical variables to predict violence during the early months of prison incarceration.<sup>143</sup> Both groups' forecasts exhibited poor predictive reliability.<sup>144</sup> When explaining their future dangerousness determinations, the professionals, both psychologists and case managers, "consistently emphasized current offense, severity of current offense, and history of violence, none of which were significantly correlated with actual inmate violence."<sup>145</sup> Conversely, they relied minimally on factors, such as age, that have been empirically linked to violence.<sup>146</sup>

Another common error is over-reliance on the clinical interview.<sup>147</sup> Clinical assessments of violence that are based primarily on the client interview are limited by the narrow and skewed portion of the population to which the individual clinician has been exposed.<sup>148</sup> In addition, "[r]arely do clinicians gather systematic feedback regarding the accuracy of their past judgements, resulting in growing confidence over time entirely unrelated to any increase in accuracy."<sup>149</sup> In other words, because clinicians rarely if ever track their predictions for accuracy and therefore do not alter the bases for their assessments over time,

140. *Id.*; see MONAHAN, *supra* note 10, at 62–64 (discussing the susceptibility of clinical predictions to illusory correlation).

141. Cunningham & Reidy, *supra* note 18, at 26–27.

142. ALEXANDER & AUSTIN, *supra* note 27, at 25.

143. Cunningham & Reidy, *supra* note 12, at 76 (citing Robert P. Cooper & Paul D. Werner, *Predicting Violence in Newly Admitted Inmates: A Lens Model Analysis of Staff Decision Making*, 17 CRIM. JUST. & BEHAV. 431 (1990)).

144. *Id.*

145. *Id.*

146. *Id.*

147. Cunningham & Reidy, *supra* note 18, at 28–29. Additional criticisms of clinical assessments include the misapplication of psychological testing, crediting faulty implications of antisocial personality disorder and psychopathy, ignoring the effects of aging, failure to define the severity of the violence, failure to consider context and perhaps most importantly, inadequate reliance on base rates. *Id.* at 23–31.

148. *Id.* at 28.

149. *Id.*

their dangerousness judgements are likely to rest upon factors which poorly predict or do not predict future acts of violence in prison.<sup>150</sup>

Mental health experts commit these same errors in Virginia capital cases today.<sup>151</sup> Clinical forensic psychologists, testifying on behalf of the prosecution, continue to rely upon factors that do not reliably predict future violence. Dr. Arthur Centor, a clinical forensic psychologist, has testified in at least ten capital cases that resulted in sentences of death.<sup>152</sup> In *Wright v. Commonwealth*,<sup>153</sup> Centor based a prediction of future dangerousness on an examination of the defendant including the defendant's social history.<sup>154</sup> Centor concluded that "there is a high probability that [Wright] would, in the future, commit acts that are criminal, violent and a danger to society."<sup>155</sup> Similarly, in *Edmonds v. Commonwealth*,<sup>156</sup> Centor testified that "there are strong indications that there is a high probability of future dangerousness."<sup>157</sup> He reached that conclusion after considering "an evaluation of the defendant's record of criminal convictions, presentencing reports . . . testimony at the guilt trial, the defendant's statements to the police, and the autopsy report."<sup>158</sup> He later reaffirmed his determination after conducting a two-hour interview with the defendant.<sup>159</sup>

150. Cunningham & Reidy, *supra* note 12, at 76.

151. Despite the United States Supreme Court holdings in *Daubert v. Merrell Dow Pharmaceuticals* and *Kumho Tire Co. v. Carmichael*, which "ultimately may have a constraining effect on the use of clinical predictions of violence risk in capital cases, at present these predictions continue relatively unabated." Edens et al., *supra* note 16, at 57. See *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 587 (1993) (concluding that the Federal Rules of Evidence provide the standard for admitting expert scientific testimony in a federal trial); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (holding that, under *Daubert*, a court's gatekeeping function applies to testimony based on "technical" and "other specialized" knowledge as well as "scientific" knowledge).

152. See, e.g., *Swann v. Commonwealth*, 441 S.E.2d 195, 201 (Va. 1994) (noting that the Commonwealth's case in chief included evidence of Swann's future dangerousness, through the direct examination of Dr. Centor); *Stewart v. Commonwealth*, 427 S.E.2d 394, 408 (Va. 1993) (upholding the admission of Dr. Centor's testimony that Stewart would pose a future danger "based on the circumstances of these cases, Stewart's prior criminal record, and the results of Stewart's psychological tests"); *Yeatts v. Commonwealth*, 410 S.E.2d 254, 265 (Va. 1991) (noting that "Dr. Centor examined Yeatts pursuant to court order and reported Yeatts posed 'a probability of future dangerousness'"); *Savino v. Commonwealth*, 391 S.E.2d 276, 281 (Va. 1990) (discussing testimony by Dr. Centor that Savino "show[ed] signs of future dangerousness in view of his past criminal history so that he would have a high probability of committing criminal acts of violence that would constitute a continuing serious threat to society in the future").

153. 427 S.E.2d 379 (Va. 1993).

154. *Wright v. Commonwealth*, 427 S.E.2d 379, 391 (Va. 1993).

155. *Id.*

156. 329 S.E.2d 807 (Va. 1985).

157. *Edmonds*, 329 S.E.2d at 813.

158. *Id.*

159. *Id.* A survey of future dangerousness cases in Virginia suggests that the Commonwealth's reliance on expert testimony like that offered by Dr. Centor is waning. Nonetheless, jurors will

Despite the unreliable and inaccurate nature of this and similar mental health testimony, when faced with challenges to the sufficiency of such future dangerousness evidence, the Supreme Court of Virginia has routinely emphasized that the circumstances of the offense and the defendant's prior history alone are sufficient to support a future dangerousness finding.<sup>160</sup> These rulings mean that a future dangerousness finding in Virginia could stand, regardless of whether the court admitted unreliable clinical predictive testimony. Given the natural tendency by jurors to overestimate prison violence in the absence of statistical base rate data, the capital jury will again err on the side of sentencing the defendant to death.

*B. Dispelling the Notion that Actuarial Risk Assessment is Not Individualized*

The capital sentencing process needs an alternative and objective resource to assist jurors in assessing a capital offender's potential to commit violent acts while incarcerated. Actuarial tools have consistently proven more accurate than clinical predictions.<sup>161</sup> Although actuarial risk assessment tools rely on statistically analyzed group data in order to counter errors in human judgement, the tools are not without detractors. Critics argue that because actuarial techniques rely on group based statistics, they are not sufficiently individualized to satisfy the tailored inquiry required to assess the likelihood that a specific defendant will commit future violent acts.<sup>162</sup> In fact, "the distinction between individualized as opposed to group methods is a false dichotomy."<sup>163</sup> As William M. Grove and Paul E. Meehl have noted, the search for a truly individualized determination of risk "receives illegitimate, fallacious weight from an assumption that . . . the statistics give mere probabilities, average results, or aggregate pro-

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continue to overestimate the incidence of assaultive behavior in prison based upon the Commonwealth's non-expert evidence of future dangerousness. Accordingly, the need for reliable base rate testimony remains.

160. See *supra* Part III.A (discussing the evidence sufficient to support a finding of future dangerousness in Virginia).

161. Cunningham & Reidy, *supra* note 12, at 72; see William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL. PUB. POLY & L. 293, 296-99 (1996) (presenting meta-analysis of studies on risk prediction and concluding the majority of studies favor actuarial methods); MONAHAN, *supra* note 10, at 57-67 (discussing common errors in clinical prediction, including vagueness in specifying the severity of violence, disregard of statistical base rates, reliance on weak or nonexistent correlations, and failure to incorporate contextual considerations). See generally PAUL E. MEEHL, *CLINICAL VERSUS STATISTICAL PREDICTION: A THEORETICAL ANALYSIS AND A REVIEW OF THE EVIDENCE* (Univ. of Minn. 1954) (discussing the strengths and weaknesses of both the actuarial and clinical predictive methods and concluding that the actuarial method is more accurate and is the soundest way to ensure the accuracy of clinical predictive methods).

162. Cunningham & Reidy, *supra* note 121, at 519.

163. *Id.* at 517.

portions, whereas in dealing with the unique individual one will know exactly what will befall that person. Of course, such a claim can almost never be made."<sup>164</sup>

The fact is that *all* scientifically derived expertise is based upon research on various groups and animals.<sup>165</sup> That is, any evaluation by a professional, including risk assessment, is derived from collective data based on specific groups in a particular context.<sup>166</sup> Whether the risk assessment is clinical or actuarial, the process involves application of group data to an individual.<sup>167</sup> A predictive assertion of violence made according to observations from a clinical interview necessarily relies—if it relies on anything—upon previous observations of a group of persons with similar characteristics and an increased occurrence of violence in the same context.<sup>168</sup> Similarly, actuarial risk assessment techniques identify variables that are predictive of future violence.<sup>169</sup> These “risk factors” attributable to an individual defendant are then interpreted according to the rate of violence among an experimental sample with the same set of characteristics.<sup>170</sup>

A full response to the argument that probabilities are irrelevant to the unique individual is beyond that scope of this article. However, a hypothetical may be illustrative. As modified from a situation presented by Grove and Meehl, consider the following.<sup>171</sup> Your sister suffers from a debilitating illness. Her physician informs you that she may have a chance for relief in an experimental surgery performed by surgeon Y. Because your sister is in poor health and in no condition to decide upon a course of treatment, you must decide for her. What questions do you ask the physician? Most likely, you would ask: “What are the chances for success?” “Is there a possibility that she might not survive the surgery?” You would probably not respond well if the physician told you that your questions were meaningless because your sister is unique and therefore no one can really say how the surgery will affect her. What you want to hear and expect instead is that the surgery is successful at the hands of surgeon Y 90% of the time or 15% of the time. With that information, and knowledge of your sister’s particular condition, you can make an informed decision. The numbers

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164. Grove & Meehl, *supra* note 161, at 305.

165. Cunningham & Reidy, *supra* note 121, at 517–18.

166. *Id.* at 518.

167. *Id.*

168. *Id.*

169. *Id.* at 518–19.

170. *Id.* at 519.

171. See Grove & Meehl, *supra* note 161, at 305 (proposing a similar hypothetical in rebuttal to critics of actuarial methods who claim that “statistical predictionists aggregate, whereas we seek to make predictions for the individual, so the actuarial figures are irrelevant in dealing with the unique person”).



do not tell you with certainty that your sister will or will not survive. But they provide you with the information you need to make your determination.<sup>172</sup>

Analogizing to the capital sentencing proceeding, statistical risk assessment evidence does not provide a yes-or-no answer to the question of whether “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society.”<sup>173</sup> That is fortune telling, and the dangers of such Grigson-like testimony are well-documented.<sup>174</sup> However, risk assessment does provide the relative likelihood of an event in probabilistic terms.<sup>175</sup> As Cunningham notes

The distinction between prediction and assessment is more than simply semantics. . . . Probabilistic estimates keep the focus on the data as opposed to emotional reasoning, untestable assumptions, and dueling conclusionary testimony of competing experts. Probabilistic estimates communicate that serious violence among capital offenders in prison . . . are low base rate behaviors and are not exhibited by the majority of capital offenders. Most importantly, the concept of relative likelihood provides more information to the court than a dichotomous prediction, allowing the trier of fact to apply the best available data and methods to what is ultimately a social consideration of what degree of violence risk is acceptable.<sup>176</sup>

Given the increasing reliability of actuarial risk assessment techniques, a capital jury deserves no less when deciding upon the appropriateness of an irrevocable sentence.<sup>177</sup>

In fact, Cunningham and Reidy reported that, at the federal level, courts regularly admit statistically analyzed base rate evidence.<sup>178</sup> Between the 1994 enactment of the Federal Death Penalty Act and 2002, at least fifty federal death penalty trials proceeded to the sentencing phase.<sup>179</sup> Mental health experts testified using group statistical methods in no fewer than eighteen of these federal death penalty cases.<sup>180</sup> The testimony usually included base rate data

172. *Id.*

173. Cunningham & Reidy, *supra* note 18, at 34 (noting that “[v]iolence risk assessment in any context involves an estimate of likelihood, not a dichotomous prediction”).

174. *See id.*, at 34 (“Clinicians continue to confuse crystal balls with science at capital sentencing, undertaking predictions of violence rather than assessments of risk.”).

175. *Id.*

176. *Id.* at 34–35.

177. *See* Eric S. Janus, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443, 1345 (2003) (noting that courts should adopt state-of-the-art risk assessment methods, especially in light of empirical data suggesting the predictive superiority of actuarial over clinical assessments).

178. Cunningham & Reidy, *supra* note 121, at 514.

179. *Id.*

180. *Id.* In 2000, Steven Kiersh argued that in order to combat the government’s claim that

regarding prison populations used “as risk assessment anchoring points regarding the likelihood that a federal capital defendant would commit acts of serious violence while service a life-without-parole sentence in federal prison.”<sup>181</sup> In six of the eighteen cases, the Government also presented testimony regarding violence risk assessment, usually in rebuttal.<sup>182</sup> Notably, the Government’s testimony did not dispute the methodology of the defense’s reliance on statistical evidence or the data offered.<sup>183</sup>

*C. Constitutional Implications of the Current Future Dangerousness Determination in Virginia*

Our now not-so-naive observer has probably realized that there is a serious problem with the future dangerousness inquiry in Virginia. He knows that the tools that the Supreme Court of Virginia has provided the jury are not suitable to the task assigned to them. Virginia requires juries to consider facts with little relevance to future behavior in prison—the nature of the crime and the defendant’s prior history—and has thus far failed to provide basic information about the behavior of similarly situated murders or the conditions under which the defendant on trial will live out his life if spared.<sup>184</sup> Without this objective information regarding prison life and actual rates of prison violence, the jury is playing a proverbial game of pin the tale on the donkey. Blindfolded, members of the jury attempt to fulfill their role as arbiters of the appropriate sentence. Nonetheless, given the jury’s natural propensity to overestimate recidivism and assaultive behavior in prison, the sentencing proceeding is weighted in favor of a sentence of death.

Taken together, these considerations implicate a fundamental constitutional concern. As a matter of federal constitutional law, a capital defendant has a right to present a complete defense and more specifically, to meet the Commonwealth’s claim that he will pose a future danger to society.<sup>185</sup> This “right of rebuttal,” guaranteed by due process, derives directly from the rule of *Gardner v.*

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a client is so violent that he must be executed to prevent future violent acts, defense counsel “must introduce expert testimony from a penal expert and statistician.” Steven R. Kiersh, *How to Use and Combat Experts in Federal Death Penalty Cases*, 2 ASS’N TRIAL LAW. AM. ANN. CONVENTION REFERENCE MATERIALS 1793 (2002), WL 2 Ann.2000 ATLA-CLE 1793.

181. Cunningham & Reidy, *supra* note 121, at 514.

182. *Id.*

183. *Id.* at 515.

184. See *supra* Part III.A–B (analyzing the Supreme Court of Virginia’s future dangerousness jurisprudence).

185. The United States Supreme Court has held that “one of the hallmarks of due process in our adversary system is the defendant’s ability to meet the State’s case against him.” *O’Dell v. Netherland*, 521 U.S. 151, 169 (1997) (citing *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (holding that a capital defendant has a right to present a “complete defense”)).

*Florida*,<sup>186</sup> which held that due process is violated when a defendant is sentenced to death “on the basis of information which he had no opportunity to deny or explain.”<sup>187</sup>

*Simmons v. South Carolina*<sup>188</sup> applied this rule to future dangerousness assessments in capital sentencing.<sup>189</sup> Pursuant to *Simmons*, if the prosecution argues that a parole-ineligible defendant poses a future danger to society, the defendant is entitled to a “life-means-life” instruction informing the jury of his parole-ineligible status.<sup>190</sup> In *Simmons*, the prosecution urged the jury to consider the defendant’s future dangerousness in determining the proper sentence.<sup>191</sup> In response, prior to the penalty phase jury deliberations, defense counsel requested a jury instruction to clarify that “life imprisonment” in the defendant’s case did not carry the possibility of parole.<sup>192</sup> In other words, to rebut the prosecution’s claim of future dangerousness, defense counsel sought to inform the jury that any potential for danger would necessarily be confined to the prison setting.<sup>193</sup> The trial court rejected the requested instruction.<sup>194</sup>

The United States Supreme Court held that denial of the instruction violated the Due Process Clause of the Fourteenth Amendment.<sup>195</sup> The Court accepted the defendant’s premise that the jury could reasonably have believed that he might be released on parole if not given a death sentence.<sup>196</sup> This

186. 430 U.S. 349 (1977).

187. *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

188. 512 U.S. 154 (1994).

189. See *Simmons v. South Carolina*, 512 U.S. 154, 169 (1994) (plurality opinion) (holding that due process requires that a capital jury be informed that a defendant sentenced to life imprisonment will not be eligible for parole).

190. *Id.* at 178 (O’Connor, J., concurring). “Where the State puts the defendant’s future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible.” *Id.*; see VA. CODE ANN. § 19.2-264.4(A) (Michie 2004) (providing for a life-means-life instruction at the defendant’s request); *Yarbrough*, 519 S.E.2d at 616 (holding that in all capital cases the trial court, upon the defendant’s request, must instruct the jury that life imprisonment means life imprisonment without the possibility of parole).

191. *Simmons*, 512 U.S. at 157.

192. *Id.* at 158–60.

193. *Id.*

194. *Id.* at 159–60. When the jury later sent a note to the judge from the deliberation room asking, “Does the imposition of a life sentence carry with it the possibility of parole?” the trial judge responded with the following instruction: “You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their *plan [sic] and ordinary meaning.*” *Id.* at 160.

195. *Id.* at 162; see U.S. CONST. amend. XIV, § 1 (guaranteeing that no state shall “deprive any person of life, liberty, or property, without due process of law”).

196. In *Simmons*, defense counsel, at oral argument, presented the results of a statewide public-

“misunderstanding” created “a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration” after which he stood to be released into free society to kill again.<sup>197</sup> The *Simmons* Court responded to this dilemma by holding, as the Court would later reiterate in *Shafer v. South Carolina*,<sup>198</sup> that when “a capital defendant’s future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant ‘to inform the jury of [his] parole ineligibility.’”<sup>199</sup>

Notably, the right of rebuttal established by *Simmons* is based upon a recognition of the critical importance of context to any dangerousness determination. As Justice O’Connor noted in her concurrence, the prosecution in *Simmons* told the jury, “[y]our verdict should be a response of society to someone who is a threat.”<sup>200</sup> *Simmons*’s response was that his criminal history involved *only* elderly women, a group with which he would not have contact behind bars; this claim “stood a chance of succeeding, if at all, only if the jury were convinced that petitioner would *stay* in prison.”<sup>201</sup> In other words, the jury’s future dangerousness decision rested upon a distinction between the risk *Simmons* posed in society at large, and the much-reduced risk he posed in the restrictive prison setting.

Not surprisingly, in determining whether death is the appropriate sentence, capital juries place great emphasis on the prosecution’s assertions of future dangerousness.<sup>202</sup> That much is clear from *Simmons*, and the questions proposed

opinion survey. *Simmons*, 512 U.S. at 159. Only 7% of jury-eligible adults believed that life imprisoned inmates would spend the rest of their lives in prison. *Id.* Nearly 75% of those surveyed believed that a convicted murderer would be paroled in less than thirty years. *Id.* Finally, more than three-quarters indicated that, if asked to make a capital sentencing decision, the number of years the defendant would actually spend behind bars would be an “extremely important” or a “very important” factor in deciding between a sentence of life and death. *Id.*

197. *Id.* at 161.

198. 532 U.S. 36 (2001).

199. *Simmons*, 512 U.S. at 168–69; *Shafer v. South Carolina*, 532 U.S. 36, 39 (2001) (quoting *Ramdas v. Angelone*, 530 U.S. 156, 165 (2000) (plurality opinion)).

200. *Simmons*, 512 U.S. at 176 (O’Connor, J., concurring).

201. *Id.* (emphasis in original).

202. See Aletha M. Claussen-Schultz et al., *Dangerousness, Risk Assessment, and Capital Sentencing*, 10 PSYCHOL. PUB. POLY & L. 471, 480–82 (2004) (presenting studies of capital juries in which jurors expressed concern about and substantially discussed the defendant’s potential for violent behavior if returned to society); John H. Blume et al., *Future Dangerousness in Capital Cases: Always “At Issue”*, 86 CORNELL L. REV. 397, 404 (2001) (concluding that juror deliberations on the issue of future dangerousness to society overshadowed jury discussions on all other issues except the crime itself); Stephen P. Garvey & Paul Marcus, *Virginia’s Capital Jurors*, 44 WM. & MARY L. REV. 2063, 2089–98 (2003) (reaching conclusions about Virginia’s capital jurors analogous to those reached by John H. Blume et al. in South Carolina).

by the jury to the trial court in *Simmons* and *Shafer* illustrate this reliance.<sup>203</sup> For example, the *Simmons* jury asked the trial judge to answer one question: “Does the imposition of a life sentence carry with it the possibility of parole?”<sup>204</sup> The question highlighted the capital jury’s general misunderstanding of the term “life imprisonment.”<sup>205</sup> The *Simmons* Court took notice of the common-sense implication that “many jurors might not know whether a life sentence carries with it the possibility of parole.”<sup>206</sup> Similarly, in *Shafer*, the jury deliberated for three and one-half hours before submitting two questions for resolution: “1) Is there any remote chance for someone convicted of murder to become elig[i]ble for parole?” and “2) Under what conditions would someone convicted for murder be elig[i]ble?”<sup>207</sup> The Supreme Court directly addressed this issue when it held that a capital defendant has a due process right, when future dangerousness is at issue, to inform the jury that the defendant is ineligible for parole.<sup>208</sup>

Questions by jurors also indicate that sentencers want to know more about the specific prison conditions that might affect the defendant’s potential for violence in prison. For example, in *Rhines v. Weber*,<sup>209</sup> a capital case in South Dakota, the jury came back with numerous questions for the court including: (1) “Will [the defendant] be allowed to mix with the general inmate population?” and (2) “Will [the defendant] be jailed alone or will he have a cell mate?”<sup>210</sup> As discussed above, answers to questions such as these can be of critical importance to the jury’s ability to assess the defendant’s capacity to commit future violent acts in prison. It necessarily follows that absent the right to provide such information, the defendant’s ability to present a complete defense and to rebut the prosecution’s future dangerousness case is severely curtailed.

The constitutional importance of a full and fair determination of a defendant’s dangerousness has been heightened by the United States Supreme Court’s decision in *Ring v. Arizona*.<sup>211</sup> *Ring* invalidated Arizona’s capital sentencing scheme to the extent that it allowed statutory aggravating factors to be found by a judge rather than a jury, and by a standard of less than beyond a

203. *Simmons*, 512 U.S. at 160; *Shafer*, 532 U.S. at 44.

204. *Simmons*, 512 U.S. at 160.

205. *Id.* at 177–78 (O’Connor, J., concurring). “[T]hat the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison.” *Id.* at 178.

206. *Id.*

207. *Shafer*, 532 U.S. at 44.

208. *Simmons*, 512 U.S. at 168–69.

209. 608 N.W. 2d 303 (S.D. 2000).

210. *Rhines v. Weber*, 608 N.W.2d 303, 310 (S.D. 2000).

211. *Ring v. Arizona*, 536 U.S. 584 (2002).

reasonable doubt.<sup>212</sup> Relying on its earlier decision in *Apprendi v. New Jersey*,<sup>213</sup> the Court held that, “[b]ecause Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ the Sixth Amendment requires that they be found by a jury” and therefore, proven beyond a reasonable doubt.<sup>214</sup> Thus, after *Ring*, future dangerousness is effectively an element of the aggravated crime of capital murder for which the death sentence is possible, and the defendant’s right of rebuttal as to future dangerousness is not merely similar to, but identical to, the due process right of any criminal defendant to mount a defense to each element of the offense charged.<sup>215</sup>

Together, these cases establish a constitutional right to present objective evidence upon which a jury can rely in deciding whether the death-eligible “element” of future dangerousness has been proven beyond a reasonable doubt. Without this information, jurors are likely to fill in the gaps, erroneously, between the defendant’s violent past and a presumed violent future. That leap is unsubstantiated by current knowledge regarding risk assessment, and this potentially irrevocable and correctable error must be avoided.

#### V. Conclusion

The issue of whether a sentence of death should turn on a finding of future dangerousness has long been the subject of debate. Nonetheless, Virginia long ago chose the path of violence prediction by explicitly adopting future dangerousness as a statutory aggravating factor.<sup>216</sup> After almost thirty years of sentencing and executing capital offenders based in whole or in part on a jury finding of future dangerousness, the process by which Virginia establishes dangerousness is overdue for a critical assessment.

As this article has shown, it is much easier to predict that a given convicted murderer will be violent in the future than it is to make such a prediction *and be correct*. Given the unreliable nature of mental health testimony that is not grounded in statistical evidence, it is time for Virginia courts and the Virginia defense bar to recognize that risk assessment tools have a role to play in the future dangerousness determination at capital sentencing.

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212. *Id.* at 609.

213. 530 U.S. 466 (2000).

214. *Ring*, 536 U.S. at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)); see *Apprendi*, 530 U.S. at 476 (holding that any fact that increases the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt).

215. *Ring*, 536 U.S. at 609.

216. See VA. CODE ANN. § 19.2-264.2 (Michie 2004) (prohibiting a jury from imposing a sentence of death in a capital murder case unless it finds “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman”).

With the abolition of parole, the Virginia General Assembly enacted, and in fact mandated, a non-corporal alternative to a sentence of death: life imprisonment without the possibility of parole. However, if jurors are not informed of the true nature of prison life and prison violence by capital offenders, they will continue to impose sentences of death when they otherwise might sentence the defendant to die in prison. Absent the basic risk assessment information discussed in this article, a capital jury cannot reliably select death over life imprisonment without the possibility of parole as the appropriate punishment.

In addition, without the basic facts regarding the operation of the penal system, the jury lacks the evidentiary basis upon which to serve its fundamental role of "maintain[ing] a link between contemporary community values and the penal system."<sup>217</sup> Because of the operation of this "link" over time, certain severe punishments once imposed have now disappeared from the criminal justice system. In 1789, on the floor of the First Congress, Representative Livermore proclaimed as certain that "villains often deserve whipping, and perhaps having their ears cut off."<sup>218</sup> However, whippings and mutilation would undoubtedly be "cruel and unusual" today.<sup>219</sup> Punishments such as public flogging disappeared, not only because they fell out of favor in the abstract, but also because society developed a practical and superior alternative, namely long-term imprisonment.<sup>220</sup> Had sentencers been kept in the dark about the new non-corporal alternative, however, they certainly would have continued to impose the now antiquated sentences.

Similarly, when states conceal essential information about the true nature of an alternative punishment to death, they obstruct the historic process by which our society replaces one form of punishment with another. Once Virginia made the choice to adopt life without parole as a uniquely severe and incapacitive alternative to the death penalty, it acquired a constitutional and moral obligation not to distort the sentencing process by denying sentencing juries the information necessary to accurately assess the adequacy of that punishment.

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217. *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968).

218. *Furman v. Georgia*, 408 U.S. 238, 262 (1972) (Brennan, J., concurring) (quoting 1 ANNALS OF CONG. 754 (Joseph Gales ed., 1789)).

219. See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

220. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY*, 74-76 (Basic Books 1993) (discussing the rejection of whipping and mutilation with the development of an effective alternative, imprisonment).

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# **CASE NOTES:**

**United States Supreme Court**

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