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Virginia's Redefinition of the "Future Dangerousness" Aggravating Factor: Unprecedented, Unfounded, and Unconstitutional

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Virginia’s Redefinition of the “Future Dangerousness” Aggravating Factor: Unprecedented, Unfounded, and Unconstitutional

Lara D. Gass*

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I. Introduction

Imagine you are a juror in a Virginia capital murder trial. It has reached the penalty phase of trial, the guilt phase having concluded with a conviction of first-degree murder. There was

little question about the defendant's culpability—he had confessed to the killing—and a guilty verdict was a relatively straightforward finding. But now you and your eleven co-jurors must confront a far graver issue than the question of guilt. It is a question of life or death: should the defendant spend the rest of his life behind bars, or face execution?

Arguing for a life sentence, the defense describes the defendant's tragic past and reveals the emotional and physical abuse that the defendant endured throughout his childhood. The defendant's mentally ill mother constantly berated the defendant and his sister, screaming at them things such as "I wish I'd never had you" and "you're not worth a shit." She brutally beat the defendant whenever she felt like it, once so uncontrollably that his sister thought their mother was going to kill him. The defendant's father, a serial pedophile, routinely sexually assaulted the defendant's sister and younger cousins. When the defendant gained enough courage to defend his sister against one of their father's attacks, his father forced him at gunpoint to strip to his underwear and kicked him out of the house for good. He was sixteen years old.

On the streets with no one to turn to, the defendant fell hard into drug and alcohol addiction. With addiction came a life of crime and impulsive violence—offenses which the defendant committed only when he was under the influence of drugs, alcohol, or both. During his consequent incarcerations, when he had no access to drugs or alcohol, the defendant was a model prisoner who posed no danger to those around him. After his release from prison, the defendant repeatedly tried to break free of his addictions. Each time, however, his unstable environment and lack of support system stifled his efforts at sobriety. And so this cycle of addiction, crime, and imprisonment continued, culminating in the murder for which he is currently on trial.

The prosecution, arguing for a sentence of death, emphasizes the defendant's violent past, specifically focusing on the defendant's criminal record, history of aggression, and the circumstances surrounding the murder. Pointing to this backwards-looking evidence, the prosecutor argues that the defendant is a very dangerous person. The prosecution stresses that unless the defendant is executed, he will undoubtedly

commit future acts of violence.

After both sides have concluded their arguments, the judge instructs you and your fellow jurors to determine whether the defendant will receive the death penalty. You will base your decision in large part upon your assessment of the defendant's likelihood of committing future acts of violence "in society." When you ask the judge whether "society" means prison society or society in general, the judge responds that "society" means *all* of society.

To you, this does not make sense. You know—because the judge has told you so—that if the defendant is not put to death, he will spend the rest of his life behind bars: in Virginia (as in virtually all death penalty states), "life imprisonment" means life without possibility of parole. If prison is the only place that the defendant will ever live, how—and why—would you predict the defendant's future acts in free society? Notwithstanding your confusion, you and your fellow jurors realize that you must make a decision. You were instructed to determine whether there is a probability that the defendant would commit future violent acts in *all* of society, counter-factual as it may be. Although the defendant's painful childhood made you feel sympathetic—and was certainly pushing you towards a verdict of life in prison—the defendant's history of violence speaks for itself. Based on the judge's instruction, the decision seems clear. You and the rest of the jury return a unanimous sentence of death.

The foregoing hypothetical describes the very real murder trial of Mark Lawlor.¹ Lawlor was prosecuted in Fairfax County, Virginia, for the murder of Genevieve Orange, a tenant in the apartment complex where Lawlor worked.² Despite the extreme brutality of Lawlor's crime, his defense presented a compelling argument against the death penalty, describing his horrific childhood, his severe addiction to drugs and alcohol, and the fact that the crime was committed after Lawlor had consumed

1. See *infra* notes 141–62 and accompanying text (discussing *Lawlor v. Commonwealth*, 738 S.E.2d 847 (Va. 2013) (No. 120481)).

2. See Brief of the Commonwealth at 5, *Lawlor v. Commonwealth*, 738 S.E.2d 847 (Va. 2013) (No. 120481) ("Lawlor was employed by the Prestwick Apartments as a leasing agent, and lived in an apartment one floor below Ms. Orange in a different wing of the same complex.").

massive amounts of crack cocaine and alcohol.³ To counter the prosecution's claims, the defense offered evidence of Lawlor's good behavior during past incarcerations and argued that when in a structured environment without access to drugs or alcohol, Lawlor posed little—if any—threat to those around him.⁴

To support this argument, the defense offered as a witness Dr. Mark Cunningham, a nationally renowned prison risk assessment expert who is exceptionally experienced in assessing capital defendants' likelihood of committing future violent acts while imprisoned for life.⁵ Dr. Cunningham intended to provide his risk assessment of Mark Lawlor and testify that, based on specific factors including future context (in other words, prison) and Lawlor's individualized characteristics (for example, his employment history, continued contact with family and friends while in prison, and past appraisals by correctional officers), he posed a low risk of future violence while in prison.⁶

But the jurors never heard this risk assessment evidence. The trial court excluded virtually all of Dr. Cunningham's testimony, citing Supreme Court of Virginia precedent as grounds for its decision.⁷ Indeed, the trial court kept out any reference to “general prison life” conditions based on Virginia case law.⁸ The defense could not discuss the fact that serious violent recidivism

3. See Opening Brief for Appellant at 16–17, *Lawlor v. Commonwealth*, 738 S.E.2d 847 (Va. 2013) (No. 120481) (describing Lawlor's horrible past and his intoxication during the commission of the crime).

4. See Brief of the Commonwealth, *supra* note 2, at 25 (stating that Lawlor presented witnesses to describe his good behavior in jail).

5. See *Homepage*, <http://www.markdcunningham.com/index.php>, MARK D. CUNNINGHAM, PH.D., ABPP (last visited Sept. 7, 2013) (stating that Mr. Cunningham is a clinical and forensic psychologist who has provided “consultation and/or testimony in state or federal litigation in 42 states, the District of Columbia, and Puerto Rico”) (on file with the Washington and Lee Law Review).

6. See Opening Brief for Appellant, *supra* note 3, at 42 (“The defense sought to introduce the expert opinion of Dr. Mark Cunningham that, based on Mr. Lawlor's particular character, history, and background, he would be a low risk for violence in prison and would adapt positively to the prison environment.”).

7. See *id.* (“[T]he court generally, and emphatically, excluded it because the testimony focused on Mr. Lawlor's risk of serious violence *in prison*.”).

8. See *id.* at 46 (stating that the trial court relied on Supreme Court of Virginia precedent as its reason for excluding general prison evidence).

by all capital murderers, once imprisoned for life, is extremely rare.⁹ Nor could the defense give any explanation of exactly how and why the Virginia prison system is able to minimize the risk of such violence despite the fact that these prisons are filled with “dangerous” people.¹⁰ Excluding any information about the overall context of Lawlor’s future life prohibited the jury from reaching a reliable assessment of the magnitude of the risk posed by Lawlor, and it all but guaranteed that the jury would greatly overestimate the risk of future violence.¹¹ This is because the jury would base its future “risk assessment” only by extrapolating from the information they did have—especially the extreme violence displayed by the capital murder itself. Such an ominous prediction of Lawlor’s future behavior (quite understandably) had a significant impact on the jurors, one that ultimately produced a unanimous verdict of death.¹²

The trial court based its exclusion of the risk assessment evidence on the Supreme Court of Virginia’s case law interpreting Virginia’s “future dangerousness”¹³ statutory aggravating

9. See *id.* at 33–49 (discussing the trial court’s exclusion of any mention of general prison information, including prison statistics); see also *infra* notes 94–162 and accompanying text (discussing Supreme Court of Virginia’s precedent prohibiting general prison information).

10. See Opening Brief for Appellant, *supra* note 3, at 42 (discussing the trial court’s exclusion of any mention of general prison information, including prison conditions that make prison violence less likely); see also *infra* notes 94–162 and accompanying text (discussing Supreme Court of Virginia’s precedent prohibiting general prison information).

11. See *infra* notes 51–57 and accompanying text (discussing the likelihood of juries to overestimate capital defendants’ risk of future violence when they do not have reliable, accurate risk assessments from which they can predict future dangerousness).

12. See Opening Brief for Appellant, *supra* note 3, at 18 (stating that the jury returned a verdict of death).

13. See Meghan Shapiro, *An Overdose of Dangerousness: How “Future Dangerousness” Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 AM. J. CRIM. L. 145, 146 (2008) (“Future dangerousness’ is a very non-technical name for a particularly problematic sentencing factor used in nearly every capital jurisdiction in the United States, directly underlying at least half of all modern era executions and likely playing some role in the rest.” (footnotes omitted)). Wyoming is the only state to use the term “future dangerousness” in its death penalty statute. See WYO. STAT. ANN. § 6-2-102(h)(xi) (2012) (“The defendant poses a substantial and continuing threat of future dangerousness or is likely to commit continued acts of criminal violence.”). Most statutes refer to the notion of a defendant’s future

factor.¹⁴ This statute provides that
 a sentence of death shall not be imposed unless the
 court or jury shall (1) after consideration of the past
 criminal record of convictions of the defendant, find
 that there is a probability that the defendant would
 commit criminal acts of violence that would
 constitute a continuing serious threat to society . . .
 and (2) recommend that the penalty of death be
 imposed.¹⁵

Under a normal, commonsense future dangerousness assessment, the statute would require the jury to “predict[] . . . whether an individual in the criminal justice system will commit a violent crime in the future.”¹⁶ From its inception, the notion of future dangerousness as a basis for imposing the death penalty has caused concern.¹⁷ It seems practically impossible for one person to

dangerousness through language referencing the defendant’s likelihood of future violent acts. *See, e.g.*, VA. CODE ANN. § 19.2-264.2 (2012) (“[T]here is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society.”). This Note refers to this sentencing factor as “future dangerousness” for simplicity’s sake.

14. *See* BLACK’S LAW DICTIONARY 277 (9th ed. 2009) (describing the term “aggravating circumstance” to mean “[a] fact or situation that increases the degree of liability or culpability for a criminal act”). The terms “aggravating circumstance” and “aggravating factor” are used interchangeably. *Id.* The U.S. Supreme Court has determined that a state “must channel the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death’” when it authorizes the death penalty. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (citations omitted). In order to channel the sentencer’s discretion pursuant to constitutional standards, “the trier of fact must convict the defendant of murder and find one ‘aggravating circumstance’ (or its equivalent) at either the guilt or penalty phase.” *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). Thus, “statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.” *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

15. VA. CODE ANN. § 19.2-264.2 (2013).

16. Brian Sites, *The Danger of Future Dangerousness in Death Penalty Use*, 34 FLA. ST. U. L. REV. 959, 960–61 (2007) (“Future dangerousness is ultimately a yes-or-no decision, . . . ‘maybe’ is not an option.”).

17. *See* Eric F. Citron, Note, *Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty*, 25 YALE L. & POL’Y REV. 143, 154 n.56 (2006) (“There have been literally hundreds of scholarly articles written on the problems of the future dangerousness standard, many originating in the law-and-psychology community.”).

accurately predict another person's future actions.¹⁸ Nonetheless, the U.S. Supreme Court upheld the constitutionality of the future dangerousness aggravating factor long ago, and the factor has become prominent in many states' capital sentencing schemes.¹⁹

Virginia has a particularly long and complicated history with the future dangerousness aggravating factor. Unlike all other jurisdictions, Virginia does not interpret "future dangerousness" to mean an assessment of the defendant's likely future behavior. Rather, the Supreme Court of Virginia has redefined the aggravating factor as a somewhat abstract evaluation of whether the defendant has "a mental inclination towards violence."²⁰ To perform this evaluation, the trier of fact is only allowed to consider evidence of the defendant's past criminal record and history, and the circumstances surrounding the offense.²¹ Accordingly, all other evidence—including general prison evidence—is irrelevant to the future dangerousness analysis. This atypical interpretation of the future dangerousness aggravating factor has significant implications for the way Virginia capital sentencing hearings are conducted, and raises serious issues of fundamental fairness for Virginia capital defendants like Mark Lawlor.²²

This Note explores Virginia's redefinition of the future dangerousness statutory aggravating factor and considers the constitutional implications that flow from it. Part II discusses the constitutionality of the future dangerousness statutory aggravating factor and the U.S. Supreme Court's assessment of what a future dangerousness inquiry requires. Part III analyzes

18. See Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1254 (2000) ("Sentencing a defendant to death because of some act he may commit in the future is troubling for those opposed to such teleological forecasting and seems to contradict the 'innocent until proven guilty' premise of the American judicial system.").

19. See *infra* notes 19–29 and accompanying text (discussing the Supreme Court's approval of future dangerousness and the states that have codified future dangerousness).

20. See *infra* notes 169–72 and accompanying text (discussing Virginia's interpretation of future dangerousness).

21. See *infra* notes 169–72 and accompanying text (discussing Virginia's interpretation of future dangerousness).

22. See *infra* Part V.

the role that future dangerousness predictions play in capital sentencing proceedings. Part IV surveys the Supreme Court of Virginia's capital decisions concerning the issue of future dangerousness and prison violence risk assessments. Part V outlines the implications of the Virginia court's decisions and the constitutional concerns that are raised. Finally, Part VI concludes that the current interpretation of Virginia's future dangerousness statutory aggravating factor cannot withstand constitutional scrutiny and argues that substantial changes are needed to the Commonwealth's capital sentencing structure.

II. Future Dangerousness as a Constitutionally Acceptable Aggravating Factor

In 1973, Texas became the first state to incorporate the concept of future dangerousness into its capital sentencing structure.²³ The state's death penalty statute required the capital sentencing jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."²⁴ If the jury answered in the affirmative—if it found that there was a probability of future dangerousness—the defendant was all but guaranteed a death sentence.²⁵ But the statute failed to include any guidance

23. See Shapiro, *supra* note 13, at 148 ("Future dangerousness was born in the 63rd Texas legislature, which incorporated it in its 1973 scramble to reinstate the death penalty after *Furman v. Georgia*." (footnote omitted)).

24. *Jurek v. Texas*, 428 U.S. 262, 269 (1976) (quoting TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b)(2) (West 1973)). The future dangerousness question is currently written exactly the same as it was in 1973. See TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b)(1) (West 2013) (providing Texas's current future dangerousness question).

25. See Citron, *supra* note 17, at 155 (explaining that, although the Texas statute required affirmative answers to three "special questions" in order to sentence the defendant to death, "only the 'future dangerousness' question provided any real chance of escape from the ultimate sanction"). The other two special questions—"whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result" and "whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased"—were of no real significance by the time the jury reached the sentencing phase in a capital trial. *Id.* "Clearly, a verdict of murder with malice aforethought would be unlikely—

as to what this future dangerousness inquiry entailed, leaving every operative word undefined.²⁶ A challenge to the statute's undefined language resulted in the U.S. Supreme Court's seminal decision in *Jurek v. Texas*.²⁷

The defendant in *Jurek* alleged that Texas's future dangerousness statutory question led to the arbitrary infliction of the death penalty because it was impossible for a jury to accurately predict future behavior.²⁸ In a short, ten-sentence paragraph, the Court addressed this claim and determined that a jury's future dangerousness inquiry does not necessarily lead to a capricious application of the death penalty.²⁹ While the Court acknowledged that it is "not easy to predict future behavior," the Court nonetheless found that it was not an impossible determination to make.³⁰ In support of its assertion, the Court pointed to other areas of the criminal justice system—such as the bail and parole processes—that require a future dangerousness examination.³¹ The Court determined that "[t]he task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed

capital case or not—if the jury believed that the murder was not unreasonable in light of some provocation, or not even committed deliberately." *Id.* Consequently, the jury would inevitably answer the two questions in the affirmative, leaving open only the question of future dangerousness. *Id.* at 155–56.

26. See Shapiro, *supra* note 13, at 150 n.18 (explaining that, although the Texas statute leaves undefined "probability," "criminal acts of violence," and "continuing threat to society," courts have repeatedly held that the terms are not impermissibly vague); see also Citron, *supra* note 17, at 158 ("[N]ot only is [the Texas death penalty statute] ambiguous as to the frame of reference for the future dangerousness prediction, it also offers absolutely no guidance as to the level of certainty required for an answer of 'yes.'").

27. *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion).

28. *Id.* at 274 ("[T]he petitioner argues that it is impossible to predict future behavior and that the question is so vague as to be meaningless.").

29. See *id.* at 275–76 (discussing the future dangerousness inquiry and upholding Texas's death penalty statute).

30. See *id.* at 274–75 ("It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made.").

31. See *id.* at 275 (discussing the other areas of the justice system in which future dangerousness predictions must be made). The Court noted that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Id.*

countless times each day throughout the American system of criminal justice.”³² The Court thus concluded that the Texas statute was constitutional as written.³³

Following the Court’s approval of the dangerousness statutory language in *Jurek*, five states—Oregon, Oklahoma, Wyoming, Idaho, and Virginia—enacted new death penalty statutes that codified some form of a future dangerousness requirement.³⁴ And similar to Texas’s statutory scheme, these newly enacted death penalty statutes left most, if not all, of the statutory language undefined.³⁵ Although the terms in the future dangerousness statutes were left open to interpretation, it was clear that these statutes, including Texas’s, were passed with the assumption that juries would interpret future dangerousness statutory language according to its “common meaning.”³⁶ That is,

32. *Id.* at 275–76.

33. *See id.* at 276 (finding the Texas capital sentencing scheme constitutional).

34. *See* Shapiro, *supra* note 13, at 146 n.2 (noting the enactment of death penalty statutes in these states following *Jurek*). Oregon’s future dangerousness statute is identical to Texas’s statute. *See* OR. REV. STAT. ANN. § 163.150(1)(b)(B) (2013) (asking the sentencer whether “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society”). Oklahoma’s future dangerousness aggravating factor requires a finding that there exists “a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” OKLA. STAT. tit. 21, § 701.12(7) (2013). Wyoming requires a determination that the defendant “poses a substantial and continuing threat of future dangerousness or is likely to commit continued acts of criminal violence.” WYO. STAT. ANN. § 6-2-102(h)(xi) (2012). Idaho’s future dangerousness aggravating factor requires a finding that “[t]he defendant, by his conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.” IDAHO CODE ANN. § 19-2515(9)(i) (2013). And Virginia requires a finding that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society.” VA. CODE ANN. §§ 19.2-264.2, 264.4(c) (2013).

35. *See* Shapiro, *supra* note 13, at 149–50 (“The statutes are notoriously undefined; Texas, Oklahoma[,] and Virginia, for example, leave every operative word undefined.”). Idaho is the only state that provides a definition for its future dangerousness aggravating factor, construing its “propensity” requirement to denote that a person “is a willing, predisposed killer who tends toward destroying the life of another, one who kills with less than normal amount of provocation.” *State v. Creech*, 670 P.2d 463, 472 (Idaho 1983). The court determined that “propensity assumes a proclivity, a susceptibility, and even an affinity toward committing the act of murder.” *Id.*

36. *King v. State*, 553 S.W.2d 105, 107 (Tex. Crim. App. 1977) (“Where

when engaging in a future dangerousness assessment, the jury would “predict [the defendant’s] future behavior.”³⁷

With this commonsense understanding that “future dangerousness” requires a forward-looking assessment into the capital defendant’s likely future behavior, it becomes necessary to determine how the jury actually goes about the process of making such a prediction. What factors come into play when making such a prediction? How exactly does the process work? The next section discusses what evidence prosecutors and capital defendants proffer in their attempts at proving or disproving future dangerousness to the jury.

III. Prison Violence Risk Assessment

Pursuant to the commonsense understanding of “future dangerousness,” a future dangerousness assessment under a state’s death penalty statute requires the jury to evaluate a capital defendant’s likely future behavior. Both sides present evidence tending to show a defendant’s probability of committing dangerous acts in the future, often through future dangerousness experts. These experts purport to engage in “risk assessments,”³⁸

terms used are words simple in themselves, and are used in their ordinary meaning, jurors are supposed to know such common meaning and terms and under such circumstances such common words are not necessarily to be defined in the charge to the jury.” (citations and internal quotation marks omitted). The court in *King* determined that the future dangerousness statute was constitutional, noting that in *Jurek*, “the Supreme Court of the United States concluded that the submission of the issues provided by [the death penalty statute] . . . constitutionally guided the jury’s determination of the punishment issues. No special definitions of the terms of that statute were required.” *Id.*

37. *Jurek v. Texas*, 428 U.S. 262, 274 (1976). Texas, Oklahoma, and Virginia all relied on the *Jurek* Court’s interpretation of the future dangerousness language in upholding their future dangerousness statutes. See *infra* notes 80–89 and accompanying text (discussing the Supreme Court of Virginia’s reliance on *Jurek* when interpreting Virginia’s future dangerousness statutory aggravating factor).

38. See Jessica M. Tanner, “Continuing Threat” To Whom?: *Risk Assessment in Virginia Capital Sentencing Hearings*, 17 CAP. DEF. J. 381, 382–83 (2005) (“The process of . . . determining the likelihood of future violent behavior is what social scientists term ‘risk assessment.’”); Sites, *supra* note 16, at 961

A “risk assessment” involves the use of clinical, actuarial, or physiological methods to determine the probability that an individual

but the methods and data used in the different risk assessments lead to very different—and not always reliable—results.

*A. The Prosecution's Methods of Predicting Future
Dangerousness*

In an attempt to convince the jury that the defendant will likely pose a future danger to society, the prosecution often utilizes “experts” to offer a prediction of future dangerousness.³⁹ Using unscientific data in their risk assessments,⁴⁰ these mental health professionals grossly overestimate the degree of risk created by capital defendants.⁴¹ Their calculation of dangerousness—relying on subjective clinical assessments of the defendant⁴² as well as other

will commit a violent crime in the future. Risk assessments return a percentage chance that a given defendant will commit a violent crime in the future. They are thus somewhat analogous to when weather forecasts give a percentage chance that certain weather will occur in the future.

39. See Shapiro, *supra* note 13, at 159 (describing the prosecution “experts” as illegitimate “dangerousness diagnosticians”).

40. See Mark D. Cunningham & Jon R. Sorensen, *Improbable Predictions at Capital Sentencing: Contrasting Prison Violence Outcomes*, 38 J. AM. ACAD. PSYCHIATRY LAW 61, 62 (2010) (describing the analyses used by these “experts”). The prosecution’s “experts” often rely on “the abhorrence of the capital murder offense, the callousness of the defendant, the defendant’s prior community misconduct, and the repugnant personality features giving rise to aberrant behavior.” *Id.* Such clinical/intuitive risk analyses lead to “grave risk of future violence in all contexts, including prison.” *Id.*

41. See Mark D. Cunningham & Thomas J. Reidy, *Integrating Base Rate Data in Violence Risk Assessments at Capital Sentencing*, 16 BEHAV. SCI. & L. 71, 71–72 (1998) (“Consistent with well established clinical proclivities to over-predict violence, . . . the most notorious mental health expert testimony at capital sentencing has grossly overstated the magnitude of risk.”); Cunningham & Sorensen, *supra* note 40, at 63 (“If ‘threat to society’ contemplated misconduct of sufficient severity that a preventative intervention of death seemed proportional (e.g., something more than a mutual fistfight or minor assault), these expert predictions had a staggering error rate.”); Shapiro, *supra* note 13, at 161–62 (“Mental health professionals themselves are entirely skeptical of their own predictions, [and] academics appear to have unanimously accepted that such professionals are unreliable” (footnotes omitted)).

42. See Tanner, *supra* note 38, at 397 (“[M]ental health experts have typically . . . rel[ied] primarily on subjective clinical assessments centered around the individual client interview. Based upon that interview, a review of

“common sense” factors⁴³—is often made “to an unqualifiedly high degree of certainty.”⁴⁴ But the fact is that these unempirical “psychiatric predictions of long-term future dangerousness *are wrong in at least two out of every three cases.*”⁴⁵ Such inaccurate predictions of future dangerousness led the American Psychiatric Association (APA) to conclude long ago that these “expert” opinions should not be presented in capital sentencing proceedings.⁴⁶

Despite the shocking overestimations by these mental health professionals, the Supreme Court put its stamp of approval on the admissibility of this type of expert testimony in *Barefoot v.*

the client’s file and record, a comparison to similar cases, and a literature review, a professional evaluator derives an estimate of risk.”).

43. Mark D. Cunningham, Thomas J. Reidy, & Jon R. Sorensen, *Assertions of “Future Dangerousness” at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence*, 32 LAW & HUM. BEHAV. 46, 50 (2008) (describing “common sense” factors such as the “defendant’s history of criminal acts in the community, including features of the capital offense; assertions of lack of remorse; and/or the defendant’s associated violent-prone disposition”).

44. Shapiro, *supra* note 13, at 159. Take, for instance, the infamous Dr. James P. Grigson, otherwise known as “Dr. Death.” By 1994, “Dr. Grigson had appeared in at least 150 capital trials on behalf of the state, and his predictions of future dangerousness had been used to help convict at least one-third of all Texas death row inmates.” Eugenia T. La Fontaine, Note, *A Dangerous Preoccupation With Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases are Unconstitutional*, 44 B.C. L. REV. 207, 208 (2002). Dr. Grigson often testified that he was one hundred percent certain that the defendant would be dangerous in the future, and in some cases he offered testimony that there was “a one thousand percent chance” that the defendant would be a future danger. *Id.* at 209. Even though Dr. Grigson was eventually expelled from the American Psychiatric Association (APA) and from the Texas Society of Psychiatric Physicians (TSPP), his testimony sealed the fate for countless capital defendants. *Id.* at 210.

45. Shapiro, *supra* note 13, at 161 (emphasis added) (quoting Brief Amicus Curiae of the Am. Psychiatric Ass’n for Petitioner at 14, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080)).

46. *See id.*

[B]y 1983 the American Psychiatric Association had reached the firm conclusion that[] “[p]sychiatrists should not be permitted to offer a prediction concerning the long-term future dangerousness in a capital case, at least in those circumstances where the psychiatrist purports to be testifying as a medical expert possessing predictive expertise in this area. . . . Medical knowledge has simply not advanced to the point where long-term predictions—the type of testimony at issue in this case—may be made with even reasonable accuracy.”

Estelle.⁴⁷ The Court did not dispute the APA's assertion that the testimony was unreliable.⁴⁸ Rather, it reasoned that the adversarial process would filter the reliable testimony from the unreliable.⁴⁹ Through effective cross-examination and presentation of his own expert, the Court determined that the capital defendant has ample opportunity to counter the prosecution's expert's claims of dangerousness.⁵⁰ As one might expect, these unfounded overestimations of future dangerousness have a significant influence on a sentencing jury despite capital defendants' attempts to dispute these grave predictions.

B. The Jury's Tendency to Overpredict

When conducting future dangerousness assessments, juries tend to overestimate severely the threat of violence posed by a capital defendant.⁵¹ A number of factors play a role in the jury's

47. *Barefoot v. Estelle*, 463 U.S. 880 (1982). The prosecution's psychiatrist in *Barefoot*, the notorious Dr. Grigson, testified that "whether Barefoot was in society at large or in a prison society there was a 'one hundred percent and absolute' chance that Barefoot would commit future acts of criminal violence that would constitute a continuing threat to society." *Id.* at 919 (Blackmun, J., dissenting).

48. *See id.* at 896–902 (majority opinion) (acknowledging that errors in expert predictions may occur); *see also id.* at 920 (Blackmun, J., dissenting) ("The APA's best estimate is that *two out of three* predictions of long-term future violence made by psychiatrists are wrong. . . . The Court does not dispute this proposition, . . . and indeed it could not do so; the evidence is overwhelming.").

49. *See id.* at 901 (majority opinion) ("We are unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case.").

50. *See id.* at 898 ("Psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but as generally so unreliable that it should be ignored.").

51. *See, e.g.,* Sorensen & Pilgrim, *supra* note 18, at 1268–70 (discussing a study conducted with former capital jurors in Texas that showed the jurors' extreme overestimation of future dangerousness). Jurors in the study were asked to estimate the probability that capital defendants would recidivate in the future if sentenced to life in prison. *Id.* at 1269. The median estimate of a given capital defendant's committing another murder was 50%, compared to the actual observed frequency of such repeat murders by life-imprisoned inmates to be 0.2%. *Id.* In another study, a review of prison disciplinary records of a sample of future-danger-predicted, formerly death-sentenced inmates in Texas was

overestimation,⁵² and the prosecution's "expert" testimony declaring a probability that the defendant will strike again if not put to death is particularly influential.⁵³ Such a grim forecast, confidently made by someone who appears to be a preeminent specialist in the field of future-dangerousness prediction, is understandably persuasive in the eyes of an impressionable jury.⁵⁴

Because a "lack of objective information regarding the likelihood of repeat violence" is a critical component of jury over-

conducted following the inmates transfer to the general prison population. See Mark D. Cunningham, *Dangerousness and Death: A Nexus in Search of Science and Reason*, 61 AM. PSYCHOLOGIST 828, 834 (2006). This study revealed that if capital juries had been contemplating serious institutional violence (e.g. aggravated assaults with a weapon) when predicting a capital defendant's future dangerousness, the juries were wrong 90% of the time. *Id.* If the juries were contemplating a homicide, they were wrong 99% of the time. *Id.* As Dr. Cunningham states, "[p]redictions of future violent conduct are subject to multiple faulty conceptual strategies. . . . The result of these faulty decision-making processes is more often an overestimation of violence risk." *Id.* at 833–34.

52. See Cunningham, *supra* note 51, at 834 (discussing flawed strategies employed by unaided lay individuals when making violence risk assessment judgments based on intuition and common sense). Dr. Cunningham states that faulty conceptual strategies employed by uninformed lay persons include:

- (a) not accurately distinguishing between actual violence risk variables and those intuitively believed to be predictive but that are not (i.e., illusory correlation);
- (b) not incorporating all of the available data and thus emphasizing variables that are most memorable or most consistent with personal bias, which results in faulty weighting (i.e., an inability to optimally weight the variables);
- (c) having a lack of knowledge of base rate data regarding violence incidence among similar individuals in the predicted context;
- (d) ignoring base rates in the face of specific information or when confronted with a specific individual;
- (e) relying on personal experience based on a narrow and skewed portion of the population under consideration;
- (f) having minimal or absent information on the accuracy of predictions; and
- (g) showing inflated confidence in the accuracy of judgment.

Id.

53. See Cunningham & Reidy, *supra* note 41, at 72 ("There is a real danger that a jury may be inappropriately and significantly influenced by poorly grounded predictions of future violence offered with great confidence, even when the prediction is based on intuition rather than solid scientific evidence.").

54. See *Barefoot v. Estelle*, 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting) ("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.").

prediction,⁵⁵ defendants attempt to offer their own future dangerousness experts to counter those opinions presented by the prosecution. But even when defense expert testimony is permitted,⁵⁶ it is unlikely to be as persuasive to the jury as prosecution expert testimony.⁵⁷ Nevertheless, capital defendants advocate for the admission of their own future dangerousness experts as a means of countering the prosecution's unscientific predictions of the defendants' likely future behavior.

C. The Defense's Methods of Predicting Future Dangerousness

Importantly, prison is the only relevant context for capital risk assessments because it is the sole alternative to the death penalty for a convicted capital defendant in every jurisdiction.⁵⁸ Although it is commonly believed that prison inmate violence among murderers is high,⁵⁹ the reality is that “[m]ost capital defendants do not engage in serious violence in prison.”⁶⁰ The jury would never know of this fact by means of the prosecution's “expert” testimony alone, however, because such testimony does not discuss the context into which a convicted capital defendant will spend the rest of his life if spared the death penalty. Instead, prosecution experts merely assert generalized claims that the

55. See Sorensen & Pilgrim, *supra* note 18, at 1254 (“Several factors in the decision-making process encourage jurors to overestimate the threat of violence posed by capital murderers. Foremost among these is the lack of objective information regarding the likelihood of repeat violence.”).

56. See *infra* notes 165–75 and accompanying text (discussing Virginia's exclusion of defense risk assessment experts).

57. See Shapiro, *supra* note 13, at 164 (“Jurors are far more likely to have negative opinions of opposing defense experts, and to see them as ‘hired guns,’ than they will of State experts.” (footnotes omitted)).

58. See Cunningham & Sorensen, *supra* note 40, at 62 (“The adoption of life without parole as an alternative sentencing option in all 37 American jurisdictions utilizing the death penalty has rendered prison the only relevant predictive context for capital risk assessments.”). For a discussion of Virginia's abolition of parole for capital offenders, see *infra* notes 90–93 and accompanying text.

59. See Shapiro, *supra* note 13, at 158 (explaining that without objective factual information on which to base a future dangerousness prediction, juries “can (and apparently do) fear that failing to impose a death sentence could lead to high levels of in-prison violence . . .”).

60. Cunningham & Sorensen, *supra* note 40, at 62.

capital defendant is “dangerous.”⁶¹ Consequently, capital defendants proffer prison violence risk assessments that take into account the low levels of prison violence to demonstrate that, if given a life sentence, the defendant would have a statistically based improbability of committing future dangerous acts.⁶²

The risk assessments proffered by capital defendants employ “base rate-driven and context-specific methodology.”⁶³ A base rate is “the statistical prevalence of a particular behavior in a given group over a set period of time”⁶⁴ and is “the most important single piece of information necessary to make an accurate [future dangerousness] prediction.”⁶⁵ In conducting one of these base rate-focused risk assessments, the expert first establishes “with what frequency capital offenders are violent in a particular prison environment.”⁶⁶ The expert then adjusts the resulting percentage—the base rate—for specific context, including the level of prison security or isolation.⁶⁷ This adjustment for context is a vital part of assessing the likelihood of future violence because “base rates may vary depending on the setting or context.”⁶⁸ Finally, with the base rate as an anchor, the expert individualizes the risk assessment by examining the defendant’s “history, behavior pattern, and disposition” and formulates a scientifically based prediction of that defendant’s likelihood to commit future violent acts.⁶⁹

As previously stated, the prevalence of serious prison violence is very low. The yearly rate of repeat murder in prison

61. See *supra* notes 39–50 and accompanying text (discussing the prosecution’s “experts” and the data on which they rely to make future dangerousness predictions).

62. See Cunningham & Sorensen, *supra* note 40, at 63 (“Expert testimony asserting such statistically based improbability, when it appears at capital sentencing, is invariably sponsored by the defense.” (footnotes omitted)).

63. *Id.* at 62.

64. Cunningham & Reidy, *supra* note 41, at 73.

65. JOHN D. MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 60 (1981).

66. Tanner, *supra* note 38, at 387.

67. See *id.* (discussing the risk assessment process).

68. Cunningham & Reidy, *supra* note 41, at 75.

69. See *id.* at 87 (stating that once the base rate is determined, “[i]t is at this juncture that a defendant’s history, behavior pattern, and disposition become relevant in individualizing the risk assessment”).

has been found to be less than one percent for murderers in general.⁷⁰ “Studies of capital murderers determined the base rates of violent rule infractions to be .06 per year or less,”⁷¹ and when “capital risk assessments for prison are anchored to these base rates, highly reliable estimates of an improbability of future serious violence result.”⁷² Conversely, “[w]hen prison risk estimates fundamentally deviate from or ignore these base rates, errors abound.”⁷³ Unlike risk assessments that incorporate prison violence base rates (the defense’s risk assessments), risk assessments that use only unscientific, “common sense” data (the prosecution’s risk assessments) are not reliable evaluations of that defendant’s likelihood to commit violence acts in the future.⁷⁴

Capital defendants recognize the importance of introducing base rate-focused risk assessments to the jury in order to counter intuition-based, unreliable risk assessments offered by the prosecution. Defendants maintain that, pursuant to Supreme Court jurisprudence, their proffered risk assessments are constitutionally required as both rebuttal and mitigating evidence.⁷⁵ Nevertheless, Virginia consistently denies capital defendants the opportunity to introduce these scientifically based risk assessments, violating fundamental constitutional mandates and departing from widespread acceptance of this evidence in other jurisdictions.

70. See Sorensen & Pilgrim, *supra* note 18, at 1256 (“The yearly rate of repeat murder in prison has been found to be .002 or less for murderers in general.”). The repeat murder rate is about .002 for murderers commuted from death sentences to life in prison sentences. *Id.* And “[t]his rate is consistent in situations where capital murderers serving life without parole and capital murderers serving death sentences were placed in the general prisoner population.” *Id.*

71. *Id.*

72. Cunningham & Sorensen, *supra* note 40, at 71.

73. *Id.*

74. See Cunningham, *supra* note 51, at 832 (“Past community violence is not strongly or consistently associated with prison violence; current offense, prior convictions, and escape history are only weakly associated with prison misconduct; and the severity of the offense is not a good predictor of prison adjustment.”).

75. See *infra* notes 118–62 and accompanying text (discussing the arguments put forth by Virginia capital defendants why such risk assessments should be admitted in Virginia capital sentencing proceedings).

*IV. Future Dangerousness and Risk Assessment in Virginia
Capital Cases*

Following the Supreme Court's decision in *Jurek*,⁷⁶ Virginia followed Texas's lead and enacted a new capital punishment statute that incorporated a future dangerousness statutory aggravating factor.⁷⁷ The Commonwealth's statutory scheme provides that a capital defendant is eligible for the death penalty only if the prosecution proves beyond a reasonable doubt the presence of at least one of two statutory aggravating factors: a finding of future dangerousness or a finding that the crime was outrageously or wantonly vile.⁷⁸ The future dangerousness

76. See *supra* notes 23–33 and accompanying text (discussing *Jurek*).

77. See *Smith v. Commonwealth*, 248 S.E.2d 135, 146 (Va. 1978) (stating that the Virginia General Assembly enacted the Commonwealth's modern death penalty statutes in 1977 following the pattern approved in *Jurek*); see also Jason J. Solomon, *Future Dangerousness: Issues and Analysis*, 12 CAP. DEF. J. 55, 58 (1999) ("After *Jurek*, Virginia passed death penalty statutes that included language similar to that approved in *Jurek*. Included in these statutes was the future dangerousness inquiry.").

78. See VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4(C) (2013) (providing Virginia's capital punishment statutory scheme). Two statutes comprise the Commonwealth's death penalty scheme: Section 19.2-264.2 and Section 19.2-264.4(C) of the Virginia Code. Section 19.2-264.2 dictates the conditions for the imposition of the death penalty, and states:

In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that 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 in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

Id. § 19.2-264.2. Section 19.2-264.4(C) dictates the sentencing proceeding in a capital case, and states:

The penalty of death 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 commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

statutory aggravating factor was originally determined to require the jury to assess whether the defendant displays a probability of committing future criminal acts.⁷⁹ As this section discusses, the Supreme Court of Virginia's interpretation of this statutory aggravating factor has, over time, diverged from the commonsense understanding of "future dangerousness," and Virginia's death penalty statute is now construed in such a way to completely bar from admission defense-sponsored, base rate-focused risk assessment evidence.

*A. In the Beginning: Smith v. Commonwealth*⁸⁰

The first case to challenge Virginia's new death penalty statutory scheme came in *Smith v. Commonwealth*. The petitioner in *Smith* brought a claim similar to the one brought in *Jurek*—that is, the petitioner argued that the statutory definitions of the two aggravating circumstances were so vague as to be unconstitutional.⁸¹ The Supreme Court of Virginia rejected Smith's future dangerousness argument, quoting a majority of the *Jurek* opinion as support for its decision.⁸² Similar to the *Jurek* Court's reasoning, the *Smith* court noted that although predicting future dangerousness is not easy, "prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system."⁸³

Id. § 19.2-264.4(C). Virginia's second aggravating factor—that the defendant's conduct in committing the crime was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim," *id.* § 19.2-264.2, is not discussed in this Note.

79. See *infra* notes 80–89 (discussing the Supreme Court of Virginia's original interpretation of the future dangerousness statutory aggravating factor).

80. *Smith v. Commonwealth*, 248 S.E.2d 135 (Va. 1978), *cert. denied*, 441 U.S. 967 (1979).

81. See *id.* at 148 (stating Smith's claim that the statutory definitions are unconstitutional because they "vest the sentencing authority with standardless sentencing power").

82. See Solomon, *supra* note 77, at 58 ("The [Virginia] court looked to the United States Supreme Court's decision in *Jurek* and quoted nearly all of the *Jurek* opinion relating to future dangerousness.").

83. *Smith*, 248 S.E.2d at 148 (quoting *Jurek v. Texas*, 428 U.S. 262, 275 (1976)).

The Virginia court noted that there is no constitutional error when the jury bases its prediction of future dangerousness on the defendant's prior criminal history, stating that

[i]f the defendant has been previously convicted of "criminal acts of violence," i.e., serious crimes against the person committed by intentional acts of unprovoked violence, there is a reasonable "probability," i.e., a likelihood substantially greater than a mere possibility, that he would commit similar crimes in the future. Such a probability fairly supports the conclusion that society would be faced with a "continuing serious threat."⁸⁴

In a footnote to this discussion, the court mentioned a secondary statutory predicate upon which the jury may base its prediction of future dangerousness: the circumstances surrounding the offense.⁸⁵ Virginia's highest court determined that the statute sufficiently guided the jury's discretion and was thus constitutional under *Jurek*.⁸⁶

The *Smith* decision was the first time that the Supreme Court of Virginia interpreted the Commonwealth's new statutory scheme to require that the jury look *backwards* when analyzing a defendant's *future* dangerousness.⁸⁷ This backwards-looking interpretation significantly influenced the development of the court's death penalty jurisprudence⁸⁸ and set the tone for the

84. *Id.* at 149 (footnote omitted).

85. *See id.* at 149 n.4 ("It should be noted that, while prior criminal conduct is the Principal [sic] predicate, the statute provides a further predicate, Viz., 'the circumstances surrounding the commission of the offense of which (the defendant) is accused.'").

86. *See id.* at 148, 151 (holding that the statute was not unconstitutionally vague).

87. *See id.* at 148–49 (indicating that the two predicates upon which a sentencer can predict future dangerousness are the defendant's prior criminal history and the circumstances surrounding the offense—two backwards-looking predicates).

88. *See, e.g.,* *Frye v. Commonwealth*, 345 S.E.2d 267, 283 (Va. 1986) (determining that unadjudicated acts of criminal conduct support a future dangerousness finding); *Edmonds v. Commonwealth*, 329 S.E.2d 807, 813 (Va. 1985) (stating that the jury is permitted to consider the "circumstances surrounding the commission of the offense" and the "heinousness of the crime" as determinative of future dangerousness), *cert. denied*, 474 U.S. 975 (1985); *Quintana v. Commonwealth*, 295 S.E.2d 643, 655 (Va. 1983) (stating that the "heinous circumstances surrounding this homicide" is the only evidence needed to support a finding of future dangerousness), *cert. denied*, 460 U.S. 1029 (1983);

admissibility (or, rather, nonadmissibility) of base rate-focused risk assessment evidence.⁸⁹

B. Abolition of Parole in Virginia Creates a New “Society”

The Virginia General Assembly abolished parole for felony offenses—which include capital murder⁹⁰—in 1995.⁹¹ A defendant convicted of capital murder in Virginia now faces only two possible sentences: life in prison without the possibility of parole, or death.⁹² Because a convicted capital defendant will never be released into society at large even if his life is spared, the only “society” to which the defendant might pose a threat is prison society.⁹³ Knowing this, capital defendants have shifted their defense strategy to focus on the likelihood that they will be a continuing threat to prison society. But the Supreme Court of Virginia, over time, has frustrated these efforts.

Clanton v. Commonwealth, 286 S.E.2d 172, 180 (Va. 1982) (providing the defendant’s prior convictions as evidence of future dangerousness); Clark v. Commonwealth, 257 S.E.2d 784, 789–90 (Va. 1979) (describing the defendant’s lack of remorse and prior criminal record as evidence of future dangerousness), *cert. denied*, 444 U.S. 1049 (1980).

89. See *infra* notes 118–62 and accompanying text (describing the Supreme Court of Virginia’s more recent jurisprudence surrounding the admission/exclusion of risk assessment evidence).

90. See VA. CODE ANN. § 18.2-30 (2013) (“Any person who commits capital murder, murder of the first degree, murder of the second degree, voluntary manslaughter, or involuntary manslaughter, shall be guilty of a felony.”). Capital murder includes fifteen statutorily defined offenses, including murder for hire, murder during a commission of a robbery, and murder of a law-enforcement officer. *Id.* § 18.2-31.

91. See *id.* § 53.1-165.1 (stating that the provisions for parole do not apply “to any sentence imposed or to any prisoner incarcerated upon a conviction for a felony offense committed on or after January 1, 1995”). Capital defendants who are sentenced to life in prison do not have the option to petition for geriatric parole. See *id.* § 53.1-40.01 (stating that geriatric parole—parole that may be granted only after the convict reaches the age of sixty-five—is not eligible to those persons who were convicted for a Class 1 felony offense). Thus, life actually means life for capital defendants in Virginia.

92. See *id.* § 19.2-264.4(A) (“In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.”).

93. See *id.* (providing the only two options that a capital defendant faces if he or she is convicted: life in prison without the possibility of parole, or death).

*1. An Attempt to Introduce General Prison Evidence Through a
Redefinition of “Society”*

Initially, capital defendants argued that, following the abolition of parole, the statutory definition of “society” should be limited to prison society because that was the only society in which a capital defendant would spend the remainder of his life.⁹⁴ The Supreme Court of Virginia rejected this argument outright, noting that the statute “requires that the jury make a factual determination whether the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society.”⁹⁵ The statute does not limit the definition of “society” to prison society simply because a defendant is ineligible for parole.⁹⁶ Because the court was unwilling to “rewrite the statute to restrict its scope,” it concluded that the statutory term “society” denotes society at large—a society into which the capital defendant will never be released.⁹⁷

Although the Supreme Court of Virginia determined that the statutory definition of “society” is not exclusively limited to prison society, capital defendants were still eager to introduce evidence about general prison conditions, including security measures taken to prevent violence. Defendants argued that evidence about prison conditions was relevant as both mitigation⁹⁸ and rebuttal⁹⁹

94. See *Lovitt v. Commonwealth*, 537 S.E.2d 866, 878 (Va. 2000) (“[The defendant] argues that, since he is ineligible for parole after being convicted of these offenses, the only society that should be considered in this case for purposes of ‘future dangerousness’ is prison society.”), *cert. denied*, 534 U.S. 815 (2001).

95. *Id.* at 879.

96. See *id.* (“The statute does not limit this [future dangerousness] consideration to ‘prison society’ when a defendant is ineligible for parole.”).

97. *Id.* See also *Tanner*, *supra* note 38, at 394 (“[T]he 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.”).

98. See *Tennard v. Dretke*, 542 U.S. 274, 284–85 (2004) (defining relevant mitigating evidence as “evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value” (citations and quotations omitted)).

99. See *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (plurality opinion) (determining that a defendant is denied due process of law when a capital defendant is not allowed to present all mitigating evidence—i.e. when a death sentence is imposed, at least in part, “on the basis of information which he had

evidence to demonstrate that they would not pose a future danger if the jury chose to spare their lives.¹⁰⁰ The Supreme Court of Virginia, however, rejected the arguments on both fronts.

2. *An Attempt to Introduce General Prison Evidence as Mitigating Evidence*

The Supreme Court of Virginia first rejected defendants' mitigation argument in *Cherrix v. Commonwealth*.¹⁰¹ Relying on a footnote in the U.S. Supreme Court's decision *Lockett v. Ohio*,¹⁰² the Virginia court noted that a trial court has discretion to "exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."¹⁰³ The court determined that because general information about prisons does not pertain to a defendant's history or experience, a trial court could appropriately exclude such prison evidence as irrelevant.¹⁰⁴ The court went on to distinguish the U.S. Supreme Court's holding in *Skipper v. South Carolina*,¹⁰⁵ which required the admission of evidence surrounding the defendant's own prior

no opportunity to deny or explain").

100. See *Cherrix v. Commonwealth*, 513 S.E.2d 642, 653 (Va. 1999) (arguing that evidence regarding the general nature of prison life and its effect on the capital defendant's future dangerousness through testimony of a penologist, sociologist, and other witnesses was admissible as mitigating evidence), *cert. denied*, 528 U.S. 873 (1999); *Burns v. Commonwealth*, 541 S.E.2d 872, 892–93 (Va. 2001) (arguing that evidence "describing the daily inmate routine, general prison conditions, and security measures" of maximum-security prisons was admissible as rebuttal evidence), *cert. denied*, 534 U.S. 1043 (2001).

101. *Cherrix v. Commonwealth*, 513 S.E.2d 642 (Va. 1999).

102. *Lockett v. Ohio*, 438 U.S. 586 (1978). The Court in *Lockett* held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (footnotes omitted). The Court stated in a footnote to this holding, however, that nothing in the Court's decision "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." *Id.* at 604 n.12.

103. *Cherrix*, 513 S.E.2d at 653 (quoting *Lockett*, 438 U.S. at 605 n.12).

104. See *id.* ("We agree with the conclusion of the trial court that 'what a person may expect in the penal system' is not relevant mitigation evidence.").

105. *Skipper v. South Carolina*, 476 U.S. 1 (1986).

jail behavior, stating that “none of the [general prison] evidence proffered at trial addressed Cherrix’s ability to conform or his experience in conforming to prison life, as the defendant’s evidence did in *Skipper*.”¹⁰⁶ Thus, the Supreme Court of Virginia made clear that information concerning general prison conditions alone would not be admitted as mitigating evidence in Virginia capital sentencing proceedings.

3. An Attempt to Introduce General Prison Evidence as Rebuttal Evidence

Virginia’s highest court rejected the argument that general prison life evidence serves as rebuttal evidence in *Burns v. Commonwealth*.¹⁰⁷ In *Burns*, the court first noted that the Commonwealth did not argue anything concerning specific prison conditions or the likelihood that a prisoner would commit violent crimes while in prison.¹⁰⁸ Thus, the general “prison life” evidence that the defendant attempted to offer would not actually rebut a specific argument made by the prosecutor.¹⁰⁹

The court also determined that broad “prison life” evidence could not be proffered as rebuttal evidence to the Commonwealth’s general future dangerousness claim.¹¹⁰ Because

106. *Cherrix*, 513 S.E. at 653 n.4 (citing *Skipper*, 476 U.S. at 4); see also Tanner, *supra* note 38, at 392–93 (“The court found that the proffered evidence regarding the ‘general nature of prison life,’ 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.”).

107. See *Burns v. Commonwealth*, 541 S.E.2d 872, 894 (Va. 2001) (“[W]e find no error in the circuit court’s decision quashing the subpoena directed to the Department of Corrections and refusing to admit evidence about prison life in a maximum security prison in rebuttal to the Commonwealth’s evidence in this case of Burns’ future dangerousness.”), *cert. denied*, 122 S. Ct. 621 (2001).

108. See *id.* at 893 (“[T]he Commonwealth offered no such evidence regarding the nature of prison life for a defendant convicted of capital murder or any other felony. Nor did the Commonwealth introduce evidence about the number of violent crimes committed in prison or the likelihood that a prisoner could escape.”).

109. See *id.* (“Burns’ evidence was not in rebuttal to any evidence concerning prison life.”).

110. See *id.* (“Evidence regarding the general nature of prison life in a maximum security facility is not relevant to that inquiry, even when offered in

the court interprets Virginia's death penalty statute to require the jury to look at particular aspects of the defendant when addressing future dangerousness,¹¹¹ the court stated that the relevant inquiry is "not whether [the defendant] *could* commit criminal acts of violence in the future but whether he *would*."¹¹² Essentially, the court determined that information involving the general nature of the prison system and the security measures taken within prisons to secure inmates has no bearing on whether a defendant possesses the propensity to commit acts of violence in the future.¹¹³

C. Reforming the Defense Strategy

Following the Supreme Court of Virginia's decisions regarding general prison evidence, defense attorneys adjusted their strategy in an attempt to comply with the court's rulings. Recognizing that general "prison life" data was not admissible as mitigation or rebuttal evidence, capital defendants attempted to offer individualized assessments, which incorporated prison data into the evaluation, to demonstrate the defendant's improbability of committing violent acts in the future.¹¹⁴ The Supreme Court of Virginia quickly rejected this revised approach in *Juniper v.*

rebuttal to evidence of future dangerousness such as that presented in this case.").

111. *See id.* ("[T]he focus must be on the particular facts of Burns' history and background, and the circumstances of his offense.").

112. *Id.*

113. *See id.* ("[A] determination of future dangerousness revolves around an individual defendant and a specific crime. Evidence regarding the general nature of prison life in a maximum security facility is not relevant to that inquiry, even when offered in rebuttal to evidence of future dangerousness.").

114. *See* Opening Brief for Appellant, *supra* note 3, at 42 ("The defense sought to introduce the expert opinion . . . that, based on [the defendant's] particular character, history, and background, he would be a low risk for violence in prison and would adapt positively to the prison environment.").

Commonwealth,¹¹⁵ *Porter v. Commonwealth*,¹¹⁶ and *Morva v. Commonwealth*.¹¹⁷

1. *Juniper v. Commonwealth*

In *Juniper*, the defendant requested that his court-appointed psychologist, Dr. Thomas Pasquale, testify that “Juniper’s risk assessment for future dangerousness was different in a prison setting from that in an ‘open community.’”¹¹⁸ The Supreme Court of Virginia affirmed the trial court’s denial of this request, stating that

[w]hile Dr. Pasquale may not have sought to offer specific evidence on a day in the life of a prisoner, as in *Cherrix*, he offered nothing to the trial court to support his opinion as being based on Juniper’s individual characteristics that would affect his future adaptability in prison and thus relate to a defendant-specific assessment of future dangerousness.¹¹⁹

The court determined that the psychologist’s testimony was not sufficiently individualized to the defendant so as to conform to the court’s prior decisions, and the testimony was properly precluded as irrelevant.¹²⁰

2. *Porter v. Commonwealth*

In *Porter*, the defense again attempted to introduce evidence concerning the defendant’s risk of future dangerousness in a narrowly tailored way. The defendant requested the appointment of Prison Expert Dr. Mark D. Cunningham “as an expert on the assessment of the risk of violence by prison inmates and, in

115. *Juniper v. Commonwealth*, 626 S.E.2d 383 (Va. 2006), *cert. denied*, 549 U.S. 960 (2006).

116. *Porter v. Commonwealth*, 661 S.E.2d 415 (Va. 2008), *cert. denied*, 556 U.S. 1189 (2009).

117. *Morva v. Commonwealth*, 683 S.E.2d 553 (Va. 2009), *cert. denied*, 131 S.Ct. 97 (2010).

118. *Juniper*, 626 S.E.2d at 422.

119. *Id.* at 424.

120. *See id.* (“The trial court thus correctly barred Dr. Pasquale’s generalized testimony and did not abuse its discretion in doing so.”).

particular, the risk of future dangerousness posed by the defendant if incarcerated in a Virginia penitentiary for life.”¹²¹ In support of this request, the defense claimed that the Supreme Court of Virginia’s prior decisions denying the introduction of such evidence were decided incorrectly, arguing that some evidence of prison life must be allowed to properly assess and predict a defendant’s future dangerousness.¹²² Porter argued that “context and statistical and actuarial data . . . are indispensable to the determination of risk” because “it is manifestly impossible for a defendant adequately to explain why he is not a continuing serious threat to society without introducing evidence of the conditions of prison incarceration, including prison security and the actual rates of serious criminal violence in prison.”¹²³

In response to Porter’s request, Virginia’s highest court reiterated, as it had in its prior decisions, that Virginia’s death penalty statute dictates that a defendant’s future dangerousness should only be determined by looking at three specific criteria: the defendant’s past criminal record, prior history, and the circumstances surrounding the offense.¹²⁴ Because Dr. Cunningham’s report involved a review of general prison data and conditions—and did not exclusively focus on the three criteria dictated by the statute—the trial court properly excluded the risk assessment as irrelevant to the question of future dangerousness.¹²⁵

121. *Porter*, 661 S.E.2d at 435.

122. *See id.* at 436 (“In his Prison Expert Motion, however, Porter primarily focused on criticizing prior decisions of this Court regarding prison risk assessment experts and lauding the virtues of various statistical modes of analysis to project rates of prison inmate violence.”).

123. *Id.* (internal quotation marks omitted).

124. *See id.* at 437 (“The plain directive of these statutes is that the determination of future dangerousness is focused on the defendant’s ‘past criminal record,’ ‘prior history’ and ‘the circumstances surrounding the commission of the offense.’”).

125. *See id.* at 442 (“Porter’s proffer in the Prison Expert Motion fails to address the statutory factors under Code § 19.2-264.2 and 19.2-264.4(C) as being individualized and particularized as to Porter’s prior history, conviction record and the circumstances of the crime.”).

3. *Morva v. Commonwealth*

With these decisions as precedent, capital defendants once more adjusted their defense strategy knowing that they were fighting an uphill battle. In *Morva*, the defense again requested that Dr. Mark Cunningham be appointed as an Expert on Prison Risk Assessment.¹²⁶ And again the defense argued that a risk assessment expert was needed in order to effectively present mitigating evidence and to rebut assertions of future dangerousness by the Commonwealth.¹²⁷ This case was distinguishable from prior cases, argued the defense, because *Morva*'s proffered risk assessment was much more individualized than those proffered in past cases.¹²⁸ *Morva* stated that the risk assessment in *Porter* was rejected because “[a]t no place in the motion [did Porter] proffer that Dr. Cunningham’s statistical analysis of a projected prison environment [would] focus . . . on the particular facts of [his] history and background, and the circumstances of his offense.”¹²⁹ *Morva*'s proffered risk assessment, on the other hand, integrated individualized characteristics into Dr. Cunningham’s statistical analysis and thus conformed to the court’s risk assessment precedent.¹³⁰ Dr. Cunningham proposed to “factor into his statistical analysis individualized characteristics that have been shown to reduce the likelihood of future violent behavior in prison, including *Morva*'s

126. See *Morva v. Commonwealth*, 683 S.E.2d 553, 561 (Va. 2009) (noting the defense’s motion for Dr. Cunningham’s appointment).

127. See *id.* at 562

Morva stated that he could not “effectively rebut assertions of ‘future dangerousness’ by the Commonwealth unless he [were] given the tools with which to inform the jury how to make reliable assessments of the likelihood of serious violence by an individual defendant in [a] prison setting—including security and the actual prevalence of serious violence” in a prison setting, which Dr. Cunningham’s testimony would provide.

128. See *id.* at 563 (“*Morva* claims that the proffer provided by Dr. Cunningham in this case is distinguishable from the proffer we held insufficient in *Porter*.”).

129. *Id.* (citations omitted).

130. See *id.* (“Due to the integration of these factors into the analysis, *Morva* claims that Dr. Cunningham’s testimony would have been ‘individualized’ to *Morva* rather than simply a generalization applicable to any convicted murderer.”).

prior behavior while incarcerated, age, level of educational attainment, and appraisals of his security requirements during prior incarceration.”¹³¹

In response to the defense’s argument, the Commonwealth cited the court’s prior decisions and contended that Dr. Cunningham’s testimony was not relevant as mitigating evidence because his “testimony would have related to conditions of confinement, not to Morva, and that such testimony, therefore, was not ‘particularized’ to Morva.”¹³² The Commonwealth also argued that because it had not introduced any evidence concerning Morva’s potential prison life—but, instead, limited its evidence “to the statutory requirements consisting of Morva’s prior history and the circumstances surrounding the offense”—Dr. Cunningham’s assessment did not rebut any specific evidence concerning prison life.¹³³

The Supreme Court of Virginia once again reiterated the principle that “[t]he specific language of the controlling statutes, Code §§ 19.2-264.2 and 19.2-264.4(C), dictates what evidence is relevant to the inquiry concerning future dangerousness.”¹³⁴ This language directs that the “relevant inquiry is not whether [a defendant] *could* commit criminal acts of violence in the future but whether he *would*.”¹³⁵ Thus, the death penalty statutes define the relevant evidence regarding the issue of future dangerousness, and a defendant’s probability of committing future acts of violence is not determined based on the Commonwealth’s ability to secure the defendant in prison but rather the defendant’s history and the circumstances surrounding the defendant’s offense.¹³⁶

The court went on to state that “[t]o be admissible, evidence relating to a prison environment must connect the specific characteristics of the particular defendant to his future

131. *Id.*

132. *Id.*

133. *Id.* at 563–64.

134. *Id.* at 564.

135. *Id.* (quoting *Burns v. Commonwealth*, 541 S.E.2d 872, 893 (Va. 2001)).

136. *See id.* at 565 (“Code §§ 19.2-264.2 and 19.2-264.4(C) do not put at issue the Commonwealth’s ability to secure the defendant in prison. The relevant evidence surrounding a determination of future dangerousness consists of the defendant’s history and the circumstances of the defendant’s offense.”).

adaptability in the prison environment.”¹³⁷ If the defense wishes to present evidence of conditions of prison life and the security measures used in maximum security facilities, the defense must ensure that the evidence “is specific to the defendant on trial and relevant to that specific defendant’s ability to adjust to prison life.”¹³⁸ The court then determined that Dr. Cunningham’s proffered testimony of prison life was inadmissible because it considered “general factors concerning prison procedure and security that are not individualized as to Morva’s prior history, conviction record, or the circumstances of his offense.”¹³⁹ Thus, Dr. Cunningham’s testimony was properly excluded by the trial court.¹⁴⁰

D. Where We End Up: Lawlor v. Commonwealth

The Supreme Court of Virginia’s decision in *Morva* gave capital defense attorneys a scintilla of hope. In its ruling, the court acknowledged that evidence relating to the prison

137. *Id.*

138. *Id.*

139. *Id.* at 566. The court discussed the different aspects of Dr. Cunningham’s evaluation that made the evidence inadmissible. Dr. Cunningham proposed to testify about “Virginia Department of Corrections’ procedures and security interventions that would act to significantly reduce the likelihood of an inmate engaging in serious violence in prison.” *Id.* at 565. But the court noted that “Dr. Cunningham does not claim that the use or effectiveness of such interventions is related in any way to Morva’s individual history, conviction record, or circumstances of his offense.” *Id.* The court then went on to explain itself:

The fact that being an inmate in a single cell, locked down twenty-three hours a day, with individual or small group exercise, and shackled movement under escort would greatly reduce opportunity for serious violence toward others, is not particular to Morva. It is true for any other inmate as well, and it is evidence of the effectiveness of general prison security, which is not relevant to the issue of Morva’s future dangerousness. Whether offered by an expert, or anyone else, evidence of prison life and the security measures used in a prison environment are not relevant to future dangerousness unless it connects the specific characteristics of a particular defendant to his future adaptability in the prison environment.

Id. at 565–66.

140. *See id.* at 566 (“[T]he circuit court did not err or abuse its discretion in denying the motion to appoint Dr. Cunningham as an expert for Morva.”).

environment—evidence that the defense would like to offer as rebuttal and mitigation to the Commonwealth's claim that a capital defendant will be dangerous in the future—*may* be admitted so long as it was properly individualized.¹⁴¹ It seemed that the court had not foreclosed the introduction of general prison evidence completely. This notion was quickly challenged in *Lawlor v. Commonwealth*.

In *Lawlor*, the defense sought to introduce Dr. Mark Cunningham's expert opinion—as both mitigating and rebuttal evidence—that, “based on Mr. Lawlor's particular character, history, and background, he would be a low risk for violence in prison and would adapt positively to the prison environment.”¹⁴² Although the trial court admitted Dr. Cunningham as an expert witness, the trial court rejected most of his testimony on the issue of future dangerousness because the testimony included Dr. Cunningham's expert opinion regarding Lawlor's likelihood to pose a future threat of danger to prison society only.¹⁴³ Dr. Cunningham attempted to discuss Lawlor's “specific employment history, continued contact with family and friends while in prison, and past appraisals by correctional officers,” and would have testified that these factors are “predictive that Mr. Lawlor represents a low likelihood of committing acts of violence while *in*

141. *See id.* at 565

To be admissible, evidence relating to a prison environment must connect the specific characteristics of the particular defendant to his future adaptability in the prison environment. . . . It must be evidence peculiar to the defendant's character, history, and background in order to be relevant to the future dangerousness inquiry. . . . *Conditions of prison life and the security measures utilized in a maximum security facility are not relevant to the future dangerousness inquiry unless such evidence is specific to the defendant on trial and relevant to that specific defendant's ability to adjust to prison life.*

(emphasis added) (citations omitted).

142. Opening Brief for Appellant, *supra* note 3, at 42; *see also* *Lawlor v. Commonwealth*, 738 S.E.2d 847, 882 (Va. 2013) (“Lawlor argues that Dr. Cunningham's testimony was not about generalized prison conditions. He argues it was sufficiently particularized based on attributes such as his age, prior behavior while incarcerated, education, and employment history, which are admissible under *Morva*.”).

143. *See* Opening Brief for Appellant, *supra* note 3, at 42 (“Although brief snippets of Dr. Cunningham's testimony were not excluded, the court generally, and emphatically, excluded it because the testimony focused on Mr. Lawlor's risk of serious violence *in prison*.”).

*prison.*¹⁴⁴ The trial court sustained the Commonwealth's objections to this testimony based on the Commonwealth's argument that the Supreme Court of Virginia's prior decision made clear that the issue of future dangerousness may not be limited to prison society.¹⁴⁵ The trial court reasoned that "when [Lawlor] or his witness tried to narrow the [statutory] language from 'society' to 'prison society,'" it would be "misleading to the jury."¹⁴⁶

1. Lawlor's Risk Assessment as Rebuttal Evidence

On appeal, the Supreme Court of Virginia took each of the defense's arguments in turn. Concerning the argument that Dr. Cunningham's testimony was admissible as rebuttal evidence, the defense argued that Dr. Cunningham's testimony did not merely discuss general prison conditions and was sufficiently particularized to the defendant as required by the court's decision in *Morva*.¹⁴⁷ The defense argued that the trial court erred in

144. *Id.* at 44–45 (emphasis added). Dr. Cunningham's testimony would have concluded with the following:

Q: Have you reached an opinion, to a reasonable degree of psychological certainty, based on all of the factors relevant to your studies of prison risk assessment, as to what Mark Lawlor's risk level is for committing acts of violence while incarcerated? And if so, what is your opinion?

A: Yes. It is my opinion based on my analysis of all of the relevant risk factors which are specific to Mr. Lawlor's prior history and background, that Mr. Lawlor represents a very low risk for committing acts of violence while incarcerated.

Q: Are all of your opinions concerning the above questions and answers about Mr. Lawlor grounded in scientific research and peer reviewed scientific literature?

A: Yes.

Id. at 45.

145. See Brief of the Commonwealth, *supra* note 2, at 36 ("The Commonwealth argued, and the [trial] court agreed, that th[e] [Supreme Court of Virginia] has made clear that the issue of future dangerousness may not be limited to prison society.").

146. *Id.*

147. See *Morva v. Commonwealth*, 683 S.E.2d 553, 565 (Va. 2009) ("To be admissible, evidence relating to a prison environment must connect the specific characteristics of the particular defendant to his future adaptability in the prison environment.").

excluding the testimony due to the fact that it was limited to the prison environment because if Lawlor was sentenced to life imprisonment, “prison society would be the only society to which he could pose a risk.”¹⁴⁸

Addressing this argument, the court emphasized that “the question of future dangerousness is about the defendant’s *volition*, not his *opportunity*, to commit acts of violence. Evidence of custodial restrictions on opportunity therefore is not admissible.”¹⁴⁹ Citing *Morva v. Commonwealth*,¹⁵⁰ the court reiterated that the issue “is not whether the defendant is physically capable of committing violence, but whether he has the mental inclination to do so.”¹⁵¹ Because Dr. Cunningham’s testimony was limited to prison society only,¹⁵² it was irrelevant to the statutory language that requires a future-dangerousness assessment to consider society as a whole.¹⁵³ The court determined that “[t]o be admissible as evidence rebutting the future dangerousness aggravating factor under the statutes, expert opinion testimony must not narrowly assess the defendant’s continuing threat to prison society alone.”¹⁵⁴ As such, the court determined that Dr. Cunningham’s testimony was properly excluded as irrelevant to the issue of future dangerousness.¹⁵⁵

148. *Lawlor v. Commonwealth*, 738 S.E.2d 847, 882 (Va. 2013).

149. *Id.*

150. *See supra* notes 126–39 and accompanying text (discussing *Morva*).

151. *Lawlor*, 738 S.E.2d at 882.

152. *See id.* (“It expressed Dr. Cunningham’s opinion of Lawlor’s risk of future violence in prison society only, rather than society as a whole.”).

153. *See id.* at 883 (“[The statute] requires that the jury make a factual determination whether the defendant ‘would commit criminal acts of violence that would constitute a continuing serious threat to society.’ The statute does not limit this consideration to ‘prison society’ when a defendant is ineligible for parole.” (quoting *Lovitt v. Commonwealth*, 537 S.E.2d 866, 879 (Va. 2000)).

154. *Id.*

155. *See id.* (stating that “evidence concerning a defendant’s probability of committing future violent acts, limited to the penal environment, is not relevant to consideration of the future dangerousness aggravating factor set forth” in the statute).

2. Lawlor's Risk Assessment as Mitigating Evidence

The defense also argued that Dr. Cunningham's testimony was admissible as mitigating evidence because jurors could reasonably find "that evidence of Mr. Lawlor's low risk of violence in prison (where he would be spending his entire life) warranted a sentence less than death."¹⁵⁶ The defense maintained that Dr. Cunningham's testimony did not constitute general evidence about what a person may expect in the prison setting, but rather his testimony concerned the defendant's "specific characteristics, such as his age, employment history, and ongoing connections with friends and family."¹⁵⁷

In response to this argument, the court noted that "[a]s with evidence rebutting the future dangerousness aggravating factor, the relevant inquiry is narrowly focused on whether the particular defendant is *inclined to* commit violence in prison, not whether prison security or conditions of confinement render him *incapable* of committing such violence."¹⁵⁸ The court determined that to satisfy *Morva's* standard, "the evidence must consist of more than the recitation of shared attributes as the basis for predicting similar behavior."¹⁵⁹ Statistical evidence regarding attributes shared by the defendant with others, and statistical models based on that evidence predicting the likelihood of violence in the future, are irrelevant.¹⁶⁰ Dr. Cunningham's proffered testimony merely

156. Opening Brief for Appellant, *supra* note 3, at 47.

157. *Id.* at 48–49.

158. Lawlor v. Commonwealth, 738 S.E.2d 847, 883 (Va. 2013). The court went on to note that "testimony relevant to a defendant's propensity to commit violence while incarcerated necessarily must be personalized to the defendant based on his specific, individual past behavior or record. Otherwise it cannot constitute evidence of the defendant's personal character and would be irrelevant even for purposes of mitigation." *Id.* at 883–84.

159. *Id.* at 884.

160. *See id.*

[T]he mere fact that an attribute is shared by others from whom a statistical model has been compiled, and that the statistical model predicts certain behavior, is neither relevant to the defendant's character nor a foundation for expert opinion. . . . Merely stating that the percentage of violent crimes committed by a specified demographic group sharing one of the defendant's attributes is lower, based on statistical models, than others who do not share it does not

(a) suppl[ied] an item of demographic data coupled with an unexplained, conclusory opinion that the datum indicates Lawlor will present a low risk of violence while incarcerated or (b) la[id] the foundation that the opinion is based on statistical models. While each datum is extracted from Lawlor's personal history, it sheds no light on his character, why he committed his past crimes and the crime for which he stood convicted, or how would it influence or affect his behavior while incarcerated.¹⁶¹

Thus, the Supreme Court of Virginia held that the trial court did not err by excluding Dr. Cunningham's testimony.¹⁶²

V. Argument

Lawlor redefined Virginia's future dangerousness aggravating factor entirely. In effect, the redefined aggravating factor no longer requires capital juries to perform a forward-looking risk assessment when conducting a future-dangerousness analysis.¹⁶³ Virginia capital juries are now required to conduct a character-based evaluation to determine a defendant's likelihood of committing future violent acts.¹⁶⁴ This section discusses the court's redefinition of the future dangerousness aggravating factor, highlighting the ways in which this redefinition completely changes the future dangerousness game in Virginia—drastically diverging from every other jurisdiction's interpretation of the aggravating factor—and runs afoul of both

suffice.

(citations omitted).

161. *Id.* at 885. The court held that one proffered answer was admissible, namely one that “establishes the fact that Lawlor did not engage in violent behavior during past periods of incarceration.” *Id.* However, this fact was already known to the jury through other evidence and consequently the trial court did not abuse its discretion. *Id.*

162. *See id.* (“In short, the proffered testimony is not probative of Lawlor's disposition to make a well-behaved and peaceful adjustment to life in prison. Accordingly, the circuit court did not abuse its discretion in excluding these questions and answers.” (citations and internal quotation marks omitted)).

163. *See infra* notes 179–79 and accompanying text (discussing the court's redefinition of the future dangerousness statutory aggravating factor).

164. *See infra* notes 176–79 and accompanying text (discussing the court's redefinition into a character-based assessment).

the Eighth Amendment and the Fourteenth Amendment's Due Process Clause of the U.S. Constitution.

A. *The Realities of Lawlor*

The Supreme Court of Virginia's decision in *Lawlor* was novel in many respects. *Lawlor* was the first decision to place an absolute bar on admission of base rate-focused risk assessments in Virginia capital trials.¹⁶⁵ It also marked the first time that the court definitively redefined Virginia's future dangerousness aggravating factor to be a character assessment rather than a forward-looking dangerousness assessment.¹⁶⁶ And, most importantly, the decision was the first time that the Virginia court departed so radically from all other interpretations of future dangerousness.¹⁶⁷ These "firsts," taken together, have significant constitutional implications for the Virginia death penalty statutory scheme.

1. *Total Exclusion of Base Rate-Focused Risk Assessments*

The Supreme Court of Virginia held in *Lawlor* that Dr. Cunningham's risk assessment testimony was not relevant as mitigating or rebuttal evidence and thus was inadmissible.¹⁶⁸ Quite simply, the court rejected an unchallenged risk assessment that would have taken into account every aspect of the

165. See *infra* notes 165–75 and accompanying text (discussing the total exclusion of base-rate focused risk assessments).

166. See *infra* notes 176–79 and accompanying text (discussing the redefinition of the future dangerousness aggravating factor).

167. See *infra* notes 180–93 and accompanying text (discussing Virginia's radical departure from other jurisdictions).

168. See *Lawlor v. Commonwealth*, 738 S.E.2d 847, 883 (Va. 2013) ("To be admissible as evidence rebutting the future dangerousness aggravating factor under the statutes, expert opinion testimony must not narrowly assess the defendant's continuing threat to prison society alone. The court therefore did not abuse its discretion by excluding Dr. Cunningham's testimony as rebuttal evidence on the future dangerousness."); *id.* at 885 ("[The evidence] sheds no light on [Lawlor's] character, why he committed his past crimes and the crime for which he stood convicted, or how would it influence or affect his behavior while incarcerated. It therefore is not personalized for the purposes of establishing future adaptability.").

defendant's character, background, and offense only because Dr. Cunningham proposed to connect his assessment to the defendant's known future environment—prison.¹⁶⁹ While the court did not state it explicitly, its holding in *Lawlor* essentially prohibits all valid prison violence risk assessments from entering into the future dangerousness equation. This is because a well-founded risk assessment for a capital defendant cannot be done *without* prison data.¹⁷⁰ No scientifically defensible risk assessment will exclude the setting in which risk is to be assessed or the base rates of violence in that setting.¹⁷¹ This is especially true for a capital sentencing risk assessment, as it is extremely relevant “to consider that prison is a highly structured and intensively supervised setting quite distinct from free society, warranting utilization of base rates that are specific to that

169. See *id.* at 883 (“[E]vidence concerning a defendant’s probability of committing future violent acts, limited to the penal environment, is not relevant to consideration of the future dangerousness aggravating factor set forth in [Virginia’s death penalty statute].”); *id.* at 884

We stress that characteristics alone are not character. Merely extracting a set of objective attributes about the defendant and inserting them into a statistical model created by compiling comparable attributes from others, to attempt to predict the probability of the defendant’s future behavior based on others’ past behavior does not fulfill the requirement that evidence be “peculiar to the defendant’s character, history, and background” under *Morva*.

170. See *supra* notes 58–75 and accompanying text (discussing defense experts’ risk assessment method); see also *Morva v. Commonwealth*, 683 S.E.2d 553, 572 (Va. 2009) (Koontz, J., dissenting)

By holding that this evidence regarding “context” is inadmissible, the majority effectively excludes all future prison risk assessment evidence and establishes a *per se* rule of inadmissibility because, as Dr. Cunningham stated, the conditions of confinement are a necessary component of such an assessment. The majority fails to recognize that when calculating the risk of future violent acts, “prison life” evidence is relevant and essential to achieving an individualized prediction.

171. See Cunningham & Reidy, *supra* note 41, at 75 (“It is clear that in order to adequately predict individual aggressive behavior, one must know something about the environment in which the individual is functioning.” (citations omitted)); Cunningham & Sorensen, *supra* note 40, at 71 (“As a growing body of data reflects, the serious prison violence of concern to capital risk assessments has a very low base rate. These low base rates provide a critically important foundation for reliable risk assessments for prison, *not* an impediment to them.”).

context.”¹⁷² Consequently, a risk assessment for a capital defendant that omits the relevant prison violence base rate from the evaluation will be fundamentally speculative and inaccurate.¹⁷³

Thus, the holding in *Lawlor* ensures that base rate-focused risk assessments will never be admitted. Base rates represent data from the general prison environment, and *Lawlor* makes clear that such general prison evidence will never be admissible.¹⁷⁴ It is ironic that the court considers a base rate—which, as previously discussed, is considered the most critical component of a reliable risk assessment¹⁷⁵—as “speculation.”¹⁷⁶ This is because the only alternative to base rate-focused risk assessments is precisely that: jury speculation.¹⁷⁷ Without evidence grounded in scientifically sound predictions, jurors will rely on conjecture, intuition, personal biases, and misinformation to assess the defendant’s likelihood of future violent acts.¹⁷⁸ Nonetheless, the court’s decision effectively prohibits capital

172. Cunningham & Reidy, *supra* note 41, at 75.

173. See Cunningham & Sorensen, *supra* note 40, at 71 (“[T]he most common significant error made by clinicians in the prediction of violent behavior relates to ignorance of information surrounding the statistical base rate of violence in the population in question.” (citations omitted)); Cunningham, *supra* note 51, at 836 (“Broadly conceptualized, accuracy in probability estimates requires statistical data specifying the rate of violence in a similarly situated group or in the face of a particular characteristic. Inaccuracy occurs when such data are unavailable or when the available data are ignored.”). See also *supra* notes 58–75 and accompanying text (discussing base rates).

174. See *Lawlor v. Commonwealth*, 738 S.E.2d 847, 883 (Va. 2013) (“The statute does not limit this consideration to ‘prison society’ when a defendant is ineligible for parole, and we decline [the defendant’s] effective request that we rewrite the statute to restrict its scope.” (quoting *Lovitt v. Commonwealth*, 537 S.E.2d 866, 879 (Va. 2000))); *id.* at 884 (“Merely stating that the percentage of violent crimes committed by a specified demographic group [in the prison environment] sharing one of the defendant’s attributes is lower, based on statistical models, than others who do not share it does not suffice.”).

175. See *supra* notes 58–75 and accompanying text (discussing the importance of base rates to a valid risk assessment).

176. *Lawlor*, 738 S.E.2d at 884 (quoting *Porter v. Commonwealth*, 661 S.E.2d 415, 442 (Va. 2008)).

177. See *supra* notes 39–57 and accompanying text (discussing speculation in future dangerousness predictions when base rates are not incorporated into the equation).

178. See Sorensen & Pilgrim, *supra* note 18, at 1254 (“[J]urors’ assessments of future dangerousness is highly subjective.”).

defendants from presenting as part of their defense a scientifically reliable risk assessment, a decision that has significant consequences for the meaning of the future dangerousness aggravating factor in Virginia.

*2. Virginia's Future Dangerousness Aggravating Factor No
Longer Requires Juries to Perform Forward-Looking Risk
Assessments*

The *Lawlor* court justified its exclusion of prison violence risk assessments on the grounds that Virginia's death penalty statute decrees what evidence is relevant to the future dangerousness inquiry.¹⁷⁹ "The relevant evidence is 'the past criminal record of convictions of the defendant,' . . . and 'evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused.'"¹⁸⁰ The court made clear that, under Virginia's death penalty statute, context is not relevant to a future dangerousness assessment in any way. The court also reiterated its holding from prior decisions that "the question of future dangerousness is about the defendant's *volition*, not his *opportunity*, to commit acts of violence."¹⁸¹

It follows that in order to satisfy Virginia's future dangerousness aggravating factor, the jury must *not* engage in a forward-looking risk assessment to determine whether the defendant is actually likely to commit future acts of violence. Instead, the court's requirement that the jury assess whether the defendant has the "mental inclination" to commit violence—based on statutorily defined, backwards-looking evidence—effectively requires the jury to engage in a subjective character assessment of the defendant.¹⁸² The jury must determine whether the

179. See *Lawlor*, 738 S.E.2d at 881 ("The statutes . . . define the evidence relevant to prove the future dangerousness aggravating factor, or the probability that the defendant 'would commit criminal acts of violence that would constitute a continuing serious threat to society.'").

180. *Id.* (citations omitted).

181. *Id.* at 882. See also *Morva v. Commonwealth*, 683 S.E.2d 553, 565 (2009) ("Our precedent is clear that a court should exclude evidence concerning the defendant's diminished opportunities to commit criminal acts of violence in the future due to the security conditions in the prison.").

182. See *Lawlor v. Commonwealth*, 738 S.E.2d 847, 882 (Va. 2013) ("[T]he

defendant possesses certain characteristics, based on his background, character, and record, that tend to show he is a person of violent character. In other words, the jury must make a finding as to whether or not the capital offense he committed was “in character.” This redefinition of the future dangerousness statutory aggravating factor departs drastically from all other jurisdictions’ interpretation of future dangerousness, and it is certainly not what the Supreme Court intended “future dangerousness” to mean when it decided *Jurek v. Texas*.

3. Virginia’s Redefinition Diverges From Every Other Jurisdiction

The Supreme Court of Virginia’s redefinition is in conflict with every other jurisdiction that has similar “future dangerousness” sentencing factors in its death penalty statutory schemes. This divergence is most obviously discerned by a comparison with the architect of the “future dangerousness” statute, Texas.¹⁸³ Recognizing that the terms in the death penalty statute relating to future dangerousness should be interpreted according to their “ordinary meaning,”¹⁸⁴ Texas courts understand that a future dangerousness assessment means that “the State has the burden of proving beyond a reasonable doubt that there is a probability that [the defendant] would commit criminal acts of violence in the *future*, so as to constitute a continuing threat, whether in or out of prison.”¹⁸⁵ Accordingly, Texas courts consistently permit capital defendants to present risk-assessment evidence that takes into account general prison conditions.¹⁸⁶

issue is not whether the defendant is physically capable of committing violence, but whether he has the mental inclination to do so.”); *see also id.* at 883 (“[T]he relevant inquiry is narrowly focused on whether the particular defendant is *inclined to commit violence in prison*, not whether prison security or conditions of confinement render him *incapable* of committing such violence. Unlike inclination or volition, capacity—i.e., what a prisoner *could* do—is not relevant to character.”).

183. *See supra* note 23 and accompanying text (discussing Texas as the first state to use future dangerousness in its sentencing scheme).

184. *King v. State*, 553 S.W.2d 105, 107 (Tex. Crim. App. 1977).

185. *Druery v. State*, 225 S.W.3d 491, 506–07 (Tex. Crim. App. 2007).

186. *See, e.g., Matson v. State*, 819 S.W.2d 839, 852–54 (Tex. Crim. App. 1991) (finding reversible error to exclude actuarial testimony by risk-assessment

Oregon also interprets its future dangerousness statutory language “as those words are commonly understood.”¹⁸⁷ Because a future dangerousness inquiry necessarily involves a forward-looking assessment, Oregon courts allow capital defendants to introduce risk assessments that take into account their future environment.¹⁸⁸ Thus, capital defendants in Oregon are generally allowed to present risk assessment evidence that incorporates general prison conditions, including prison security measures.¹⁸⁹ And Oklahoma courts, like Oregon and Texas courts, define future dangerousness according to the “common sense” meaning of the term.¹⁹⁰ Oklahoma’s future dangerousness statutory aggravating factor is “phrased in conventional and understandable terms, . . . and presents the sentencer with the type of *forward-looking inquiry* that is a permissible part of the

expert). The *Matson* court rejected the State’s argument that the expert’s testimony was inadmissible because “the witness based his opinion on experience in the criminal justice system and probability estimates ‘in general’ rather than on individuals with characteristics and backgrounds similar to those of appellant,” because denying the defendant the opportunity to present this evidence “would be tantamount to preventing appellant from presenting his own side of the case.” *Id.* at 852–53. *See also* *Anderson v. Quarterman*, 204 Fed. App’x 402, 406 (5th Cir. 2006) (noting that at trial, defense counsel presented testimony from a psychologist, who testified that “testing had confirmed that Anderson was dangerous but that he believed that the security in the Texas prison system would be able to prevent Anderson from committing violent acts in prison”); *Threadgill v. State*, 146 S.W.3d 654, 671 (Tex. Crim. App. 2004) (noting that the trial court allowed the defendant to call the prison warden to testify “about the prison classification system and controls in place to maintain security and safety within the prison system”).

187. *State v. Tucker*, 845 P.2d 904, 914 (Or. 1993).

188. *See State v. Douglas*, 800 P.2d 288, 296 (Or. 1990) (“When the jury considers the threat that the defendant might pose because of future violent crimes, it may consider the threat to prison society.”).

189. *See, e.g., id.* at 296

The evidence in a particular case could make an instruction on the possibility of release relevant to the jury’s assessment of future dangerousness. For example, an expert might testify that the defendant would not pose a threat to prison society, because of its structured environment, but would pose a threat to society at large, if released.

190. *See Sanchez v. State*, 223 P.3d 980, 1007 (Okla. Crim. App. 2009) (noting that the future dangerousness aggravating factor “is not unconstitutional if it has some common sense core of meaning . . . that criminal juries should be capable of understanding” (citations and internal quotation marks omitted)).

sentencing process.”¹⁹¹ Because a future dangerousness assessment necessarily involves a forward-looking evaluation, Oklahoma courts allow defendants to proffer base rate-focused risk assessment evidence.¹⁹² Likewise, Idaho courts interpret its future dangerousness statutory language as requiring a forward-looking assessment of the defendant’s probability to commit dangerous acts in the future but have not yet evaluated the admissibility of base rate-focused risk assessment evidence.¹⁹³

The jurisdictions discussed in this section all follow the U.S. Supreme Court’s interpretation of what it means for the jury to make a “future dangerousness” assessment.¹⁹⁴ That is to say, a future dangerousness inquiry involves a capital jury “predict[ing] future behavior.”¹⁹⁵ The Supreme Court of Virginia’s redefinition of the future dangerousness aggravating factor from a forward-looking risk assessment to a character-based risk assessment diverges from this commonsense interpretation, and Virginia’s future dangerousness statutory aggravating factor can no longer

191. *Id.* at 1008 (emphasis added) (citations and internal quotation marks omitted).

192. *See* *Rojem v. State*, 207 P.3d 385, 390–91 (Okla. Crim. App. 2009) (discussing Dr. Cunningham’s testimony at sentencing, for which “Cunningham created a developmental profile for [the defendant] explaining the formative basis for his decision-making, as well as a risk assessment profile to determine his potential for future dangerousness in prison”); *Hanson v. State*, 72 P.3d 40, 51–53 (Okla. Crim. App. 2003)

This Court has never held inadmissible evidence of a defendant’s propensity for future violence, in or out of prison, to support continuing threat. Both this Court and the Supreme Court have explicitly held that psychiatric evidence is relevant on this issue. Its scientific reliability has long been accepted. This Court has not held that the specific “risk assessment” evidence of future dangerousness, combining clinical results with a defendant’s own history, is inadmissible. Neither this Court nor the United States Supreme Court have suggested that this evidence would be irrelevant on the issue of future dangerousness.

193. *See* *State v. Creech*, 670 P.2d 463, 472 (1983) (citing *Jurek v. Texas* and discussing future dangerousness as requiring a prediction of future behavior). Additionally, after extensive research it appears that Wyoming courts have neither interpreted the meaning of its future dangerousness statutory aggravating factor nor evaluated the admissibility of base rate-focused risk assessment evidence.

194. *See supra* notes 23–33 and accompanying text (discussing the Supreme Court’s interpretation of future dangerousness).

195. *Jurek v. Texas*, 428 U.S. 262, 274 (1976).

be justified by the Supreme Court's decision in *Jurek*.¹⁹⁶ Consequently, a reexamination of Virginia's future dangerousness statutory aggravating factor is needed. As evidenced below, Virginia's future dangerousness aggravating factor, as the Virginia Supreme Court now interprets it, no longer survives constitutional scrutiny.

B. The Troubling Implications of Lawlor

The Supreme Court of Virginia's redefinition of the statutory aggravating factor from a forward-looking risk assessment to a subjective character assessment is troubling because of its constitutional implications. The redefinition of the aggravating factor produces significant Eighth Amendment issues in light of the provision's prohibition on cruel and unusual punishment. This section discusses the constitutional concerns that are raised by the Virginia court's interpretation of future dangerousness in *Lawlor*.

1. The Redefined Statute Violates the Eighth Amendment's Prohibition Against the Arbitrary Implementation of the Death Penalty

The Supreme Court has recognized that the Eighth Amendment's ban on cruel and unusual punishments prohibits capital punishment sentencing procedures that create a substantial risk of arbitrary and capricious imposition.¹⁹⁷ In essence, "capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all."¹⁹⁸ To ensure consistent and fair application of the death penalty, an aggravating

196. See *Smith v. Commonwealth*, 248 S.E.2d 135, 148 (Va. 1978) (upholding Virginia's future dangerousness statutory aggravating factor based principally on the Supreme Court's approval of the aggravating factor in *Jurek*).

197. See *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (Douglas, J., concurring) ("The high service rendered by the 'cruel and unusual' punishment clause . . . is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.").

198. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

circumstance must meet two specific constitutional requirements: it cannot apply to every convicted murderer and it cannot be unconstitutionally vague, in the sense that the language of the aggravating circumstance itself fails to provide “any guidance to the sentencer.”¹⁹⁹

Virginia’s future dangerousness statutory aggravating factor is not necessarily unconstitutional on its face.²⁰⁰ Rather, it is the Supreme Court of Virginia’s redefinition that runs afoul of the Constitution. As discussed above, the court’s redefinition asks the jury to conduct a character-based assessment of the capital defendant to determine whether it is likely, given the defendant’s disposition, that he would commit violent acts in the future. Because the court limits the jury’s assessment only to evidence of the capital defendant’s prior history and offense, effectively every risk assessment could conclude that the defendant would pose a future danger to society. All capital defendants have committed heinous crimes. When considering evidence of background, character, record, and the prosecution’s subjective “expert” testimony, it would seem that every capital defendant possesses characteristics tending to show that he is a person of violent character.²⁰¹ Thus, the court’s interpretation of Virginia’s death penalty statute does not pass constitutional muster because the sentencing factor could reasonably apply to every convicted murderer.²⁰²

This leads to the standardless sentencing discretion that the Court has deemed intolerable under the Constitution. The redefined aggravating factor does not “channel the jury’s discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the

199. *Arave v. Creech*, 507 U.S. 463, 471 (1993).

200. *See supra* notes 23–33 and accompanying text (discussing *Jurek v. Texas* and the Supreme Court’s approval of the future dangerousness aggravating factor).

201. *See* Cunningham, *supra* note 51, at 834 (“[U]nder what circumstances would a recently convicted . . . capital offender not be considered dangerous, compared with a law-abiding member of the community?”).

202. *See* Godfrey v. Georgia, 446 U.S. 420, 428–29 (1980) (striking down as unconstitutional one of Georgia’s statutory aggravating factors because “[a] person of ordinary sensibility could fairly characterize almost every murder as ‘outrageously or wantonly vile, horrible and inhuman’”).

process for imposing a sentence of death.”²⁰³ It now irrationally departs from the commonsense understanding that the aggravating factor directs the jury to undertake a predictive inquiry about the defendant’s likelihood to commit additional violent crimes if allowed to live²⁰⁴ and instructs the jury to perform some arbitrary assessment of the defendant’s character. Absent further guidance, a juror of ordinary sensibility could reasonably characterize any capital defendant to be a person of dangerous character. This “standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury” violates the Eighth Amendment.²⁰⁵

*2. The Redefined Statute Violates the Eighth Amendment’s
Mandate that the Defendant Has the Right to Present All
Mitigating Evidence*

Not only does the redefined future dangerousness aggravating factor violate the Eighth Amendment’s prohibition against the arbitrary implementation of the death penalty, it also violates the defendant’s right to present all relevant mitigating evidence. The Supreme Court held in *Lockett v. Ohio*²⁰⁶ that, pursuant to the Eighth Amendment, the jury must “not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”²⁰⁷ The Court later stated that “evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating.”²⁰⁸ “[A] defendant’s disposition to make a well-behaved and peaceful adjustment to

203. *Id.* at 427 (citations and internal quotation marks omitted).

204. *See* *Jurek v. Texas*, 428 U.S. 262, 274 (1976) (stating that in conducting a future dangerousness analysis, the jury is instructed to “predict future behavior”).

205. *Godfrey*, 446 U.S. at 429.

206. *Lockett v. Ohio*, 438 U.S. 586 (1978).

207. *Id.* at 604.

208. *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986); *see also id.* at 7 n.2 (“Such evidence of adjustability to life in prison unquestionably goes to a feature of the defendant’s character that is highly relevant to a jury’s sentencing determination.”).

life in prison is itself *an aspect of his character* that is by its nature relevant to the sentencing determination.”²⁰⁹ The Supreme Court of Virginia’s preclusion of base rate-focused risk assessment evidence, which specifically takes into account a defendant’s ability to adapt to prison life, violates these fundamental constitutional standards.

Individualized risk assessments, like the one that the defendant proffered in *Lawlor*, are based on characteristics such as the defendant’s age, employment history, and ongoing connections with family and friends.²¹⁰ Such evidence, which serves the “explicit purpose of convincing the jury that [the defendant] should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment,” is powerful mitigation evidence because it tends to make jurors less likely to impose death.²¹¹ It demonstrates to the jury that a life sentence, rather than a death sentence, is appropriate. Risk assessment evidence demonstrating that the defendant would pose a low risk of violence in the prison environment is exactly what the Court has held cannot constitutionally be excluded as mitigating evidence.

The preceding discussion argues that the Supreme Court of Virginia’s redefinition of the Commonwealth’s future dangerousness aggravating factor runs afoul of the Eighth Amendment. The court’s reinterpretation of the aggravating factor cannot stand in light of the Constitution’s ban on cruel and unusual punishment. The argument may be made, however, that *Lawlor* did not in fact redefine the aggravating factor. Although it is difficult to defend this argument,²¹² the next section addresses the constitutional deficiencies in Virginia’s future dangerousness statutory aggravating factor if the court’s decision in *Lawlor* is interpreted in this alternative manner.

209. *Id.* at 7 (emphasis added).

210. See Opening Brief for Appellant, *supra* note 3, at 48 (“Dr. Cunningham’s opinions . . . did not constitute evidence of what a person may expect in the penal system[,] . . . but concern[ed] the history or experience of the defendant, . . . reflecting Mr. Lawlor’s specific characteristics . . .”).

211. *Skipper*, 476 U.S. at 7.

212. See *supra* notes 168–79 and accompanying text (discussing *Lawlor*’s impact on Virginia’s future dangerousness statutory aggravating factor).

C. An Alternative Reading of Lawlor

Notwithstanding the foregoing argument that *Lawlor* effectively redefines Virginia's statutory aggravating factor to require the jury to perform a character assessment rather than a risk assessment, one might assert that the court's decision does not inevitably redefine the aggravating circumstance to require a character assessment. If *Lawlor* is read to require Virginia juries to make a forward-looking assessment to predict a capital defendant's likely future behavior, the aggravating factor is nevertheless unconstitutional. This is because the capital defendant's constitutional right to rebut the Commonwealth's future dangerousness claim is unquestionably violated.

The U.S. Supreme Court's capital decisions have long presumed that claims of future dangerousness will be subjected to thorough adversarial testing.²¹³ This is because the Due Process Clause requires that the defendant be allowed to rebut all accusations by the prosecution.²¹⁴ The Supreme Court of Virginia's holding in *Lawlor* runs afoul of this constitutional mandate by prohibiting a vital tool in the defense's rebuttal argument, and for all practical purposes, it renders the prosecution's claim of future dangerousness a nearly un rebuttable assertion.

The Supreme Court of Virginia's interpretation of the "future dangerousness" statutory aggravating factor denies the Virginia capital defendant the constitutionally required opportunity to "present his own side of the case."²¹⁵ The capital defendant is prohibited from presenting the strongest argument concerning why he is unlikely to commit serious violent acts in the future—namely, the commonsense understanding that "preventative

213. See, e.g., *Barefoot v. Estelle*, 463 U.S. 880, 901 (1983) ("We are unconvinced . . . that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case.").

214. See *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986) ("Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, . . . elemental due process require[s] that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977))).

215. *Barefoot*, 463 U.S. at 901.

measures such as lock down, isolation, and shackled movement reduce and counter the opportunity for violence toward others.”²¹⁶ A capital defendant is left to present only backwards-looking evidence. Because the defendant is a convicted capital murderer, who undoubtedly committed a gruesome crime, there is no reasonable way he can effectively argue that he will not pose a danger to society in the future with such a limited range of evidence. In essence, the defendant is “not permitted the means to effectively respond to the Commonwealth’s assertions” that he would likely commit violent acts in the future if allowed to live out his life in prison.²¹⁷ If *Lawlor* is read to require a forward-looking assessment, it is clear that Virginia law now bases a death penalty sentence on unsubstantiated speculation about the defendant’s likely behavior in society,²¹⁸ after an imaginary release from prison which is legally certain never to happen,²¹⁹ while prohibiting the defendant from presenting his strongest rebuttal argument.

The Supreme Court of Virginia’s exclusion of base rate-focused evidence is in tension with the U.S. Supreme Court’s decision in *Simmons v. South Carolina*, which involved the due process right to rebut the prosecution’s claims of future dangerousness.²²⁰ The Court in *Simmons* held that capital defendants have a due process right to rebut prosecution claims of future dangerousness by informing juries that their “life imprisonment” sentencing option carries with it no chance of parole.²²¹ This “life without parole” evidence has nothing to do

216. Tanner, *supra* note 38, at 385.

217. *Morva v. Commonwealth*, 683 S.E.2d 553, 569 (Va. 2009) (Koontz, J., dissenting).

218. See *supra* notes 59–74 and accompanying text (discussing the counter-intuitive reality that the actual rate of serious violence by imprisoned murderers is far lower than the “continuing threat” predictions of misinformed sentencing jurors).

219. See *supra* notes 90–93 and accompanying text (discussing abolition of parole in Virginia).

220. See *Simmons v. South Carolina*, 512 U.S. 154, 165 (1994) (“Like the defendants in *Skipper* and *Gardner*, petitioner was prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death.”).

221. See *id.* at 171 (“The State may not create a false dilemma by advancing generalized arguments regarding the defendant’s future dangerousness while, at the same time, preventing the jury from learning that the defendant never

with a defendant's past record, history, or offense, and yet the Supreme Court determined that it was appropriate and critical evidence to rebut the prosecution's future dangerousness claim.²²²

The *Simmons* decision demonstrates that, despite what the Supreme Court of Virginia has mistakenly held, merely because evidence is generally applicable to all inmates does not automatically disqualify it from consideration as rebuttal evidence. Because the relevant inquiry is constitutional in nature rather than statutory, evidence that does not necessarily pertain to a defendant's past record, history, or offense may nonetheless be constitutionally required. Risk assessment evidence is precisely that type of constitutionally mandated evidence.

Accordingly, even if the Supreme Court of Virginia's decision in *Lawlor* requires a forward-looking risk assessment in determining a capital defendant's future dangerousness, the aggravating circumstance cannot withstand constitutional scrutiny. Either way it is interpreted, it is undoubtedly time for a critical reassessment of the Commonwealth's understanding of "future dangerousness."

VI. Conclusion

Death is different.²²³ Because of its finality, any death penalty scheme deserves increased precautions to ensure that it is not imposed speciously. Despite this reality, Virginia law places a defendant's future dangerousness at the center of its capital sentencing process but does little to guarantee its fair implementation. The Supreme Court of Virginia's latest decision

will be released on parole.").

222. See *id.* at 165 ("The logic and effectiveness of [the defendant's] argument naturally depended on the fact that he was legally ineligible for parole and thus would remain in prison if afforded a life sentence.").

223. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)

[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

in *Lawlor* solidifies once and for all the fundamental unfairness of the Commonwealth's capital sentencing scheme.

The Supreme Court of Virginia's long and convoluted course to its current interpretation of Virginia's future dangerousness statutory aggravating factor has ended in a construal of the aggravating factor that runs afoul of essential constitutional standards. A future dangerousness inquiry under Virginia's capital sentencing scheme now requires a jury to base its future dangerousness assessment not on a prediction of a defendant's likely future behavior but instead on some amorphous facet of the defendant's character.²²⁴ By banning modern risk assessment methodology in Virginia capital proceedings and allowing unscientific and unreliable evidence in its stead, capital juries are left to make unfettered determinations as to which capital defendants live and which capital defendants die. Such unrestrained infliction of the death penalty is a clear violation of the Supreme Court's long-established rule that a sentence of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner.²²⁵

Virginia's steadfast fixation with the death penalty has led it to issue its most far-reaching decision to date. Not only does *Lawlor* go well beyond any other jurisdiction,²²⁶ it offends constitutional standards on multiple fronts. Critical changes are needed to the Commonwealth's capital sentencing structure. A future dangerousness inquiry should not involve a nebulous evaluation of the capital defendant's character—it should entail a prediction into the defendant's likely future behavior based on empirical, reliable risk assessment evidence. The Virginia sentencing process should allow capital defendants to provide a jury with an accurate understanding of life without parole and

224. See *supra* notes 176–79 and accompanying text (discussing the Supreme Court of Virginia's redefinition of the aggravating factor).

225. See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (“[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”).

226. See *supra* notes 183–93 and accompanying text (discussing the difference between Virginia's interpretation of future dangerousness and other jurisdictions' interpretations).

should not leave jurors to speculate about possibilities. Unless Virginia corrects its interpretation of its future dangerousness statutory aggravating factor, the current capital sentencing scheme runs too great a risk that the death penalty will be applied “sparsely, selectively, and spottily to unpopular groups.”²²⁷

227. *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (Douglas, J., concurring).