No. 16-

IN THE

Supreme Court of the United States

WILLIAM CHARLES MORVA,

Petitioner,

v.

DAVID ZOOK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether a state rule that excludes as irrelevant evidence that a capital defendant is unlikely to pose a risk of future violence in prison is contrary to or an unreasonable application of this Court's precedent under the Eighth Amendment and Due Process Clause.

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William Charles Morva respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-29a) is published at 821 F.3d 517. The district court's opinion (App. 31a-159a) is unreported but available at 2012 WL 5383160. The Supreme Court of Virginia's opinion (App. 161a-204a) is reported at 278 Va. 329. The state trial court's oral order (App. 205a-206a) is unreported.

JURISDICTION

The court of appeals entered judgment on May 5, 2016 (App. 1a) and denied rehearing on June 1, 2016 (App. 207a). On August 12, 2016, the Chief Justice extended the time for filing a petition for certiorari to September 29, 2016. On September 19, 2016, the Chief Justice further extended the time for filing to October 28, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Eighth and Fourteenth Amendments to the United States Constitution and the Antiterrorism and Effective Death Penalty Act (AEDPA) are reproduced in the Appendix (App. 209a).

STATEMENT

It has long been clearly established that a criminal defendant facing the death penalty must be afforded certain rights during sentencing. The Eighth Amendment guarantees the defendant the right to introduce all evidence in mitigation, *see, e.g.*, *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and the Due Process Clause guarantees him the right to rebut any prosecution claim that he will pose a continuing threat to society in the future, *see, e.g.*, *Simmons* v. *South Carolina*, 512 U.S. 154 (1994); *Skipper* v. *South Carolina*, 476 U.S. 1 (1986). In *Skipper*, this Court squarely held that a capital defendant is entitled under both constitutional provisions to introduce evidence bearing on his likely future conduct in prison—specifically, evidence that he "would not pose a danger if spared (but incarcerated)." *Skipper*, 476 U.S. at 5. Such evidence, the Court recognized, is not only "'mitigating' in the sense that [it] might serve

as a 'basis for a sentence less than death'"; it also directly rebuts the allegation that the defendant will continue to pose a danger if returned to the prison environment. *Id.* at 4-5 & n.1.

Despite this clearly established law, the Supreme Court of Virginia has repeatedly held that any evidence that takes the prison environment into account is "irrelevant" and inadmissible in capital cases because it is not sufficiently individualized and does not address whether the defendant will pose a danger to society at large—a setting to which he will never return, given Virginia's abolition of parole for capital offenders. Virginia is undisputedly an outlier in this respect. Consistent with this Court's precedent, all other jurisdictions recognize that evidence addressing a capital defendant's likely future conduct in prison is relevant and often critical to determining the defendant's future dangerousness.

In this case, the Virginia courts excluded the testimony of a recognized prison-violence risk-assessment expert at William Morva's capital trial. The expert had proposed to testify, based on Mr. Morva's individual characteristics and the low rates of serious violence in Virginia prisons, that Mr. Morva was unlikely to pose a threat to anyone if incarcerated. With that testimony excluded, the prosecution argued freely to the jury—without fear of any meaningful rebuttal—that Mr. Morva would endanger the lives of prison guards unless sentenced to death. As two dissenting justices of the Supreme Court of Virginia explained, the court's decision left Mr. Morva with "little, if any, defense to the imposition of the death penalty." App. 193a.

The Fourth Circuit nonetheless denied habeas relief, adopting an unduly narrow reading of this Court's

precedent and failing to recognize the constitutional principles at stake. Its decision perpetuates the conflict between Virginia's approach and that of every other death-penalty jurisdiction. And, by declaring Virginia's approach reasonable, it effectively insulates Virginia law from review. Without this Court's intervention, Virginia courts will continue to impose death sentences based on incomplete mitigation records and predictions of future dangerousness that defendants have no ability to rebut.

A. Background And Capital Trial

In August 2006, Mr. Morva had been in jail in Montgomery County, Virginia for about a year, awaiting trial for attempted burglary, attempted robbery, and related charges. On August 20, Mr. Morva complained of injuries and was transported to a nearby hospital. After receiving medical treatment, Mr. Morva assaulted and disarmed the deputy sheriff assigned to escort him. Using the deputy's gun, Mr. Morva then fatally shot an unarmed hospital security guard, Derrick McFarland, and fled the scene.

The next morning, a local resident spotted Mr. Morva on a walking trail in Montgomery County. Still armed with the deputy's gun, Mr. Morva shot and killed the local sheriff's officer who responded to the sighting, Corporal Eric Sutphin. Mr. Morva was apprehended in a thicket near the trail later that day. He was arrested and charged with capital murder and other crimes.

In Virginia, a capital defendant is death-eligible only if the prosecution proves one or both of two statutory aggravating factors beyond a reasonable doubt: (i) "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," and (ii) "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." Va. Code Ann. § 19.2-264.4(C); *see also id.* § 19.2-264.2. Before trial, the prosecution notified Mr. Morva and the trial court that it would seek a sentence of death by proving the statutory aggravating factor of future dangerousness.

In response, Mr. Morva asked the trial court to appoint a well-known forensic psychologist and expert in scientific prison-violence risk assessment, Dr. Mark Cunningham. Dr. Cunningham's qualifications were undisputed. He had published extensively on the topic of prison-violence risk assessment, including dozens of publications relating specifically to the incidence of violence among capital murderers in prison, CAJA137-140, and he had testified as an expert in more than 100 state and federal capital sentencing proceedings, CAJA137.

Mr. Morva's motion argued that he had a right under the Eighth and Fourteenth Amendments to introduce Dr. Cunningham's testimony, CAJA80-83 (citing *Gardner* v. *Florida*, 430 U.S. 349 (1977); *Skipper* v. *South Carolina*, 476 U.S. 1 (1985); *Simmons* v. *South Carolina*, 512 U.S. 154 (1991)), and set forth the reasons why he needed it. Mr. Morva explained that, in light of Virginia's abolition of parole for capital offenders, *see* Va. Code Ann. § 19.2-264.4(A), the jury's determination of the first statutory aggravating factor had to consider whether he was likely to pose a continuing threat *in prison*. To do so, the jury needed the "tools" to "make reliable assessments of the likelihood of serious violence by an individual defendant in the

prison setting." CAJA72-73. In particular, Mr. Morva argued that the jury required information about the conditions of incarceration he would experience if sentenced to life imprisonment and information about the actual prevalence of serious violence in prisons. *Id.*; *see also* CAJA142 (Dr. Cunningham explaining that without expert testimony, the jury would have "no mechanism to understand or incorporate base rate data" or "appreciate the importance of context").

Mr. Morva further explained that jurors "tend to greatly overestimate the incidence of prison violence." CAJA73. In reality, the prevalence of serious violence in prisons is significantly lower than in the general community. CAJA76. Mr. Morva cited a Texas study concluding that only 5 percent of capital inmates—all of whom had been predicted to pose a continuing threat to society—committed serious acts of violence in prison. CAJA78. That same study concluded that jurors who sentence a defendant to death may overestimate a defendant's likelihood to engage in serious acts of violence by as much as 100 times. CAJA78-79.

The trial court denied Mr. Morva's request for Dr. Cunningham's appointment on the ground that his proposed testimony was not relevant. Relying on settled Virginia precedent, the court held that evidence about a defendant's "environment and structure within a maximum security prison" is inadmissible in a capital case. App. 206a.

Mr. Morva moved for reconsideration, arguing that exclusion of Dr. Cunningham's testimony violated his federal constitutional rights to rebut allegations of future dangerousness and to present mitigating evidence to the factfinder. CAJA172-173 (citing *Simmons*, 512 U.S. 154; *Lockett* v. *Ohio*, 438 U.S. 586 (1978); *Skipper*,

476 U.S. 1). Dr. Cunningham elaborated on his proposed testimony in a declaration accompanying Mr. Morva's motion, explaining that "[r]ates of assaults in the Virginia Department of Corrections are very low." CAJA154. At the time, inmates subject to maximum-security conditions were held in a single cell, locked down for 23 hours per day, and shackled during escorts. CAJA159-160. Dr. Cunningham explained that inmates held under similar conditions commit serious assaults on correctional officers at an annual rate of only 6 per 10,000 inmates—less than one tenth of one percent. CAJA160. Dr. Cunningham acknowledged that these findings are counterintuitive, making it all the more important to ensure that the jury has this information. CAJA154.

Dr. Cunningham further explained that he would tailor his risk assessment to Mr. Morva's personal characteristics—characteristics that have been shown empirically to increase or decrease the risk of violence in prison. CAJA144. Dr. Cunningham described some of the statistical conclusions he expected to be relevant, including that:

- "The seriousness of the offense of conviction and escape history are not predictive of misconduct or violence in prison." CAJA146;
- "Inmates serving life-without-parole sentences are not disproportionately more likely [than parole-eligible inmates] to perpetrate assaults in prison, and have been disproportionately less likely to be involved in assaultive misconduct in some studies." CAJA147;
- "Capitally convicted inmates serving life terms are unlikely to perpetrate serious violence in prison. The likelihood of this violence becomes markedly

and progressively less as the severity of the violence specified increases." CAJA148; and

- "The murder of a law enforcement officer in the capital offense is not reliably associated with a higher rate of prison violence." CAJA153.

Dr. Cunningham also demonstrated how an assessment based in part on group statistical data would still be individualized to Mr. Morva. He explained that he would adjust the data to account for Mr. Morva's "demographic features, adjustment to prior incarceration, offense and sentence characteristics, and other factors." CAJA154. He further explained that "group data of one sort or another" is at the center of *all* scientific predictions of behavior. CAJA154-155. A psychologist can only diagnose a patient as clinically depressed, for example, by comparing that patient to "a group of individuals who displayed a similar constellation of symptoms." CAJA155. The same principle is true of violence risk assessment. Any conclusions an expert draws about a defendant's future risk of violence from his history, personality characteristics, or psychological diagnoses "all rely on group statistical data as their scientific foundation." CAJA155.

The trial court denied the motion for reconsideration. The sentencing phase of trial thus proceeded without Dr. Cunningham's testimony. As anticipated, the prosecution argued that Mr. Morva would commit future acts of violence in prison unless sentenced to death. The prosecution and its witnesses described Mr. Morva's criminal history and his talk of kidnapping and extortion. CAJA510-513, 517-518. The prosecution also cited a letter Mr. Morva wrote to his mother in September 2005 about his experience in jail awaiting trial. In the letter, he told his mother he was "getting very

sick" in jail, and that he was afraid the guards would allow him to die. In the passage highlighted by the prosecution, Mr. Morva wrote: "If I feel like I am about to die, then I will make sure that I am not the only one. I will kick an unarmed guard in the neck and make him drop. Then I'll stomp him until he is as dead as I'll be." CAJA461, 978-979.

In mitigation, Mr. Morva relied primarily on the testimony of a forensic neuropsychologist and forensic psychiatrist, who confirmed that Mr. Morva suffers from schizotypal personality disorder. CAJA763-764, 795-801. Schizotypal personality disorder is less severe than schizophrenia but shares some of its features, including "odd beliefs," "magical thoughts that influence behavior," and "suspiciousness or paranoid ideation." CAJA802-808. The psychiatrist explained that Mr. Morva has "a way of seeing the world that one could say is not fully in his control," and that his disorder is "a factor that influences how he sees the world and how he acts." CAJA822-824.

In closing, the prosecution argued that Mr. Morva would pose a future danger to society at large and in prison, asserting that Mr. Morva was likely to escape again, and that when he did, he would "hurt[]" and "murder[] people." CAJA892-893, 907. The prosecution argued that Mr. Morva would pose a threat to "the safety and security of guards":

> We're talking about a prisoner who shoots uniformed officers. Those people are entitled to protection in the world too. Jail guards, prison guards. They are part of society and they are at risk from that Defendant without a doubt. You need look no further than his actions and his words to know that those guards are at risk.

CAJA893-894. Mr. Morva, the prosecution argued, would pose an even greater risk of violence in prison than he had in the past. Citing Mr. Morva's letter to his mother, the prosecution asked the jury: "If one month [in jail] causes you to develop the heart and the mind to kill a jail guard, … what is the prospect of life in prison going to cause that person to feel justified in doing to those prison guards?" CAJA895-896. The prosecution concluded by asserting that Mr. Morva "hates jail guards," and by stressing the likelihood that he would murder again unless sentenced to death: "Could there be anything worse, could there be anything worse? Yes, there could. One thing. And that would be if that Defendant ever hurt or killed another person." CAJA907-908.

The only rebuttal Mr. Morva could offer was testimony that he had no disciplinary infractions during his previous 18 months at the regional jail. CAJA734-737. The exclusion of Dr. Cunningham's testimony precluded Mr. Morva from presenting evidence to disprove the assumptions on which the prosecution's claim of future dangerousness depended. And it left him with no ability to present the jury with a scientifically grounded assessment of the risk he would actually pose within the prison environment.

The jury found the prosecution had established both statutory aggravating factors beyond a reasonable doubt and sentenced Mr. Morva to death. CAJA909-914.

B. Direct Appeal

The Supreme Court of Virginia upheld the trial court's denial of Mr. Morva's motion to appoint Dr. Cunningham and affirmed Mr. Morva's conviction and

sentence. The court acknowledged the individualized nature of Dr. Cunningham's proffered assessment, recognizing that he "proposed to provide testimony that concerns Morva's history and background, prior behavior while incarcerated, age and educational attainment, and [that] such factors might bear on his adjustment to prison." App. 183a. Relying on a long line of state precedent, however, the court held that Dr. Cunningham's testimony was nonetheless irrelevant because he proposed to rely in part on information about the prison environment that was "not particular" to Mr. Morva—namely, information about prison procedures and security. App. 184a. In the court's view, evidence of future dangerousness must relate specifically and only to the defendant's "character, history, and background"; it cannot pertain to "[i]ncreased security measures [or] conditions of prison life" that applied equally to other inmates. App. 182a.

The court acknowledged Mr. Morva's constitutional arguments, but determined that this Court's jurisprudence does not preclude state courts from "'exclud[ing], as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.'" App. 180a (quoting *Burns* v. *Commonwealth*, 541 S.E.2d 872, 873 (Va. 2001)).

Two justices dissented. They recognized that the majority was "effectively adopt[ing] a *per se* rule that expert prison risk assessments are inadmissible to rebut evidence of future dangerousness in a capital murder case." App. 190a (Koontz, J., dissenting). That rule "fail[ed] to recognize that when calculating the risk of future violent acts, 'prison life' evidence is relevant and essential to achieving an individualized prediction." App. 200a-201a. In Mr. Morva's case, the exclusion of Dr. Cunningham's testimony had deprived Mr. Morva

of the ability to respond to the prosecution's prediction of future dangerousness, contravening this Court's decision in *Skipper*, 476 U.S. 1. Given the prosecution's direct appeal to the jury's fears, the dissent would have held the error was not harmless beyond a reasonable doubt. App. 203a. Indeed, by leaving him with "little, if any, defense to the imposition of the death penalty," the dissent concluded that the exclusion of Dr. Cunningham's testimony "result[ed] in a fundamentally unfair trial." App. 190a, 193a.

This Court denied certiorari. *Morva* v. *Virginia*, 562 U.S. 849 (2010).

C. Federal Habeas Petition

Following the denial of state post-conviction relief, Mr. Morva sought habeas relief in federal court. Mr. Morva argued that the denial of his request for Dr. Cunningham's appointment violated two clearly established rights: his due process right to rebut allegations of future dangerousness and his Eighth Amendment right to present all relevant evidence in mitigation. The district court dismissed the petition. App. 31a.

The U.S. Court of Appeals for the Fourth Circuit affirmed. The court first held that the relevant question was not whether the Virginia courts had unconstitutionally prohibited Mr. Morva from presenting mitigating evidence or rebutting future dangerousness—an argument the court said was framed at "too high a level of generality" for purposes of 28 U.S.C. § 2254(d)—but whether due process "require[d] the appointment of a state-funded nonpsychiatric expert … where other state-funded experts had been provided." App. 10a. Considering that narrower question, the court observed that this Court "has never addressed a capital

defendant's right to a state-funded nonpsychiatric expert," and that the state court "did not unreasonably apply clearly established federal law in requiring Morva to show a particularized need for his requested expert." App. 10a-12a (discussing *Ake* v. *Oklahoma*, 470 U.S. 68 (1985)).

The court then considered the state courts' basis for concluding that Mr. Morva had not shown a sufficient need for Dr. Cunningham's appointment—namely, the Supreme Court of Virginia's holding that Dr. Cunningham's "testimony regarding prison life, prison security, and statistics on similarly situated defendants' instances of violence in prison" was "irrelevant and therefore inadmissible" under "Virginia precedent on the relevance of prison-environment evidence to a future-dangerousness assessment." App. 12a. Addressing that decision, the court of appeals held that it was "not unreasonable under U.S. Supreme Court precedent" to exclude prison-environment evidence or statistical evidence about violence in prison as irrelevant. App. 14a. Distinguishing *Skipper* and *Simmons*, the Fourth Circuit held that "[a] defendant's constitutional right to present mitigating evidence related to his character, criminal history, and the circumstances of his offense does not upset a state court's broad discretion in determining the admissibility of other, nonindividualized evidence." App. 14a-15a (citing *Lockett*, 438 U.S. at 604 & n.12). The court therefore concluded that "the Supreme Court of Virginia did not unreasonably apply U.S. Supreme Court precedent by deeming irrelevant evidence that did not relate specifically to Morva's character, background, criminal record, or the circumstances of his offense—i.e., evidence regarding general prison life and security offered to show that Morva's 'opportunities to commit criminal acts of violence in the

future would be severely limited in a maximum security prison.'" App. 15a.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION CONTRAVENES THIS COURT'S PRECEDENT AND LEAVES UNCHECKED VIRGINIA'S OUTLIER PROHIBITION ON EVIDENCE ASSESSING A CAPITAL DEFENDANT'S RISK OF FUTURE VIOLENCE IN PRISON

This Court has long recognized two related constitutional protections for capital sentencing. First, a capital defendant has a due process right to rebut allegations of future dangerousness with evidence bearing on his likelihood of committing future violent acts—regardless whether that evidence is "individualized" to the defendant. Second, a capital defendant has a right to present all mitigating evidence that might influence the jury to select a sentence other than death—including evidence that the defendant "would not pose a danger if spared (but incarcerated)." *Skipper*, 476 U.S. at 5. By holding that the state court's rule excluding prison-violence risk-assessment evidence was not contrary to or an unreasonable application of clearly established federal law, the Fourth Circuit contravened this Court's precedent and perpetuated the conflict between Virginia's approach and that of every other death-penalty jurisdiction.

A. Clearly Established Law Protects Capital Defendants' Rights In Sentencing

1. Right to rebut allegations of future dangerousness

In *Jurek* v. *Texas*, 428 U.S. 262 (1976), this Court upheld the constitutionality of Texas's capital-sentencing scheme. Then, as now, a Texas jury deciding

whether to impose the death penalty had to determine whether there was "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* at 269 (opinion of Stewart, Powell, and Stevens, JJ.). The Court explained that assessing a defendant's future dangerousness under that standard requires a "prediction of future criminal conduct." *Id.* at 275. Recognizing that it is "not easy to predict future behavior," the Court deemed it "essential" that "the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Id.* at 275-276.

Several jurisdictions, including Virginia, adopted similar statutory aggravating factors after *Jurek*, making future dangerousness a prominent feature of capital sentencing. Over decades of reviewing sentences imposed under these schemes, this Court has consistently adhered to its initial understanding of future dangerousness. The inquiry is "forward-looking," *Johnson* v. *Texas*, 509 U.S. 350, 369 (1993), and focuses on the defendant's likely real-world conduct, *see Barefoot* v. *Estelle*, 463 U.S. 880, 898 (1983) (future-dangerousness inquiry requires "predictions of future behavior").

As relevant here, this Court has recognized that future dangerousness is a function of context and, accordingly, that a defendant's "probable future conduct *in prison*" is often a critical aspect of the inquiry. *Skipper*, 476 U.S. at 5 n.1 (emphasis added). Indeed, "the question of a defendant's likelihood of injuring others in prison is precisely the question posed by" the future-dangerousness issue. *Franklin* v. *Lynaugh*, 487 U.S. 164, 179 n.9 (1988). This understanding has long informed prosecution arguments on future dangerousness. In *Skipper*, for example, the prosecution "urged the jury to return a sentence of death in part because

[the] petitioner could not be trusted to behave if he were simply returned to prison." 476 U.S. at 5 n.1; *see also, e.g.*, *Giarratano* v. *Commonwealth*, 266 S.E.2d 94, 101 (Va. 1980) (describing prosecution evidence that the defendant "if incarcerated, would constitute a homicidal threat to himself and to the prison population").

In *Skipper*, this Court held that a defendant has a constitutional right to rebut the prosecution's claim of future dangerousness by introducing evidence bearing on his "probable future conduct in prison." 476 U.S. at 5 n.1. "Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty," the Court held, excluding such evidence would run afoul of "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" *Id.* (quoting *Gardner*, 430 U.S. at 362); *see also id.* at 9 (Powell, J., concurring) (death sentence should be vacated "because [petitioner] was not allowed to rebut evidence and argument used against him").

This Court expanded on *Skipper* in *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), where the defendant sought to rebut the prosecution's claim of future dangerousness by introducing evidence that he did not pose a real risk of future violence given the practical constraints of life imprisonment. Specifically, he argued that he posed a threat only to elderly women—a group he would not encounter in prison. *Id.* at 157 (plurality). The defendant sought to bolster the impact of that evidence by informing the jury that he would not be eligible for parole if sentenced to life imprisonment. *Id.* The Court held that a capital defendant who will be ineligible for parole has a due process right to inform the jury of that fact. *Id.* at 161-162 (plurality); *id.* at 178 (O'Connor, J., concurring in the judgment); *see also*

Lynch v. *Arizona*, 136 S. Ct. 1818, 1819 (2016) (per curiam) (reaffirming *Simmons*).

Simmons rested on the recognition that future dangerousness is a context-specific analysis, requiring the jury to consider all information that may bear on a defendant's likely future behavior. *See* 512 U.S. at 163 (plurality) ("In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant."). The future-dangerousness inquiry for a parole-ineligible defendant will naturally differ in kind from the future-dangerousness inquiry for a defendant who may one day reenter society: For a parole-ineligible defendant, the Court said, "[t]he State is free to argue that the defendant will pose a danger to others *in prison* and that executing him is the only means of eliminating the threat to the safety of *other inmates or prison staff*." *Id.* at 165 n.5 (plurality) (emphasis added).

In light of *Skipper* and *Simmons*, it is clearly established that a capital defendant whose only alternative to death is life imprisonment has a right to rebut the prosecution's allegation of future dangerousness by presenting information and evidence about his probable future conduct in prison.

2. Right to present all mitigating evidence

It is also clearly established that the sentencer in a capital case may "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." *Lockett*, 438 U.S. at 604. The Court has repeatedly reaffirmed that rule. *See, e.g.*, *Hitchcock* v. *Dugger*, 481 U.S. 394 (1987); *Eddings* v.

Oklahoma, 455 U.S. 104 (1982); *see also McKoy* v. *North Carolina*, 494 U.S. 433, 441 (1990) ("[T]he mere declaration that evidence is 'legally irrelevant' to mitigation cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less than death.").

In *Skipper*, this Court held that a capital defendant must be allowed to introduce in mitigation evidence that "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." 476 U.S. at 7. That disposition to adjust to life in prison is "an aspect of his character that is by its nature relevant to the sentencing determination," as it could persuade the jury that "he should be spared the death penalty." *Id.* Accordingly, such evidence is "mitigating" in the sense that it "might serve 'as a basis for a sentence less than death.'" *Id.* at 4-5 (quoting *Lockett*, 438 U.S. at 604). As this Court subsequently explained, *Skipper* thus established that "[a] capital jury must be allowed to consider a broader category of mitigating evidence than normally relevant in noncapital proceedings." *Ayers* v. *Belmontes*, 549 U.S. 7, 28 (2006).

This Court has held that rule to be "clearly established" for purposes of federal habeas review under 28 U.S.C. § 2254(d). *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 246 (2007). In particular, *Lockett* and *Skipper* clearly establish that a capital defendant has an Eighth Amendment right to present all relevant evidence in mitigation—including evidence establishing that he would pose no undue threat to others if confined to life in prison. *Skipper*, 476 U.S. at 7.

B. All Other Death-Penalty Jurisdictions Follow This Court's Clearly Established Law

This Court's jurisprudence is so well settled that all other death-penalty jurisdictions that have considered the question have held that capital defendants are constitutionally entitled to introduce evidence bearing on their risk of future dangerousness in the prison environment. Virginia alone categorically excludes evidence assessing risk of future violence in prison.

In *People* v. *Smith*, 347 P.3d 530, 559-560 (Cal. 2015), the California Supreme Court held that a defendant has a due process right to present evidence of prison conditions to rebut allegations of future dangerousness. The trial court had excluded expert testimony on prison security measures and the defendant's ability to adjust to life in prison, offered by the defendant to rebut the prosecution's evidence of his previous escape attempts and violent conduct in jail. Reversing, the state supreme court held: "[w]hen … the prosecution raises an inference of future dangerous conduct in prison as part of its case in aggravation, the defendant is entitled to respond with evidence that his chances to inflict harm in prison will be limited." *Id.* at 559. Critically, the court underscored that the outcome was compelled by *Simmons*, *Skipper*, and *Gardner*, stating that the defendant's right to present evidence rebutting the future-dangerousness aggravator is "settled, and of constitutional dimension." *Id* at 558-559. The exclusion of such evidence created "an unfair advantage" for the prosecution on "the critical question" of the penalty phase, by "significantly enhanc[ing]" the impact of the prosecution's future-dangerousness claim. *Id.* at 559.

In Oklahoma, which also makes future dangerousness a factor in capital sentencing, the Court of Criminal

Appeals has similarly recognized a capital defendant's settled right under *Skipper* to rebut allegations of future dangerousness "by presenting expert evidence [on that subject]." *Hanson* v. *State*, 72 P.3d 40, 51-53 (Okla. Crim. App. 2003). In *Hanson*, the trial court had excluded the testimony of a risk-assessment expert, whose qualifications the State had challenged. The Court of Criminal Appeals reversed and remanded for an evaluation of the expert's reliability, admonishing that any error in excluding the testimony "would be of constitutional magnitude." *Id.* Oklahoma courts have since reaffirmed defendants' right to offer expert risk assessments, as well as expert testimony about the processes of institutionalization and the decreasing likelihood of violence as inmates age. *See Johnson* v. *State*, 95 P.3d 1099, 1103-1104 (Okla. Crim. App. 2004); *Rojem* v. *State*, 207 P.3d 385, 389 (Okla. Crim. App. 2009) (expert presented a "risk assessment profile to determine [the defendant's] potential for future dangerousness in prison").

Federal courts, too, recognize the settled constitutional rights at stake when capital defendants are barred from presenting prison-risk-assessment evidence. In *United States* v. *Troya*, 733 F.3d 1125, 1133, 1138 (11th Cir. 2013), for example, the Eleventh Circuit held that the district court had erred by excluding expert testimony that the defendant "could be safely managed in prison given a variety of factors supported by statistical data." The court explained that under *Simmons*, the defendant "had a right to rebut [the prosecution's] evidence." *Id.* at 1135.

Other jurisdictions routinely admit evidence assessing a defendant's risk of violence in prison. Indeed, the relevance of such evidence often goes unchallenged, further underscoring the clearly established nature of

the defendant's right to introduce it.[1] In Texas, for example, capital defendants frequently present expert testimony about their probability of violence in prison. *See, e.g.*, *Coble* v. *State*, 330 S.W.3d 253, 266, 285-286 (Tex. Crim. App. 2010) (recounting testimony that defendant was "in the lowest risk group for violence in prison"); *see also Renteria* v. *State*, 2011 WL 1734067, at *3-4 (Tex. Crim. App. May 4, 2011) (noting testimony that defendant had a "very low probability" of violence in prison based on individualized considerations).

The same is true in other state and federal courts. *See, e.g.*, *State* v. *Burns*, 344 P.3d 303, 331 (Ariz. 2015), *cert. denied*, 136 S. Ct. 95 (2015); *Archuleta* v. *Galetka*, 267 P.3d 232, 265-266 (Utah 2011); *State* v. *Douglas*, 800 P.2d 288, 296 (Or. 1990). Indeed, in *United States* v. *Caro*, 597 F.3d 608, 616 (4th Cir. 2010), a federal capital defendant convicted of committing murder in Virginia was able to present testimony by Dr. Cunningham that he "would be unlikely to endanger anyone during a life sentence"—but only because he was tried in federal court.

As these cases demonstrate, the admissibility of evidence about a defendant's risk of violence in prison is settled and uncontroversial outside Virginia's courts. Other jurisdictions recognize and adhere to this Court's understanding of future dangerousness as requiring a prediction of a defendant's actual future conduct. Under that approach, "the likelihood that a defendant does not or will not pose a heightened risk of violence in the

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[1] Courts upholding the exclusion of expert prison risk-assessment evidence have done so either because the expert was not qualified, *see, e.g.*, *Weisheit* v. *State*, 26 N.E.3d 3, 9-10 (Ind. 2015), or because the prosecution did not claim the defendant would pose any danger in the prison environment, *see, e.g.*, *United States* v. *Taylor*, 814 F.3d 340, 359 (6th Cir. 2016). Neither circumstance is present here. *See supra* pp. 5, 8-10.

structured prison community is a relevant, indeed important, criterion" in assessing future dangerousness, even if it is not "the exclusive focus." *Coble*, 330 S.W.3d at 269; *see also State* v. *Addison*, 87 A.3d 1, 118-120 (N.H. 2013) (information about expected conditions of confinement can be critical to determining whether defendant "poses a realistic threat while serving the rest of his natural life in a high security environment"); *State* v. *Sparks*, 83 P.3d 304, 323 (Or. 2004) ("whether a defendant will be a danger to 'society' includes the consideration of whether that defendant will be a danger to prison society").

Consistent with their understanding of this Court's holdings, courts outside Virginia recognize the importance of informing the jury about "whether the prison environment offers opportunities for violence," as well as "evidence concerning the efficacy of [the prison's] measures to control such opportunities." *Cole* v. *State*, 2014 WL 2807710, at *30 (Tex. Crim. App. June 18, 2014); *see also, e.g.*, *United States* v. *Snarr*, 704 F.3d 368, 395 (5th Cir. 2013) (describing testimony about security conditions that would "preclude [the defendants] … from engaging in further dangerous activity"); *United States* v. *Whitten*, 610 F.3d 168, 177 (2d Cir. 2010) (describing defense witness's testimony about controls in place to prevent prison violence). Such evidence is particularly important as a means of providing "necessary context" for jurors, who "ordinarily will not have the personal experience or expertise to know what opportunities for violence exist in the prison setting." *Sparks*, 83 P.3d at 323-324.

C. Exclusion Of Mr. Morva's Prison-Violence Risk Assessment Was Contrary To And An Unreasonable Application Of Clearly Established Federal Law

Perpetuating the conflict between Virginia's approach and the practice of all other death-penalty jurisdictions, the Fourth Circuit erroneously held that excluding evidence tending to show a capital defendant poses a low risk of future violence in prison is not unreasonable under AEDPA's deferential standard. App. 8a-10a, 14a. But AEDPA does not shield a state-court decision that is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). The Supreme Court of Virginia's decision in this case was "contrary to" clearly established law on a capital defendant's right to rebut claims of future dangerousness and to present all relevant evidence in mitigation, particularly given the "materially indistinguishable facts" of *Skipper*. *See Bell* v. *Cone*, 535 U.S. 685, 694 (2002). At a minimum, the decision "unreasonably applie[d]" the governing legal principles to the facts of Mr. Morva's case. *Id.*

1. Right to rebut allegations of future dangerousness

As explained, *Skipper* and *Simmons* establish beyond dispute that a capital defendant has a right to rebut allegations of future dangerousness with evidence that he will not pose an undue danger if sentenced to life imprisonment. *Skipper* involved circumstances substantially similar to this case. There, the defendant sought to introduce evidence about his past conduct that would bear on his "probable future conduct in prison." 476 U.S. at 5 n.1. Here, Dr. Cunningham proposed to

draw upon Mr. Morva's individual characteristics, including his past conduct in prison, to demonstrate that his likelihood of committing future violent crimes in prison was low. And although Dr. Cunningham intended to take into account the conditions of Mr. Morva's confinement, *Simmons* dispelled any argument that rebuttal evidence must be limited to an individual defendant's own past behavior. *Simmons* reaffirmed that the future-dangerousness inquiry is forward-looking and highly dependent on context, and therefore requires the jury to consider all information potentially bearing on his conduct—including the defendant's likely future setting. *E.g.*, 512 U.S. at 163 ("In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant.") (plurality).

The Supreme Court of Virginia's decision, which rested solely on state precedent deeming the evidence at issue irrelevant and inadmissible, unreasonably contravened this Court's precedent. First, the court reiterated its view that future dangerousness is about the defendant's character for violence, not about the actual likelihood that he will commit future violent acts. App. 181a-182a; *see also Lawlor* v. *Commonwealth*, 738 S.E.2d 847, 882 (Va. 2013) ("[T]he issue is not whether the defendant is physically capable of committing violence, but whether he has the mental inclination to do so."). That understanding cannot be squared with this Court's repeated explanations that assessing future dangerousness is a *predictive* exercise. Nor can it be squared with *Simmons*: If the only relevant question in assessing future dangerousness is a defendant's *character* for violence, rather than his *ability* to commit acts of violence, then a defendant's eligibility for parole should be irrelevant. Yet *Simmons* held that this information was obviously relevant to determining future dangerousness.

Second, the Supreme Court of Virginia deemed Dr. Cunningham's testimony irrelevant because his assessment would take into account the conditions under which Mr. Morva would be confined if not sentenced to death. App. 184a (testimony inadmissible because general information about prison procedures and security was "essential" to Dr. Cunningham's assessment). This refusal to acknowledge the relevance of context in assessing a defendant's future dangerousness is directly contrary to this Court's common-sense understanding of what the future-dangerousness inquiry entails. *See Simmons*, 512 U.S. at 163 (recognizing that duration of prison sentence is "indisputably relevant"); *Skipper*, 476 U.S. at 5 n.1 (recognizing relevance of "probable future conduct *in prison*" (emphasis added)); *Franklin*, 487 U.S. at 179 (same). Even the prosecution in this very case argued to the jury that for purposes of future dangerousness, "society is not limited to outside those prison walls." CAJA907.

The Fourth Circuit nonetheless determined that the Supreme Court of Virginia's "classification of prison-environment evidence as irrelevant and therefore inadmissible is not unreasonable under U.S. Supreme Court precedent." App. 14a. In so holding, the Fourth Circuit closely confined this Court's decisions to their facts. It dismissed *Gardner* as involving information that was never disclosed to the defense at all, and it distinguished *Skipper* and *Simmons* as involving "narrow" questions about the defendant's right to present specific types of evidence or information to the jury. App. 12a-14a. But that interpretation of this Court's precedent ignores the "elemental due process" principles that animated the decisions. *See Gardner*, 430 U.S. at 362; *Skipper*, 476 U.S. at 5 n.1; *Simmons*, 512 U.S. at 161-162 (plurality opinion); *id.* at 178 (O'Connor, J., concurring in judgment).

The Fourth Circuit deemed it significant that the Court in *Skipper* stated "the only question" before it was whether exclusion of the defendant's evidence violated his constitutional rights. App. 13a. But that statement did not, as the Fourth Circuit suggested, reveal an intention to narrow the scope of the opinion. On the contrary, this Court was simply explaining that it had no need to consider the threshold question whether the Constitution protects a capital defendant's right to present all relevant mitigating evidence because that principle was "well established" and not disputed by the State; the "only question" was its application to the facts. If anything, the passage cited by the Fourth Circuit confirms the clearly established nature of the principles governing this case.

The Fourth Circuit also suggested that a state court may reasonably exclude evidence that is "nonindividualized." App. 15a. Even if that were a fair characterization of Dr. Cunningham's assessment, *see infra* p. 28, this Court has never imposed such a limitation on evidence offered to rebut allegations of future dangerousness. On the contrary, *Simmons* held that a defendant has a constitutional right to present the jury with information that is not individualized at all—namely, the fact that life imprisonment carries no possibility of parole.

The Fourth Circuit's analysis also contradicted this Court's holdings that AEDPA does not "require[] 'an identical factual pattern before a legal rule must be applied.'" *White* v. *Woodall*, 134 S. Ct. 1697, 1706 (2014); *see also Marshall* v. *Rodgers*, 133 S. Ct. 1446, 1449 (2013) ("the lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since 'a general standard' from this Court's cases can supply such law").

"'[C]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.'" *Woodall*, 134 S. Ct. at 1706. That is the case here. By incorporating empirical research on a variety of factors that would affect Mr. Morva's likelihood of violence in prison, Dr. Cunningham's testimony would have provided a comprehensive, reliable assessment of Mr. Morva's probable future conduct in prison—at least as relevant to rebutting the prosecution's claim of future dangerousness as the evidence at issue in *Skipper*. The Fourth Circuit erred in finding the Virginia courts' exclusion of that evidence reasonable.

2. Right to present all mitigating evidence

The Fourth Circuit likewise erred in concluding that exclusion of Dr. Cunningham's testimony did not contravene clearly established law confirming a defendant's right to present all mitigating evidence. *Skipper* compels the conclusion that expert testimony about the low risk of violence Mr. Morva would pose in prison was admissible as evidence of his "disposition to make a well-behaved and peaceful adjustment to life in prison." 476 U.S. at 7; *see also id.* at 5 n.1 ("evidence of probable future conduct in prison" is relevant "as a factor in aggravation or mitigation").

Both the Supreme Court of Virginia and the Fourth Circuit relied on a footnote in *Lockett* explaining that courts retain "traditional authority … to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense," *Lockett*, 438 U.S. at 604 & n.12. But *Skipper* expressly holds that whether a defendant will pose a danger in prison *is* "an aspect of his character that is by its nature relevant to the sentencing determination." 476

U.S. at 7. Because Dr. Cunningham's risk assessment was explicitly addressed to Mr. Morva's ability to adjust to life in prison, it was relevant character evidence that could not be excluded under the *Lockett* footnote.

Moreover, the Fourth Circuit's dismissal of Dr. Cunningham's testimony as "nonindividualized," App. 15a, was simply incorrect. Dr. Cunningham's statistical analysis would have drawn on several of Mr. Morva's individual characteristics, including his prior behavior in prison, his age, his educational attainment, his criminal history, and his likely security requirements during incarceration. *Supra* pp. 7-8. By assessing these characteristics in conjunction with information about rates of serious violence in Virginia prisons, Dr. Cunningham could offer a complete picture of how Mr. Morva would likely adjust to prison—and, in particular, whether he was likely to pose a threat to others. The Supreme Court of Virginia, unlike the Fourth Circuit, accordingly did not dispute the individualized nature of Dr. Cunningham's proffered assessment. App. 183a. The state court excluded his testimony only because Dr. Cunningham *also* proposed to rely on information about prison conditions that was not unique to Mr. Morva. But as explained, that information can be critical to accurately predicting a defendant's "probable future conduct in prison." *Skipper*, 476 U.S. at 5 n.1. Here as in *Skipper*, the evidence of Mr. Morva's low risk of violence in prison was mitigating evidence that he had a clearly established right to introduce.

Virginia's unique prohibition on prison-violence risk-assessment evidence left Mr. Morva with no opportunity to show the jury that he could exist in the prison environment without posing a danger to others. The Fourth Circuit failed to recognize the direct conflict between Virginia's approach and this Court's precedent,

and instead validated Virginia's categorical exclusion of this evidence as "not unreasonable." App. 14a. That decision further entrenches the conflict between Virginia and every other death-penalty jurisdiction, and leaves Virginia's unreasonable prohibition on this critical evidence unchecked absent this Court's review.

II. THE QUESTION PRESENTED IS IMPORTANT

Virginia's categorical exclusion of risk-assessment evidence deprives the jury of information it needs to make a reliable assessment of future dangerousness and an informed sentencing decision. *See* App. 200a-201a (Koontz, J., dissenting); Cunningham & Reidy, *Integrating Base Rate Data in Violence Risk Assessments at Capital Sentencing*, 16 Behav. Sci. & L. 71, 73 (1998) ("'knowledge of the appropriate base rate is the most important single piece of information necessary to make an accurate prediction'" of a defendant's risk of violence). Virginia law instead encourages verdicts based on emotion, suspicion, and misconception—precisely what this Court has sought to prevent.

Mr. Morva is one in a long line of Virginia capital defendants to be precluded from informing the jury about his risk of violence in prison. For nearly two decades, the Supreme Court of Virginia has consistently deemed inadmissible evidence about prison security generally and about particular defendants' likelihood of committing serious violent acts in prison.[2] Based on

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[2] *See, e.g.*, *Prieto* v. *Commonwealth*, 721 S.E.2d 484, 492, 501-502 (Va. 2013); *Andrews* v. *Commonwealth*, 699 S.E.2d 237, 275-276 (Va. 2010); *Porter* v. *Commonwealth*, 661 S.E.2d 415, 441-442 (Va. 2008); *Juniper* v. *Commonwealth*, 626 S.E.2d 383, 422-424 (Va. 2006); *Bell* v. *Commonwealth*, 563 S.E.2d 695, 714-715 (Va. 2002); *Lenz* v. *Commonwealth*, 544 S.E.2d 299, 305 (Va. 2001); *Burns*, 541 S.E.2d at 893; *Walker* v. *Commonwealth*, 515 S.E.2d

that precedent, trial courts not only exclude the evidence itself, but also refuse to appoint expert witnesses for indigent capital defendants like Mr. Morva if their testimony would touch on prison conditions in any way. *E.g.*, *Porter* v. *Commonwealth*, 661 S.E.2d 415, 441-442 (Va. 2008); *Bell* v. *Commonwealth*, 563 S.E.2d 695, 714-715 (Va. 2002). Virginia's prohibition on such evidence has only hardened in recent years, with the courts definitively concluding that *any* evidence that assesses a defendant's risk of violence within the context of the prison environment is irrelevant. *Lawlor*, 738 S.E.2d at 882-883. Virginia thus effectively bars all prison-violence risk-assessment evidence, in clear contravention of this Court's precedent. Now that the Fourth Circuit has declared Virginia's approach reasonable, unless this Court intervenes there is no prospect of aligning that approach with this Court's jurisprudence.

Intervention is particularly warranted given that Virginia accounts for a substantial portion of all executions nationwide. *See* Death Penalty Information Center, *Facts About the Death Penalty* (updated Oct. 26, 2016), *available at* http://deathpenaltyinfo.org/documents/FactSheet.pdf. A large percentage of these executions have been predicated on a finding of future dangerousness—in many cases, no doubt, a finding that the defendant had no ability to rebut. *See* Cunningham et al., *Capital Jury Decision-Making: The Limitations of Predictions of Future Violence*, 15 Psych. Pub. Pol. & L. 223, 225 (2009) (future dangerousness was the sole aggravating factor found in 24 of Virginia's 103 executions between 1976 and 2009, and was one of the aggravating factors found in 50 others). As the dissent in Mr.

565, 574 (Va. 1999); *Cherrix* v. *Commonwealth*, 531 S.E.2d 642, 653 (Va. 1999).

Morva's case recognized, it is "fundamentally unfair" to permit a jury to sentence a defendant to death on the basis of incomplete information about future dangerousness, to which the defendant cannot effectively respond, App. 190a (Koontz, J., dissenting)—particularly since Virginia is the only jurisdiction to exclude such evidence.

Although this Court has recognized doubts about the reliability of the future-dangerousness inquiry and the evidence prosecutors often introduce to prove it, *see*, *e.g.*, *Barefoot*, 463 U.S. at 899-901 & n.7, the Court has approved the use of future dangerousness as a factor in sentencing—but only on the express understanding that the defendant will have the "opportunity to present his own side of the case" and that "the adversary process can[] be trusted" to ensure reliable determinations. *Id.* at 901. For the adversary process to function as intended, the jury must "be presented with all of the relevant information." *Id.* at 897-898; *see also id.* at 898 (describing "desirab[ility]" of "open and far-ranging argument that places as much information as possible before the jury"); *Jurek*, 428 U.S. at 272-273 (relying on Texas's interpretation of future-dangerousness factor to permit consideration of "whatever mitigating circumstances relating to the individual defendant can be adduced"). That requirement in turn reflects this Court's long-held understanding that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett*, 438 U.S. at 604; *see also Gardner*, 430 U.S. at 357-358. Virginia's approach conflicts with that understanding and undermines capital defendants' basic due process right to present a complete defense. *See Simmons*, 512 U.S. at 175 (O'Connor, J., concurring in the judgment); *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986).

III. THIS CASE IS A GOOD VEHICLE

At Mr. Morva's sentencing, the prosecution directly appealed to the jury's fear that he would pose a continuing threat to society in prison. The prosecution repeatedly suggested that he would be able to injure or kill others in prison, including prison guards. CAJA893-896. The summation relied on many of the misconceptions Dr. Cunningham's testimony was meant to rebut, including the suggestion that Mr. Morva's past violence meant he was more likely to be violent if sentenced to life imprisonment and that his prior escape from jail made it likely he would be able to escape again, despite significantly heightened security conditions. Under these circumstances, it is highly likely Mr. Morva was prejudiced by the exclusion of evidence tending to show he would not pose a risk of violence in prison. That prejudice requires reversal. *Skipper*, 476 U.S. at 8 (vacating death sentence where prosecutor's closing argument "made much of the dangers petitioner would pose if sentenced to prison" and trial court excluded defendant's rebuttal evidence).

Neither the Supreme Court of Virginia nor the Fourth Circuit purported to find that any error in the exclusion of Dr. Cunningham's testimony would have been harmless. Nor could they have. Although Mr. Morva's jury found the statutory "vileness" aggravator established, that finding cannot render the exclusion of Mr. Morva's evidence harmless. *Tuggle* v. *Netherland*, 516 U.S. 10, 13-14 (1995). In *Tuggle*, this Court vacated a Virginia defendant's death sentence where the trial court's refusal to appoint an expert had "prevented [the defendant] from developing his own psychiatric evidence to rebut the Commonwealth's evidence and to enhance his defense in mitigation." The Court explained that a Virginia capital jury always retains the

discretion not to impose the death penalty, even if it determines that a statutory aggravator is present. *Id.* at 12 n.1. Thus, even assuming the defendant's evidence would not have affected the vileness finding, "the absence of [the] evidence may well have affected the jury's ultimate decision, based on all of the evidence before it, to sentence [him] to death rather than life imprisonment." *Id.* at 13-14. The same reasoning applies here.[3]

Nor is it relevant that Mr. Morva, an indigent defendant, required the appointment of Dr. Cunningham as a state-funded expert. The Fourth Circuit initially framed the habeas inquiry as whether this Court's precedents "clearly establish a capital defendant's right to a state-funded nonpsychiatric expert." App. 14a. But as explained, *supra* pp. 24-25, the sole reason the Virginia courts gave for denying Mr. Morva's request for Dr. Cunningham's appointment was that, under Virginia law, any evidence bearing on the defendant's risk of violence in prison was irrelevant and thus inadmissible. *See* App. 206a (trial court); App. 184a-185a (Supreme Court of Virginia explaining that denial of expert was not abuse of discretion given "the inadmissibility of the evidence that Morva sought to introduce through Dr. Cunningham"). Acknowledging this aspect

[3] "Vileness" requires a finding that the crime was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim." Va. Code Ann. § 19.2-264.4(C). There was no dispute at trial that Mr. Morva's crimes involved neither torture nor aggravated battery, and "depravity of mind" requires "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation," *Smith* v. *Commonwealth*, 248 S.E.2d 135, 149 (Va. 1978). The jury may well have concluded that Mr. Morva's conduct only barely satisfied that high standard, making it all the more likely the jury would have chosen life imprisonment if it knew all the relevant information.

of the Virginia decision, the Fourth Circuit then squarely addressed the question presented here, holding that "the Supreme Court of Virginia did not unreasonably apply U.S. Supreme Court precedent by deeming irrelevant … evidence regarding general prison life and security offered to show that Morva's 'opportunities to commit criminal acts of violence in the future would be severely limited in a maximum security prison.'" App. 15a. That decision warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1

WILLIAM CHARLES MORVA,
Petitioner-Appellant,
v.

DAVID ZOOK, WARDEN, SUSSEX I STATE PRISON,
Respondent-Appellee.

Argued: March 22, 2016
Decided: May 5, 2016

Before WYNN and DIAZ, Circuit Judges, and DAVIS, Senior Circuit Judge.

* * *

DIAZ, Circuit Judge:

William Charles Morva appeals the district court's dismissal of his petition for a writ of habeas corpus, and challenges several aspects of his capital convictions and death sentence. First, Morva argues that the Virginia circuit court's refusal to appoint a prison-risk-assessment expert compels relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d). But because Morva has identified no clearly established federal law requiring the ap-

pointment of a nonpsychiatric expert, we reject this claim.

Next, Morva asserts three related ineffective-assistance-of-counsel claims regarding his counsel's investigation and presentation of mitigating evidence in his capital sentencing hearing. Reviewing these claims through the deferential lens of § 2254(d), we find neither deficient performance nor resulting prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). Last, we determine whether Morva has shown cause to excuse his procedurally defaulted claim that counsel was ineffective for stipulating at the guilt phase of trial that Morva was a prisoner in lawful custody at the time of the alleged capital murder. Finding the underlying claim insubstantial under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), we hold that he has not.

Accordingly, we affirm the district court's judgment.

I.

A.

In the summer of 2006, Morva was in jail awaiting trial in Montgomery County, Virginia, on burglary-, robbery-, and firearm-related charges. He had been in jail for approximately one year when he escaped and committed the crimes we address in this appeal. We set out the relevant facts of Morva's crimes, as recited by the Supreme Court of Virginia:

> Morva was scheduled to go to trial on August 23, 2006. In the evening on August 19, 2006, he informed the jail personnel that he required medical attention due to an injury to his leg and forearm. During the early morning hours of August 20, 2006, Sheriff's Deputy Russell Quesenberry, who was in uniform and

armed with a Glock .40 caliber semi-automatic pistol, transported Morva to the Montgomery Regional Hospital located in Montgomery County. Morva was wearing waist chains, but Deputy Quesenberry did not secure Morva's allegedly injured arm.

Upon arrival at the hospital, Morva "kept trying" to walk on Deputy Quesenberry's right side even though he was ordered to walk on Deputy Quesenberry's left side. Quesenberry was required to have Morva walk on his left because Quesenberry wore his gun on his right side. Quesenberry observed that Morva's limping was sporadic and "sort of went away." Also, Nurse Melissa Epperly observed Morva walking as if he were not injured.

After the hospital treated Morva, Morva requested to use the bathroom. Deputy Quesenberry inspected the bathroom and allowed Morva access. While in the bathroom, Morva removed a metal toilet paper holder that was screwed to the wall. As Deputy Quesenberry entered the bathroom, Morva attacked him with the metal toilet paper holder, breaking Quesenberry's nose, fracturing his face, and knocking him unconscious. Morva then took Quesenberry's gun. Prior to leaving the bathroom, Morva confirmed that Quesenberry's gun was ready to fire, ejecting a live round from the chamber.

After escaping from the bathroom, Morva encountered Derrick McFarland, an unarmed hospital security guard. Morva pointed Quesenberry's gun at McFarland's face. McFarland

stood with his hands out by his side and palms facing Morva. Despite McFarland's apparent surrender, Morva shot McFarland in the face from a distance of two feet and ran out of the hospital, firing five gunshots into the electronic emergency room doors when they would not open. McFarland died from the gunshot to his face.

In the morning of August 21, 2006, Morva was seen in Montgomery County near "Huckleberry Trail," a paved path for walking and bicycling. Corporal Eric Sutphin, who was in uniform and armed, responded to that information by proceeding to "Huckleberry Trail."

Andrew J. Duncan observed Morva and then later observed Corporal Sutphin on "Huckleberry Trail." Four minutes later, Duncan heard two gunshots, less than a second apart. David Carter, who lived nearby, heard shouting, followed by two gunshots, and saw Corporal Sutphin fall to the ground.

Shortly thereafter, Officer Brian Roe discovered Corporal Sutphin, who was dead from a gunshot to the back of his head. Corporal Sutphin's gun was still in its holster with the safety strap engaged. Officer Roe confiscated Corporal Sutphin's gun to secure it and continued to search for Morva.

Later that day, Officer Ryan Hite found Morva lying in a ditch in thick grass. Even though Morva claimed to be unarmed, officers discovered Quesenberry's gun on the ground where Morva had been lying. Morva's DNA

was found on the trigger and handle of Quesenberry's gun.

Morva v. Commonwealth (*Morva I*), 683 S.E.2d 553, 557 (Va. 2009). After a six-day trial, the jury found Morva guilty of assault and battery of a law-enforcement officer, escape of a prisoner by force or violence, three counts of capital murder,[1] and two counts of using a firearm in the commission of a murder.

B.

1.

We begin with a brief discussion of Virginia's capital sentencing scheme.

Under Virginia law, a capital sentencing hearing proceeds in two stages. *See Tuggle v. Netherland*, 516 U.S. 10, 12 n.1 (1995) (per curiam). First, the jury decides whether the Commonwealth has proved at least one of two statutory aggravating factors beyond a reasonable doubt: the defendant's future dangerousness and the vileness of his capital offense conduct. Va. Code Ann. §§ 19.2-264.2, 19.2-264.4(C). In evaluating the aggravating factor of future dangerousness, the jury is limited to considering the defendant's criminal record, his prior history, and the circumstances surrounding the commission of the capital offense. §§ 19.2-264.2, 19.2-264.4(C). If the jury fails to find an aggravating factor, it must impose a sentence of life imprisonment; if, however, the jury finds one or both of the statutory aggravating factors, it has full discretion to

[1] Morva was charged with the capital murder of Derrick McFarland, the capital murder of Eric Sutphin, and the capital offense of premeditated murder of more than one person within a three-year period.

impose either the death sentence or life imprisonment. *See* §§ 19.2-264.2, 19.2-264.4(C)-(D); *Tuggle*, 516 U.S. at 12 n.1.

Although Virginia juries are not instructed to give special weight to aggravating factors or to balance aggravating and mitigating evidence, *Swann v. Commonwealth*, 441 S.E.2d 195, 205 (Va. 1994), juries are constitutionally required to consider relevant mitigating evidence in determining a sentence in a capital case, *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982).

2.

Prior to trial, Morva moved for the appointment of Dr. Mark D. Cunningham, a prison-risk-assessment expert, to "rebut the Commonwealth's claim that Morva was a future danger to society and to provide the jury with an assessment of the likelihood that Morva would commit violence if he were sentenced to life in prison." *Morva I*, 683 S.E.2d at 557. The circuit court denied the motion, stating that Virginia law barred as irrelevant Dr. Cunningham's testimony regarding the environment and structure of a maximum-security facility as well as testimony regarding rates of violence among individuals similarly situated to the defendant. Morva later moved for reconsideration, supported by a letter from Dr. Cunningham, but the motion was denied.

Morva also sought the appointment of a mental-health expert and a mitigation specialist, which the circuit court granted. The court appointed Dr. Bruce Cohen, a forensic psychiatrist; Dr. Scott Bender, a neuropsychologist; and Dr. Leigh Hagan, a psychologist. All three experts prepared capital-sentencing evaluations. Dr. Cohen and Dr. Bender diagnosed Morva with

schizotypal personality disorder.[2] Dr. Cohen and Dr. Hagan, however, noted that there was no evidence indicating that Morva was experiencing "an extreme mental or emotional disturbance" at the time of the capital offenses, or that he was "unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." J.A. 2013; *see also* J.A. 2025-26 (showing in Dr. Bender's evaluation that he did not find to the contrary; rather, he did not consider the issue).

At the sentencing phase, the Commonwealth tendered evidence of both statutory aggravating factors. Morva called thirteen witnesses, including Dr. Bender and Dr. Cohen. While Dr. Cohen testified to Morva's absence of extreme mental or emotional disturbance and his ability to appreciate the criminality of his conduct, the doctor also testified that Morva's schizotypal personality disorder mitigated against imposing the death sentence. The jury ultimately found both aggravating factors beyond a reasonable doubt and imposed the death sentence on each of the three capital murder convictions.

On direct appeal (and as relevant here), Morva challenged the circuit court's denial of his motion to appoint Dr. Cunningham as a prison-risk-assessment expert. The Supreme Court of Virginia found no abuse of discretion, affirmed Morva's convictions and sentences, and subsequently denied rehearing. Two justices dissented from the majority's decision on the prison-risk-assessment issue, finding that the circuit court's denial of Morva's motion "result[ed] in a fundamentally unfair

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[2] The disorder "shares some of the biologic, emotional, and cognitive features of schizophrenia, but the symptoms are of lesser severity." J.A. 2015.

trial in the sentencing phase" because absent Dr. Cunningham's testimony and assessment, Morva "was not permitted the means to effectively respond to the Commonwealth's assertions" of future dangerousness. *Morva I*, 683 S.E.2d at 568-69 (Koontz, J., dissenting).

The U.S. Supreme Court denied further review.

C.

Morva then sought post-conviction relief in the Supreme Court of Virginia. His petition raised, in relevant part, three of the ineffective-assistance-of-counsel claims before us now. The Warden filed a motion to dismiss, supported with exhibits and affidavits, including Dr. Bender's, Dr. Cohen's, and Dr. Hagan's capital-sentencing evaluations. Morva moved repeatedly to supplement the record and for discovery, the appointment of mental-health experts, and an evidentiary hearing. The court denied Morva's motions and dismissed the habeas petition, finding no ineffective assistance.

Morva subsequently filed a federal habeas petition under 28 U.S.C. § 2254, raising the claims on appeal here. The district court held two hearings, permitted supplemental briefing, and later issued a memorandum opinion dismissing the petition. The court found that Morva was not entitled to relief under AEDPA's deferential standard. It also held that Morva failed to show cause for his defaulted ineffective-assistance claim.

This appeal followed.

II.

Morva presents five claims. First, he contends that the Virginia circuit court's denial of his motion to appoint a prison-risk-assessment expert violated his Eighth and Fourteenth Amendment rights. Next, Morva raises three related ineffective-assistance-of-

counsel claims regarding counsel's investigation into his childhood, family background, and mental-illness history; counsel's presentation of mitigating evidence; and counsel's assistance to the state-funded mental-health experts. Finally, Morva appeals the denial of relief on a separate ineffective-assistance-of-counsel claim, raised for the first time in the district court, regarding his counsel's decision during the guilt phase of trial to stipulate to Morva's status as a "prisoner in a state or local correctional facility," who was "imprisoned, but not yet had gone to trial," and who was "in lawful custody" at the time of the charged offenses. J.A. 282-83.

We consider each argument in turn, "reviewing de novo the district court's denial of [Morva's] petition for a writ of habeas corpus." *Gray v. Zook*, 806 F.3d 783, 790 (4th Cir. 2015).

A.

We turn first to Morva's prison-risk-assessment claim. Because the Supreme Court of Virginia adjudicated this claim on the merits, we may not grant Morva habeas relief unless the court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Gordon v. Braxton*, 780 F.3d 196, 202 (4th Cir. 2015) (quoting § 2254(d)).

Our evaluation of a state's application of clearly established federal Supreme Court precedent depends on the specificity of the clearly established law. "[W]here the 'precise contours' of [a] right remain 'unclear,' state courts enjoy 'broad discretion' in their adjudication of a prisoner's claims." *Woods v. Donald*, 135 S. Ct. 1372,

1377 (2015) (per curiam) (second alteration in original) (quoting *White v. Woodall*, 134 S. Ct. 1697, 1705 (2014)). Similarly, when the Supreme Court has not yet "confront[ed] 'the specific question presented by [a particular] case,' the state court's decision [cannot] be 'contrary to' any holding" of the Supreme Court. *Id.* (quoting *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam)).

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fair-minded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Thus, "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

The Supreme Court of Virginia did not unreasonably reject Morva's claim that he was constitutionally entitled to a state-funded prison-risk-assessment-expert. Morva improperly frames the court's alleged error as an unconstitutional prohibition on his right to present mitigating evidence. But this presents the issue "at too high a level of generality." *Woods*, 135 S. Ct. at 1377. Rather, Morva challenges the Supreme Court of Virginia's decision that due process did not require the appointment of a state-funded nonpsychiatric expert—particularly where other state-funded experts had been provided—because he did not make the required showing under Virginia law.

We conclude that the Supreme Court of Virginia reasonably applied clearly established federal law in rejecting Morva's challenge. Notably, the U.S. Su-

preme Court has never addressed a capital defendant's right to a state-funded nonpsychiatric expert. The Court has only ruled on an indigent defendant's due process right to a state-funded psychiatrist when he makes "a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial." *Ake v. Oklahoma*, 470 U.S. 68, 74, 79 (1985). Since *Ake*, "the Supreme Court ha[s] flatly declined to resolve the question of what, if any, showing would entitle an indigent defendant to [state-funded] nonpsychiatric assistance as a matter of federal constitutional law." *Weeks v. Angelone*, 176 F.3d 249, 265-66 (4th Cir. 1999).

Absent federal precedent on the issue, the Supreme Court of Virginia has crafted a rule to determine when due process requires a state-funded nonpsychiatric expert. In *Husske v. Commonwealth*, the court announced the "particularized need" standard: "an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is 'likely to be a significant factor in his defense,' and that he will be prejudiced by the lack of expert assistance." 476 S.E.2d 920, 925 (Va. 1996) (citation omitted) (quoting *Ake*, 470 U.S. at 82-83). To satisfy this burden, the defendant must demonstrate that the "expert would materially assist him in the preparation of his defense" and that the expert's absence "would result in a fundamentally unfair trial." *Id.*

We have said that the *Husske* standard is "congruent with the requirements of the federal Constitution." *Bramblett v. True*, 59 F. App'x 1, 9 (4th Cir. 2003); *see also Page v. Lee*, 337 F.3d 411, 415-16 (4th Cir. 2003) (finding that North Carolina's particularized-need test, which mirrors Virginia's, "is surely a reasonable inter-

pretation of *Ake*"). Thus, the Supreme Court of Virginia did not unreasonably apply clearly established federal law in requiring Morva to show a particularized need for his requested expert.

Turning to the Supreme Court of Virginia's application of the *Husske* test to Morva's case, we find no constitutional violation warranting habeas relief under § 2254(d). The court first addressed the three cases on which Morva relied in support of his claim—*Gardner v. Florida*, 430 U.S. 349 (1977), *Skipper v. South Carolina*, 476 U.S. 1 (1986), and *Simmons v. South Carolina*, 512 U.S. 154 (1994)—and found they did not dictate the result he urged. *Morva I*, 683 S.E.2d at 564-66. The court then discussed Virginia precedent on the relevance of prison-environment evidence to a future-dangerousness assessment and, finding irrelevant and therefore inadmissible an "essential" part of Dr. Cunningham's proffered testimony (i.e., his testimony regarding prison life, prison security, and statistics on similarly situated defendants' instances of violence in prison), concluded that "the circuit court did not err or abuse its discretion in denying [Morva's] motion" because Morva did not satisfy the particularized-need test. *Id.* at 565-66.

The Supreme Court of Virginia's conclusion that *Gardner*, *Skipper*, and *Simmons* do not support the constitutional rule Morva asserts is neither contrary to, nor involves an unreasonable application of, clearly established federal law. *Gardner* concerned a court's imposition of the death penalty on the basis of a confidential presentence report that was never disclosed to the defense. 430 U.S. at 353 (plurality opinion). Vacating and remanding the case for resentencing, the U.S. Supreme Court announced that the imposition of a death sentence "on the basis of information which [the de-

fendant] had *no opportunity* to deny or explain" is unconstitutional. *Id.* at 362 (plurality opinion) (emphasis added) (finding a due process violation); *id.* at 364 (White, J., concurring in the judgment) (finding an Eighth Amendment violation); *id.* (Brennan, J., concurring in part and dissenting in part) (joining the plurality's due process reasoning).

The Court relied on this general principle years later in *Skipper*, when it considered a capital defendant's right to present mitigating evidence regarding future dangerousness when the prosecution asserts that aggravating factor, lest the defendant be sentenced to death on information he was never allowed to challenge. 476 U.S. at 5 n.1. The Court's holding, however, was narrow:

> *[T]he only question before us* is whether the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived [him] of his right to place before the sentencer relevant evidence in mitigation of punishment. It can hardly be disputed that it did.

Id. at 4 (emphasis added).

Finally, *Simmons* announced yet another narrow expansion of a capital defendant's right to introduce mitigating evidence. The Court there held that when "the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Simmons*, 512 U.S. at 156 (plurality opinion); *id.* at 177-78 (O'Connor, J., concurring in the judgment) ("Where the State puts the defendant's future dangerousness in is-

sue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible.").[3]

These cases do not clearly establish a capital defendant's right to a state-funded nonpsychiatric expert. *See White*, 134 S. Ct. at 1702 ("'[C]learly established Federal law' for purposes of § 2254(d)(1) includes only 'the holdings, as opposed to the dicta, of this Court's decisions.'" (alteration in original) (quoting *Howes v. Fields*, 132 S. Ct. 1181, 1187 (2012))). Confined as we are under AEDPA, we conclude that the Supreme Court of Virginia's decision regarding a right whose "'precise contours' … remain 'unclear,'" is neither contrary to nor an unreasonable application of federal law. *Woods*, 135 S. Ct. at 1377 (quoting *White*, 134 S. Ct. at 1705).

The Supreme Court of Virginia's separate determination that Morva failed to show a particularized need for the expert also does not run afoul of clearly established law. The court's classification of prison-environment evidence as irrelevant and therefore inadmissible is not unreasonable under U.S. Supreme Court precedent. Nor is the court's similar determination regarding statistical evidence of similarly situated inmates and instances of prison violence.

A defendant's constitutional right to present mitigating evidence related to his character, criminal histo-

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[3] Together, the three-justice plurality and Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, "provid[ed] the dispositive votes necessary to sustain [the judgment]." *O'Dell v. Netherland*, 521 U.S. 151, 158 (1997).

ry, and the circumstances of his offense does not upset a state court's broad discretion in determining the admissibility of other, nonindividualized evidence. *See Lockett v. Ohio*, 438 U.S. 586, 604 & n.12 (1978) (plurality opinion) ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."); *see also Johnson v. Texas*, 509 U.S. 350, 362 (1993) ("[*Lockett* and its progeny] do not bar a State from guiding the sentencer's consideration of mitigating evidence. Indeed, we have held that 'there is no … constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence ….'" (second alteration in original)). Thus, the Supreme Court of Virginia did not unreasonably apply U.S. Supreme Court precedent by deeming irrelevant evidence that did not relate specifically to Morva's character, background, criminal record, or the circumstances of his offense—i.e., evidence regarding general prison life and security offered to show that Morva's "opportunities to commit criminal acts of violence in the future would be severely limited in a maximum security prison." *Burns v. Commonwealth*, 541 S.E.2d 872, 893 (Va. 2001).

Finally, the Supreme Court of Virginia did not unreasonably decide the facts. Morva contends otherwise, but he does not identify the alleged factual error. We assume he takes issue with the court's finding that the inadmissible evidence of general prison life and security was "essential" to Dr. Cunningham's proffered testimony. *Morva I*, 683 S.E.2d at 566. But Dr. Cunningham's own statements to the circuit court compel this finding. In his letter, he wrote that an individualized prison-risk assessment "is only meaningful if it takes

into account the person's future setting, if known, and the frequency of serious violence by people with similar characteristics in similar settings." J.A. 176. His declaration also noted that the proffered group-statistical data and prison-environment evidence are "necessary" and "critically important" to a "reliable violence risk assessment." J.A. 145-46. Accordingly, we hold that Morva's prison-risk-assessment claim does not warrant federal habeas relief.

B.

Next we consider Morva's nondefaulted ineffective-assistance-of-counsel claims. First we determine the appropriate standard of review. Then we turn to the merits.

1.

The district court applied § 2254(d) to Morva's nondefaulted claims, and we review that decision de novo. *Gordon*, 780 F.3d at 202. For AEDPA's deferential standard to apply to the state post-conviction-relief court's dismissal of these claims, the court's decision must qualify as an "adjudicat[ion] on the merits" under § 2254(d); otherwise, de novo review is proper. *Id.* (alteration in original) (quoting § 2254(d)). "Whether a claim has been adjudicated on the merits is a case-specific inquiry," *Winston v. Pearson* (*Winston II*), 683 F.3d 489, 496 (4th Cir. 2012), but "[a] claim is not 'adjudicated on the merits' when the state court makes its decision 'on a materially incomplete record,'" *Gordon*, 780 F.3d at 202 (quoting *Winston v. Kelly* (*Winston I*), 592 F.3d 535, 555 (4th Cir. 2010)). "A record may be materially incomplete 'when a state court unreasonably refuses to permit "further development of the facts" of a claim.'" *Id.* (quoting *Winston II*, 683 F.3d at 496). Morva argues that the state court's denial of the ap-

pointment of experts and an evidentiary hearing resulted in a decision on a materially incomplete record. We disagree.

Although the Supreme Court of Virginia precluded some factual development as to counsel's investigative decisionmaking, the court did not act unreasonably. The record was substantial and contained sufficient evidence to answer the *Strickland* inquiry. Moreover, the record provided reasons for counsel's decisions not to interview or call certain witnesses at the sentencing phase, and included cumulative information about Morva's background that counsel received through witness interviews. And trial transcripts show the extent of mitigating evidence presented to the jury.

Moreover, there is no doubt that the Supreme Court of Virginia considered this substantial record in ruling on Morva's ineffective-assistance claims. *See Morva v. Warden of Sussex I State Prison* (*Morva II*), 741 S.E.2d 781, 789-90 (Va. 2013) (discussing the "double-edged" nature of submitted affidavits regarding Morva's background and character, and evaluating the quality and implications of Morva's mental-health evidence).

We therefore review Morva's remaining nondefaulted claims under AEDPA's highly deferential standard. Under AEDPA, we defer to the state court's judgment, and under clearly established Supreme Court precedent, the state court defers to counsel's presumptive "sound trial strategy." *Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential."). It was Morva's burden before the state court to show both that counsel's performance was deficient—that "counsel's representation fell below an objective standard of reasonableness"—and that he suffered prejudice as a result—by showing

"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112.

"Surmounting *Strickland*'s high bar is never an easy task," *id.* at 105 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)), and "[e]stablishing that a state court's application of *Strickland* was unreasonable [or contrary to clearly established federal law] under § 2254(d) is all the more difficult," *id.* This double-deference standard effectively cabins our review to a determination of "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

2.

Morva asserts that counsel was ineffective in failing to (1) adequately investigate his background, history, character, and mental illness; (2) provide all available information to the mental-health experts to ensure accurate evaluations; and (3) adequately present the available mitigating evidence to the jury. Although Morva identifies these as three distinct claims, his briefs address them together, and we will resolve them as such. The post-conviction-relief court found that Morva failed to satisfy both *Strickland* prongs. We first review the court's decision on deficient performance, before considering whether Morva met his burden as to prejudice.

a.

Regarding deficient performance, the Supreme Court of Virginia held that counsel's investigation and presentation of mitigating evidence did not fall below

an objective standard of reasonableness. *See Morva II*, 741 S.E.2d at 789 (calling counsel's investigation "exhaustive," finding that counsel spoke with the affiants on whom Morva's claim relies, and characterizing the affiants' would-be testimony as "double-edged" (quoting *Lewis v. Warden of Fluvanna Corr. Ctr.*, 645 S.E.2d 492, 505 (Va. 2007))). Similarly, the court found that counsel adequately assisted the mental-health experts. *Id.* at 790 (finding that Morva failed to show an indication of "true mental illness" to alert counsel).

The Supreme Court of Virginia's decision on deficient performance does not warrant federal habeas relief. As to the investigation, Morva challenges trial counsel's alleged failure to investigate Morva's multigenerational family history by conducting "little or no investigation of [Morva's] immediate family" and only "cursory interviews with [Morva's mothers'] family members." Appellant's Br. at 50, 57. The record shows, however, that counsel hired a mitigation expert and interviewed many of the family-member affiants who did not testify at trial and on whom Morva relies to show ineffective assistance, including Morva's mother, sister, paternal half-sister, one of his brothers, and two of his aunts. Notably, Morva's mother's affidavit provides a thorough account of Morva's father's Hungarian background and American immigration and of her own family history, J.A. 1071-1082, and it also states that she "shared a good deal of information contained in th[e] affidavit with [Morva's capital defense team]" through "several conversations with [them] over a period of more than a year," *id.* at 1115.

While Morva complains that counsel could have interviewed other family members and spent more time gathering information from those family members that were interviewed, he points to no U.S. Supreme Court

case establishing that counsel's effort constitutes deficient performance or that counsel's decision not to pursue this line of mitigating evidence was constitutionally unreasonable. *See Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that … the challenged action 'might be considered sound trial strategy.'" (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955))).

Indeed, clearly established federal law supports the Supreme Court of Virginia's deference to counsel's performance in this instance. *See Wiggins v. Smith*, 539 U.S. 510, 533 (2003) *("Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing."); *Strickland*, 466 U.S. at 691 (finding that when counsel has "reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable"). Given the doubly deferential standard of AEDPA, we cannot conclude that the Supreme Court of Virginia unreasonably applied *Strickland* when it held that counsel's investigation into Morva's family history was not "outside the wide range of professionally competent assistance." 466 U.S. at 690.

Regarding the presentation of mitigating evidence, Morva has not shown that counsel performed deficiently. The jury heard from thirteen witnesses, including the mental-health experts who evaluated Morva. Witnesses testified to Morva's absent parents and his tumultuous relationship with them, including that his mother was at times homeless and unable to care for him; Morva's own nomadic lifestyle and homelessness

as a young adult; his ongoing health problems; his nonviolent and compassionate nature; and his odd, somewhat fantastical beliefs and behavior.

These sympathetic and humanizing facts compose the bulk of the affidavits Morva presented to the Supreme Court of Virginia to show inadequate investigation and presentation of mitigating evidence. That the mitigating evidence Morva insists should have been presented at trial is merely cumulative to the evidence actually heard by the jury further undercuts Morva's claim for deficient performance. *See Wong v. Belmontes*, 558 U.S. 15, 22-23 (2009) (per curiam) (rejecting the view that counsel should have presented additional "humanizing evidence" about the defendant's "difficult childhood" and "positive attributes," and stating that "[a]dditional evidence on these points would have offered an insignificant benefit, if any at all").

The same can be said about the additional evidence that Morva says counsel should have provided to the mental-health experts. Dr. Bender and Dr. Cohen found that Morva suffered from schizotypal personality disorder. In reaching this diagnosis, they conducted interviews with Morva, his mother, and his sister; performed diagnostic tests and evaluations of Morva; and considered a plethora of documents from counsel, including reports of interviews with Morva's acquaintances. Morva presents no evidence that counsel should have believed these sources were insufficient for the experts to conduct a reliable and accurate mental-health evaluation, or that providing the cumulative evidence that Morva identifies would have materially altered their assessments of his mental condition.

Morva contends that it was objectively unreasonable for counsel to fail to provide the experts certain

family medical records and the names of three acquaintances who he claims had "invaluable insight into [his] mental state." Appellant's Br. at 66. But Dr. Bender and Dr. Cohen learned, through their evaluations and interviews, of Morva's maternal family history of schizophrenia. And Morva did not show the Supreme Court of Virginia how his three acquaintances' relationships with him gave them "invaluable insight" into his mental health at the time of the capital offenses, or that counsel should have known of their value to the defense. Thus, the court did not unreasonably apply *Strickland* or its progeny when it held that Morva failed to substantiate his claim that counsel performed deficiently.

b.

As to prejudice, the Supreme Court of Virginia found that "Morva has not demonstrated what impact, if any," the new family-background evidence "had on his actions," and concluded that the information "does not mitigate Morva's actions." *Morva II*, 741 S.E.2d at 789. The court also found that Morva failed to show that "the mental health experts who examined Morva in preparation for trial and sentencing would have changed the[ir] expert[] conclusions" if they had received the additional information from counsel. *Id.* at 790. These decisions are not unreasonable.

On appeal, Morva presents a cumulative prejudice argument. He contends that the "inadequate investigation of [his] multigenerational history deprived [the] jurors of a complex, multifaceted description of [him] as a human being." Appellant's Br. at 69. Additionally, he claims that had counsel given the mental-health experts all known Morva-family history and the contact information of Morva's close acquaintances, "there is a rea-

sonable probability [that] the court-appointed mental health experts would have diagnosed Morva with" a more serious mental illness. *Id.* at 76. In turn, counsel "could have had an explanation for the jury that Morva's mental illness was a but-for cause of the violence, reducing his moral culpability and providing a strong argument for life in prison rather than a death sentence." *Id.* at 79.

This claim fails. First, Morva's arguments relate to the jury's finding that his conduct was vile, but it does nothing to combat the future dangerousness aggravating factor. And the jury imposed the death penalty not only on the basis of what Morva had done, but also on the probability that he might commit violent crimes in the future.

Second, Morva fails to show a reasonable likelihood that the evidence of his family history and the anecdotal evidence of his mental state—had it been presented—would have resulted in a life sentence. His argument regarding the probability of a different diagnosis is too speculative given the record and the lack of any support from the mental-health experts. *See Pooler v. Sec'y, Fla. Dep't of Corr.*, 702 F.3d 1252, 1268, 1279 (11th Cir. 2012) (finding no § 2254(d) error with the state post-conviction-relief court's determination that the defendant did not show prejudice because he "failed to demonstrate that [the mental-health experts] would have changed their opinions had they conducted more in-depth psychological evaluations or been provided with his records" (quoting *Pooler v. State*, 980 So. 2d 460, 469 (Fla. 2008) (per curiam))); *Roberts v. Dretke*, 381 F.3d 491, 500 (5th Cir. 2004) (finding that the prisoner failed to establish *Strickland* prejudice in part because "there is no evidence in the record suggesting that [the mental-health expert] would change the psy-

chiatric diagnosis in his report based on a review of Roberts's [undisclosed] medical records").[4]

Further, the record lacks the alleged "red flags" that would have "'point[ed]' [the experts] to a more serious mental illness." Appellant's Br. at 58 (quoting *Rompilla v. Beard*, 545 U.S. 374, 392 (2005)). Dr. Cohen thoroughly explained the eight (out of nine) symptoms indicative of schizotypal personality disorder that Morva displayed. Dr. Cohen discussed each symptom individually and also distinguished the personality disorder from an acute disease state with examples of how symptoms manifest in both conditions. Morva's three acquaintances' accounts of his mental state are consistent with Dr. Cohen's account of the schizotypal symptoms Morva manifested after the capital offenses. It is therefore unlikely the experts would have changed their minds on the basis of the acquaintances' anecdotes. And there is no reasonable probability that at least one juror would have changed his sentencing vote

[4] Morva unsuccessfully sought to supplement the record with an affidavit and unsworn preliminary report from two clinical psychologists who, years after the capital offenses and Morva's schizotypal-personality-disorder diagnosis, reviewed the documents produced throughout the litigation. The affidavit and report, which the Supreme Court of Virginia declined to consider, push for additional mental-health evaluations to determine whether Morva had a more serious mental illness at the time of the capital offenses. Morva also attached to his federal habeas petition a declaration from a psychiatrist, who did not evaluate him directly but reviewed some litigation documents and the trial mental-health experts' evaluations, and opined that Morva suffers from schizophrenic symptoms. However, these submissions do nothing to show that Dr. Cohen, Dr. Bender, and Dr. Hagan would have come to a different medical conclusion at the time of Morva's sentencing—the prejudice question before us now.

on the basis of additional lay-witness testimony regarding Morva's "complex, multifaceted" humanity.

Last, when we "reweigh the evidence in aggravation against the totality of available mitigating evidence," it is clear that Morva fails to show prejudice. *Wiggins*, 539 U.S. at 534. Even the most sympathetic evidence in the record about Morva's troubled childhood and mental health[5] does not outweigh the aggravating evidence presented at trial. "While we have no doubt that the conditions in the home and the treatment of [Morva and his] siblings made for an unpleasant living environment, they do not tip the aggravation-mitigation scale in favor of mitigation." *Phillips v. Bradshaw*, 607 F.3d 199, 219 (6th Cir. 2010). Because the Supreme Court of Virginia's no-prejudice determination was neither contrary to nor involved an unreasonable application of clearly established law, we reject Morva's ineffective-assistance claims.

C.

Finally, we turn to Morva's claim of ineffective assistance arising from counsel's stipulation at the guilt phase of trial. To convict Morva of prisoner escape, the jury was required to find that Morva was, prior to escaping, lawfully imprisoned and not yet tried or sentenced, or lawfully in the custody of law enforcement.

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[5] The affidavit of Constance "Connie" Beth Dye, one of Morva's aunts, relates the most revealing and troubling information about Morva's childhood. Ms. Dye characterizes Morva's father as a moody and controlling "monster" and his mother as absent and mentally troubled. *See* J.A. 1030-43. She also details the squalor of Morva's early childhood: the house, including the children's room, smelled bad and was littered with trash and food remnants, and the children were malnourished and dirty. *See* J.A. at 1032-38.

See Va. Code Ann. § 18.2-478. Recall that, when he escaped and committed the capital offenses, Morva was in jail awaiting trial on pending charges for, inter alia, armed robbery. After the trial court ruled, in Morva's favor, to prohibit the introduction into evidence of the substance of Morva's pending charges, defense counsel and the Commonwealth stipulated to the following:

> [O]n the dates in question for the crimes charged, that is August 20th and August 21st of 2006, … the Defendant was a prisoner in a state or local correctional facility.… [T]he Defendant was imprisoned, but not yet had gone to trial on the criminal offenses, and … the Defendant was in lawful custody. That is the extent of the stipulation.

J.A. 282-83.

Morva contends that this stipulation improperly admitted an essential element of the capital-murder charge involving the shooting of Derrick McFarland, the hospital security guard. To satisfy its burden as to capital murder, the Commonwealth was required to prove that Morva shot and killed McFarland when he was "confined in" jail or otherwise "in the custody of" a jail employee. *See* Va. Code Ann. § 18.2-31(3). Morva argues that when he killed McFarland, he had escaped from Deputy Quesenberry's custody and was not physically confined in jail, so the stipulation precluded either a successful motion to strike or an acquittal on that charge.

Morva concedes that the claim, raised for the first time to the district court, is procedurally defaulted. He argues, however, that his state post-conviction counsel's failure to raise the claim in the Supreme Court of

Virginia, serves as cause to excuse his procedural default. We do not agree.

A habeas petitioner is generally barred from obtaining federal habeas review of a claim if he failed to exhaust the claim in state court. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In *Martinez*, the Supreme Court carved out a "narrow exception" to the *Coleman* rule. 132 S. Ct. at 1315. Specifically, *Martinez* held:

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim …. where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*. To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Id. at 1318 (citation omitted). Because state prisoners in Virginia cannot raise ineffective-assistance claims on direct appeal, and because state post-conviction counsel failed to challenge counsel's stipulation, the claim is squarely in *Martinez* territory. *See Fowler v. Joyner*, 753 F.3d 446, 462 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015).

The district court, however, properly found that this was "no[t] [a] substantial claim of ineffective assistance of counsel" and dismissed it for procedural default. *Morva v. Davis* (*Morva III*), No. 7:13-cv-00283, 2015 WL 1710603, at *28 (W.D. Va. Apr. 15, 2015).

Even if the stipulation, which mirrors the elements of the prisoner escape offense, conceded an element of the capital-murder charge under section 18.2-31(3), it does not constitute ineffective assistance. It is not objectively unreasonable for counsel to stipulate to a fact that the government can prove. *See United States v. Toms*, 396 F.3d 427, 433-34 (D.C. Cir. 2005) (finding no deficient performance when counsel stipulated to a fact the government was prepared to show through witness testimony).

The Commonwealth could easily have shown that Morva was a "prisoner confined" despite the fact that he was physically outside of the jail and had escaped law enforcement's custody. In *Mu'Min v. Commonwealth*, the defendant was charged and convicted of capital murder under section 18.2-31(3)[6] for killing someone after escaping from an off-site prison work detail. *See* 389 S.E.2d 886, 889-90 (Va. 1990) (describing the facts underlying the conviction), *aff'd on other grounds sub nom. Mu'Min v. Virginia*, 500 U.S. 415 (1991). On appeal to the Supreme Court of Virginia, the defendant challenged as overly prejudicial the admission into evidence of a copy of his previous conviction, which was offered to prove the "prisoner confined in a state or local correctional facility" element of the capital murder charge. *Id.* at 894. The court found no reversible error and noted that a jury instruction, which was expressly charged to define the "prisoner confined" element on the basis of the defendant's legal status as an inmate and not on his physical location or whether he escaped, was "a correct statement of the law." *Id.* at 894 & n.7.

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[6] At the time, section 18.2-31(3) was codified as 18.2-31(c). *See Mu'Min*, 389 S.E.2d at 889.

Mu'Min makes clear that the Commonwealth could have shown, through evidence of Morva's pending charges, that he was a "prisoner confined" when he killed McFarland. *Cf. Simmons v. Commonwealth*, 431 S.E.2d 335, 335-36 (Va. Ct. App. 1993) (explaining that, in the context of escape under Virginia law, the defendant remained a "prisoner in a state, local or community correctional facility" even while released on furlough because the term refers to the prisoner's legal status, which "is not dependent upon actual physical presence in such facility or otherwise restricted by a prisoner's location"). Thus, counsel's strategic choice was not deficient performance.

Moreover, the stipulation did not prejudice Morva for substantially the same reason. Jury Instruction No. 9, which was charged without objection, provides that "[a] prisoner of a state or local correctional facility remains a prisoner at all times until he is released from that status by the proper state authority. A prisoner who escapes from custody retains the status of prisoner during the entire course of such an unauthorized absence." J.A. 492. This instruction is almost identical to the one charged in *Mu'Min*. *See* 389 S.E.2d at 894 n.7. So even without the stipulation, the Commonwealth could have proven that Morva's killing of McFarland satisfied the elements of capital murder under section 18.2-31(3). As a result, Morva's claim that his counsel was ineffective is not substantial and was properly dismissed for procedural default.

III.

For the foregoing reasons, we affirm the district court's judgment.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 7:13-cv-283

WILLIAM CHARLES MORVA,
Petitioner,

v.

KEITH W. DAVIS,
Respondent.

MEMORANDUM OPINION

William Charles Morva ("Morva"), a Virginia inmate proceeding with counsel, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, Dkt. No. 111, challenging the sentences of death imposed by the Circuit Court of Montgomery County, Virginia ("circuit court") on August 25, 2008. Respondent, who is the Warden of the Sussex I State Prison ("Warden"), moved to dismiss the petition, Dkt. Nos. 67, 120, Morva responded, and the court held a hearing on October 24, 2014. After exhaustively reviewing the record and considering the parties' arguments, the court finds that Morva's counsel were not ineffective and that his capital murder trial did not otherwise violate the laws or Constitution of the United States. As such, the Warden's motions to dismiss must be **GRANTED**.

I. *Factual and Procedural History*

Following an eight day trial held in March 2008, a jury convicted Morva of assault and battery on Montgomery County Sheriff's Deputy Russell Quesenberry, in violation of Virginia Code § 18.2-57; escape with force by a prisoner, in violation of Virginia Code § 18.2-478; one count of capital murder for killing hospital security guard Derrick McFarland while a prisoner, in violation of Virginia Code § 18.2-31(3); one count of capital murder for killing Montgomery County Sheriff's Deputy Corporal Eric Sutphin, in violation of Virginia Code § 18.2-31(6); one count of capital murder for committing premeditated murders of more than one person within a three-year period, in violation of Virginia Code § 18.2-31(8); and two counts of using a firearm in the commission of murder, in violation of Virginia Code § 18.2-31. The jury based its decision on the following facts, as recited by the Supreme Court of Virginia:

> In the summer of 2006, Morva was in jail awaiting trial on charges of attempted burglary, conspiracy to commit burglary, burglary, attempted robbery, and use of a firearm. He had been in jail for approximately one year. While in jail he wrote a letter to his mother stating, "I will kick an unarmed guard in the neck and make him drop. Then I'll stomp him until he is as dead as I'll be."
>
> Morva was scheduled to go to trial on August 23, 2006. In the evening on August 19, 2006, he informed the jail personnel that he required medical attention due to an injury to his leg and forearm. During the early morning hours of August 20, 2006, Sheriff's Deputy Russell Quesenberry, who was in uniform and armed

with a Glock .40 caliber semi-automatic pistol, transported Morva to the Montgomery Regional Hospital located in Montgomery County. Morva was wearing waist chains, but Deputy Quesenberry did not secure Morva's allegedly injured arm. Upon arrival at the hospital, Morva "kept trying" to walk on Deputy Quesenberry's right side even though he was ordered to walk on Deputy Quesenberry's left side. Quesenberry was required to have Morva walk on his left because Quesenberry wore his gun on his right side. Quesenberry observed that Morva's limping was sporadic and "sort of went away." Also, Nurse Melissa Epperly observed Morva walking as if he were not injured.

After the hospital treated Morva, Morva requested to use the bathroom. Deputy Quesenberry inspected the bathroom and allowed Morva access. While in the bathroom, Morva removed a metal toilet paper holder that was screwed to the wall. As Deputy Quesenberry entered the bathroom, Morva attacked him with the metal toilet paper holder, breaking Quesenberry's nose, fracturing his face, and knocking him unconscious. Morva then took Quesenberry's gun. Prior to leaving the bathroom, Morva confirmed that Quesenberry's gun was ready to fire, ejecting a live round from the chamber.

After escaping from the bathroom, Morva encountered Derrick McFarland, an unarmed hospital security guard. Morva pointed Quesenberry's gun at McFarland's face. McFarland stood with his hands out by his side and palms facing Morva. Despite McFarland's apparent surrender, Morva shot McFarland in the face from a

> distance of two feet and ran out of the hospital, firing five gunshots into the electronic emergency room doors when they would not open. McFarland died from the gunshot to his face.
>
> In the morning of August 21, 2006, Morva was seen in Montgomery County near "Huckleberry Trail," a paved path for walking and bicycling. Corporal Eric Sutphin, who was in uniform and armed, responded to that information by proceeding to "Huckleberry Trail."
>
> Andrew J. Duncan observed Morva and then later observed Corporal Sutphin on "Huckleberry Trail." Four minutes later, Duncan heard two gunshots, less than a second apart. David Carter, who lived nearby, heard shouting, followed by two gunshots, and saw Corporal Sutphin fall to the ground.
>
> Shortly thereafter, Officer Brian Roe discovered Corporal Sutphin, who was dead from a gunshot to the back of his head. Corporal Sutphin's gun was still in its holster with the safety strap engaged. Officer Roe confiscated Corporal Sutphin's gun to secure it and continued to search for Morva.
>
> Later that day, Officer Ryan Hite found Morva lying in a ditch in thick grass. Even though Morva claimed to be unarmed, officers discovered Quesenberry's gun on the ground where Morva had been lying. Morva's DNA was found on the trigger and handle of Quesenberry's gun.

Morva v. Commonwealth, 278 Va. 329, 335-37, 683 S.E.2d 553, 556-57 (2009).

During the sentencing phase of trial, the jury heard testimony from Dr. Bruce Cohen, a forensic psychiatrist, and Dr. Scott Bender, a neuropsychologist, both from the Institute of Law, Psychiatry, and Public Policy in Charlottesville, Virginia.[1] After conducting numerous psychological tests, Dr. Bender identified two "DSM-IV Diagnostic Possibilities:" Somatoform Disorder NOS (not otherwise specified), which is an Axis-I disorder, and a Personality Disorder NOS (not otherwise specified) (Mixed Personality Disorder with Schizotypal, Narcissistic, Antisocial, and Paranoid Features), which is an Axis-II disorder.[2] State Habeas Appendix ("SHA") Vol. 6, at 2486.[3] Relying on documents, his own interviews, and Dr. Bender's determinations, Dr. Cohen concluded that "Morva's life story and overall clinical presentation are indicative of a diagnosis of schizotypal personality disorder." SHA Vol. 6, at 2467;

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[1] Before trial, the circuit court granted trial counsel's motion to appoint a mental health expert and a mitigation specialist to assist with trial. Although trial counsel initially requested a specific psychologist from Philadelphia, the circuit court appointed Dr. Bruce Cohen. The circuit court also appointed Dr. Bender, on trial counsel's motion, to aid Dr. Cohen. Dr. Bender performed certain psychological tests on Morva to help develop Dr. Cohen's forensic evaluation. The circuit court also appointed Dr. Leigh Hagan, a psychologist, to prepare a Capital Sentencing Evaluation for the Commonwealth. However, the circuit court denied trial counsel's motion to appoint an expert on prison-risk assessments, and the facts related to this denial are discussed below in claim I.

[2] Both of these diagnoses were based on the Fourth Edition of the American Psychiatric Association's Diagnostic and Statistical Manual ("DSM-IV").

[3] Copies of Dr. Cohen and Dr. Bender's reports were attached to the respondent's motion to dismiss in state habeas proceedings before the Supreme Court of Virginia. The court cites the copies filed in Volume 6 of the state habeas appendix for convenience.

Direct Appeal Joint Appendix ("Direct Appeal JA") at 2325. Dr. Cohen did not find that Morva's schizotypal personality disorder constituted an "extreme mental or emotional disturbance at the time of the offenses" or that it significantly impaired Morva's capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law[.]" SHA Vol. 6, at 2466; Direct Appeal JA at 2324-25, 2353; *see*, *e.g.*, Va. Code Ann. § 19.2-264.3:1(A), (C). However, Dr. Cohen testified that Morva's schizotypal personality disorder served as a mitigating factor against imposing a death sentence. Direct Appeal JA at 2353-54.

After hearing substantial mitigation evidence, including testimony from Dr. Bender and Dr. Cohen, the jury recommended sentences of death for each of the three capital murder convictions and a total term of sixteen years' incarceration for the other convictions. The circuit court's August 25, 2008 sentencing order imposed the jury's recommended sentences. Direct Appeal JA at 413-15.[4] On appeal, the Supreme Court of Virginia affirmed the convictions and sentences, finding "no reversible error" and "no reason to set aside the sentences of death."[5] *Morva v. Commonwealth*, 278 Va. at 355, 683 S.E.2d at 568.

Following the denial of the direct appeal, the circuit court appointed two licensed Virginia attorneys ("state habeas counsel"), who were specially qualified under Virginia Code § 19.2-163.7 to represent Morva in state

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[4] An amended sentencing order was entered on October 8, 2008. Direct Appeal JA at 419-21.

[5] The Supreme Court of the United States denied a petition for a writ of certiorari from that decision. *Morva v. Virginia*, 131 S. Ct. 97 (2010).

habeas proceedings. On December 3, 2010, state habeas counsel filed a petition for a writ of habeas corpus and five volumes of appendices with the Supreme Court of Virginia.[6] The Warden filed a motion to dismiss supported with exhibits, including affidavits, on January 4, 2011.

Between February 4, 2011, and April 3, 2013, Morva filed five motions for leave to supplement the record and one motion to amend the petition.[7] During that

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[6] The first volume of Morva's exhibits consisted of fifty-nine affidavits, primarily from Morva's family, friends, teachers, and a physician. The remaining four volumes consisted primarily of multigenerational historical records about Morva's maternal and paternal families, Morva's educational records, jail and police records for Morva and his brother, Michael, and Michael's medical and military records.

[7] On February 4, 2011, Morva moved for leave to supplement the record with a sixth appendix volume. On April 13, 2011, Morva filed a second motion for leave to supplement the record, seeking to replace blank pages in Volume II of the appendix with seven pages relating to immigration records of Morva's father. On May 11, 2012, Morva filed a third motion for leave to supplement the record with documents establishing that Morva is a citizen of Hungary. On August 31, 2012, Morva filed a fourth motion for leave to supplement the record to add an affidavit from Dr. Dale G. Watson, a clinical psychologist who reviewed documents produced before, during, and after Morva's trial and proffered, *inter alia*, that Morva needed another mental health evaluation to determine whether Morva suffers from an Axis-I disorder. On April 3, 2013, Morva filed a motion for leave to amend the petition and also to supplement the habeas appendix with evidence supporting the amendment. Morva sought the amendment to include a person's statement to the police that he drove Morva to downtown Blacksburg without knowing Morva had just escaped and killed McFarland. The Warden objected to all of the motions to amend and to supplement except for the inclusion of Drs. Cohen, Bender, and Hagan's mental health evaluations in the sixth appendix volume

same time, Morva also pursued motions for discovery, for appointment of mental health experts, and for an evidentiary hearing to support the claims set forth in the petition and exhibits.[8] On April 12, 2013, the Supreme Court of Virginia denied all of these motions, considered "[t]he exhibits contained in the [five] appendices … pursuant to the appropriate evidentiary rules[,]" and granted the Warden's motion to dismiss the habeas petition. *Morva v. Warden of the Sussex I State Prison*, 285 Va. 511, 525, 741 S.E.2d 781, 792 (2013).

II. *Morva's Federal Habeas Claims*

Thereafter, Morva timely commenced this action with the assistance of new habeas counsel appointed by this court, and the court stayed Morva's execution pursuant to 28 U.S.C. § 2251(a)(3). The petition ripe for adjudication is Morva's second amended petition for a

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because the Warden had already attached these reports to the motion to dismiss.

[8] The motion for discovery sought permission to explore the conditions Morva experienced at the Montgomery County Jail and to depose certain persons, including trial witness Jennifer Preston; Morva's co-defendants on the burglary and robbery charges; two additional teachers at Blacksburg High School; and Laura Eichenlaub, the counselor at the Montgomery County Jail who completed an intake form on Morva following his arrest on the underlying charges. The motion for appointment of mental health experts was made in furtherance of Morva's belief that he suffers from an Axis-I disorder and that the diagnosis of this more severe mental disease would have caused the jury, had it known of it, to impose life sentences. Morva subsequently sought to supplement the motion for appointment of mental health experts with Dr. Watson's affidavit and with an unverified "preliminary report" from Dr. Leslie Lebowitz, another clinical psychologist. Dr. Lebowitz proffered that Morva may have experienced traumatic events during his childhood that may have affected Morva's behavior and actions as an adult and that evaluation by a trauma specialist was needed.

writ of habeas corpus prepared by counsel, Dkt. No. 111.[9] Morva presents the following twelve claims in the instant petition:

I. The circuit court's denial of the assistance of a risk assessment expert on the issue of future dangerousness violated the Eighth and Fourteenth Amendments;

II. (A) Morva was visibly restrained during trial in violation of due process, and (B) trial counsel rendered ineffective assistance by not objecting to the visible restraints;

III. The circuit court's exclusion of venirewoman Mary Blevins violated the Sixth and Fourteenth Amendments' guarantees of a fair trial and an impartial jury;

IV. Trial counsel rendered ineffective assistance by stipulating that Morva was "a prisoner imprisoned and in lawful custody" during his escape on August 20 and 21, 2006;

V. Trial counsel rendered ineffective assistance by not investigating and challenging forensic and other evidence relating to the two shootings;

VI. Trial counsel rendered ineffective assistance by not investigating and presenting

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[9] Morva filed a *pro se* petition for a writ of habeas corpus, Dkt. No. 61, which the court dismissed without prejudice. Dkt. No. 115. Morva was already represented by counsel, and the *pro se* claims were either procedurally defaulted and unexcused or touch upon the claims raised in the instant petition, which, as discussed herein, do not warrant relief.

evidence about conditions of confinement at the Montgomery County Jail to support a claim of imperfect self-defense;

VII. Jury Instruction 8A violated the Fourteenth Amendment's right to due process;

VIII. Trial counsel rendered ineffective assistance by (A) not making a double jeopardy objection to the third capital murder charge, and (B) not offering an instruction against triple-counting the capital murder charges and not objecting to the duplicative jury instructions and duplicative verdict forms that misled the jury into sentencing Morva to death;

IX. Trial counsel rendered ineffective assistance by not (A) conducting an adequate investigation of Morva's background, history, character, and mental illness; (B) providing the available information to the mental health experts to ensure an accurate and reliable mental health evaluation; and (C) adequately presenting all available mitigating evidence during the sentencing phase;

X. Trial counsel rendered ineffective assistance by not ensuring that Morva had constitutionally adequate expert assistance;

XI. Trial counsel rendered ineffective assistance by not investigating and presenting powerful mitigation evidence that Morva had saved a man's life and helped the Commonwealth prosecute the man's assailant; and

XII. Morva's death sentence based on a finding of depravity of mind, as permitted by Vir-

ginia Code § 19.2-264.4(C), violates the Eighth and Fourteenth Amendments.

The Warden filed motions to dismiss the second amended petition, which are before the court for decision.[10]

III. *Overview of Analytical Framework*

A. Legal Standard

For each of Morva's twelve claims for relief, the court must consider the threshold issue of whether the claim is procedurally defaulted. A claim is procedurally defaulted if: "(1) the state court relied on an adequate and independent state procedural rule to deny relief on that claim, *Fisher v. Angelone*, 163 F.3d 835, 844 (4th Cir.1998); or (2) the petitioner failed to present a claim to the state court and that claim may not now be presented, *Gray v. Netherland*, 518 U.S. 152, 161-62, (1996); *Bassette v. Thompson*, 915 F.2d 932, 936 (4th Cir. 1990)." *Bell v. True*, 413 F. Supp. 2d 657, 676 (W.D. Va. 2006), *aff'd sub nom. Bell v. Kelly*, 260 F. App'x 599 (4th Cir. 2008). As discussed *infra*, claim II(A) falls into the first category of procedurally defaulted claims, and claims IV and VIII(B) fall into the second. If a claim is

[10] The second amended petition filed on September 8, 2014, Dkt. No. 111, amended claim IX following the forensic psychiatric evaluation performed by Dr. Donna Schwartz-Watts. The second amended petition was unchanged regarding Morva's other claims. After the second amended petition was filed, the Warden filed a motion to dismiss and supporting memoranda that addressed only amended claim IX. Dkt. Nos. 120, 121. As regards the other claims, the Warden incorporated by reference the arguments made in connection with the motion to dismiss the first amended petition. As a consequence, the court must consider and address the arguments raised in both motions to dismiss, Dkt. Nos. 67 and 120, and the briefs associated therewith.

determined to have been procedurally defaulted, it is barred from federal habeas review unless the petitioner "can show that cause and prejudice or a fundamental miscarriage of justice might excuse his default." *Bell*, 413 F. Supp. 2d at 676 (citing *Fisher*, 163 F.3d at 844).

The bulk of Morva's claims were presented to the Supreme Court of Virginia, either on direct appeal or in his state habeas petition, and are not procedurally defaulted. For these claims, the court must review the state court's decision on the merits, pursuant to 28 U.S.C. § 2254. A federal court conducting habeas review is limited to determining whether a petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Thus, the court may grant habeas relief only if the state court's adjudication of a claim is (1) contrary to, or an unreasonable application of, clearly established federal law, or (2) based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

A state court determination is "contrary to" clearly established federal law[11] if it "arrives at a conclusion opposite to that reached by [the United States Supreme] Court on a question of law or if the state court decides a case differently than [the United States Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A state court determination is an "unreasonable application of" clearly established federal law if the state court "identifies the correct governing legal principle from [the United States Supreme] Court's decisions but

[11] Clearly established federal law" refers to the "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

unreasonably applies that principle to the facts of the prisoner's case." *Id.* This reasonableness standard is an objective one. *Id.* at 410. "It is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous …. Rather, that application must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003) (internal citations and quotations omitted). Review of a state court's legal determination involving clearly established federal law "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 1398 (2011).

A state court's factual determination is entitled to a "presumption of correctness," which can only be rebutted by "clear and convincing" evidence that the state court's decision was "based on [an] unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2), (e)(1); *see Bell*, 413 F. Supp. 2d at 676. The presumption applies equally to the factual findings of state courts that conducted post-conviction proceedings. *Howard v. Moore*, 131 F.3d 399, 422 (4th Cir. 1997) (citing *Rushen v. Spain*, 464 U.S. 114 (1983) (per curiam), and *Johnson v. Maryland*, 915 F.2d 892, 896 (4th Cir. 1990)). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010).

Even if a writ of habeas corpus is authorized under § 2254(d), a petitioner still is not entitled to relief unless he can show that any constitutional error committed had a substantial and injurious effect or influence on the jury's verdict. *Wilson v. Ozmint*, 352 F.3d 847, 855 (4th Cir. 2003).

> If this standard is difficult to meet, that is because it was meant to be. As amended by [the Antiterrorism and Effective Death Penalty Act], § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme] Court's precedents. It goes no further. Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Harrington v. Richter, 562 U.S. 86, 102-03 (2011) (citations omitted).

B. Standard Applicable to Claims of Ineffective Assistance of Counsel

A number of Morva's claims raise arguments of ineffective assistance of counsel.[12] A petitioner claiming

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[12] For instance, Morva argues that trial counsel's failure to raise claim II(A) and state habeas counsel's failure to raise claims IV and VIII(B) constitute ineffective assistance and cause to excuse the procedural defaults of those claims. With respect to claims IV and VIII(B), Morva cites *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), for the proposition that a procedurally

ineffective assistance of counsel must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The first prong of *Strickland* requires a petitioner to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" meaning that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88.

The second prong of *Strickland* requires a petitioner to show that counsel's deficient performance prejudiced him by demonstrating a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine the confidence of the outcome." *Id.* It is not enough "'to show that the errors had some conceivable effect on

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defaulted, substantial claim of ineffective assistance of trial counsel could be considered if habeas counsel rendered ineffective assistance, or no counsel was provided, during the initial state collateral proceeding.

Morva also raises ineffective assistance arguments in claims II(B), V, VI, VIII(A), IX, X, and XI. With respect to these claims, "double deference is required—deference to the state court judgment granting deference to trial counsel's performance." *Burr v. Lassiter*, 513 F. App'x 327, 340 (4th Cir. 2013).

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so.… When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Id. at 340-41 (internal citations omitted).

the outcome of the proceeding.' Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 693, 687). In a capital case, "the prejudice inquiry centers on 'whether there is a reasonable probability that, absent [counsel's] errors, the sentencer … would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Williams v. Ozmint*, 494 F.3d 478, 484 (4th Cir. 2007) (quoting *Strickland*, 466 U.S. at 695 (alterations and ellipses in *Ozmint*)). If a petitioner does not satisfy one prong of the *Strickland* test, a court need not inquire whether petitioner has satisfied the other prong. *Strickland*, 466 U.S. at 697.

The Sixth Amendment right to the effective assistance of counsel exists "in order to protect the fundamental right to a fair trial." *Id.* at 64. "Thus, the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

C. Applicability of 28 U.S.C. § 2254(d)

Morva argues that the deferential standard set forth in § 2254(d) should not apply in this case and his non-defaulted claims should be considered *de novo* "because the state court did not adjudicate them on the merits[.]" Second Am. Pet., Dkt. No. 111, at 20. Morva cites *Winston v. Kelly*, 592 F.3d 535, 555-56 (4th Cir. 2010), for the proposition that the Supreme Court of Virginia's disposition of the state habeas petition is not

entitled to the deference proscribed in § 2254(d) because the Supreme Court of Virginia denied Morva's motions for discovery, for appointment of mental health experts, and for an evidentiary hearing. Morva contends, therefore, that the court must review the claims *de novo*. Second Am. Pet., Dkt. No. 111, at 35.

"Whether a claim has been adjudicated on the merits is a case-specific inquiry," and *de novo* review might be appropriate if "a state court unreasonably refuses to permit further development of the facts of a claim[.]" *Winston v. Pearson*, 683 F.3d 489, 496 (4th Cir. 2012) (internal quotation marks omitted). Upon review of the voluminous record in this case, the court cannot conclude that the Supreme Court of Virginia unreasonably refused further factual development of the facts of any of Morva's claims. In addition to the seven volumes of the joint appendix considered on direct appeal, the Supreme Court of Virginia considered the five volumes of state habeas appendix materials Morva filed in connection with his initial state habeas petition along with the expert mental health assessments of Drs. Bender, Cohen, and Hagan found in volume six of the state habeas appendix. The first five volumes of the state habeas appendix span more than two thousand pages, and contain (1) fifty-nine affidavits from Morva's family, friends, acquaintances and others, (2) data regarding Morva's family history, (3) reports from police and first responders, (4) educational and employment records for Morva and his family, (5) medical records for Morva and his family, (6) military and jail records for Morva's brother Michael, and (7) Morva's jail records.

In connection with his state habeas petition, Morva sought discovery of additional information and the appointment of mental health experts. Morva asked the Supreme Court of Virginia to permit inspection or oth-

er discovery concerning the conditions of C-Block of the Montgomery County Jail where Morva was housed prior to the murders. The Supreme Court of Virginia did not permit the requested discovery and denied the claim, ruling that Morva's allegations concerning the living conditions at the Montgomery County Jail "would not have provided a viable defense to the murders he committed, and would not have mitigated the murders."[13] *Morva v. Warden*, 285 Va. at 517, 741 S.E.2d at 787. Thus, additional discovery on the jail conditions was immaterial to the ultimate legal conclusion reached by the Supreme Court of Virginia.

Next, Morva sought discovery depositions from a few persons who would not voluntarily speak with state habeas counsel. Morva asked to question Commonwealth trial witness Jennifer Preston, a witness to the shooting of hospital security guard Derrick McFarland.[14] Morva sought to question Preston about her state of mind, suggesting that her "perception and judgment may well have been impaired at the time of the shooting." State Habeas Motion for Leave to Conduct Discovery, filed March 23, 2011, at 11. Morva speculates from Preston's prior criminal history that she may have been intoxicated, that her "accident may have involved the use of drugs or consumption of alcohol or some other nonexternal event." *Id.* at 12. Morva also posits that Preston may have been in shock or had been "administered medications or other treatment in

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[13] Prior to the murders, Morva had been a pretrial detainee at the Montgomery County Jail since the summer of 2006 on charges of attempted burglary, conspiracy to commit burglary, burglary, attempted robbery, and use of a firearm.

[14] Preston was in a car accident the night before Morva's escape and was brought to the hospital for emergency treatment.

the hospital, and these may have affected her perception and judgment." *Id.* Preston testified at Morva's trial and was cross examined. Nothing about her testimony suggests any lack of capacity on her part, and the discovery request is entirely speculative.

Morva likewise sought to depose Gregory Nelson, Stanford Harvey and Jeffrey Roberts, Morva's co-defendants on the pending burglary and robbery charges, concerning Morva's "increasingly bizarre behavior" and to "provide further proof of his delusions and aberrant thoughts." *Id.* at 16-17. Morva argues that such information "would have helped the mental health experts reach an informed and accurate diagnosis." *Id.* at 17. As will be addressed in detail in connection with claim IX, Morva's mental health experts were well aware of his peculiarities,[15] and many witnesses testified in mitigation about his eccentric behavior around Blacksburg. Morva and his co-defendants faced prosecution for violent crimes, and it cannot be credibly maintained that calling them as trial witnesses could have helped Morva. Given "the totality of the evidence before the … jury," *Strickland*, 466 U.S. at 695, on mitigation, the failure to engage in additional discovery does not call into question the application of § 2254(d).

Nor can it be said that the ninth grade art and eleventh grade piano lab teachers from whom Morva

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[15] Indeed, Dr. Cohen's report states that "[b]eginning in his mid-teenage years, [Morva] developed several intense preoccupations, primarily involving his physical functioning, his belief that he is fundamentally different from other people, his desire to lead an 'all-natural' lifestyle, and his distrust of others. He is extremely rigid with regard to his personal beliefs and he has difficulty seeing things from the point of view of others." SHA Vol. 6, at 2468-74. Dr. Cohen testified at trial as to his diagnosis that Morva suffered from a schizotypal personality disorder.

sought discovery could offer relevant information that was not cumulative of the information already contained in the trial record or in the numerous affidavits from Morva's friends and acquaintances that filled Volume I of the state habeas appendix. Indeed, at trial, Morva called as witnesses another high school teacher and a guidance counselor, along with several friends.

Finally, Morva sought to depose Laura Eichenlaub, a counselor at the Montgomery County Jail who did an intake interview of Morva a few months after he was arrested on the robbery and burglary charges. Her interview notes indicate that Morva was stressed and wanted to talk with someone new. Her notes indicate that Morva's Behavior/Appearance, Thought Content/Process, Orientation, and Suicidal and Homicidal Ideation were "WNL," presumably meaning within normal limits. The form noted Morva's digestive issues (irritable bowel syndrome), poor sleep, and family history of alcoholism. Eichenlaub's interview notes are, in short, cumulative of the volumes of information on these subjects otherwise contained in the trial record and state habeas appendix. Like many of the state habeas affiants, Eichenlaub had also run into Morva at downtown Blacksburg shops before his arrest. There is no suggestion that her observations would be anything other than cumulative of the trial record or the host of affidavits collected in the state habeas appendix.

In addition to this discovery, Morva asked the Supreme Court of Virginia to appoint additional mental health experts. State habeas counsel offered an affidavit from Dr. Dale Watson and an unsworn submission by Dr. Leslie Liebowitz, opining that a comprehensive mental health evaluation of Morva should be undertaken. Dr. Watson's affidavit was somewhat critical of the opinions rendered by the mental health experts who

testified at trial, indicating that they did not have sufficient information to properly assess Morva's delusional beliefs. Appendix to Morva's Second Am. Pet., Dkt. No. 111-1, at 76-87. Dr. Liebowitz offered that Morva may have been exposed to childhood trauma and that he ought to be evaluated by a clinician with expertise in traumatic stress or child maltreatment. *Id.* at 107. However, neither Drs. Watson nor Liebowitz met Morva. Thus, neither was in a position to evaluate or diagnose Morva. As will be addressed in detail in connection with the court's discussion of claim IX, Morva had the assistance of two mental health professionals appointed by the circuit court to assist him at trial. Dr. Bender testified as to the results of psychological testing he performed on Morva, and Dr. Cohen testified as to his diagnosis of schizotypal personality disorder. The fact that other mental health experts, some years after the trial, suggest that further mental health evaluations be performed on Morva to see whether he suffered from different, even more severe, mental health issues did not change the constitutional calculus facing the Supreme Court of Virginia in claim IX. The question was not whether another expert may disagree with the assessment provided to the jury by Drs. Bender and Cohen. Rather, the question was whether their assistance, and that of trial counsel working with them, met the constitutional standard. Morva had the assistance of well-qualified mental health experts at trial, and the court cannot fault the Supreme Court of Virginia for not reopening discovery to obtain a new mental health evaluation of Morva some years later.

To be sure, the Supreme Court of Virginia did not grant Morva's requests for additional discovery, appoint new mental health experts or conduct an evidentiary hearing. But state habeas counsel presented doz-

ens of affidavits and reams of records which the Supreme Court of Virginia accepted and considered. "The fact that [Morva's] state post-conviction counsel requested but was denied an evidentiary hearing simply does not, without more, warrant *de novo* review of the state court's decision." *Burr v. Lassiter*, 513 F. App'x 327, 340 (4th Cir. 2013).

In short, there is no indication that Morva's discovery and other requests in the state habeas proceedings would have led to material evidence that could have in any respect altered the outcome of Morva's trial. Rather, the discovery sought by Morva is either speculative or cumulative of the testimony presented trial. Given the voluminous record in this case, the Supreme Court of Virginia did not act unreasonably in declining to permit the additional discovery sought by Morva, authorize a new mental health evaluation, or conduct an evidentiary hearing. As such, the court is required to review the state court's adjudication of Morva's claims under its disposition of the deferential standards of § 2254(d).

IV. *Analysis of Morva's Claims*

The court will address the substance of each of Morva's claims in turn, considering issues of procedural default in connection with claims II(A), IV and VIII(B).

A. Claim I—Denial of Expert Testimony in Prison Risk Assessment

Morva argues in claim I that the circuit court violated the Eighth and Fourteenth Amendments when it denied Morva's motion to appoint Dr. Mark D. Cunningham, a prison-risk assessment expert, in mitigation of the prosecution's assertion of Morva's future danger-

ousness. The Supreme Court of Virginia described the relevant facts as follows:

> Prior to trial, Morva filed a motion for the appointment of an expert on prison risk assessment, Dr. Mark D. Cunningham. Although the court had already appointed two psychologists as mitigation experts, Morva argued that Dr. Cunningham would be needed to rebut the Commonwealth's claim that Morva was a future danger to society and to provide the jury with an assessment of the likelihood that Morva would commit violence if he were sentenced to life in prison. Along with the motion, Morva proffered Dr. Cunningham's curriculum vitae, an example of a presentation Dr. Cunningham had given in *Commonwealth v. Jose Rogers*, and a declaration from Dr. Cunningham regarding his qualifications and experience in providing violence risk assessments and his anticipated testimony.
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> * * *
>
> Morva contended that "[b]ecause the only alternative to the death penalty for a defendant convicted of capital murder is life imprisonment without the possibility of parole, the only 'society' to which the defendant can ever pose a 'continuing serious threat' is prison society." 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.

Acknowledging Virginia precedent to the contrary, Morva also argued, in the motion, that this Court's future dangerousness precedent misinterprets the controlling requirements of federal constitutional law by rejecting evidence concerning the conditions and procedures governing a defendant's future confinement. Citing *Simmons v. South Carolina*, 512 U.S. 154 (1994), *Skipper v. South Carolina*, 476 U.S. 1 (1986), and *Gardner v. Florida*, 430 U.S. 349 (1977), Morva's motion claimed that a defendant has a constitutional right to rebut any evidence upon which the jury might rely in sentencing him to death and that this constitutional right requires appointment of an expert on prison risk assessment and "admission of [a] foundation about such critical considerations as the defendant's future classification if sentenced to life imprisonment; the limitations on his freedom within the prison system; the Virginia Department of Corrections internal safety and security measures; and the actual rates of serious violence in Virginia's prisons."

In Dr. Cunningham's declaration, provided as an attachment to the motion, Dr. Cunningham stated, "A reliable individualized assessment can be made of the likelihood that Mr. Morva will commit acts of serious violence if confined for life in the Virginia Department of Corrections." He further acknowledged that he would testify concerning "[g]roup statistical data (i.e., base rate data)" because the "rates of violence

in similarly situated groups is critically important to a reliable violence risk assessment and forms the anchoring point of any individualized risk assessment." If appointed, he would testify that "[r]isk is always a function of context," and consideration of interventions that can be brought to bear on inmates in the Virginia Department of Corrections would be an important part of the violence risk assessment he would perform. He would also testify that "[t]here are conditions of confinement available in the Virginia Department of Corrections that substantially negate the potential/occurrence of serious violence" and that "[s]hould Mr. Morva be identified as a disproportionate risk of violent or disruptive conduct by the Virginia Department of Corrections, super-maximum confinement could be brought to bear."

Dr. Cunningham further stated "it is necessary to specify the conditions of confinement in order to make a reliable violence risk assessment and to address the implicit inference of the Commonwealth in alleging [a] continuing threat that it is incompetent to securely confine the defendant in the future." He noted that he would testify that "[u]nder an administrative maximum level of confinement at Red Onion or other ultra-high security unit, an inmate is single-celled and locked down twenty-three hours daily, with individual or small group exercise, and shackled movement under escort. Under such conditions of security, opportunities for serious violence toward others are greatly reduced." He opined that "[s]uch increased security measures would act to significantly reduce

the likelihood of Mr. Morva engaging in serious violence in prison."

In the letter from Dr. Cunningham accompanying the motion to reconsider, Dr. Cunningham stated that group statistical data regarding similarly situated inmates interpreted in light of characteristics specific to Morva is relevant to future prison conduct. He also expounded upon the scientific validity of making individual assessments based upon group data. He reiterated that risk is always a function of context or preventative interventions and that increased security measures could significantly reduce the likelihood that Morva would engage in serious violence in prison. He opined that informing the jury of the capabilities of the Virginia Department of Corrections to bring higher levels of security to bear was necessary to provide an individualized risk assessment.

* * *

Morva points out that, in this case, Dr. Cunningham has 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 prior behavior while incarcerated, age, level of educational attainment, and appraisals of his security requirements during prior incarceration. 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.

* * *

> … [T]he Commonwealth in this case neither proposed nor introduced any evidence concerning Morva's prospective life in prison, but limited its evidence on the future dangerousness aggravating factor to the statutory requirements consisting of Morva's prior history and the circumstances surrounding the offense. Thus, Dr. Cunningham's anticipated testimony was not in rebuttal to any specific evidence concerning prison life.

Morva v. Commonwealth, 278 Va. at 337, 345-47, 683 S.E.2d at 557-58, 562-64 (internal citations omitted).

Despite Morva's arguments to the contrary, the trial record reflects that the Supreme Court of Virginia's determination of the facts was not unreasonable. On July 16, 2007, trial counsel moved the circuit court to appoint Dr. Cunningham as an expert to provide evidence in mitigation of the Commonwealth's expected assertion of Morva's future dangerousness, citing *Gardner*, *Skipper*, *Simmons*, *Ake v. Oklahoma*, 470 U.S. 68 (1985), and *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (1996). On August 1, 2007, the circuit court denied the motion to appoint Dr. Cunningham, citing *Burns v. Commonwealth*, 261 Va. 307, 340, 541 S.E.2d 872, 893 (2001), which held that a convict's death sentence must be based on the convict's history and background and the circumstances of the capital offense, instead of the general nature of prison life in a maximum security facility. On February 1, 2008, trial counsel asked the circuit court to reconsider the denial and submitted three documents in support: Dr. Cunningham's declaration; his updated curriculum vitae; and sample presentation slides that describe generally Dr. Cunningham's anticipated expert testimony.

Dr. Cunningham stated in his declaration that:

> A reliable individualized assessment can be made of the likelihood that Mr. Morva will commit acts of serious violence if confined for life in the Virginia Department of Corrections. In the absence of the [circuit] [c]ourt appointing me to provide this risk assessment, with associated review of records and interview of Mr. Morva, the precise contours of this testimony cannot be specified. However, the reliable methodology and associated group statistical data that would have been applied in making this risk assessment can be detailed. Further, even generalized information on the methodology, rates, and correlates of violence risk assessment for prison that is particularized by hypothetical questions can be crucial to a capital jury making this determination in a reliable and scientifically-informed fashion.

Direct Appeal JA at 663-64. The materials provided by Dr. Cunningham support the reasonableness of the Supreme Court of Virginia's conclusion that Dr. Cunningham's opinion as to Morva's future dangerousness was not based on an individualized assessment of Morva but rather on criminal justice statistics of inmates in various states over the course of several decades.

As reflected in his presentation slides, Dr. Cunningham employed a methodology that compared a defendant's age to the correlation between the ages of offenders in New York and the likelihood those offenders committed an infraction of facility rules in the 1970s. Dr. Cunningham also compared a sample defendant's age to the federal Bureau of Prisons' data from 1989 and then summarized the narrative data of the sample de-

fendant's adjustment to incarceration in various Virginia facilities. Dr. Cunningham next summarized his findings from a study of corrections in Florida that concluded inmates sentenced to life without parole were significantly less likely to be involved in assaultive conduct than inmates sentenced to less than twenty years' incarceration. Dr. Cunningham looked at other sources, including data from the Virginia Department of Corrections, to support his proposition that past violence in the community, escape history, charges, and convictions are not good predictors of a capital inmate's conduct in prison. The sample presentation slides concluded by stating that Virginia's correctional programming and security measures could reduce the risk that any capital inmate could commit assaultive conduct. The contours of Dr. Cunningham's thesis are apparent: a capital inmate, whether it be Morva or someone else, will not likely be an increased risk to institutional security because many capital convicts, although not all, did not attack inmates or staff while incarcerated and because the Virginia Department of Corrections can keep capital inmates in long-term segregation for life.

The Supreme Court of Virginia denied the claim on direct appeal, finding no error in the circuit court's refusal to appoint Dr. Cunningham. The Supreme Court of Virginia recognized that due process requires a capital defendant be allowed the opportunity to rebut information that a jury could consider, and may have relied upon, when recommending a death sentence. *Morva v. Commonwealth*, 278 Va. at 348, 683 S.E.2d at 564. Although the Supreme Court of Virginia recognized that "Dr. Cunningham proposed to provide testimony that concerns Morva's history and background, prior behavior while incarcerated, age and educational attainment, and such factors might bear on his adjust-

ment to prison[,]" it determined that Dr. Cunningham's expected testimony about the rates of assaults and prison security conditions "were not relevant to the determination the jury has to make concerning Morva's future dangerousness." *Id.* at 350, 683 S.E.2d at 565. The Supreme Court of Virginia did not consider Dr. Cunningham's description of correctional programming and security measures to be unique to Morva as the conditions would be "true of any other inmate as well, and it is evidence of the effectiveness of general prison security[.]" *Id.* at 351, 683 S.E.2d at 565. Thus, the Supreme Court of Virginia concluded that the circuit court did not err because Dr. Cunningham's proposed testimony was not relevant or probative as to Morva's future dangerousness and that a fundamentally unfair trial did not occur without that testimony. *Id.* at 351, 683 S.E.2d at 566. Concluding that Dr. Cunningham's opinion was founded on statistics derived from generalized prison studies and was not grounded in Morva's character, record or the circumstances of the offense, the Supreme Court of Virginia found no error in the circuit court's exclusion of this evidence as irrelevant to the issue of Morva's future dangerousness.

In rejecting Morva's argument that the circuit court's refusal to appoint Dr. Cunningham violated due process, the Supreme Court of Virginia addressed three United States Supreme Court decisions: *Gardner*, *Skipper*, and *Simmons*. Consistent with the Supreme Court of Virginia's conclusion, none of those cases constitutionally required admission of Dr. Cunningham's opinion.

In *Gardner*, the United States Supreme Court found a due process violation when a defendant was sentenced to death based, at least in part, on confidential information contained in a presentence report,

which he had no opportunity to explain. The Court first "acknowledged its obligation to re-examine capital-sentencing procedures against evolving standards of procedural fairness in a civilized society." 430 U.S. at 357. The *Gardner* Court reaffirmed that "death is a different kind of punishment from any other that may be imposed in this country[,]" and that the sentencing process must comply with the Due Process Clause. *Id.* at 357-58. The Court rejected the state of Florida's arguments that concerns over confidentiality of sources of information for the presentence report, delays associated with disclosure, and the proper exercise of discretion by trial judges warranted nondisclosure. "We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362.

Ronald Skipper was convicted of capital murder and rape in South Carolina. Skipper sought to introduce testimony from two jailers and a regular visitor about how he had made a good adjustment to prison, which the state trial court found to be irrelevant and inadmissible. The state trial court said his adjustment was not an issue in the case. During closing argument, the prosecution argued that Skipper would pose disciplinary problems if sentenced to prison and would likely rape other prisoners. Skipper argued that the excluded evidence was relevant mitigating evidence and it was constitutional error not to allow it under *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The Court framed the issue as "whether the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place

before the sentencer relevant evidence in mitigation of punishment." *Skipper*, 476 U.S. at 4.

The Court answered the question in no uncertain terms:

> It can hardly be disputed that it did. The State does not contest that the witnesses petitioner attempted to place on the stand would have testified that petitioner had been a well-behaved and well-adjusted prisoner, nor does the State dispute that the jury could have drawn favorable inferences from this testimony regarding petitioner's character and his probable future conduct if sentenced to life in prison. Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, see *Koon I*, *supra*, 278 S.C. at 536, 298 S.E.2d at 774, there is no question but that such inferences would be "mitigating" in the sense that they might serve "as a basis for a sentence less than death." *Lockett*, *supra*, 438 U.S. at 604. Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Jurek v. Texas*, 428 U.S. 262, 275. The Court has therefore held that evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an "aggravating factor" for purposes of capital sentencing, *Jurek v. Texas*, *supra*; see also *Barefoot v. Estelle*, 463 U.S. 880 (1983). Likewise, evidence that the defend-

> ant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*, such evidence may not be excluded from the sentencer's consideration.

476 U.S. at 4-5 (parenthetical omitted).

In footnote 1, the Court noted the relevance of the evidence of Skipper's past good behavior in prison in light of the prosecution's closing argument that Skipper would pose problems in jail, including rape.

> The relevance of evidence of probable future conduct in prison as a factor in aggravation or mitigation of an offense is underscored in this particular case by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison. Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

476 U.S. at 5 n.1.

Jonathan Simmons beat an elderly woman to death and received a death sentence after trial. During closing argument, the prosecution argued that Simmons' future dangerousness was a factor for the jury to consider when fixing an appropriate punishment. Sim-

mons argued that there was no reason to expect future acts of violence from him in a prison setting. Simmons sought to offer evidence of his ineligibility for parole and an instruction that if sentenced to life imprisonment that he would not be paroled. The trial court refused the proposed instruction. During deliberations, the jury asked a question about parole, and the trial court instructed the jury that they were not to consider parole or parole eligibility. Twenty-five minutes later, the jury returned the death sentence.

Citing *Gardner*, the *Simmons* Court noted that the Due Process Clause does not allow the execution of a person on the basis of information which he had no opportunity to deny or explain. The Court noted that the jury may well have misunderstood that Simmons could be released on parole if sentenced to life imprisonment. "The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole. We think it is clear that the State denied petitioner due process." *Simmons*, 512 U.S. at 162. The Court continued:

> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of infor-

> mation so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause.

Id. at 163-64. The Court continued:

> 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. The State raised the specter of petitioner's future dangerousness generally, but then thwarted all efforts by petitioner to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in his view, would not pose a future danger to society. The logic and effectiveness of petitioner'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. Petitioner's efforts to focus the jury's attention on the question whether, in prison, he would be a future danger were futile, as he repeatedly was denied any opportunity to inform the jury that he never would be released on parole. The jury was left to speculate about petitioner's parole eligibility when evaluating petitioner's future dangerousness, and was denied a straight answer about petitioner's parole eligibility even when it was requested.

Id. at 165-66 (footnote omitted). The Court concluded:

> But if the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to "deny or explain" the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.

Id. at 168-69.

To be sure, Morva's prosecutors argued future dangerousness in support of the death penalty. However, Morva's trial did not contain the constitutional infirmities present in *Gardner*, *Skipper* or *Simmons*. First, unlike in *Gardner*, Morva was not sentenced based on confidential information he had no opportunity to rebut. Second, unlike in *Skipper*, Morva introduced testimony from a jailer as to his good behavior while on pretrial detention. Third, unlike in *Simmons*, the circuit court told the jury that life imprisonment meant imprisonment without parole.

Nonetheless, Morva argues that the circuit court placed an unconstitutional limitation on his ability to present mitigation evidence by not appointing Dr. Cunningham as an expert witness. Viewed through the lens of § 2254(d), Morva's argument does not require issuance of the writ as to claim I.

Morva's argument that the Supreme Court of Virginia's ruling runs afoul of the holding in *Skipper* ignores the salient differences in the evidence presented

in his case and in *Skipper*. Unlike in *Skipper*, Morva was allowed to present evidence as to his future dangerousness based on how he had behaved in pretrial confinement. In particular, during the sentencing phase of trial, Morva introduced the testimony of Captain Norine Pilkins from the New River Valley Regional Jail. Captain Pilkins testified that Morva had been held at the New River Valley Regional Jail since August 21, 2006 and that he had caused no problems, noting that he was in isolation and locked down 23 hours a day. Thus, the very evidence excluded in *Skipper*—testimony from a prison guard as to pretrial behavior—was admitted at Morva's trial. As such, the Supreme Court of Virginia's decision was not "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). Given the fact that the jury heard Captain Pilkins' testimony that Morva posed no problems in the New River Valley Regional Jail during the more than one year period that he was held there in pretrial detention, Morva's trial does not run afoul of *Skipper*. There is no United States Supreme Court decision holding that due process requires expert evidence on a capital defendant's future dangerousness while in prison based on statistical evidence, rather than the "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." *Lockett*, 438 U.S. at 604. As such, Morva's argument does not cross the § 2254(d) threshold.

The determination by the Supreme Court of Virginia that due process did not require the appointment of Dr. Cunningham or the admission of his expert opinion was not unreasonable, either factually or legally. As another court considering the proposed testimony of

Dr. Cunningham concluded, "[p]ermitting his generalized testimony about prison crime would simply confuse and mislead the jury and invite a decision on an impermissible basis …. Dr. Cunningham's testimony about the capability of the Bureau of Prisons to secure inmates is not relevant to any issues in this case." *United States v. Taylor*, 583 F. Supp. 2d 923, 941 (E.D. Tenn. 2008). The *Taylor* court continued:

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

583 F. Supp. 2d at 942-43 (footnote omitted) (citing *United States v. Johnson*, 223 F.3d 665, 674-75 (7th Cir. 2000), *cert. denied*, 534 U.S. 829 (2001)).

Finally, Morva argues that the circuit court's refusal to appoint Dr. Cunningham was particularly unfair and violative of due process because the prosecution, much like in *Skipper*, argued in closing that Morva would pose a danger to prison guards.[16] Morva's argument, while superficially appealing, ignores the reality of the closing arguments given at trial.

Unlike in *Skipper*, the trial record in this case establishes that the issue of Morva's future dangerousness in prison was raised first by trial counsel, not the prosecution. During closing argument at the sentencing phase, the prosecution addressed Morva's future dangerousness by focusing on Morva's prior history and the circumstances surrounding the offenses, not his future behavior in prison. The prosecution argued:

> Defendant is a future danger to society …. [H]e is both extremely intelligent and also extremely violent …. [T]he Defendant has shown you what he is capable of in the future …. with his actions. The Defendant has shown you the damage that he can do to a man[,] [t]he damage that he can do to a man with his bare hands, the

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[16] The Supreme Court of Virginia noted that the prosecution did not introduce any evidence at the sentencing phase that Morva would pose a risk of future dangerousness inside the prison. "[T]he Commonwealth in this case neither proposed nor introduced any evidence concerning Morva's prospective life in prison, but limited its evidence on the future dangerousness aggravating factor to the statutory requirements consisting of Morva's prior history and the circumstances surrounding the offense. Thus, Dr. Cunningham's anticipated testimony was not in rebuttal to any specific evidence concerning prison life." 278 Va. at 347, 683 S.E.2d at 563-64 (internal citations omitted). While that is accurate, the issue of Morva's future dangerousness inside prison was addressed by both sides during closing argument.

> damage that he can do to a man with a piece of metal in his hand, and the damage that he can do to a man when he gets a hold of a gun .... [H]e has shown you his future dangerousness, and he has shown it to you in abundance.

Direct Appeal JA at 2413, 2418. The prosecution did not address Morva's future dangerousness in a prison setting in its initial closing argument.

In their closing argument, Morva's trial counsel focused on the fact that Morva, imprisoned for life without the possibility of parole, posed no future threat. This argument was tethered to Captain Pilkins' testimony that Morva posed no danger during his pretrial confinement at the New River Valley Regional Jail after the murders. As such, trial counsel argued that the jury should impose a life sentence because Morva would not pose a danger to anyone if confined in a secure state penitentiary.

> [T]he evidence in this case is Mr. Morva's society is in the penitentiary with life without the possibility of parole. His society is within that guarded setting .... where he will never ever again have an opportunity to commit the acts for which you have found him guilty. And, ladies and gentlemen, I submit to you that alone is sufficient to find the Commonwealth has failed to prove beyond a reasonable doubt Mr. Morva is a danger to the future .... I ask you respectfully to consider that Mr. Morva will never ever have the opportunity to escape .... [H]is society ... will be state penitentiary system [sic] with security levels that will not allow him to escape.

Direct Appeal JA at 2422-23, 2437.

In rebuttal closing argument, the prosecution addressed trial counsel's future dangerousness argument, focusing on Captain Pilkins' testimony that Morva was "always thinking" and that the jury should not ignore the possibility that Morva would escape again and pose a danger to the community, along with the danger he posed to prison guards. The prosecutor explained:

> Number one, the law says future danger, probability of violence to society, it doesn't specify to the Defendant's particular society, it doesn't specify to prison. So to even get to [trial counsel]'s theory, you've got to first conclude that that Defendant will never escape again. And I submit to you, it is impossible for you to conclude that. We heard about, from Captain Pilkins, and Captain Pilkins said he is always thinking. He's smart, he's smarter than the others, and he is always thinking. We'll talk more about that, but you first cannot reach that conclusion that [trial counsel] is asking you to reach, until you are satisfied that he will never escape again. And I submit to you, you can't be satisfied of that. Number two, just as importantly, that argument fails to consider the safety and security of guards. We're talking about a prisoner here who hates the police. We're talking about a prisoner here who hurts guards, beats them. We're talking about a prisoner who shoots uniformed officers. Those people are entitled to protection in the world too. Jail guards, prison guards. They are part of society, and they are at risk from that Defendant without a doubt. You need look no further than his actions and his words to know that those guards are at risk …. [H]e wanted to hurt officers …. He wanted

> to hurt people … that represented the law, people that represented the jail. The people that were confining him and taking away his freedom …. So society is everybody …. and it certainly is those jail guards, and those prison guards …. [Trial counsel] told you repeatedly that life in prison … would be the ultimate punishment. I want you to consider a very important fact, and a very chilling fact, and that is one month after that Defendant was placed in jail, he started talking, writing to his own mother about murdering jail guards. One month. It took one month of jail, one month of county jail, to get this Defendant ready to kill a guard. He wrote to his mother, ["]I will kick an unarmed guard in the throat and then I will stomp him until he is as dead as I'll be.["] That shows you what's in his heart, it shows you what's in his mind, it shows you a hatred of guards …. I would submit to you that in only one year he carried that out …. I submit to you, a prospect of life in prison is very frightening. If one month causes you to develop the heart and the mind to kill a jail guard, in one year and it's done, and you're killing people, what is the prospect of life in prison going to cause that person to feel justified in doing to those prison guards?

Direct Appeal JA at 2441-44.

The Supreme Court of Virginia did not unreasonably apply federal law when dismissing this claim. Although it certainly could have presented the same argument in its initial closing argument, the Commonwealth discussed Morva's future dangerousness in a correctional setting only in rebuttal. As Morva raised the issue first in closing argument, the unfairness noted

by the Court in *Skipper* and *Gardner* did not occur. Unlike in *Skipper*, Morva was able to introduce evidence directly relevant to his behavior in prison, and both sides fashioned jury arguments based on evidence as to Morva's actual behavior in prison, as opposed to Dr. Cunningham's "statistical speculation." *See Porter v. Commonwealth*, 276 Va. 203, 255, 661 S.E.2d 415, 442 (2008) (describing Dr. Cunningham's proffer in another capital case as "statistical speculation").

In short, the evidence excluded in *Skipper* was admitted here, and trial counsel were able to argue to the jury that Morva would not pose a risk inside prison based on his own historic behavior. *Skipper* does not require admission of expert testimony on the issue of future dangerousness based on statistical data rather than evidence concerning Morva's character, record, or circumstances of the offense, and the specific arguments made at trial do not suggest that Morva was denied the opportunity to rebut the prosecution's arguments or otherwise was denied due process. Because the Supreme Court of Virginia's determination of claim I was not contrary to or an unreasonable application of federal law, claim I must be dismissed.[17]

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[17] The court, however, will issue a certificate of appealability as to claim I for the following reasons.

Although the majority of the Justices of the Supreme Court of Virginia rejected claim I on Morva's direct appeal, Justice Koontz and Justice Keenan dissented. Writing for himself and Justice Keenan, Justice Koontz perceived the majority's decision as "effectively adopt[ing] a per se rule that expert prison risk assessments are inadmissible to rebut evidence of future dangerousness in a capital murder case." *Morva v. Commonwealth*, 278 Va. at 355, 683 S.E.2d at 568. In addition to this broader concern, the dissenting Justices believed the denial of Dr. Cunningham's ap-

B. Claim II—Trial Restraints

In claim II, Morva raises two issues regarding the restraints he wore under his clothes during the trial.

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pointment resulted in "fundamentally unfair" death sentences. *Id.* at 356, 683 S.E.2d at 568. The dissent concluded:

> [C]ivilized society does not consider the protection of due process rights to a fair trial as so fickle a concept that a defendant convicted of a capital offense should be subjected to a death penalty where it can be reasonably debated that a requested expert's prison risk assessment is sufficiently "particularized" to the defendant. Such a risk assessment would afford the defendant the means to assist the jury in its determination whether a life sentence without the possibility of parole, rather than a death sentence, would be the appropriate penalty for the crimes committed by the defendant.

Id. at 365, 683 S.E.2d at 574 (Koontz, J., dissenting).

The court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts. The standard for a certificate of appealability requires the applicant to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). To make a substantial showing, a party must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See id.* The severity of the penalty may be considered in making this decision, and any doubt about whether to grant a certificate of appealability should be resolved in favor of the movant. *Longworth v. Ozmint*, 302 F. Supp. 2d 569, 571 (D.S.C. 2003) (citing *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000)).

In light of the dissent lodged by Justice Koontz and Justice Keenan and the majority's disposition of claim I, the court finds that reasonable jurists could debate whether claim I should be resolved in a different manner or that the issues presented in claim I are "adequate to deserve encouragement to proceed further." Accordingly, a certificate of appealability is granted for claim I.

Morva argues in claim II(A) that due process was violated because the jury allegedly saw Morva wearing visible restraints during trial. In claim II(B), Morva alleges that trial counsel were ineffective for not objecting to Morva's restraints.

The Supreme Court of Virginia dismissed claim II(A) on habeas review pursuant to *Slayton v. Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974), which precludes a Virginia court from reviewing a nonjurisdictional claim in a petition for a writ of habeas corpus when that claim could have been presented at trial and on appeal but was not. *Morva v. Warden*, 285 Va. at 513, 741 S.E.2d at 784. *Slayton* has been considered to be an independent and adequate state procedural ground for denying relief. *See*, *e.g.*, *Fisher v. Angelone*, 163 F.3d 835, 844 (4th Cir. 1998). Although the Supreme Court of Virginia's reliance on *Slayton* is usually sufficient to foreclose federal review, a petitioner may show that *Slayton* is not "adequate" when it is "exorbitantly applied to the circumstances at issue[.]" *Hedrick*, 443 F.3d at 360 (citing *Lee v. Kemna*, 534 U.S. 362, 376 (2002)).

Morva argues that claim II(A) should not be considered procedurally defaulted via *Slayton* because the Supreme Court of Virginia's disposition of claim II(A) is "inherently contradictory" to its disposition of claim II(B). Specifically, Morva argues that *Slayton* is only properly applied when "counsel or petitioner knew or should have known of the complained of conduct at a time when the trial court could address" the issue. *Lenz v. Warden of Sussex I State Prison*, 267 Va. 318, 326, 593 S.E.2d 292, 296 (2004). Because the Supreme Court of Virginia found that there was "no evidence to suggest Morva's [trial] counsel was or should have been aware any juror had learned" that Morva was wearing

a stun belt beneath his clothes, *Morva v. Warden*, 285 Va. at 541, 741 S.E.2d at 785, Morva argues that *Slayton* cannot operate to bar his due process claim. In essence, Morva faults the Supreme Court of Virginia for not addressing his due process claim (claim II(A)) because counsel did not raise it at trial or on direct appeal, while at the same time denying his ineffective assistance claim (claim II(B)), finding that there was no reason for counsel to have been aware that certain jurors may have surmised that Morva was wearing restraints under his clothing.

Morva's argument ignores the procedural posture of the claims on habeas review at the Supreme Court of Virginia. Claim II(A), when presented in the state habeas petition, alleged that Morva's restraints were visible, which was a fact required to be accepted as true by the Supreme Court of Virginia. If Morva's restraints were truly visible, as alleged, then trial counsel, who sat next to, looked at, and interacted with Morva, could have seen the allegedly visible restraints and could have objected to the allegedly visible restraints at any time during trial. Because trial counsel could have seen the allegedly visible restraints and would have had "a fair and full opportunity to raise and have adjudicated the question … in his trial and upon appeal[,]" *Slayton* could properly bar the later presentation of this "visible restraints" due process claim on habeas review. *Slayton*, 215 Va. at 29, 205 S.E.2d at 682.

However, the ineffective assistance of counsel claim regarding the alleged visible restraints could not be raised on appeal and, thus, is not barred by *Slayton*. *See, e.g.*, S*igmon v. Dir. of the Dep't of Corr.*, 285 Va. 526, 533, 739 S.E.2d 905, 908 (2013) ("[C]laims of ineffective assistance of counsel are not reviewable on direct appeal and thus can be raised only in a habeas cor-

pus proceeding."). When adjudicating this claim on the merits, the Supreme Court of Virginia made findings of fact that, despite Morva's allegations, none of his restraints were actually visible. "Because Morva was not visibly restrained in the presence of the jury and because there is no evidence that counsel was or should have been aware that jurors had learned Morva was wearing a stun belt under his clothing, trial counsel's failure to object to the restraints or stun belt placed on Morva was not deficient performance." *Morva v. Warden*, 285 Va. at 514, 741 S.E.2d at 785.

In light of the record and the deference afforded to the Supreme Court of Virginia's application of *Slayton*, the court does not find the Supreme Court of Virginia's disposition of claims II(A) and II(B) to be inherently contradictory or that *Slayton* was exorbitantly applied to claim II(A). In applying *Slayton* to claim II(A), the Supreme Court of Virginia accepted as true Morva's assertion that his trial restraints were "visible," and properly found that claim to have been defaulted. Considering claim II(B) on the merits, the Supreme Court of Virginia made its own factual findings as to claim II(B) and found that there was no merit to Morva's claim that trial counsel were ineffective for not objecting to restraints which were, in fact, not visible to the jury.

Because the Supreme Court of Virginia's resolution of claims II(A) and II(B) rested on different factual underpinnings, with the allegations accepted as true for claim II(A) and with its separate factual findings as to claim II(B), the Supreme Court of Virginia's resolution of the two claims was not inconsistent. Because the *Slayton* inquiry of claim II(A), founded as it was on the facts alleged in claim II(A), could be resolved without reference to the Supreme Court of Virginia's factual findings on the merits of claim II(B), the dispositions of

these claims are not contradictory, and *Slayton* was not exorbitantly applied. Accordingly, claim II(A) is procedurally defaulted, and the court must determine whether there is a basis to excuse this procedural default.

To excuse the procedural default of claim II(A), Morva argues in claim II(B) that trial counsel rendered ineffective assistance by not objecting to the jurors seeing Morva's restraints. The Supreme Court of Virginia resolved the merits of claim II(B) on habeas review, finding trial counsel did not render ineffective assistance in violation of the Sixth Amendment. Because the court concludes that Morva cannot establish deficient performance and prejudice for claim II(B), he fails to establish cause and prejudice to excuse the procedural default of claim II(A). Accordingly, claim II(A) must be dismissed as procedurally defaulted.

Claim II(B) concerns whether trial counsel were ineffective for failing to object at trial concerning Morva's restraints. It is undisputed that Morva did not wear leg shackles or handcuffs in the courtroom. Rather, Morva wore a stun belt under his shirt and a leg-stiffening device under his pants leg, making it difficult to kick or run. Morva argues that the restraints were visible to the jury, undermining the presumption of innocence and supporting the prosecution's position that Morva was a danger to society.

The Supreme Court of Virginia dismissed this claim on habeas review, finding that Morva was not prejudiced because the restraints were not visible to the jury and did not undermine the right to a fair trial. Because Morva did not suggest how trial counsel could have been aware during trial that some jurors may have surmised Morva wore a stun belt under his shirt, the

Supreme Court of Virginia also determined that Morva failed to show that trial counsel performed deficiently.

The Supreme Court of Virginia's adjudication of this claim was not based on an unreasonable determination of the facts. Morva alleges that three affidavits filed in support of the state habeas petition established that jurors saw Morva wearing a stun belt and leg shackles. For example, the affidavit of Aditi Goel stated that she interviewed jurors following the trial in connection with the Capital Post-Conviction Clinic at the University of Virginia School of Law. Goel's affidavit states that she interviewed juror Richard M. Bouck, Sr., and that he stated that he saw a security belt around Morva's waist. SHA Vol. 1, at 2, ¶ 12. David Chamberlain, another law student, averred that he interviewed juror Virginia Blevins, now Virginia Linkous. Chamberlain's affidavit states that Juror Linkous could see shackles on Morva's legs under counsel table. SHA Vol. 1, at 66, ¶ 9. Madeline Gibson, an employee of the Virginia Capital Representation Resource Center, interviewed juror Deborah Corvin. The Gibson affidavit states that Corvin noticed Morva wearing shackles and had a hard time walking with them on. SHA Vol. 1, at 264, ¶ 13. Despite the assertions in these affidavits executed by persons interviewing the jurors, each of the three jurors interviewed, Bouck, Linkous, and Corvin, executed subsequent affidavits themselves, explaining that the statements attributed to them by the interviewers were incorrect. Bouck averred, "I did not tell Morva's representatives that I saw a security belt around Morva's waist. I think I became aware at some point during the trial that he was wearing a security belt, but it was concealed from view under his clothes." Warden's Motion to Dismiss State Habeas Pet., Ex. 1, ¶ 6. Juror Linkous averred, "Mr. Morva appeared in

street clothes and was neat and clean. I did not tell Morva's representatives that Morva had chains on his legs. Morva's representatives asked whether he was wearing leg chains, and I told them I had no recollection of whether Morva wore leg chains or not. I did not look at his feet." *Id.* at Ex. 4, ¶¶ 5, 8. Juror Corvin averred, "I did not tell Morva's counsel that I saw Morva walk to his seat in the courtroom. Morva was always present at counsel table when the jury was brought into the courtroom. I did not tell Morva's counsel that Morva was shackled, and I specifically told them I did not remember seeing shackles." *Id.* at Ex. 5, ¶¶ 3, 8-9, 13.

State habeas counsel also filed three affidavits from jurors on the issue of his restraints. Juror James "David" Calloway stated, "[T]wo officers sat behind Mr. Morva throughout the trial. They always looked like they were watching Mr. Morva and they sat or stood in a way that made them look prepared to react if Mr. Morva tried to do anything dangerous or inappropriate. At least one of the officers held something in his hand throughout the trial that looked to me like a Tazer or a remote control device that could be used to control Mr. Morva." SHA Vol. 1, at 196, ¶ 10. Juror James Butler stated in his affidavit, "Mr. Morva was restrained during the trial, and I was aware of it at the time. I could see a large bulge around Mr. Morva's waist beneath his clothes. Someone connected with the court (perhaps a deputy) informed me that Mr. Morva was wearing a stun belt and that it was operated by remote control by the deputies who stood guard behind him. One guard sat directly behind Mr. Morva and another deputy stood behind him with the electronic remote control device. If he made an attempt to escape or attack anyone, the deputies would activate the stun belt." SHA Vol. 1, at 193-94, ¶ 13.

Two alternate jurors provided affidavits which state habeas counsel filed in support of Morva's petition. Alternate Juror Patricia Carver averred, "I remember one juror told me that Mr. Morva was wearing shackles during the trial. I personally do not recall whether I saw Mr. Morva wearing shackles in the courtroom, but when I watched the evening news with my husband after a day in court, I saw Mr. Morva being taken into the courthouse in shackles." SHA Vol. 1, at 390, ¶ 4. Another alternate juror, Mary Campbell, reported seeing an odd bulge under Morva's clothing and that other jurors said the bulge was a stun belt. This same alternate juror stated that Morva's feet were chained together at trial and that she saw him wearing handcuffs when he walked into the courtroom and until they were removed when he sat at the defense table. SHA Vol. 1, at 350-51, ¶¶ 4-7. In a second affidavit filed in support of the Warden's motion to dismiss the state habeas petition, Campbell recanted her prior affidavit to an extent, stating that the first affidavit was not accurate, she never said she saw Morva's feet chained together, she was well positioned to see Morva during trial, and she never saw Morva's feet chained together during trial. Warden's Motion to Dismiss State Habeas Pet., Ex. 3, ¶¶ 3-5. Regardless, as both alternate jurors were dismissed from jury service before deliberations, their observations had no impact on the verdicts.

The Supreme Court of Virginia considered these affidavits when it addressed this claim on the merits, concluding as follows:

> Although some jurors executed affidavits after the trial stating that during the trial they became aware that Morva was wearing a stun belt, Morva proffers no evidence to suggest Morva's counsel was or should have been aware any ju-

> ror had learned that information during trial. Because Morva was not visibly restrained in the presence of the jury and because there is no evidence that counsel was or should have been aware that jurors had learned Morva was wearing a stun belt under his clothing, trial counsel's failure to object to the restraints or stun belt placed on Morva was not deficient performance. Moreover, the security measures were justified given Morva's demonstrated history, which showed a willingness to use violence to effect and maintain an escape from custody, and were not inherently prejudicial. *See Porter v. Commonwealth*, 276 Va. 203, 263, 661 S.E.2d 415, 446 (2008). Thus Morva has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

Morva v. Warden, 285 Va. at 514, 741 S.E.2d at 785.

Claim II(B) does not warrant federal habeas relief. In *Deck v. Missouri*, 544 U.S. 622 (2005), the United States Supreme Court held that the Constitution forbids the use of visible shackles on a capital defendant during a capital trial's guilt and penalty phases unless that use is "justified by an essential state interest," like courtroom security, specific to that defendant. 544 U.S. at 626, 630, 632. The jurors in *Deck* could see the defendant visibly shackled during the penalty phase of trial. The Court determined that visibly shackling the defendant was inherently prejudicial when "a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury[.]" *Id.* at 635. To be sure, Morva wore a stun belt under his clothes, and a few jurors observed the bulge the belt caused. The Su-

preme Court of Virginia concluded that Morva was not visibly restrained, and this determination of fact was not unreasonable. The fact that a few jurors saw a bulge under Morva's clothes and concluded that he was in some manner restrained does not offend the Due Process Clause under the circumstances of this case. Neither Morva's hands nor his feet were shackled, and given the nature of the charges being tried, there was plenty of reason for Morva to wear restraints under his clothing. The Supreme Court of Virginia found on the basis of the record that "all visible restraints were removed from Morva prior to the jurors entering the courtroom," and that his claim had no merit. *Morva v. Warden*, 285 Va. at 513-14, 741 S.E.2d at 785. Given Morva's history of violent escape, the stun belt he wore at trial under his clothing was certainly warranted and does not, under the circumstances of this case, constitute a due process violation. Nor is there any evidence to suggest that trial counsel had any clue that certain jurors observed the bulge under Morva's clothes and surmised that it was a stun belt controlled by nearby officers. Trial counsel had no basis upon which to lodge an objection and cannot be faulted for not doing so. As such, the Supreme Court of Virginia did not unreasonably determine the facts or unreasonably apply *Deck* or *Strickland*. Claim II(B) must be dismissed.

C. Claim III—Exclusion of Potential Juror Mary Blevins

In claim III, Morva argues that he was deprived of a fair trial and impartial jury when the circuit court excluded Mary Blevins from the venire for her statements about the death penalty. Morva claims that the circuit court erred when it determined Mary Blevins was unable to consider the death penalty as an appropriate punishment. The Supreme Court of Virginia

dismissed this claim on direct appeal, finding the circuit court did not abuse its discretion to exclude a venire member who admittedly could not impartially consider all sentencing options provided by law.

The Supreme Court of Virginia's adjudication of claim III was not contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts. During voir dire, when first asked by the prosecution whether she could impose the death penalty, Mary Blevins stated "I don't know about that." Direct Appeal JA at 888-89. When her response was probed further about whether she could ever give the death penalty, Mary Blevins stated "[p]robably certain circumstances I could. It's just questionable." *Id.* at 889. Questioned further, Mary Blevins stated that there were sets of circumstances under which she could consider the death penalty and under which she could give someone life in prison without possibility of parole *Id.* at 890-91. Upon questioning by defense counsel, Mary Blevins equivocated again. "I said I thought I could probably do it until I actually come down to the line. I don't know if I could do it. Vote for the death penalty." *Id.* at 905-06. She then responded that she could consider voting for the death penalty and for life, stating "[i]t would be a tough decision." *Id.* At 906. When asked about a reference in her response to a jury questionnaire to her faith, Mary Blevins stated: "[w]ell I think it's the faith that would keep me from voting for the death penalty, and then I think what I meant is if it was a child abuse case I probably couldn't, I would assume guilty before I ever got here." *Id.* at 908. The trial court sought to parse Mary Blevins' responses, stating that he was "getting some mixed signals about whether or not, under certain circumstances, you

would consider the imposition of the death penalty." *Id.* at 913. This colloquoy ensued:

> Judge Grubbs: Now you made some comment, if I understood you correctly, that perhaps your faith would prevent you from imposing a death penalty. Did I hear you correctly, or what did you mean by that statement? Because I believe another response that you made was that under certain circumstances you could impose the death penalty.
>
> Jury Panel Member: I guess I'm sending mixed feelings right there; aren't I?
>
> Judge Grubbs: That's what I got.
>
> Jury Panel Member: Yes.
>
> Judge Grubbs: And as I say, you need to think about it. And I'm sure it's—
>
> Jury Panel Member: I don't think I could.
>
> Judge Grubbs: You do not think you could impose the death penalty after considering all the evidence?
>
> Jury Panel Member: I don't. I don't.

Id. at 914. In short, Mary Blevins gave equivocal responses to inquiries from counsel concerning whether she could consider imposing the death penalty. When the trial judge asked Mary Blevins to clarify her mixed messages about her stance on the death penalty, she ultimately concluded that she did not think she could impose the death penalty even after considering all the evidence. Plainly, given Mary Blevins' responses to the questions posed to her, it was not unreasonable for the Supreme Court of Virginia to determine that Mary

Blevins could not impartially consider all sentencing options provided by law.

In *Wainwright v. Witt*, 469 U.S. 412 (1985), the United States Supreme Court reiterated that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment …. is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 469 U.S. at 424 (internal quotation marks and footnote omitted). The Court noted that a trial judge's determination of venire member's bias is entitled to factual deference on habeas review. *Id.* at 428-29.

In light of the reasonable factual disposition and federal law, the Supreme Court of Virginia did not unreasonably apply federal law to affirm the exclusion of Mary Blevins. Instead, in response to the circuit court's direct inquiry, Mary Blevins clearly stated that she did not think she could impose the death penalty even after considering all the evidence. Accordingly, claim III has no merit and must be dismissed.

D. Claim IV—Stipulation That Morva Was a Prisoner or In Custody

Morva argues in claim IV that trial counsel rendered ineffective assistance by stipulating that Morva was "a prisoner in a state or local correctional facility" and that he "was in lawful custody" on the dates of the killings. State habeas counsel did not present this claim to the Supreme Court of Virginia and, in an effort to excuse the procedural default, Morva argues that state habeas counsel rendered ineffective assistance by failing to raise this claim. In support of this argument, Morva filed an affidavit from state habeas counsel stating that

she "completely overlooked" claim IV because she "did not register that there was any significance to the fact that Morva was no longer in a correctional facility or in the custody of that facility's employee when he killed McFarland." Counsel Aff., Dkt. No. 111-1 at 22, ¶ 4.

The stipulation at issue in claim IV was read to the jury following opening statements on March 6, 2008. The circuit court stated:

> Ladies and gentlemen, that completes the opening statement of counsel. We will now begin with the presentation of evidence. The first evidence which you are to consider, along with all the other evidence which shall be presented during the course of this trial, is a stipulation of fact, or by that I mean, an agreement of fact, which has been reached by both the Commonwealth and the defense. That statement is as follows, or that stipulation is as follows, that on the dates in question for the crimes charged, that is August 20th and August 21st of 2006, that the Defendant was a prisoner in a state or local correctional facility. That the Defendant was imprisoned, but not yet had gone to trial on the criminal offenses, and that the Defendant was in lawful custody. That is the extent of the stipulation.

Direct Appeal JA at 1396-97.

As is evident from the argument of counsel leading up to the stipulation, this stipulation was directed to the escape charge. In addition to the capital murder charges, Morva was charged with escape under Virginia Code § 18.2-478. That statute makes it unlawful for a "person lawfully imprisoned in jail and not tried or sentenced" to escape "from jail by force or violence." The

statute also makes it unlawful for any "person lawfully in the custody of any police officer on a charge of criminal offense" to escape "from such custody by force or violence." Va. Code Ann. § 18.2-478. The stipulation reached stemmed from efforts made by trial counsel to keep the nature of Morva's underlying charges from coming into evidence at the guilt stage of the trial. Direct Appeal JA at 1070-89. The prosecution argued that the existence of Morva's underlying charges was an element of the escape offense which it needed to prove at trial. The prosecution also argued that the nature of the underlying charges was relevant to Morva's motive to escape and commit the murders, stating, "This is motive evidence as to the escape, and it's motive evidence as to the murders. We've got a situation here, Judge, where the Defendant, … three days after he escaped, he was facing a jury trial. He was facing a jury trial where he was facing over a hundred years in prison." *Id.* at 1083. Trial counsel countered that the prosecution could establish that Morva was "lawfully imprisoned in jail and not tried or sentenced on a criminal offense" within the meaning of Virginia Code § 18.2-478 without telling the jury the nature of the underlying robbery, burglary, and use of a firearm charges Morva was facing. Trial counsel argued:

> We submit in this matter, the Commonwealth will be able to prove by ample evidence that Mr. Morva was lawfully charged and indicted, had not been tried or sentenced, and was in the prison, in the Montgomery County [J]ail, at the time of the alleged offenses, without having to tell this jury what the nature of those underlying offenses for which he was being held were as it relates to relevance and its prejudicial value.

Id. at 1072. The circuit court granted trial counsel's motion, ruling that the prosecution had the ability to prove the elements of the escape charge:

> [I]independently of the introduction of these charges by such means as authenticated copies of the Court order denying bail or by the jail commitment card, by way of example. The probative value in introducing these charges, in the Court's opinion, particularly in this phase of the trial is outweighed by the potential prejudicial effect upon the Defendant. Consequently the motion is granted. However, it is fully understood that should this trial enter in to the sentencing phase, then the convictions of these charges will be admissible by the Commonwealth.

Id. at 1354. Following this ruling, the prosecution advised the circuit court of the stipulation reached by the parties. After the stipulation was read to the jury, the prosecution introduced trial and custody orders with the underlying charges redacted. *Id.* at 1396-99.[18]

Morva argues that this stipulation constitutes ineffective assistance of counsel because Morva killed McFarland after he had escaped from Deputy Quesenberry's custody. Thus, Morva posits, he could not have been convicted of the capital crime of committing a murder while in custody because he shot McFarland

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[18] Morva argues that because the circuit court had already ruled in Morva's favor that the underlying state charges on which he was awaiting trial ought not come into evidence, there was no need for the stipulation. As will be explained below, because the stipulation was simply a restatement of black letter Virginia law, there is no need for the court to further inquire into trial counsel's additional reasons motivating the stipulation.

after he escaped from custody. Indeed, Morva argues that his conviction for capital murder for killing another while in custody is inconsistent with his conviction for escape because he shot McFarland after he bludgeoned Deputy Quesenberry, took his gun, and was on the run.

The court cannot accept Morva's argument. Morva focuses his argument entirely on the custody prong of Virginia Code § 18.2-31(3) and ignores the prisoner prong. The statute defines capital murder to include the following: "The willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof." Regardless of whether Morva was "in the custody of an employee" of a correctional facility after he took Deputy Quesenberry's gun and fled the hospital, Virginia law continued to consider him to be a "prisoner confined" in a correctional facility even after his escape.

Virginia law is clear that one's status as a prisoner is not dependent on one's physical location. "The term 'prisoner in a … correctional facility' refers to the status of the escapee, not to the circumstances of the escape." *Mabe v. Commonwealth*, 14 Va. App. 439, 441, 417 S.E.2d 899, 900 (Va. Ct. App. 1992). Richard Mabe was incarcerated in the Washington County Jail on a felony conviction. Given his trustee status, he was assigned to work outside the jail at a Senior Citizen's Center under the supervision of an employee of the center. Mabe disappeared from the Senior Citizen's Center and, once captured, was charged with escape from a correctional facility under Virginia Code § 53.1-203. Following his escape conviction, Mabe argued to the Court of Appeals of Virginia that "the statute requires that the escapee be physically 'in' the facility at the time of the escape." 14 Va. App. at 440, 417 S.E.2d

at 900. The Court of Appeals of Virginia had little difficulty disposing of Mabe's argument, concluding that "[h]e was, in every sense, a 'prisoner in a … correctional facility,'" even though physically located at the Senior Citizen's Center. 14 Va. App. at 441, 417 S.E.2d at 900.

The *Mabe* decision cited the opinion from this district in *Wood v. Cox*, 333 F. Supp. 1064 (W.D. Va. 1971), in support of this conclusion. *Wood* was a habeas corpus case challenging a state conviction for escape from an inmate road work crew. In that case, Ralph Wood failed to return to his work detail or prison camp following a detour to the woods to use the toilet. The statute in effect at the time, Virginia Code § 53-291, made it unlawful for an inmate of a penal institution to "escape from such penal institution or from any person in charge of such inmate." The court found it to be of no moment that Wood was not physically inside a prison at the time of his escape. "Since the petitioner was at all times a convict in the state penitentiary system, it is immaterial for the purposes of the penal statute that he escaped while working on a public road." 333 F. Supp. at 1065.

The legal tenet that a person's status as prisoner is not dependent on his physical location also was recognized in *Simmons v. Commonwealth*, 16 Va. App. 621, 431 S.E.2d 335 (Va. Ct. App. 1993). Gregory Simmons, incarcerated in the Lynchburg City Jail, was released on furlough for three hours to attend a funeral. When Simmons did not return, he was apprehended and charged with escape in violation of Virginia Code § 53.1-203. Quoting *Mabe*, the *Simmons* court noted that the "term 'prisoner in a … correctional facility' refers to the status of the escapee, not to the circumstances of escape." 16 Va. App. at 623, 431 S.E.2d at 336. The court added, "This status is not dependent upon actual physical presence in such facility or otherwise restricted by a

prisoner's location. Thus, although defendant had been granted a three hour furlough, he remained 'in every sense, a "prisoner in a … correctional facility."'" *Id.* (quoting *Mabe*, 14 Va. App. at 441, 417 S.E.2d at 900) (internal citation and footnote removed).

Consistently, the Supreme Court of Virginia has held that the killing need not take place in the correctional facility to which the prisoner was confined for the capital murder statute to apply. In *Jefferson v. Commonwealth*, 214 Va. 747, 204 S.E.2d 258 (1974), the court affirmed the capital murder conviction of an inmate who killed a prison guard during an escape attempt from a courthouse. The court found "no merit in the defendant's argument that the statute applies only to a killing within the penal institution to which Jefferson was confined." 214 Va. at 752, 204 S.E.2d at 262 (citing *Ruffin v. Commonwealth*, 62 Va. (21 Grat.) 790, 793-94, 1871 WL 4928 (1871)).

Ruffin concerned the application of the capital murder statute to the murder of a guard by a prisoner hired out to the railroad. The court reasoned:

> Though at the time of the commission of the murder of which he was convicted, he was not within the walls of the penitentiary, but in a distant part of the State, he was yet, in the eye of the law, still *a convict in the penitentiary*; not, indeed, actually and bodily within its walls, imprisoned and physically restrained by its bars and bolts; but as certainly under the restraints of the laws, and as actually bound by the regulations of that institution, as if he had been locked within one of its cells. These laws and regulations attach to the person of the convict wherever he may be carried by authority

> of law, (or even when he makes his escape), as certainly and tenaciously as the ball and chain which he drags after him. And if when hired upon the public works, though hundreds of miles from the penitentiary, he kills a guard stationed over him by authority of law, he is as guilty of killing a guard of the penitentiary within the meaning of the statute, as if he had killed an officer or regular guard of that institution within its very walls.

Ruffin, *supra* at *3 (original emphasis).[19]

More than a hundred years later, the holding in *Ruffin* remains the law of Virginia, affirmed as recently as 1990 in *Mu'Min v. Commonwealth*, 239 Va. 433, 389 S.E.2d 886 (1990). David Mu'Min, an inmate at a Virginia field unit, was assigned to a Virginia Department of Transportation work detail. While on the work detail, Mu'Min sharpened a short piece of metal and concealed it in his pocket. During a lunch break, Mu'Min left the work area and walked a mile to a shopping center where he killed a woman with the sharpened metal piece. The Supreme Court of Virginia noted that an element of one of the forms of the capital offense charged was that Mu'Min was then "a prisoner confined in a state or local correctional facility." 239 Va. at 445, 389 S.E.2d at 894. Defining this term, the trial court instructed the jury as follows: "An inmate of a state correctional facility remains an inmate at all times until he is released from that status by the proper state authority. An inmate

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[19] While *Ruffin* has been appropriately subject to criticism for the notion that prisoners are "slaves of the State," lacking any rights, 1871 WL 4928, at *5, the court's conclusion that the capital murder statute is not limited to killings by prisoners inside the physical walls of a prison remains intact.

who escapes from custody retains the status of inmate during the entire course of such unauthorized absence." Citing *Ruffin* and *Jefferson*, the Supreme Court of Virginia in *Mu'Min* stated that "[t]his is a correct statement of the law in this Commonwealth." *Id.* at n.7.

The circuit court gave a nearly identical instruction in Morva's case. Jury instruction 9 stated, "A prisoner of a state or local correctional facility remains a prisoner at all times until he is released from that status by the proper state authority. A prisoner who escapes from custody retains the status of prisoner during the entire course of such an unauthorized absence." Direct Appeal JA at 1968.

While Morva argues that he could not have been in custody at the time he shot McFarland because he had escaped, that does not alter the fact that, under Virginia law, he was still a prisoner. Under Virginia law, it was Morva's status as a prisoner, rather than his physical location, which determined whether the capital murder charge applied to him. Under this precedent, the fact that Morva's killings took place outside of the Montgomery County Jail and after he escaped from Deputy Quesenberry's custody is of no moment. Because Morva's killings were done while he was "a prisoner confined in a state or local correctional facility," the capital murder statute applied.

The stipulation agreed to by trial counsel, intended to limit the prejudicial impact of the underlying state charges, does nothing more than restate black letter Virginia law as to the prisoner prong of Virginia Code § 18.2-31(3) and does not constitute prejudice under *Strickland*. As such, claim IV presents no substantial claim of ineffective assistance of counsel. Accordingly, claim IV must be dismissed as procedurally defaulted.

E. Claim V—Failure to Properly Investigate Evidence of the Shootings

In claim V, Morva argues that trial counsel rendered ineffective assistance by not investigating and challenging forensic and other evidence related to the shootings. Morva argues that trial counsel should have questioned hospital witnesses, including Jennifer Preston, about whether McFarland wore a paramilitary style uniform having multiple pockets and bulges. Morva complains that trial counsel should have argued that such a uniform made it difficult for Morva to discern whether McFarland had a weapon, giving rise to a self-defense argument.

As for the shooting of Corporal Sutphin, Morva alleges trial counsel rendered ineffective assistance for not impeaching Officer Roe's testimony that Corporal Sutphin's firearm remained strapped in his holster. Morva argues that proper cross examination would have supported Morva's belief that Corporal Sutphin intended to draw a weapon, causing Morva to shoot first in self-defense.

The Supreme Court of Virginia dismissed these arguments on habeas review. As to the cross examination of Preston, the Supreme Court of Virginia determined Morva failed to state an ineffective assistance claim, explaining:

> The record, including the trial transcript, demonstrates Preston testified that the events she witnessed, including the shooting, took mere seconds. She testified that she observed McFarland standing very still with his hands outstretched in a supplicating gesture, and Morva standing very still and pointing a gun at McFarland. She stated she clearly saw the ex-

> pression on each man's face, and then she saw Morva shoot McFarland. There is no evidence in the record, and Morva proffers none, that Preston was not looking at McFarland when Morva pulled the trigger.
>
> The witnesses testified that McFarland's uniform consisted of a dark shirt with a patch and matching trousers. Morva does not proffer any evidence, nor is there any in the record, to support his claim that McFarland's uniform was paramilitary or likely mistaken for that of armed law-enforcement personnel. Furthermore, Morva fails to provide evidence of any gestures made by McFarland that would indicate he was reaching for a firearm before he was shot.
>
> Even if McFarland was armed and was wearing a paramilitary type uniform, Morva shot McFarland as he stood in front of Morva with his hands in a supplicating gesture. Counsel was not ineffective for failing to raise a frivolous argument that Morva was justified in shooting McFarland.

Morva v. Warden, 285 Va. at 514-15, 741 S.E.2d at 785-86. The Supreme Court of Virginia determined that Morva failed to state an ineffective assistance claim about cross examining Officer Roe because "[n]o witnesses testified that Corporal Sutphin's holster was unsnapped and Officer Roe could not have been cross examined on the hearsay reports of others. Morva fails to establish that more comprehensive cross examination would have resulted in Officer Roe changing his unequivocal, uncontradicted testimony." *Id.* at 516, 741 S.E.2d at 787.

The Supreme Court of Virginia's adjudication of claim V was not contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts. The record reflects that hospital security guard McFarland was unarmed and wore long, dark pants with a matching dark shirt with a patch on the sleeve; thus, there was no indication in the record that the clothes bore any resemblance to a paramilitary uniform. Direct Appeal JA at 1527. Nothing in the record supports the proposition McFarland carried or reached for a weapon. *Id.* at 1539, 1574. Furthermore, Morva was standing close enough to McFarland to hold Deputy Quesenberry's pistol some two feet from McFarland's face while McFarland appeared peaceable with his arms stretched out and palms facing out. The Supreme Court's determination that trial counsel were not ineffective in their investigation of McFarland's shooting was not unreasonable.

The same is true as to the claim that counsel were ineffective regarding counsel's examination of trial witnesses concerning Corporal Sutphin's shooting. Officer Roe testified that Corporal Sutphin's firearm was still "snapped in the holster" before Roe removed and secured it and that there was no indication that Corporal Sutphin had drawn any weapon before Morva shot him in the back of the head. Direct Appeal JA at 1761, 1763-64. Morva argues that trial counsel could have impeached this testimony had trial counsel properly investigated Corporal Sutphin's murder.

Morva cites an unsigned report from Sydney Gay, a responding EMT, that claims Corporal Sutphin's firearm was still in the holster when he arrived at the crime scene. SHA Vol. 2, at 733. Morva also cites a police report from Blacksburg Police Officer Q. Self, who wrote that he saw Officer Roe standing at Corporal Sutphin's body,

that he saw Corporal Sutphin's firearm strapped in its holster, and that a Blacksburg Rescue Squad member handed him Corporal Sutphin's firearm, not Officer Roe. SHA Vol. 2, at 731. Morva cites an unsigned report from Marshall Frank, another EMT, which reads, "I personally removed [Corporal Sutphin's] service weapon from his holster and handed it to Blacksburg Officer Self. The weapon was undrawn with the holster retention strap unstrapped." SHA Vol. 2, at 736.

Morva argues that trial counsel were ineffective by not confronting Officer Roe with the accounts of the other first responders that a rescue squad member, and not Officer Roe, removed Corporal Sutphin's pistol from its holster and that the holster strap was unstrapped. Even had trial counsel been able to raise some question in the mind of the jury as to whether Officer Roe, as opposed to another first responder, removed Corporal Sutphin's pistol from its holster or whether the holster was strapped or not, two critical facts as to the shooting remain unchanged: (1) Corporal Sutphin was shot in the back of the head, and (2) his pistol was undrawn and in his holster. Nothing about the line of cross examination Morva claims trial counsel should have pursued could have changed these unassailable facts or advanced his claim that he shot Corporal Sutphin in self-defense. As such, there is no reasonable probability that the outcome would have changed.

In short, regardless of which first responder retrieved the pistol or whether the strap was fastened, all present reported that Corporal Sutphin's gun was undrawn and holstered. Further, Morva's contention that Corporal Sutphin made an effort to draw his weapon is completely undermined by the physical evidence that Corporal Sutphin was shot in the back of his head. Any prejudice from trial counsel not impeaching Officer

Roe's testimony about who, in fact, removed Corporal Sutphin's pistol from its holster or whether the holster was strapped had no reasonable probability of changing the outcome. There is no merit to claim V.

F. Claim VI—Conditions at the Montgomery County Jail

In claim VI, Morva argues that trial counsel rendered ineffective assistance by not investigating and presenting evidence about the conditions of confinement at the Montgomery County Jail to support a claim of imperfect self-defense.[20] Citing a report from Virginia's Compensation Board, Morva alleges that the Montgomery County Jail housed inmates at 237% to 300% of its rated capacity in 2005 and 2006 when Morva was housed there, and consequently, the jail's average programming and medical spending per inmate decreased. Second Am. Pet., Dkt. No. 111, at 76-77. Morva argues that these statistics indicate that inmates were unable to receive necessary medical care, were exposed to an ever-present threat of violent attack, and lacked privacy. Morva cites his dissatisfaction with the medical treatment at the jail for his digestive and sinus issues and an infected wound on his arm as the reasons he escaped to save his life. Morva believes that the jurors would have understood why he escaped and killed McFarland and Corporal Sutphin had they learned of the conditions of his confinement.

The Supreme Court of Virginia dismissed this claim on habeas review because the ineffective assis-

[20] An "instance of imperfect self-defense is found in the situation where the accused kills because he thinks his life is in danger but his belief is an unreasonable one." *Couture v. Commonwealth*, 51 Va. App. 239, 249 n.2, 656 S.E.2d 425, 430 n.2 (2008) (quoting Roy Moreland, *The Law of Homicide* 93 (1952)).

tance claim was frivolous as the record "demonstrate[d] that Morva was not exposed to any unique conditions of confinement and Morva was not denied medical treatment." *Morva v. Warden*, 285 Va. at 517, 741 S.E.2d at 787. The Supreme Court of Virginia further concluded that the conditions of confinement, even if true, "would not have provided a viable defense to the murders he committed, and would not have mitigated the murders." *Id.* The Supreme Court of Virginia explained:

> Morva's alleged fear that his return to Montgomery County Jail might result in his death within a few months from some unnamed danger did not create a valid claim of self-defense, nor was it reasonably probable that the jury would have perceived his alleged fear as mitigating evidence for his murder of two innocent people. Also, the record does not support Morva's allegation that he was persistently denied necessary medical attention. In fact, he had been taken to the hospital for medical treatment at the time he attacked two of the victims and escaped.

Morva v. Warden, 285 Va. at 518, 741 S.E.2d at 787-88.

Morva argues that the Supreme Court of Virginia unreasonably determined that he was not persistently denied medical attention and that the conditions at the Montgomery County Jail were not unique, and Morva further faults the Supreme Court of Virginia for not considering a claim of imperfect self-defense. Morva believes that Supreme Court of Virginia mistakenly addressed "a claim of self-defense that was not alleged" because it concluded that "the record demonstrates no person could reasonably have apprehended imminent death[.]" Morva's Resp. to Mot. to Dismiss, Dkt. No.

73, at 37-38. In contrast, Morva argues that his claim of imperfect self-defense is based on a sincere yet unreasonable apprehension. *Id.* As such, he contends that the Supreme Court of Virginia missed the point of his argument.

The Supreme Court of Virginia's adjudication of claim VI was not contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts. The Supreme Court of Virginia recognized, and rejected, Morva's imperfect self-defense argument: "[A]ccording to Morva, even if the jury found his 'fear to be unreasonable, the evidence was sufficient to present argument and instruction … with regard to a potential lesser-included offense and in mitigation of the death sentence.'" *Morva v. Warden*, 285 Va. at 517-18, 741 S.E.2d at 787 (ellipses in original). The fact that the Supreme Court of Virginia did not find a viable argument in support of self-defense, whether it be a perfect or imperfect self-defense, is not an unreasonable determination of the facts of this case. Morva fails to show that the average cost per inmate had any bearing on Morva's receipt of medical care or that he was otherwise denied medical care. The state habeas record reveals that Morva was able to see a physician at the Montgomery County Jail and received medical services and medicine. Indeed, he was receiving medical care at the Montgomery Regional Hospital at the time of his escape. Plainly, Morva cannot establish that he requested and was denied medical service. SHA Vol. 5, at 2004, 2014, 2016-24.

Moreover, the Supreme Court of Virginia did not unreasonably apply *Strickland* when it concluded that it was not reasonably probable that the jury would have considered his imperfect self-defense argument to save him from the death penalty for the murders of

McFarland and Corporal Sutphin. There is no basis to conclude that any reasonable juror would have accepted the argument that an escaped prisoner can invoke his desire, reasonable or unreasonable, not to return to incarceration to justify a killing spree.[21] Simply put, trial counsel were not ineffective for not making an argument that no reasonable juror could accept.

G. Claim VII—Jury Instruction 8A

In claim VII, Morva challenges jury instruction 8A. Jury instruction 8A stated, "You may infer that every person intends the natural and probable consequences of his acts." Direct Appeal JA at 1968:11-13. In claim VII, Morva argues that instruction 8A violated due process either by creating a conclusive or irrebuttable presumption of intent, or by negating or diminishing the presumption of innocence. The Supreme Court of Virginia rejected this claim on direct review, relying on *Schmitt v. Commonwealth*, 262 Va. 127, 145, 547 S.E.2d 186, 198-99 (2001).

In *Schmitt*, the Supreme Court of Virginia held that a jury instruction using the same language as in instruction 8A did not negate or diminish the effect of the presumption of innocence but, instead, stated a permissive inference due to the use of the modal verb "may." The Supreme Court of Virginia concluded that

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[21] As previously discussed, Morva sought discovery on conditions at the Montgomery County Jail, both during state habeas proceedings and here. Morva's request for discovery simply is immaterial. Regardless of the conditions at the Montgomery County Jail in August 2006, the Supreme Court of Virginia correctly concluded that the law does not grant an inmate the privilege "to kill any individual, no matter how innocent or lacking in culpability, who presents a bar to that escape." *Morva v. Warden*, 285 Va. at 518, 741 S.E.2d at 787.

the permissive use of "may" in that instruction "did not require the jurors to draw any inference or alter the Commonwealth's burden of proving [the defendant]'s criminal intent beyond a reasonable doubt." *Id.*

The Supreme Court of Virginia cited *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979), in support of its holding in *Schmitt*. The pertinent instruction in *Sandstrom* was, "[T]he law presumes that a person intends the ordinary consequences of his voluntary acts[,]" and the United States Supreme Court sought to resolve whether that instruction violated due process by unlawfully shifting to the defendant the burden of proof about the defendant's purpose or knowledge. The Court noted that the analysis first depended on "the nature of the presumption" the instruction describes, which in turn depends on "careful attention to the words actually spoken to the jury" to determine the way a reasonable juror could have interpreted the instruction. *Sandstrom*, 442 U.S. at 514. After noting the definition of "presume" meant "to suppose to be true without proof," the Court held that a reasonable jury "could well have interpreted" the phrase "the law presumes" as an instruction either: (1) to find intent once "convinced of the facts triggering the presumption[,]" or (2) to find intent "unless the defendant proved the contrary[,] … effectively shifting the burden of persuasion on the element of intent." *Id.* at 517 (emphasis omitted). The Court ultimately found that the instruction violated due process because a reasonable juror could have thought the phrase "the law presumes" shifted the burden of persuasion as to intent to the defendant.

The Supreme Court of Virginia's adjudication of claim VII was not contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts. Although

Morva argues that instruction 8A could have been written more clearly by adding the words "unless you choose not to do so" or the phrase "but are not required to do so," the use of "may" satisfied due process.[22] The words actually spoken to the jury in instruction 8A plainly described a permissive inference by allowing, but not requiring, the jury to infer that one intends the natural and probable consequences of an act. In order to find a violation of *Sandstrom*, the court would have to read the permissive term "may" in the instruction given in this case as the mandatory terms "should" or "shall." Phrased as it was, instruction 8A permitted the jury to infer intent as to the consequences of an act, but did not require such an inference. As such, it did not improperly shift the burden of proof, run afoul of *Sandstrom*, or violate due process. Accordingly, claim VII must be dismissed.

H. Claim VIII—Failure to Object to the Third Capital Charge on Double Jeopardy Grounds and Failure to Object that the Verdict Forms Triple Counted the Capital Charges and Misled the Jury into Imposing the Death Penalty

In claim VIII(A), Morva argues that trial counsel rendered ineffective assistance by not making a "double jeopardy objection" to the third capital murder charge for the premeditated murder of more than one person within a three-year period.

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[22] Thus, Morva proposes that the instruction should have said, "You may infer, unless you choose not to do so, that every person intends the natural and probable consequences of his acts," or, "You may infer, but are not required to do so, that every person intends the natural and probable consequences of his acts." Second Am. Pet., Dkt. No. 111, at 90.

The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V.

> Because it was designed originally to embody the protection of the common-law pleas of former jeopardy, see *United States v. Wilson*, 420 U.S. 332, 339-340 (1975), the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

Brown v. Ohio, 432 U.S. 161, 165 (1977). The Fifth Amendment guarantee against double jeopardy consists of three separate constitutional protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 715 (1969) (footnotes omitted). As Morva faced only one prosecution, only the third guarantee—prohibiting multiple punishments for the same offense—is at issue here.

In claim VIII(A), Morva argues that his conviction on the third capital murder charge, for killing more than one person in a three-year period, is impermissibly derivative of his two other capital murder charges. As such, he claims it violates the Double Jeopardy Clause

and the rule in *Clagett v. Commonwealth*, 252 Va. 79, 472 S.E.2d 263 (1996), *cert. denied*, 519 U.S. 1122 (1997).

Michael Clagett killed four people during the course of a tavern robbery in Virginia Beach. Clagett was charged in two indictments. The first indictment charged four separate counts of capital murder during the commission of a robbery, and the second indictment charged one count of multiple homicide capital murder. The jury convicted Clagett of the five death sentences for the four homicides. On appeal, Clagett asserted, and the Commonwealth agreed, that he had been "impermissibly punished with five death sentences for four homicides." *Id.* at 95, 472 S.E.2d at 272. Finding the conviction for multiple homicide capital murder to be derivative of the other four capital convictions, the Supreme Court of Virginia vacated the fifth capital conviction.[23]

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[23] Morva adds that the prohibition against derivative capital sentences in *Clagett* was mentioned by the Supreme Court of Virginia in two subsequent cases. In *Beck v. Commonwealth*, 253 Va. 373, 376 n.*, 484 S.E.2d 898, 900 n.* (1997), Christopher Beck murdered three persons during the commission of a robbery and pled guilty to three capital offenses for those killings plus one for the capital murder of the three victims as part of a single act or transaction. Va. Code Ann. § 18.2-31(7). Citing *Clagett*, the Supreme Court of Virginia noted that the fourth capital murder charge had been nolle prossed and the fourth guilty plea withdrawn. Likewise, in *Walton v. Commonwealth*, 256 Va. 85, 501 S.E.2d 134 (1998), Percy Walton killed three persons during the commission of a robbery, and he was convicted of one capital murder charge for each killing plus a capital murder charge for the willful, deliberate, and premeditated killing of more than one person within a three-year period under Virginia Code § 18.2-31(8). Morva's third capital conviction was pursuant to the same statute. Again citing *Clagett*, the Supreme Court of Virginia noted that at the time of sentencing the trial court dismissed the fourth death sentence. *Walton*, 256 Va. at 87 n.*, 501 S.E.2d at 135 n.*.

Three years later in *Payne v. Commonwealth*, 257 Va. 216, 509 S.E.2d 293 (1999), the Supreme Court of Virginia addressed the question "whether there can be more than one death sentence imposed where there is only one victim." *Id.* at 227, 509 S.E.2d at 300. Eric Payne received two death sentences for each of two separate convictions. Payne received two death sentences for the killing of his first victim: one for capital murder in the commission of a robbery, and one for capital murder in the commission of rape. Payne also received two death sentences for the killing of his second victim: one for capital murder while in the commission of or subsequent to object sexual penetration, and one for capital murder while in the commission of or subsequent to attempted rape.

In addressing the double jeopardy challenge in *Payne*, the Supreme Court of Virginia noted that "[i]n the single-trial setting, 'the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.'" *Id.* at 227, 509 S.E.2d at 300 (quoting *Brown v. Ohio*, 432 U.S. at 165). "Thus, resolution of the question whether punishments imposed by a court are unconstitutionally multiple requires a determination of what punishments the legislature has authorized." *Payne*, 257 Va. at 227, 509 S.E.2d at 300 (citing *Whalen v. United States*, 445 U.S. 684, 688 (1980)). Reviewing the statute, the *Payne* court concluded that the language of Virginia Code § 18.2-31 expressed the legislative intent that there are multiple capital offenses. The Supreme Court of Virginia next looked to the rule in *Blockburger v. United States*, 284 U.S. 299 (1932). There, the United States Supreme Court stated, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the

test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. Because Payne violated distinct statutory provisions, the Supreme Court of Virginia concluded that each of his killings constituted two capital offenses. *Payne*, 257 Va. at 228, 509 S.E.2d at 301. The *Payne* court held that "each conviction was for the violation of a distinct statutory provision for which a separate statutory punishment was authorized. Consequently, the convictions and sentences do not violate the constitutional guarantee of protection against multiple punishments for the same offense." *Id.* at 229, 509 S.E.2d at 301.[24]

The Supreme Court of Virginia addressed its opinions in *Clagett* and *Payne* in 2004 in *Winston v. Commonwealth*, 268 Va. 564, 604 S.E.2d 21 (2004). Leon Winston asserted a double jeopardy violation because the jury returned two verdicts of capital murder for the killing of one victim. After first noting that Winston's assignment of error did not assert a *Clagett* "multiple

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[24] Justice Koontz, who authored *Clagett*, dissented in *Payne* as follows:

> Today, for the first time a majority of this Court concludes that by enacting Code § 18.2-31, our General Assembly has authorized the imposition of more than one death sentence for the capital murder of one victim. Indeed in the present cases, the majority concludes that Eric Christopher Payne is properly subject to the imposition of four death sentences for the capital murder of only two victims. I cannot join in such a patently strange result. Moreover, in my view, such a result was not intended and, consequently, was not authorized by our General Assembly in enacting Code § 18.2-31.

257 Va. at 229, 509 S.E.2d at 301.

punishment double jeopardy" claim, the Supreme Court of Virginia stated:

> Furthermore, since *Clagett*, we have considered the question whether a defendant charged with capital murder can be convicted of more than one offense of capital murder of the same victim and whether a defendant can receive more than one death sentence for the killing of the same victim. In *Payne*, the defendant was convicted of two distinct statutory provisions of subsection 5 of Code § 18.2-31 involving the same victim. Because "each statutory provision required proof of a fact that the other did not," we held that Payne was properly convicted of two capital offenses in the killing of the same victim. Additionally, Payne was sentenced to two death sentences for the same victim. We observed, "[w]e think it is clear, as well as logical, that the General Assembly intended for each statutory offense to be punished separately 'as a Class 1 felony.'" 257 Va. at 228, 509 S.E.2d at 301. In approving the two death sentences for the capital murder of one victim, we further held "the convictions and sentences do not violate the constitutional guarantee of protection against multiple punishments for the same offense." *Id.* at 229, 509 S.E.2d at 301. The trial court did not err "by allowing two verdicts of capital murder of [the victim]."

Winston, 268 Va. at 614-15, 604 S.E.2d at 49-50.

In his state habeas petition, Morva raised a stand-alone double jeopardy challenge, contending that his case is indistinguishable from *Clagett*. The Supreme Court of Virginia did not address this issue, holding that

it was barred under *Slayton*, 215 Va. at 29, 205 S.E.2d at 682, because it was not raised at trial or on direct appeal.

The Supreme Court of Virginia did address Morva's state habeas claim that trial counsel were ineffective for not raising a double jeopardy challenge to his third death sentence. After reviewing Virginia Code §§ 18.2-3(3), 18.2-3(6), and 18.2-3(8), the Supreme Court of Virginia determined that double jeopardy was not implicated because each subsection of the death penalty statute of which Morva was convicted had different elements. The Supreme Court of Virginia reasoned:

> Morva was sentenced to death for three separate capital offenses: capital murder while in custody, Code § 18.2-31(3), capital murder of a law-enforcement officer, Code § 18.2-31(6), and capital murder of more than one person within a three-year period, Code § 18.2-31(8). The elements of capital murder while in custody are: (1) the willful, deliberate, and premeditated killing; (2) of another; (3) by a prisoner of a state or local correctional facility, or while in the custody of an employee of such facility. The elements of capital murder of a law-enforcement officer are: (1) the willful, deliberate, and premeditated killing; (2) of a law-enforcement officer; (3) for the purpose of interfering with the performance of his official duties. The elements of capital murder of more than one person within a three-year period are: (1) the willful, deliberate, and premeditated killing; (2) of more than one person; (3) within a three-year period. The elements of each of these capital offenses are different and each carries its own separate penalty.

Morva v. Warden, 285 Va. at 519, 741 S.E.2d at 788. Citing *Payne*, the Supreme Court of Virginia concluded that Morva's trial counsel were not ineffective for not presenting a meritless double jeopardy challenge.

Claim VIII(A) of Morva's federal petition again raises *Clagett* and double jeopardy through the lens of ineffective assistance of counsel. Morva argues that, *Payne* notwithstanding, trial counsel should have made a *Clagett* objection to the third death sentence which was derived entirely from the fact of his two other killings.

The Supreme Court of Virginia's adjudication of claim VIII(A) was not contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts. Morva's three capital sentences for violating Virginia Code § 18.2-31(3), (6), and (8) do not constitute double jeopardy because these subsections proscribe three separate and independent crimes. The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger*:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not ….

284 U.S. at 304. This test emphasizes the elements of the two crimes. "If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof of-

fered to establish the crimes." *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975).

Consistent with *Blockburger*, the Supreme Court of Virginia concluded in *Payne* that the General Assembly of Virginia clearly intended each subsection of § 18.2-31 "to be punished separately." 251 Va. at 228, 509 S.E.2d at 301. Following *Payne*, Morva's trial counsel were not ineffective by not making a *Clagett* objection. Consistent with *Payne*, the Supreme Court of Virginia concluded in Morva's state habeas case that the three capital convictions were separate capital offenses having separate elements for which separate statutory punishments were authorized. This court is bound to accept the Supreme Court of Virginia's construction of Virginia's statutes. *Missouri v. Hunter*, 459 U.S. 359, 368 (1983). Indeed, in *Missouri v. Hunter*, itself a multiple punishment double jeopardy case, the Court held:

> Legislatures, not courts, prescribe the scope of punishments. Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes, proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Id. at 368-69 (footnote omitted). Given the holdings in *Blockburger* and *Missouri v. Hunter* and the construction the Supreme Court of Virginia has placed on the Virginia capital offense statute, Virginia Code § 18.2-31, it cannot be maintained that Morva's three death sentences run afoul of clearly established federal law. Nor is there any basis upon which to argue that they

are based on an unreasonable determination of the facts. Accordingly, claim VIII(A) must be dismissed.

Morva argues in claim VIII(B) that the jury was misled into imposing the death penalty because trial counsel did not offer an instruction against "triple-counting" the capital murder charges and did not object to alleged duplicative jury verdict forms. Claim VIII(B) is procedurally defaulted, and to excuse that deficiency, Morva argues that state habeas counsel rendered ineffective assistance by not presenting claim VIII(B) to the Supreme Court of Virginia.

The circuit court instructed the jury to consider "any mitigation evidence … which do[es] not justify or excuse the offense, but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment." Direct Appeal JA at 2409. The circuit court also instructed the jury that, even if it found at least one aggravating factor to support imposing the death penalty, the jury could impose a life sentence and that "nothing in these instructions nor in the law requires you to sentence [Morva] to death no matter what your findings may be." Direct Appeal JA at 2406. After the circuit court gave that instruction, trial counsel reiterated to the jury that Virginia "law is such that it never ever, never ever, requires the imposition of the death penalty" and, "under any circumstances, you are never ever required to impose death as punishment." Direct Appeal JA at 2420, 2428.

Consistent with the circuit court's instructions during the sentencing phase, the circuit court provided the jury with alternative verdict forms. For the murder of Derrick McFarland, for example, the jury received seven forms: three forms imposing the death penalty and four forms imposing life imprisonment. The circuit

court provided multiple forms because the Commonwealth argued that the death penalty was warranted for two separate statutory reasons: (1) that Morva posed a risk of future dangerousness, and (2) that Morva's conduct in committing the offense was outrageously or wantonly vile, horrible, inhuman or involved depravity of mind. The first death penalty form encompassed both of these reasons, and the other two forms concerned one reason each. Likewise, the four alternative verdict forms imposing life imprisonment reflected the options available to the jury. The first life imprisonment form was to be used in the event the jury found that the Commonwealth failed to meet its burden of proof regarding either statutory reason. The second and third life imprisonment forms were to be used in the event that the jury concluded that the Commonwealth met its burden of proof as to one of the statutory reasons, but that the jury, having considered all of the evidence in mitigation of the offense, fixed punishment at life imprisonment. The fourth life imprisonment form was to deal with the situation where the jury found that the Commonwealth proved both statutory aggravating factors but decided to impose a life sentence regardless. These forms are not confusing, nor do they represent triple counting. Rather, the verdict forms provided to the jury, both for the sentences of death or life imprisonment, merely reflect the various sentencing options available to the jury. Consequently, the record refutes Morva's speculation that the jurors were confused about the possibility of imposing a life sentence instead of the death penalty. As such, claim VIII(B) presents no substantial claim of ineffective assistance of counsel and must be dismissed as procedurally defaulted.

I. Claim IX—Failure to Investigate Morva's Background, Provide Information to the Mental Health Experts, and Otherwise Present Mitigation Evidence

In claim IX, Morva argues that trial counsel rendered ineffective assistance during the sentencing phase of trial. Specifically, Morva alleges trial counsel: (A) did not conduct an adequate investigation of Morva's background, history, character, and mental illness; (B) did not provide the available information to the mental health experts to ensure an accurate and reliable mental health evaluation; and, consequently, (C) did not adequately present all available mitigating evidence during the sentencing phase. The Supreme Court of Virginia dismissed these arguments on habeas review, and the court finds that the dismissal was not contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts.

In support of claim IX(A), Morva argues that trial counsel "cut short their investigation and disregarded investigative 'red flags' pointing to the need for further investigation[,]" such as Morva's multi-generational mental illnesses and family history. Second Am. Pet., Dkt. No. 111, at 100-01. Morva faults trial counsel because they did not investigate his father's:

> Hungarian familial links, never conducted or proposed to conduct investigation in Hungary, never tried to contact family members in Hungary, never attempted to obtain any records from Hungary, never contacted relevant European non-governmental organizations (NGOs) or other organizations for assistance, never sought pro bono help from a law firm in Hunga-

> ry, and never recognized that the Hungarian government or European NGOs would have conducted an investigation even without funding from the circuit court.

Id. at 109. Morva's father allegedly experienced emotional trauma from significant events in his life: his aunt was murdered; he was forced to serve in the Nazi-aligned Hungarian Army during World War II although he was Jewish; he committed "very gruesome acts" during the Hungarian Revolution; his parents died of cancer and suicide; he divorced his first wife; he kept his Jewish heritage a secret; and he kept multiple firearms in his house after emigrating to the United States because he was afraid Nazis would kill him and his family. Morva also faults trial counsel because they did not investigate his mother's abusive first marriage, which caused her anxiety; how Morva's father controlled and was domineering of Morva's mother; the experiences of the three siblings, nieces, and nephews of Morva's mother;[25] the relationship between Morva's mother and maternal grandmother; and Morva's maternal grandmother's nervous breakdown, schizophrenia, three-month hospitalization, mean demeanor, and alcoholism.

In claim IX(B), Morva argues that trial counsel did not provide available information to the mental health experts to ensure an accurate and reliable mental health evaluation. Specifically, Morva faults trial counsel for not disclosing to Drs. Cohen and Bender, the two appointed mental health experts, the details of trial coun-

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[25] Allegedly, one sibling suffers from schizophrenia, the second sibling suffers from obsessive compulsive disorder and has struggled with depression, the third sibling married a cheating man, and several nieces or nephews have alcohol and drug addiction problems and obsessive compulsion disorder. *Id.* at 116.

sel's interviews with Morva's friends and family or the friends and family's contact information. *Id.* at 128-29. Morva further faults trial counsel for not "obtain[ing] information from friends and family about the symptoms of Morva's apparent descent into mental illness, which, if reviewed by the trial experts, would have raised 'plenty of "red flags" pointing' to a more serious mental illness." *Id.* at 121. Morva alleges that reasonable counsel would have investigated these people more and provided that information to the appointed experts and that, had trial counsel done so, "there is a reasonable probability that the mental health experts would have made an Axis-I diagnosis" of, "most likely[,] schizophrenia, obsessive compulsive disorder, and/or delusional order[,]" instead of an Axis-II personality disorder. *Id.* at 129, 135.

In claim IX(C), Morva argues that trial counsel did not adequately present all available mitigating evidence during the sentencing phase. Specifically, Morva alleges that "competent counsel would have been able to explain to the jurors how Morva's criminal actions were directly related to and a product of [a delusional disorder]—a circumstance far beyond his control that diminishes his moral culpability." *Id.* at 140.

The Supreme Court of Virginia dismissed these arguments on habeas review, finding no deficient performance or resulting prejudice. The Supreme Court of Virginia concluded:

> The record, including Morva's exhibits, demonstrates that counsel conducted an exhaustive investigation and spoke with the witnesses upon whose affidavits Morva now relies. These affidavits contain vast amounts of negative information that shows Morva as self-absorbed, manipulative, aggressive, and uncaring. As such,

> testimony from these witnesses would have been "double-edged." Furthermore, Morva has not demonstrated what impact, if any, his parents' upbringings had on his actions. The information about his parents that Morva now provides does not concern Morva's personal background or history, or the circumstances of the offense, and does not mitigate Morva's actions.
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> * * *
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> Morva proffers no competent evidence to substantiate his claim that he suffered from a "true mental illness," or that providing additional information to the mental health experts who examined Morva in preparation for trial and sentencing would have changed the experts' conclusions.

Morva v. Warden, 285 Va. at 521, 522-23, 741 S.E.2d at 789, 790 (internal citation omitted). After reviewing the record, the court finds that the Supreme Court of Virginia's adjudication of claim IX was not contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts.

First, as to claim IX(A), as the Supreme Court of Virginia recognized, Morva's father's exposure to Nazi-occupied Hungary and Soviet repression following the 1956 Hungarian Revolution has nothing to do with this case and could not serve to mitigate Morva's crimes. Rather than focus on history Morva never experienced and a country Morva never visited, trial counsel presented testimony from a number of witnesses who knew Morva and explained that he was an easy-going, compassionate, free spirit who was friendly, polite, and likeable.

For example, Michael Delpercio, one of Morva's former high school teachers, testified that he spent time with Morva alone after class discussing Morva's wide-ranging interests. Morva "reminded [Delpercio] of a hippie sort of. Kind of easy-going, liberal type, you know, like to discuss, you know, broad kind of liberal issues sort of." Direct Appeal JA at 2193. Describing Morva as "real, kind of passivist," Delpercio saw no signs of violence in Morva, and testified that he caused no trouble in class. *Id.* at 2193-95. Their relationship was such that Morva "would discuss problems that he had with me. And I knew he had, I got the impression he had some problems with his father, and there was some issues about moving and what his mother wanted." *Id.* at 2194.

Debbie Campbell, a former high school guidance counselor, testified that Morva appeared to be "respectful[,]" "very polite and friendly[,]" "a bright and likeable young man[,]" and a "free spirit type personality" who was not a "troublemaker." *Id.* at 2200, 2203, 2205. Campbell related that, even after Morva dropped out of high school, she saw Morva in downtown Blacksburg periodically and that he seemed to be "the same as in high school[:]" polite, friendly, and articulate. *Id.* at 2204-05.

Maria Rott, a high school friend, testified that Morva was "always very, very caring[,]" concerned about the plight of minorities, "compassionate towards people who were having a hard time," "cared a lot about nature and animals," and was interested in the outdoors. *Id.* at 2209. Rott testified that "William was always there to stand up for friends of his. I remember a number of times just, you know, he would just be a comfort. And every time that you would see him, if I would see him downtown, he always had a big smile when he greeted me and a big hug." *Id.* at 2210. Rott described

how Morva would engage other people at the local coffee shop in conversation: "William is not afraid to talk to anybody. I always thought it was fun to see what he was thinking about or what topic, you know, he had read about. He was very interested in a lot of things. I remember some interesting conversations about Native Americans, his concern for their, what they're going through in this country, and some of those issues." *Id.* at 2212. Rott also saw no signs of violence in Morva, describing him as "fervently against guns. He was always very, he would always stick up for his friends, but never in a violent way." *Id.* at 2214. Rott recalled that Morva "missed a fair amount of school because of health" and that she talked to him about his stomach problems and very restricted diet. *Id.* at 2213-14.

Kyla Trice, another high school friend, testified that Morva "has always been one of the best people [she's] ever known," who "was the type of person to give you a hug on a bad day" and a "great person to have around." *Id.* at 2220, 2222. Trice explained that she never knew Morva to be violent and was shocked to hear of the charges against him. *Id.* at 2223, 2228.

Anna Burkhart, another high school friend, testified that Morva was "a very sweet, open, and intelligent person. A very sensitive person also, and a very good friend to me." *Id.* at 2233. Burkhart testified that she knew Morva well, often spending time together. Burkhart testified that Morva's family relationship was "tumultuous and difficult[,]" "especially with his father as so many people do growing up[,]" but that she never saw any violence in him. *Id.* at 2236. As with other friends, Burkhart testified that she knew Morva suffered from stomach problems. *Id.* at 2238. Burkhart also explained that she knew Morva was homeless after he dropped out of school and his family moved to Rich-

mond and that he either stayed with friends or acquaintances or camped in the woods. *Id.* at 2238-39.

Emily DeBoard, another high school friend, spoke of the time Morva helped her pick up her school books and papers that had tumbled from her backpack, while others pointed and laughed. *Id.* at 2251. DeBoard described Morva as fun-loving and quiet, not a troublemaker. *Id.* at 2252. DeBoard described seeing Morva help a woman struggling with bags to cross the street in downtown Blacksburg and observing Morva in a local coffee shop discussing that he wanted to move to the Dakotas to document living with Native Americans. *Id.* at 2253-54.

Eric Spinrad testified that Morva was "one of the first people that opened up to me and made [Blacksburg] enjoyable." *Id.* at 2257. Spinrad testified that Morva was concerned that his mother was living out of a car and that he was "decentered" after his father's death. *Id.* at 2257-58, 2260. Spinard testified that Morva would bring up his father in conversation, noting that Morva had "a lot of respect for his father. I mean no parental situation is perfect but there is a love for family there." *Id.* at 2258. Spinrad testified that Morva drifted around Blacksburg for a period, staying with him or with other friends, and mentioned his digestion issues, terming his stomach "active." *Id.* at 2258-59. Spinrad described Morva as a "very helpful guy" and that he had "a lot of respect for everything he's done for me." *Id.* at 2260.

Aaron Grisby, who worked at the local coffee shop Morva frequented, "knew him as a very kind and caring person, very sincere. Probably one of the most sincere people I knew in Blacksburg. Always very friendly. Always willing to talk and listen with just about everybody he met." *Id.* at 2273. Grisby told the jury about Morva's

struggles with his diet and digestive issues, and that he never knew Morva to be violent. *Id.* at 2272-73.

In support of his claim that trial counsel conducted an inadequate investigation, Morva's state habeas appendix contained affidavits from additional persons who attended high school with Morva or knew him in Blacksburg. By and large, these affidavits repeat the same information or themes about Morva that were presented to the jury during trial, *i.e.*, that Morva was a compassionate, friendly person who, over time, drifted into increasingly eccentric beliefs and behaviors. Dr. Cohen's report and testimony factored these attributes of Morva's character into the psychiatric assessment developed in mitigation. The fact that trial counsel did not call additional witnesses to cumulatively testify that Morva was a friendly, wayward soul, wandering barefoot around Blacksburg and obsessed with the plight of Native Americans or other causes does not constitute deficient performance or establish prejudice. *See Wong v. Belmontes*, 558 U.S. 15, 22-28 (2009) (rejecting the notion that more cumulative evidence is always better, especially when "the notion that the result could have been different if only [the defendant] had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful"). The factual evidence presented at sentencing by trial counsel was designed to paint Morva in a sympathetic light and support the expert psychological and psychiatric testimony. Simply because cumulative testimony could have been presented does not render the trial strategy and development of trial evidence ineffective. The simple reality is that Morva had not been diagnosed with any mental health issues or received any mental health treatment prior to the murders, and it cannot be credibly argued that trial counsel were ineffective or Morva

prejudiced because trial counsel did not present additional witnesses as to Morva's eccentricities. The jury heard substantial evidence as to Morva's personality and behavior, two mental health experts testified that he suffered from a schizotypal personality disorder, and trial counsel cannot be faulted because the jury did not find it to be sufficiently mitigating. Accordingly, claim IX(A) must be dismissed.

As for claim IX(B), Morva faults trial counsel for not disclosing to Drs. Cohen and Bender the details of trial counsel's interviews with Morva's friends and family or their contact information.[26] Based on the information from trial counsel, Dr. Cohen, the forensic psychiatrist, interviewed Morva's mother, Elizabeth Morva, and Morva's sister, Emily Happel.

Morva's habeas petition asserts that his mother was partly responsible for the squalor and abuse Morva allegedly experienced, and Emily Happel allegedly experienced the same environment. Elizabeth Morva acknowledged in her affidavit that Dr. Cohen "mostly asked me questions about my family and our background," yet she did not discuss the squalor and abuse Morva claims he experienced or her relatives' infirmi-

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[26] Although Morva faults trial counsel for not communicating "available information" to both Dr. Cohen and Dr. Bender, Dr. Bender's report was based on information from Morva during an interview and neuropsychological testing. Direct Appeal JA at 2289-91. Dr. Bender did not need other people's contact information as part of his psychological testing and expert analysis. Moreover, both Dr. Cohen and Dr. Bender were aware that Morva's "[f]amily history is reportedly positive for schizophrenia in his grandmother[,]" and Dr. Cohen testified during trial that Morva's maternal grandmother was hospitalized for three months in the 1950s for possible schizophrenia. SHA Vol. 6, at 2468, 2483; Direct Appeal JA at 2349.

ties.[27] Furthermore, Emily Happel acknowledges that she told Dr. Cohen that Morva "was a pretty normal kid." SHA Vol. 1, at 474, ¶ 3. Despite not recounting the allegedly depraved childhood, as described in Morva's petition, to trial counsel or in her affidavit, Morva's sister admits she told Dr. Cohen about the changes she saw occur in Morva over the years, including Morva's paranoia, how Morva looked and acted like a "rabid dog" before she kicked him out of her house, and the changes Morva experienced right before he escaped. SHA Vol. 1, at 479, ¶ 27, 483, ¶¶ 46-47. Even Morva acknowledges in his petition that Elizabeth Morva and Emily Happel "were capable of giving the experts information regarding Morva's childhood and adolescence," but it is apparent that, despite the opportunity, neither of them told Dr. Cohen about the negative environment Morva asserts he experienced while growing up in the Morva household. Trial counsel cannot be faulted because Morva's family members did not report the circumstances of Morva's childhood in a manner consistent with his petition.

Morva also faults trial counsel for not contacting Morva's brothers, Nat or Michael, or providing their contact information to Dr. Cohen. However, Dr. Cohen learned when he interviewed Emily Happel that Morva

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[27] Notably, Elizabeth Morva admits that trial counsel asked her about Morva's mental health and family background at the very beginning of legal representation. SHA Vol. 1, at 130, ¶ 164. She averred that trial counsel could not use claims of mental illness as Morva's defense strategy "because there was no documented history of him having a mental illness prior to the murders. In particular, they said they needed medical records." SHA Vol. 1, at 131, ¶ 168. However, the record makes clear that there were no mental health records to obtain because Morva did not receive mental health treatment before the murders.

had lived with his brother Nat in Richmond, Virginia, for a period of time and that Michael had moved back to Blacksburg to live with Morva. Dr. Cohen could have obtained or requested Nat's or Michael's contact information without any assistance from trial counsel, either on his own initiative or from Elizabeth Morva or Emily Happel.[28] It cannot be credibly contended that trial counsel were responsible for not providing Dr. Cohen with Nat's or Michael's contact information when Dr. Cohen knew of the brothers and could have obtained their contact information from other sources as he deemed necessary in formulating his opinion.[29]

Morva particularly faults trial counsel for conducting only cursory interviews with some of the people who gave statements to state habeas counsel, including,

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[28] Although Nat filed an affidavit in support of the state habeas petition, he, too, does not detail the allegedly depraved childhood Morva's petition claims he experienced or his extended family's infirmities.

[29] Nonetheless, testimony from Morva's two brothers was unlikely to change the outcome. Michael had been arrested in 2005 along with William on the burglary and robbery charges, and his affidavit is otherwise patently incredible. *See*, *e.g.*, SHA Vol. 1, at 377-78, ¶ 39, 379-80, ¶¶ 45-47, 382, ¶ 57, 387, ¶ 75; *see also* SHA Vol. 3, at 1205-17, 1220-22 (describing Michael Morva's behavior in 2006 and 2007), SHA Vol. 7, at 2654 (same). His testimony could not have helped Morva. The only notable information described in Nat's affidavit is how his relationship with Morva disintegrated. SHA Vol. 1, at 73, ¶ 23. According to Nat, Morva left pornographic images on Nat's home computer that were discovered by Nat's four year old son. When Nat chided Morva, Morva became "very angry" and acted like Nat was throwing him out of the house. Again, this testimony could not have been helpful to Morva's defense. In short, it cannot be maintained that an interview by Dr. Cohen of Nat or Michael Morva could have changed his diagnosis or had any reasonable probability of affecting the outcome.

most importantly, Qato Burkhart, Mark Williams, and Father James Arsenault. Trial counsel spoke with Qato (formerly Anna) Burkhart for two hours at a hotel in Raleigh where trial counsel inquired about Morva's mental health. SHA Vol. 1, at 407-43. Burkhart testified at trial. Trial counsel also spoke to Morva's friend, Mark Williams. Both in a police interview and in his state habeas affidavit, Williams described Morva, armed with his father's pistol, "pretending he was being attacked and defending himself …. He thought the system was going to come after him, violently." SHA Vol. 1, at 343, ¶ 53. Trial counsel told Williams "that they could not use me because I knew things about Will's feelings about the police and fighting back." *Id.* at 347, ¶ 69. Father James Arsenault did not meet Morva until after the murders. Father Arsenault testified at trial that he saw Morva almost every week at the New River Valley Jail and that Morva was "very respectful, and polite, and very mindful too of his language." Direct Appeal JA at 2282. In short, trial counsel spoke to each of these witnesses and two were called as mitigation witnesses at trial. Trial counsel cannot be faulted for not calling Mark Williams to testify and risk him recounting Morva practicing violent encounters with police. There is no substance to the assertion that trial counsel shirked their obligation to interview and call these persons to testify for Morva at trial.

Jack Bennett noted in his affidavit that Morva "was the local eccentric and everyone in town has a William Morva story." SHA Vol. 1, at 184, ¶ 3. To be sure, trial counsel could have persisted in trying to talk to anyone in Blacksburg who had a "William Morva story." The affidavits in the state habeas record reflect, however, that, had trial counsel continued to investigate everyone who met Morva in Blacksburg, the information

would be cumulative or not otherwise probative of new mitigation evidence that had a reasonable probability to change the outcome.

As for claim IX(C), Morva complains that Drs. Cohen and Bender would have had access to more information that "would have raised 'plenty of "red flags" pointing' to a more serious mental illness" had trial counsel forwarded more contact information of Morva's acquaintances from Blacksburg. But Dr. Cohen already had sufficient information to diagnose Morva with schizotypal personality disorder. Indeed, Dr. Cohen based his diagnosis on the very sort of information contained in the affidavits included in the state habeas record. In his evaluation, Dr. Cohen states:

> Mr. Morva recalled his father as having been very opinionated over issues related to politics and religion. He strongly believed in religious and political diversity and was opposed to excessive government control. His father sometimes came into conflict with his mother over issues of religion …. Mr. Morva denied any history of childhood abuse, but he did report (and his mother confirmed) that his father was … very opinionated, became angry very easily, tended to insult the children and was a strict disciplinarian [who] would slap Mr. Morva or his siblings even for minor infractions. Despite this (and perhaps because of this), Mr. Morva came to see himself as a free-thinker who "wouldn't be tamed" by his father.
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> The family moved to Blacksburg when Mr. Morva was 14 years old, the summer before he started high school. Mr. Morva recalled having been intelligent but despite this having per-

formed extremely poorly in school ever since elementary school. "I failed almost all of my classes." Despite this, he did not recall having been referred for educational testing or counseling, never was evaluated for a learning disability or attention problem, and was allowed to progress to the next grade despite his poor grades. His mother, in a separate interview, confirmed that this was the case. His school records also indicate that he received C's, D's, and F's throughout school career. He did not get into fights, use alcohol or drugs, or demonstrate other behaviors suggestive of a conduct disorder. However, he did demonstrate limited attention, motivation, and attendance and would get into arguments with his teachers. He ultimately dropped out of school at age 18, during his senior year of high school. A report at the time that he dropped out from a high school by a school [guidance counselor] commented: "He is a bright and likeable young man. His free spirit type personality did not mesh with the school setting …."

During the present evaluation, Mr. Morva described a complex belief system centering on his physical health. He recalled having felt "sick," "exhausted," and "unable to concentrate" throughout his school years, due to both chronic sinus infections and irritable bowel symptoms. With regard to the latter, Mr. Morva described becoming extremely constipated and having to repeatedly spend hours on the toilet with very limited results, even after taking stool softeners or laxatives. He reported that it was only after high school that he dis-

covered on his own that by drinking more fluid, avoiding processed foods, and in particular living a more "natural" lifestyle (e.g., eating mostly meat and nuts and camping out in the woods, as the American Indians used to do) that his energy and digestive complaints dramatically improved. He assumed that during his childhood he'd had a hyperactive immune system that only now had calmed down.

…. However, there is no record of his having been treated for irritable bowel symptoms until late adolescence, with his attorneys having only been able to locate a single medical consultation note from October 2003, at which time Mr. Morva told the physician that his symptoms had been present for "several years." Mr. Morva's mother did not recall him having experienced bowel difficulties during his childhood and she felt certain that such symptoms were something that she likely would have noticed. Therefore, it appears likely that Mr. Morva's preoccupation with his bowel function and with the impact of nutrition on his overall health likely began during his late teenage years.

…. [W]hen Mr. Morva was 18 years old his parents returned to the Richmond area …. Mr. Morva asked to stay in Blacksburg where he had friends and where he hoped to find a job and support himself. His parents agreed to this plan. Until their house sold about one year later, Mr. Morva remained there, but it also was during this period that he began going on extended camping expeditions into the Jefferson National Forest. After the house sold, he al-

ternated between living in the woods, living in a rented apartment, or staying with friends.

Mr. Morva stated that starting at about age 19, he would go into the woods, at first bringing along typical camping supplies but later learning how to live completely naturally, e.g.[,] by making his own survival tools (including making his own bow and arrows in order to hunt deer), making his own shelter from rocks and skins, and making his own soap from deer fat. In the woods, he felt healthier than he'd ever felt, subsisting primarily on a diet of deer meat and nuts. He described having learned such techniques from his own experience, supplemented by some reading of library books. He denied being a loner or recluse, and in fact stated that he typically came out of the woods after about two weeks and then for the next several months would live in town, usually staying with various friends. He added that he often invited people to come into the woods with him to share this profound experience, but people never took him up on it. He spent a great deal of time hanging out at local establishments, particularly Bollo's coffee house, usually with an open shirt and without shoes. He said that he went barefoot for philosophical reasons, since humans weren't designed to wear shoes, as well as to toughen the soles of his feet for when he was out in the woods. He also seems to have enjoyed the attention that this brought him (with people referring to him as "Barefoot Will.") He did, however, carry around a pair of shoes with him for when he went into establishments that required him to wear them.

* * *

Mr. Morva's impression was that he had acquired a reputation around Blacksburg as "that cool guy who hangs out all of the time." Police interviews, defense interviews, and newspaper interviews with a variety of Blacksburg locals describe Mr. Morva as having appeared to them to be immature and egotistical (claiming to be an expert in almost anything being discussed, and going into extended diatribes about a variety of subjects). They tended to humor him, couldn't say for sure how much of his stories were fact or fiction, and generally viewed him as a harmless eccentric.

Mr. Morva denied that there had been any change in his personality or social functioning throughout his life. However, his mother and sister had different perceptions of this. They indicated that [as] a child he had been gentle and shy but that at about age 16 or 17 he had started acting differently. He didn't appear to them to have been depressed, and he did have some friends, but he tended to spend more and more time alone …. His mother did not recall Mr. Morva ever having been grossly delusional, but she did recall him intermittently making[] comments to her such as, "I know things that nobody else knows, and I don't know how I know them." He never fully explained such comments to her. She did suggest to him in his late teenage years that he might benefit from seeing a therapist, but he became annoyed with this suggestion, and she didn't pursue it further.

His mother further recalled that in April 2004 Mr. Morva's father died and Mr. Morva coped poorly with this. He arrived at the funeral without shoes, disheveled, and in shabby clothing. He was very disorganized in his thinking and behavior. His mother reported that his thought processing itself was quite disorganized, to the point where she couldn't fully understand what he was talking about. He spoke at length about the plight of the American Indian. He was extremely intense in his demeanor, and at one point he grabbed her arm and said, "Are you listening to me? This is important, that's why I have to train." He also was preoccupied with the belief that "there's no good or bad. For example, most people think being hit by a truck would be a bad thing, but it's just a different experience."

* * *

Mr. Morva's sister recalled him as having become increasingly rigid and intense in his thinking from about age 19 through 21. He could have a bland demeanor during conversation but then might abruptly become loud and angry, depending on the topic being discussed. She didn't recall him as having become frankly delusional, but at times he would make[] statements that had a paranoid and/or grandiose flavor, such as when in about 2001 he told her that the Blacksburg police "hate me, they're following me, they won't let me go." This was at about the same time that he had started going out into the woods and had begun his "all-natural" diet.

* * *

His sister further recalled that throughout the funeral, which was indoors, Mr. Morva preferred to stay outside by himself. Later, in her home, Mr. Morva became furious in discussing his brother Michael's plans to join to the Marines and fight in Iraq. Mr. Morva insisted that Al Queda [sic] "must have had a reason for what they did, and if you have a reason, it's not wrong.[] There is no right and wrong." He became so loud, angry, and intense ("like an animal") that she became concerned for her children's safety and asked him to leave.

* * *

…. Mr. Morva's friend Mark Williams came forward and reported that he'd known Mr. Morva for three years and had been his roommate until Spring, 2005. Mr. Williams also stated that he'd observed a marked change in Mr. Morva following his father's death, around January 2005. Mr. Morva had brought a handgun back that had belonged to his father and had become extremely concerned over the dire financial straits his mother had been put in. (This is not something that his mother reported to me having been concerned about following her husband's death.) According to the police report of Mr. Williams' comments: "Will appeared consumed in violent fantasy and began talking about criminal activity. When he (Mr. Williams) observed him practicing for a confrontation with 'police' in the living room of the apartment (moving furniture and practicing shooting stances/positions), he asked him to

> move out." Mr. Williams added that he had overheard comments by Mr. Morva related to possible robberies, but he had "felt that Will's disclosures were still just fantasy and that he'd never act upon them." Other witnesses (e.g. Nisha Thuruthy) also reported that Mr. Morva had made comments related to having engaged in local thefts, but again there were such fantastic features to Mr. Morva's stories and such an element of bragging (e.g., he said that he used magnets to disable various alarm systems and that he knew how to "cut the wires" to any security system, and he added that he was too smart to get caught as the local police were "stupid"), that Ms. Thuruthy also had assumed that Mr. Morva simply was making up stories.
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> * * *
>
> Mr. Morva is a person of above average intelligence who—despite his intelligence—has failed to achieve what might have been expected of him in all areas of his life, including educationally, occupationally, and in his relationships with other people. Beginning in his mid-teenage years, he developed several intense preoccupations, primarily involving his physical functioning, his belief that he is fundamentally different from other people, his desire to lead an "all-natural" lifestyle, and his distrust of others. He is extremely rigid with regard to his personal beliefs and he has difficulty seeing things from the point of view of others.

SHA Vol. 6, at 2468-74. In short, Dr. Cohen's evaluation fairly captures the essence of the volumes of information collected in the state habeas record, and it

cannot be credibly argued that trial counsel were ineffective for not providing him with additional contacts or that there was a reasonable probability that such additional information could have changed the outcome.

Finally, Morva argues that Dr. Cohen's diagnosis of schizotypal personality disorder did not go far enough and that a proper investigation would have yielded a more serious Axis-I diagnosis of delusional disorder, persecutory type. In that regard, Morva relies on the subsequent reports from Drs. Dale G. Watson, Ph.D., and Leslie Lebowitz, Ph.D., submitted to the Supreme Court of Virginia, but not considered by the court or made part of the state habeas record, and from Dr. Donna Schwartz-Watts, M.D., filed in connection with the federal habeas petition.[30] Morva argues that such

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[30] The affidavit of Dr. Watson and an unsworn opinion from Dr. Liebowtiz are appended to Morva's second amended petition. As their submissions reflect, neither Dr. Watson nor Dr. Liebowtiz met Morva. As such, neither of them was in a position to evaluate or diagnose Morva. Upon review of information collected in the state habeas appendix, Dr. Watson averred that he saw "evidence that Mr. Morva holds delusional beliefs," and that "a mental health evaluation of Mr. Morva is necessary at this time in order to ascertain accurately whether he suffers from an Axis I disorder because none of the prior evaluators were fully aware of Mr. Morva's history as detailed above." Appendix to Morva's Second Am. Pet., Dkt. No. 111-1, at 83, 85. Dr. Liebowitz, a licensed clinical psychologist whose work has focused on the long-term effects of exposure to trauma and the treatment of traumatic stress reactions, reviewed Dr. Watson's affidavit and a multi-generational genogram. She stated that "Mr. Morva most likely has a history of exposure to serious traumatic events, that these events likely affected his development, and that a complete evaluation by a clinician with special expertise in the field of traumatic stress or child maltreatment would be necessary to a meaningful understanding of Mr. Morva's behaviors and actions as an adult." *Id.* at 107-08. The submissions by Drs. Watson and Liebowtiz were provided to the Supreme Court of Virginia as part of Morva's effort to obtain another men-

available but unpresented mitigation evidence "'might well have influenced the jury's appraisal' of … culpability[.]" *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 538 (2003), and *Williams v. Taylor*, 529 U.S. 362, 398 (2000)). The court cannot agree.

Based on scientific testing that he performed, Dr. Bender testified that Morva had weakness, or cognitive dysfunction, in executive functioning, which he described as "your ability to plan, organize your thoughts, to switch from one thing to the other fairly efficiently and effectively, to hold things in your memory temporarily as you work through a problem, [and] problem solving itself." Direct Appeal JA at 2293. Dr. Bender testified that the results of his neuropsychological testing were consistent with schizotypal personality disorder. *Id.* at 2294. He stated, "individuals with such a diagnosis of schizotypal personality disorder tend to show this same pattern of dysfunction on neuropsychology testing." *Id.* at 2294. Dr. Bender also testified that his evaluation and testing of Morva did not indicate any malingering or attempt to fake a condition. *Id.* at 2297, 2311-13.

Dr. Cohen interviewed Morva several times over the course of a year, several hours at a time. Dr. Cohen also interviewed Morva's mother and sister and reviewed police, jail, school and medical records, and the neuropsychological testing performed by Dr. Bender. In mitigation, Dr. Cohen testified that he found in Morva "evidence of a disorder called schizotypal personality disorder. That was to my mind, the primary factor in looking at him that one could consider to be a quality in

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tal health evaluation. As such, neither of these submissions constitutes a mental health evaluation or diagnosis for Morva.

the history or his character that might relate to the offenses." *Id.* at 2325. Dr. Cohen explained that the DSM-IV recognized the schizotypal personality disorder diagnosis and that his opinion that Morva suffered from this condition was rendered to "a reasonable degree of psychiatric certainty." *Id.* at 2383. In fact, Dr. Cohen testified that while the DSM-IV allowed a schizotypal disorder diagnosis if five of nine symptoms were present, Morva had "[p]ossibly all nine, but at least eight of them." *Id.* at 2328. Dr. Cohen described schizotypal personality disorder as having "features that it shares with schizophrenia." *Id.* at 2330. "With schizotypal personality disorder, you don't see overt hallucinations or delusions or severely disorganized thinking, and the person isn't as clearly out of contact with reality, but you can see evidence of manifestations that are similar but more subtle." *Id.* at 2331. Dr. Cohen testified at length regarding the manifestations of this disorder in Morva, including his delusions of reference, odd beliefs, unusual perceptual experiences including bodily illusions, odd thinking and speech, suspiciousness or paranoid ideation, inappropriate or constricted affect, odd behavior or appearance, and lack of close friends or confidants. *Id.* at 2331-41. Dr. Cohen testified that this disorder usually manifested itself in the teenage years and can become more severe into a person's twenties. *Id.* at 2343. Dr. Cohen had no concern that Morva was malingering. In fact, Dr. Cohen testified that "Mr. Morva's main thing that he wanted to persuade me of … was how intelligent he was and how he had the answers for everything. And he was basically opposed, he really had real concerns about my testifying even today if it was going to paint him in a light of a person who might have some sort of mental impairment." *Id.* at 2344-45. Dr. Cohen testified about the significant role genetics plays in the develop-

ment of one's personality and the fact that there is a higher rate of schizotypal personality disorder "where you know one person in the family has a diagnosis of schizophrenia." *Id.* at 2348-49. Dr. Cohen noted the fact that Morva's grandmother was hospitalized in the 1950s for possible schizophrenia. Dr. Cohen concluded:

> [H]e does appear to have a condition that we know has a basis in genetics. Sure it doesn't mean that your genes determine everything that you do, but it plays a role in shaping who we are, your family background and the genes that you come to life with. He also has a way of seeing the world that one could say is not fully in his control, it's kind of a reflection of who he is. It doesn't mean that he couldn't have potentially chosen to do otherwise, but this is a factor that influences how he sees the world and how he acts. So the way he saw his jail setting when he was sitting in it, the way he felt he was treated in the jail, the way he felt that the jail conditions were unbearable, even though there's lots of inmates who are on the same jail block as him who aren't trying to escape. His personality and the way he views the circumstances plays a role in helping to understand, not excuse, but helping to understand how he ended up acting the way he did.

Id. at 2353-54.

Morva argues that counsel failed to provide adequate information to Drs. Bender and Cohen and that competent counsel would have done investigation sufficient to obtain a diagnosis of a more serious delusional disorder. Morva argues that:

> [E]quipped with a diagnosis of delusional disorder, a major mental illness and a DSM V Axis I disorder, and the family and social history and symptoms supporting the diagnosis, competent counsel would have been able to explain to the jurors how Morva's criminal actions were directly related to and a product of his mental illness—a circumstance far beyond his control that diminishes his moral culpability …. In addition, rather than Morva's violence being the product of a depraved and evil mind, trial counsel could have had a explanation for the jury that Morva's mental illness was a but-for cause of the violence, reducing his moral culpability and providing a strong argument for life in prison rather than a death sentence.

Second Am. Pet., Dkt. No. 111, at 140.[31]

The court cannot agree. First, the evaluation done by Dr. Donna Schwartz-Watts in 2014 comes many years after the trial and the evaluations done by Drs. Bender and Cohen.[32] Dr. Schwartz-Watts' 2014 evaluation cannot be used as a basis to attack the adjudication of the state habeas claims. *See Cullen v. Pinholster*, 563 U.S. __, 131 S. Ct. 1388, 1398 (2011). Moreover, Morva has made no showing that Dr. Schwartz-Watts' diagnosis of a delusional disorder in 2014 could have, or would have, been rendered by the trial experts in 2008 had

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[31] DSM-V was published in 2013, superseding the version in use during Morva's trial.

[32] As noted previously, neither Drs. Watson nor Liebowtiz, who provided opinions in support of state habeas counsel's request for another mental health evaluation of Morva, were in a position to diagnose Morva, although each were of the view that a comprehensive evaluation should be undertaken.

they been presented with the evidence Morva claims was not adequately pursued. Indeed, Dr. Cohen explained in great detail the aspects of Morva's life that led him to form his diagnosis that Morva suffered from a schizotypal personality disorder and that Morva's disorder "influences how he sees the world and how he acts." Direct Appeal JA at 2328-41, 2354. In short, Dr. Cohen presented to the jury expert psychiatric evidence in mitigation of Morva's actions, which the jury weighed. The evidence from Dr. Schwartz-Watts' 2014 evaluation—that Morva's conduct should be mitigated by the diagnosis of a delusional disorder as opposed to a schizotypal personality disorder—is founded on the same attributes of Morva's personality and behavior that Dr. Cohen presented to the jury. To be sure, there is a difference in degree. But it has not been established that Dr. Cohen's opinion would have been any different had he been presented with the additional information Morva argues trial counsel should have provided.

In short, Dr. Cohen was able through his testimony to describe to the jury, based on his hours of interactions with Morva, his interviews with Morva's mother and sister, his consideration of Dr. Bender's testing, and his review of records, that Morva had a recognized mental disorder that played a role in "his thinking, his feeling, his behaviors." Direct Appeal JA at 2387. The evidence developed in the state and federal habeas petitions do not portray a different picture of William Morva—rather they simply serve to put a different DSM label on the same attributes of Morva's personality and behavior that Dr. Cohen testified to at trial. As such, the court cannot conclude that there is a reasonable probability that the outcome would have been different had Dr. Cohen been provided the additional information Morva now suggests was lacking. Trial

counsel presented expert psychiatric evidence based on many hours of evaluations of Morva done by Drs. Bender and Cohen over the course of the year before trial. There is no basis to suggest that trial counsel were in any respect ineffective in presenting this expert testimony in mitigation.

Morva relies principally on *Rompilla v. Beard*, 545 U.S. 374 (2005), but the deficiencies of counsel there were not present here. In *Rompilla*, the defense put on "relatively brief testimony: five of his family members argued in effect for residual doubt, and beseeched the jury for mercy, saying they believed Rompilla was innocent and a good man." *Id.* at 378. Post-conviction counsel "identified a number of likely avenues the trial lawyers could fruitfully have followed in building a mitigation case." *Id.* at 382. The Court noted that while "there is room for debate about trial counsel's obligation to follow at least some of those potential lines of enquiry," *id.* at 383, it was clear and dispositive that "the lawyers were deficient in failing to examine the court file on Rompilla's prior conviction," *id.*, which the prosecution used in aggravation. No similarly egregious failing can be attributed to Morva's trial counsel.

Nor is this a case like *Wiggins v. Smith*, 539 U.S. 510 (2003), where counsel did not pursue mitigation evidence beyond that contained in the presentence report and department of social service records and introduced no evidence of Wiggins' life history. Morva's witnesses, lay and expert, painted a rather clear picture as to Morva's character and behavior. That the jury did not find it to be sufficiently mitigating cannot be blamed on trial counsel's efforts.

This case is a far cry as well from *Williams v. Taylor*, 529 U.S. 362 (2000), where trial counsel did not

prepare for sentencing until a week before trial, did not conduct "an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood," *id.* at 395, and "failed to introduce available evidence that Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school." *Id.* at 396.

Finally, this case does not begin to resemble *Porter v. McCollum*, 558 U.S. 30 (2009), where the defense did no investigation and put on no evidence concerning Porter's mental health although he was subject to abuse as a child, suffered from a brain abnormality, and was traumatized by combat exposure in the Korean War to the extent that he went absent without leave twice. As the Court noted, "[t]he judge and jury heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability." *Id.* at 41.

Here, in contrast, trial counsel investigated and presented substantial evidence in mitigation, thirteen witnesses in total, including two expert mental health professionals. Morva argues that counsel should have done more. But unlike *Rompilla*, *Wiggins*, *Williams*, and *Porter*, there is no showing that additional evidence would have been anything other than cumulative and that it is reasonably probable that the result would have been different.

> This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, cf. *Wiggins*, 539 U.S., at 525, or would have been apparent from documents any reasonable attorney would have obtained, cf. *Rompilla v. Beard*, 545 U.S. 374, 389-393 (2005). It is instead a case, like *Strickland* itself, in which de-

> fense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments." 466 U.S. at 699.

Bobby v. Van Hook, 558 U.S. 4, 11-12 (2009).

As such, the Supreme Court of Virginia's adjudication of claim IX was not an unreasonable application of *Strickland*. Morva has not sufficiently shown that trial counsel conducted an inadequate investigation of Morva's background, history, character, and mental defect or that any omitted information resulted in inaccurate and unreliable mental health evaluations. None of the family members and acquaintances' affidavits run contrary to the testimony of Drs. Cohen and Bender. Morva argues that the result would have been different had the jury heard that Morva suffered from a more serious delusional disorder, as opposed to a schizotypal personality disorder, but the new diagnosis, while differing in degree, is founded on the same attributes of Morva's personality and behavior that were amply presented to the jury. The jury heard in mitigation from many witnesses who knew Morva's passive, free spirit nature and from mental health professionals that he suffered from a schizotypal personality disorder. The jury chose to impose the death penalty nonetheless, and there is nothing short of speculation to suggest the additional cumulative evidence raised in the state habeas record had any reasonable probability of changing the outcome. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). Accordingly, this claim must be dismissed. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record refutes

the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.").

J. Claim X—Ake v. Oklahoma Claim

In claim X, Morva argues that trial counsel rendered ineffective assistance by not ensuring that Morva had constitutionally adequate expert assistance from Drs. Cohen and Bender. Morva alleges that Drs. Cohen and Bender "made clear to [trial] counsel that they would maintain 'objectivity' in their involvement in the case and would not act in Morva's best interest." Second Am. Pet., Dkt. No. 111, at 146. Morva concedes that he was not "entitled to an expert who renders an opinion that is favorable to [him]," but argues that he was entitled to "an expert to serve an assisting or advocacy role in the identification, development, and presentation of evidence" of "Morva's history, character, background, and mental condition." *Id.* at 145, 146.

Morva bases this claim on a sentence in each of the appointed experts' reports contained in an introductory paragraph entitled "Confidentiality Statement." Dr. Cohen's report reads:

> Before beginning the evaluation, Mr. Morva was informed that this was a forensic evaluation and that I would not be acting as his personal physician. He was informed that the goal of the evaluation would be to prepare a report that sought objectivity rather than act in his best interest. He also was informed that this evaluation would be protected by attorney-client privilege but that a copy of the report would potentially be released to the Court and to the Commonwealth's attorney should he and his attorneys choose to use psychiatric testi-

> mony at sentencing. He was given an opportunity to ask questions. He demonstrated an understanding of this information and agreed to proceed with the evaluation.

SHA Vol. 6, at 2465. Dr. Bender's Neuropsychological Evaluation Report contained nearly identical language. SHA Vol. 6, at 2483.[33] Because of this language, Morva believes trial counsel should have objected to the experts' appointments and requested that new experts be appointed.

The Supreme Court of Virginia dismissed this claim on habeas review, stating, "Morva proffers no authority for his contention that the experts appointed to assist Morva should be biased in Morva's favor. Morva was entitled to, and received, 'access to [] competent' mental health experts to 'conduct an appropriate examination and assist in evaluation, preparation, and presentation of' Morva's defense, as required by *Ake v. Oklahoma*, 470 U.S. 68, 84 (1985)." *Morva v. Warden*, 285 Va. at 522, 741 S.E.2d at 790 (alteration in original).

The Supreme Court of Virginia's adjudication of claim X was not contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts. *Ake* held that "the participation of a psychiatrist is important enough to preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense" when the indigent defendant's sanity is likely to be a signifi-

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[33] As Dr. Bender is not a medical doctor, his report does not disclaim that he was acting as Morva's personal physician. Dr. Bender's report substitutes "neuropsychological testimony" for "psychiatric testimony." Otherwise, the language in the introductory "Confidentiality Statement" of the two reports is identical.

cant factor at trial. 470 U.S. at 78, 82-83. Trial counsel requested and received not just one, but two, mental health experts to aid in the preparation and presentation of mitigation evidence on Morva's behalf.

Morva was assisted in his defense by the appointment of two mental health professionals who tested and evaluated him. Morva's experts did not testify on behalf of the circuit court, nor were they available to the prosecution.[34] Rather, they were appointed to assist Morva and were called by Morva's trial counsel to testify in the sentencing phase in mitigation of a death sentence. Neither *Ake* nor the Due Process Clause requires more. Accordingly, the Supreme Court of Virginia's adjudication of claim X was not contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts, and this claim must be dismissed.

K. Claim XI—Failure to Investigate and Present "Powerful" Mitigation Evidence That Morva Saved a Man's Life

In claim XI, Morva argues that trial counsel rendered ineffective assistance by not investigating and presenting "powerful" mitigation evidence that Morva had saved a man's life, helped the Commonwealth pros-

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[34] Drs. Bender and Cohen were not neutral experts appointed to assist the court and available to both sides as in *Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003). There, unlike here, the trial court denied the defense request for appointment of an independent expert to assist the defense, relying instead on the appointment of a neutral "friend of the court" psychiatrist, "i.e., one whose report is available to both the defense and the prosecution." 332 F.3d at 392. That is not what happened here. Two mental health professionals were appointed to assist Morva's trial counsel. They tested and evaluated Morva and testified on his behalf at trial. This case does not resemble the circumstances in *Powell*.

ecute the man's assailant, and was subjected to harassment for doing so. Morva believes that this information "would have provided jurors with a significantly more positive understanding of Morva's background and character and moved one or more jurors to exercise mercy and select life without parole as the appropriate sentence." Second Am. Pet., Dkt. No. 111, at 150.

In support of this claim, Morva presented the affidavit of Dorothy Mullaney, the former wife of Kevin Grizzard. Mullaney explained that she got to know Morva personally after Morva saved Grizzard's life. Morva's former classmate brutally attacked Grizzard at a bar, and Morva intervened, called the police, and stayed with Grizzard, who was unconscious, until the police arrived. Mullaney was impressed with Morva's actions because Morva had not known Grizzard before the attack and had testified against the assailant at the subsequent criminal trial. Morva also presented Fitzpatrick Turner's affidavit, which discussed how Turner saw the assailant's friends hassle Morva at a local bar.

The Supreme Court of Virginia dismissed this claim on habeas review. The Supreme Court of Virginia concluded that the record established that Morva had recruited Grizzard to participate in a number of burglaries in 2005 and, thus, trial counsel could not be considered ineffective for not presenting such "double-edged" evidence. The Supreme Court of Virginia also noted that Morva did not present an affidavit from Grizzard to verify that he would have testified as Morva contends and that the affidavits Morva provided "contain hearsay statements concerning the attack and Morva's involvement." *Morva v. Warden*, 285 Va. at 520, 741 S.E.2d at 789.

The Supreme Court of Virginia's adjudication of claim XI was not contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts. No affidavit from Grizzard appeared in the state habeas record, and Mullaney, who was not present at the attack on her former husband outside the bar, could not provide admissible testimony as to Morva intervening on Grizzard's behalf. As indicated by the Supreme Court of Virginia, the state habeas record included a police report of an interview with Grizzard. This report reads:

> Mr. Grizzard said he met William Morva approximately four years ago, when Will saved his life by fighting off two males who were literally stomping his head on the ground at Joe's Diner in Blacksburg ….
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> …. Will admitted criminal activity and said things like the Blacksburg Police would never catch him, never take him in and never hold him because they are too stupid …. Will had a problem with the Virginia Tech Police because he was kicked out of some Virginia Tech buildings. Will said he disliked police at Tech as they were nasty. He was caught using one of the school's bathrooms and he was not allowed on campus.
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> …. Michael [Morva, Will's brother,] said he was not involved with the robbery at Food Time. Michael said Will did that on his own …. Someone, maybe Michael, told him that Michael and Will used to rob ATMs in Richmond.

Will came to Mr. Grizzard to see if he wanted to make some money. This was just prior to Will getting arrested for the robbery. Will said, "I got this job. I'll call you when I'm getting ready to do the job." Will called him later from Christiansburg and wanted him to come give him a ride. Will told him he had bought a shotgun and did not want to ride the public bus with a shotgun. Will called right back and said he had a ride.

Three days before Will was caught for the robbery, Will called Mr. Grizzard and said he needed his help. Will said he needed to be picked up. Mr. Grizzard took Will to mean that he would need a ride in the future. Mr. Grizzard said he felt like if he said yes to Will, that when Will called him, he could get up in Will's face and talk him out of the crime. However, the night of the robbery of Food Time behind Kroger in Blacksburg, Will did not call him. The Food Time was not that far from Will's residence at the time. Mr. Grizzard added that he has not seen Will since three nights before that robbery.

Mr. Grizzard and Will sat on the back deck at Mr. Grizzard's house. Mr. Grizzard was mad at Will for what Will had just done at Kroger. Mr. Grizzard had taken Will to Kroger and when they returned, Will unloaded stolen groceries from underneath his shirt. Mr. Grizzard chastised Will for stealing groceries. Will spoke angrily of his family members and said it was their fault.

> Grizzard noticed a change in Will from the day he saved him. It looked like he was going to do something crazy ….

SHA Vol. 2, at 741-42 (internal quotation marks omitted). Moreover, Morva admitted to Dr. Hagan, a clinical psychologist,[35] that he regretted having testified because he did not feel Grizzard benefitted from the attacker's incarceration and that "the ends of justice" would have been better served by the attacker paying restitution and attending anger management classes. SHA Vol. 6, at 2480.

In light of this evidence, the Supreme Court of Virginia did not unreasonably determine that testimony about Morva's relationship with Grizzard was "double-edged." Mullaney would not have been allowed to testify about the attack because she did not witness it.[36] Had Grizzard testified consistent with his police interview, his testimony may well have detracted from the picture the defense tried to paint at sentencing of Morva as a peaceful, free spirit. Plainly, the decision to present the evidence reflected the exercise of trial tactics not subject to second guessing on habeas review. Consequently, it was a reasonable application of *Strickland* for the Supreme Court of Virginia to characterize the exclusion of such testimony as a strategic decision; the discussion

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[35] The circuit court had appointed Dr. Hagan as an expert to assist the Commonwealth with mitigation evidence, pursuant to Virginia Code § 19.2-264.3:1(F).

[36] Even had she been able to testify, Mullaney's testimony was likewise fraught with problems for the defense. Mullaney worked with and knew victim McFarland personally because he used to walk her to her car after her shift at the hospital. Mullaney's testimony of the considerate and gentle character of McFarland could not have benefitted Morva.

of Morva's efforts to stop and prosecute the assailant was outweighed by the prejudicial discussion of Morva's criminal behavior and belief that the assailant should not have been incarcerated. Moreover, the totality of the evidence does not suggest there was a reasonable probability that the jury would have imposed life sentences had Grizzard testified about his involvement with Morva. Accordingly, claim XI must be dismissed.[37]

L. Claim XII—Depravity of Mind Provision of Virginia's Capital Murder Statute

In claim XII, Morva argues that the jury's finding of vileness for acts involving depravity of mind, as permitted by Virginia Code § 19.2-264.4(C), violates the Eighth and Fourteenth Amendments.[38] Morva asserts that Virginia's definition of depravity of mind is unconstitutionally vague under *Godfrey v. Georgia*, 446 U.S.

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[37] Indeed, although trial counsel did not call Grizzard, they presented other evidence of Morva's efforts to assist others who were victims of crimes. Amber Erbschloe testified that Morva "was one of a handful of people that helped identify a man that had tried to rape and kill me in downtown Blacksburg." Direct Appeal JA at 2244. Erbschloe testified that Morva helped identify the assailant and provided that information to Erbschloe and the police.

[38] Virginia Code § 19.2-264.4(C) provides:

> 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.

420 (1980). Morva asserts that the definition of depravity of mind given to the jury left them without a proper benchmark to weigh Morva's conduct.

The circuit court instructed the jury "that depravity of mind means a degree of moral turpitude and … psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Direct Appeal JA at 2409. This instruction was based on the definition of depravity of mind adopted by the Supreme Court of Virginia in *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978). Morva argues that "[w]ithout a meaningful standard of reference for these terms, jurors cannot possibly determine whether a particular capital murder involves more moral turpitude and psychical debasement than that inherent in the definition of legal malice and premeditation." Second Am. Pet., Dkt. No. 111, at 154. Morva concludes that, without a "meaningful standard," the "jurors were left with a standard that could fairly be used to characterize every murder[,]" in violation of *Godfrey*. Second, Morva asserts that the evidence was insufficient to support the jury's finding of depravity of mind. *Id.* at 152.

The Supreme Court of Virginia rejected claim XII on direct review. The Supreme Court of Virginia concluded that murder by a single gunshot wound causing instantaneous death may constitute depravity of mind, especially if the murder is execution style and the murderer did not show any remorse or regret or if the murder was unprovoked. *Morva v. Commonwealth*, 278 Va. at 352-53, 683 S.E.2d at 566 (citing *Green v. Commonwealth*, 266 Va. 81, 106, 580 S.E.2d 834, 848-49 (2003); Hedrick v. Commonwealth, 257 Va. 328, 338-39, 513 S.E.2d 634, 640 (1999); *Thomas v. Commonwealth*, 244 Va. 1, 24-25, 419 S.E.2d 606, 619-20 (1992)).

In *Gregg v. Georgia*, 428 U.S. 153 (1976), the United States Supreme Court held that the portion of Georgia's death penalty statute that mirrors the relevant portion of Virginia Code § 19.2-264.4(C) was not unconstitutionally vague.[39] 428 U.S. at 201. In reaching this decision, the Court recognized that "there [wa]s no reason to assume that the Supreme Court of Georgia will adopt … an open-ended construction" to apply the phrase "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery" to all murders. 428 U.S. at 201. As determined in *Gregg*, the wording of Virginia Code § 19.2-264.4(C) is facially valid, and Morva fails to establish that Virginia Code § 19.2-264.4(C) was unconstitutionally applied as in *Godfrey*.

Revisiting the holding of *Gregg* four years later in *Godfrey*, the United States Supreme Court determined that the Supreme Court of Georgia had, despite its prior assumption, "adopted a broad and vague construction" of the phrase so as to violate the Eighth and Fourteenth Amendments. In the underlying case, the Supreme Court of Georgia had relied on the phrase "outrageously or wantonly vile, horrible and inhuman" to affirm Godfrey's two death sentences because, after Godfrey's wife moved out, filed for divorce, and filed a charge of aggravated assault, Godfrey killed her and her mother with single shotgun blasts to each of their heads.

The United States Supreme Court invalidated Godfrey's two death sentences because the Supreme Court of Georgia failed to apply:

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[39] The relevant portion of the Georgia statute read, "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." 428 U.S. at 210 (quoting Ga. Code § 27-2534.1(b)(7) (1978)).

> [A] constitutional construction of the phrase "outrageously or wantonly vile, horrible or inhuman in that [they] involved … depravity of mind.…" [….] The petitioner's crimes cannot be said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes.

446 U.S. at 432-33 (footnote omitted). The Court concluded that there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433.

In contrast, the Supreme Court of Virginia has long recognized that, "[s]ince any act of murder arguably involves a 'depravity of mind' and an 'aggravated battery to the victim', it is conceivable that the language defining the second aggravating circumstance could be tortured to mean that proof of an intentional killing is all the proof necessary to establish [depravity of mind]." *Smith*, 219 Va. at 478, 248 S.E.2d at 149. However, the Supreme Court of Virginia found that such a "tortured" interpretation was "strained, unnatural, and manifestly contrary to legislative intent" because the General Assembly "was selective in choosing the types of intentional homicide it felt justified a potential sentence of death" and "did not intend to sweep all grades of murder into the capital class." *Id.*

By the Supreme Court of Virginia's own definition, depravity of mind constitutes conduct or intent beyond the conduct or intent needed to convict a defendant of

non-capital murder, and Morva's jury was instructed consistent with the definition of depravity of mind set by the Supreme Court of Virginia in *Smith*. Thus, the Supreme Court of Virginia's interpretation and application does not run afoul of *Godfrey* and *Gregg* because there is no basis to find that the Supreme Court of Virginia adopted or applied an open-ended construction of depravity of mind. Morva further fails to establish that the holding in *Godfrey*, which critiqued the application of Georgia's death penalty, invalidates the Supreme Court of Virginia's interpretation or application of depravity of mind.

Morva also relies on *Maynard v. Cartwright*, 486 U.S. 356 (1988), to argue that the jury instruction defining depravity of mind was unconstitutionally vague because the jury was not instructed about what constitutes "baseline quantities of moral turpitude and/or psychical debasement ordinarily inherent in the definition of legal malice and premeditation." "Without a meaningful standard of reference for these terms," Morva argues, "jurors were left with a standard that could fairly be used to characterize every murder." Second Am. Pet., Dkt. No. 111, at 154.

In *Maynard*, the United States Supreme Court held that the aggravating circumstance provision of a state's death penalty statute, which read, "especially heinous, atrocious, or cruel," was unconstitutionally vague. The Court explained that the terms "especially heinous, atrocious, or cruel" did not provide adequate guidance for the jury's discretion, even with the addition of the word "especially," "because an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" *Maynard*, 486 U.S. at 363-64. However, Morva's jury was told that, in order to impose a death sentence, it

must determine that Morva's intent and conduct surpassed such intent and conduct of a murderer not eligible for a death sentence. Direct Appeal JA at 2409.

Morva cites the facts of *Godfrey* in support of his argument that the evidence could not establish depravity of mind. In *Godfrey*, the wife told the defendant on the phone that their broken marriage was irreconcilable, that she wanted all of the proceeds from a planned sale of their residence, and that her mother supported her position.

> At this juncture, the petitioner got out his shotgun and walked with it down the hill from his home to the trailer where his mother-in-law lived. Peering through a window, he observed his wife, his mother-in-law, and his 11-year-old daughter playing a card game. He pointed the shotgun at his wife through the window and pulled the trigger. The charge from the gun struck his wife in the forehead and killed her instantly. He proceeded into the trailer, striking and injuring his fleeing daughter with the barrel of the gun. He then fired the gun at his mother-in-law, striking her in the head and killing her instantly.
>
> The petitioner then called the local sheriff's office, identified himself, said where he was, explained that he had just killed his wife and mother-in-law, and asked that the sheriff come and pick him up. Upon arriving at the trailer, the law enforcement officers found the petitioner seated on a chair in open view near the driveway. He told one of the officers that "they're dead, I killed them" and directed the officer to the place where he had put the mur-

> der weapon. Later the petitioner told a police officer: "I've done a hideous crime, … but I have been thinking about it for eight years … I'd do it again."

446 U.S. at 425-26 (ellipses in original).

The facts before the jury in Morva's case transcend those present in *Godfrey*. Unlike *Godfrey*, Morva did not have an on going, troubled personal relationship with the victims, did not promptly report his crimes, and did not turn himself in. After reviewing Morva's murders, the Supreme Court of Virginia found Morva killed McFarland and Corporal Sutphin with depravity of mind for the following reasons:

> Morva's words contained in a letter written from jail to his mother described his pre-planned intent to kill guards. Such planning is evidence of Morva's depravity of mind.
>
> Morva viciously attacked a guard who had taken Morva to receive medical treatment, fracturing the guard's face with a metal toilet paper holder that Morva had removed from the wall. Neither of the men killed by Morva posed a physical threat to him. Morva shot McFarland, who was passive and unarmed, in the face at point-blank range; he shot Corporal Sutphin in the back of the head while Sutphin's gun was still holstered. Additionally, Morva had several hours from the time he shot McFarland to consider the consequences of his actions before he shot Corporal Sutphin. This fact indicates a lack of remorse or regret for his actions.

Morva v. Commonwealth, 278 Va. at 353, 683 S.E.2d at 566-67 (citations omitted). These reasons are not an

unreasonable determination of the facts, and the evidence was sufficient to constitute depravity of mind. *See, e.g.*, *In re Winship*, 397 U.S. 358, 364 (1970) (stating due process requires the elements of a state criminal charge to be proven beyond a reasonable doubt). The state record, when viewed in the light most favorable to the Commonwealth, shows that Morva expressed a desire to kill a guard, manipulated Deputy Quesenberry for his benefit before bludgeoning him, shot the passive McFarland in the face at close range, and executed Corporal Sutphin with a shot to the back of the head. Plainly, the Supreme Court of Virginia's adjudication of this claim is not contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts, and claim XII must be dismissed.

V. *Conclusion*

In *Harrington v. Richter*, Justice Kennedy, writing for the Court, observed:

> The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law. Judges must be vigilant and independent in reviewing petitions for the writ, a commitment that entails substantial judicial resources. Those resources are diminished and misspent, however, and confidence in the writ and the law it vindicates undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance.

562 U.S. at 91-92. As detailed above, viewed in the light of those sound and established principles, no writ of habeas corpus may issue in this case. In sum, the court concludes that Morva's counsel were not ineffective and that his capital murder trial did not otherwise

violate the laws or Constitution of the United States. "[F]undamental fairness is the central concern of the writ of habeas corpus," *Strickland*, 466 U.S. at 697, and the court is convinced that Morva received a fair trial. Accordingly, the court grants the Warden's motions to dismiss, dismisses the instant petition for a writ of habeas corpus, and grants a certificate of appealability for claim I. A certificate of appealability is denied for all other claims.

Entered: April 15, 2015

/s/ Michael F. Urbanski
Michael F. Urbanski
United States District Judge

APPENDIX C

SUPREME COURT OF VIRGINIA

Record Nos. 090186, 090187

WILLIAM CHARLES MORVA

v.

COMMONWEALTH OF VIRGINIA

September 18, 2009

PRESENT: All the Justices

OPINION BY JUSTICE S. BERNARD GOODWYN

* * *

William Charles Morva was charged, in the Circuit Court of Montgomery County, with assaulting a law enforcement officer, escape, two counts of use of a firearm in the commission of murder, and three counts of capital murder.[1] Upon a joint motion for change of venue, the case was transferred to the Circuit Court of Washington County.

After a jury trial, Morva was found guilty of all charges, and the case proceeded to a capital sentencing hearing. The jury found both the future dangerousness

[1] Morva was charged with the capital murder of Derrick McFarland, the capital murder of Eric Sutphin, and the capital offense of premeditated murder of more than one person within a three-year period.

and vileness aggravating factors and sentenced Morva to death on all three capital murder convictions. He was sentenced to a total of sixteen years imprisonment on the noncapital offenses. On June 23, 2008, in accordance with the jury's verdicts, the circuit court sentenced Morva to death plus sixteen years and entered final judgment.

I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW[2]

Applying settled principles of appellate review, we will state the evidence presented at trial in the light most favorable to the Commonwealth, the prevailing party at trial. *Gray v. Commonwealth*, 274 Va. 290, 295, 645 S.E.2d 448, 452 (2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 1111 (2008); *Juniper v. Commonwealth*, 271 Va. 362, 376, 626 S.E.2d 383, 393, *cert. denied*, 549 U.S. 960 (2006).

A. Facts Adduced At Trial

In the summer of 2006, Morva was in jail awaiting trial on charges of attempted burglary, conspiracy to commit burglary, burglary, attempted robbery, and use of a firearm. He had been in jail for approximately one year. While in jail he wrote a letter to his mother stating, "I will kick an unarmed guard in the neck and make him drop. Then I'll stomp him until he is as dead as I'll be."

Morva was scheduled to go to trial on August 23, 2006. In the evening on August 19, 2006, he informed the jail personnel that he required medical attention

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[2] Certain facts relating to the specific assignments of error will be stated or more fully described in the later discussion of a particular assignment of error.

due to an injury to his leg and forearm. During the early morning hours of August 20, 2006, Sheriff's Deputy Russell Quesenberry, who was in uniform and armed with a Glock .40 caliber semi-automatic pistol, transported Morva to the Montgomery Regional Hospital located in Montgomery County. Morva was wearing waist chains, but Deputy Quesenberry did not secure Morva's allegedly injured arm.

Upon arrival at the hospital, Morva "kept trying" to walk on Deputy Quesenberry's right side even though he was ordered to walk on Deputy Quesenberry's left side. Quesenberry was required to have Morva walk on his left because Quesenberry wore his gun on his right side. Quesenberry observed that Morva's limping was sporadic and "sort of went away." Also, Nurse Melissa Epperly observed Morva walking as if he were not injured.

After the hospital treated Morva, Morva requested to use the bathroom. Deputy Quesenberry inspected the bathroom and allowed Morva access. While in the bathroom, Morva removed a metal toilet paper holder that was screwed to the wall. As Deputy Quesenberry entered the bathroom, Morva attacked him with the metal toilet paper holder, breaking Quesenberry's nose, fracturing his face, and knocking him unconscious. Morva then took Quesenberry's gun. Prior to leaving the bathroom, Morva confirmed that Quesenberry's gun was ready to fire, ejecting a live round from the chamber.

After escaping from the bathroom, Morva encountered Derrick McFarland, an unarmed hospital security guard. Morva pointed Quesenberry's gun at McFarland's face. McFarland stood with his hands out by his side and palms facing Morva. Despite McFarland's apparent surrender, Morva shot McFarland in the face

from a distance of two feet and ran out of the hospital, firing five gunshots into the electronic emergency room doors when they would not open. McFarland died from the gunshot to his face.

In the morning of August 21, 2006, Morva was seen in Montgomery County near "Huckleberry Trail," a paved path for walking and bicycling. Corporal Eric Sutphin, who was in uniform and armed, responded to that information by proceeding to "Huckleberry Trail."

Andrew J. Duncan observed Morva and then later observed Corporal Sutphin on "Huckleberry Trail." Four minutes later, Duncan heard two gunshots, less than a second apart. David Carter, who lived nearby, heard shouting, followed by two gunshots, and saw Corporal Sutphin fall to the ground.

Shortly thereafter, Officer Brian Roe discovered Corporal Sutphin, who was dead from a gunshot to the back of his head. Corporal Sutphin's gun was still in its holster with the safety strap engaged. Officer Roe confiscated Corporal Sutphin's gun to secure it and continued to search for Morva.

Later that day, Officer Ryan Hite found Morva lying in a ditch in thick grass. Even though Morva claimed to be unarmed, officers discovered Quesenberry's gun on the ground where Morva had been lying. Morva's DNA was found on the trigger and handle of Quesenberry's gun.

B. Proceedings Before And During Trial

1. Pretrial Motions

Prior to trial, Morva filed a motion for the appointment of an expert on prison risk assessment, Dr. Mark D. Cunningham. Although the court had already appointed two psychologists as mitigation experts, Morva

argued that Dr. Cunningham would be needed to rebut the Commonwealth's claim that Morva was a future danger to society and to provide the jury with an assessment of the likelihood that Morva would commit violence if he were sentenced to life in prison. Along with the motion, Morva proffered Dr. Cunningham's curriculum vitae, an example of a presentation Dr. Cunningham had given in *Commonwealth v. Jose Rogers*, and a declaration from Dr. Cunningham regarding his qualifications and experience in providing violence risk assessments and his anticipated testimony. The court denied the motion, finding that this Court had rejected the introduction of such evidence in *Burns v. Commonwealth*, 261 Va. 307, 541 S.E.2d 872, *cert. denied*, 534 U.S. 1043 (2001).

Subsequently, Morva filed a motion requesting the court to reconsider the denial of his request for the appointment of Dr. Cunningham as a prison risk assessment expert. Attached to the motion was a letter from Dr. Cunningham in which he stated that in forming his opinion concerning the risk of Morva committing violent acts in prison, he would interpret Morva's criminal history, capital murder conviction, and projected life sentence in light of group statistical data regarding similarly situated inmates. In the letter, Dr. Cunningham stated that in doing the assessment, he would take into consideration Morva's prior behavior while incarcerated, his security requirements during prior incarcerations, his age, and his level of educational attainment. He also stated that preventative interventions and increased security measures could significantly reduce the likelihood that Morva would engage in violence in prison and that such information was essential to his expert opinion. After hearing arguments, the court denied the motion to reconsider.

Morva also filed, prior to trial, a motion in which he argued that lethal injection was unconstitutional. Upon Morva's request, the court took the motion under advisement. Morva failed to present any additional evidence or argument on the matter. The circuit court never ruled on the motion, and Morva never raised the motion again at any other point while before the circuit court.

2. Voir Dire

During voir dire, juror Vesta Andrews revealed that her husband was a retired federal probation officer and that her son was a federal probation officer in Richmond. Andrews also stated that her daughter had been the victim/witness director for the City of Bristol for seven years and had quit a few months prior. Morva's attorney asked Andrews if she thought that she would have a problem serving on the jury. Andrews responded, "I don't think so because … I've heard so much over the years that I'm very broad minded." Morva's attorney then asked her if her relationship to former and current law enforcement personnel might affect her feelings on the case. Andrews stated that she was "not prejudice[d] one way or the other." When later asked if she would automatically vote for the death penalty if the defendant willfully and deliberately killed a police officer during the course of his duties, Andrews said that she would have to hear more of the evidence and that she "could go either way."

Morva made a motion to strike Andrews for cause due to her family background in law enforcement. The Commonwealth argued that a person could not be struck from a jury solely on the basis that she has family members in law enforcement. The circuit court denied Morva's request to strike Andrews for cause, find-

ing she did not show any bias or prejudice against either side.

Prospective juror Mary Blevins stated in her juror questionnaire that she might have a problem imposing the death sentence because of her religious beliefs. During voir dire, she stated that even if she decided that the death penalty was appropriate, she did not know if she would be able to sentence someone to death. When questioned further, she stated that she probably could in certain circumstances, but that it was "questionable." Upon additional inquiry, the circuit court asked her if she would be able to impose the death penalty after considering all the evidence. Blevins said that she did not think that she could impose the death penalty.

The Commonwealth moved to strike Blevins from the jury panel for cause because she would not be able to impose the death penalty. Morva objected to Blevins being stricken. The circuit court sustained the motion due to Blevins' feelings about the death penalty.

At the conclusion of the jury selection process, Morva urged the court to refuse to seat the jury because of the court's rulings during the jury selection process. The circuit court denied the motion, stating that the members of the panel did not show bias or prejudice and that all of the members of the panel indicated that under the appropriate circumstances, they could impose either the death penalty or life in prison.

3. Guilt Phase Jury Instructions

At the conclusion of the evidence in the guilt phase of the trial, Morva objected to Jury Instruction 8A, which stated, "[Y]ou may infer that every person intends the natural and probable consequences of his

acts." Morva argued that the instruction created an "improper presumption that negates or diminishes the effect of the presumption of innocence." The circuit court overruled the objection, stating that the appellate courts have been clear in their rulings that this is an appropriate instruction.

4. Penalty Phase

Following a six-day jury trial, the jury found Morva guilty on all charges, including the three capital murder charges. The case proceeded to a sentencing hearing. After the Commonwealth rested during the sentencing phase, Morva moved to strike the vileness aggravating factor in regard to the capital offenses. The court denied the motion. Finding that the Commonwealth had proven both future dangerousness and vileness aggravating factors, the jury sentenced Morva to death on all three capital murder convictions.

After the jury's verdict, Morva filed a motion to set aside the verdict, arguing that the court erred in not allowing him to present evidence on prison risk assessment in order to rebut the Commonwealth's evidence that Morva was a future danger to society, especially because the Commonwealth argued that the killings occurred during an escape attempt. Morva claimed that the information he submitted from Dr. Cunningham in support of the appointment of Dr. Cunningham as a prison risk assessment expert was individualized and particularized enough to warrant Dr. Cunningham's appointment. In denying the motion, the circuit court commented that the proffered evidence was not relevant, as the Commonwealth had presented evidence only as to Morva's prior criminal record, not on Morva's possible life in prison. The circuit court denied the motion, referencing this Court's decision in

Porter v. Commonwealth, 276 Va. 203, 661 S.E.2d 415 (2008).

II. ANALYSIS

A. Method Of Execution

Morva argues that his death sentences should be reversed because Virginia's lethal injection process would expose him to unnecessary pain thereby violating his right against cruel and unusual punishment.

The record demonstrates that Morva filed a motion and a proffer in which he argued in part that lethal injection was unconstitutional because the protocol used for the admission of the drugs in the lethal injection process inflicts cruel and unusual punishment on the prisoner. Prior to the start of the trial, Morva informed the court that the United States Supreme Court was reviewing the issue regarding the constitutionality of lethal injection protocols in the case of *Baze v. Rees*. Because a decision in *Baze* had not been reached at that time,[3] Morva requested that the court continue the hearing on the matter and stated that he would readdress the matter after *Baze* had been decided. The court continued the matter.

Morva never raised the motion again at any point before, during, or after the trial. Thus, the circuit court never ruled on the motion concerning the constitutionality of execution by lethal injection. Morva's failure to obtain a ruling by the circuit court on this matter means that he has waived the issue on appeal. Rule 5:25; *Juniper*, 271 Va. at 383-84, 626 S.E.2d at 398.

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[3] The United States Supreme Court decided the appeal in *Baze* on April 16, 2008. *Baze v. Rees*, ___ U.S. ___, 128 S.Ct. 1520 (2008).

B. Objections To Jurors

Morva claims that the circuit court erred in not striking juror Vesta Andrews for cause and in striking juror Mary Blevins for cause and that those errors resulted in the empanelling of jurors who were substantially impaired. In *United States v. Wood*, 299 U.S. 123, 145-46 (1936), the United States Supreme Court stated that the Constitution does not require specific procedures or tests for determining the impartiality of a jury. The qualifications of jurors and the mode of jury selection are without restriction or limitation, except for the requirement of an impartial jury. *Id.*

Morva argues that the circuit court erred in denying his motion to strike juror Vesta Andrews for cause on the grounds that she was substantially impaired as a juror due to her substantial relationship with and connection to law enforcement personnel. On appeal, we give deference to a trial court ruling to retain or exclude a prospective juror because the trial court is in a superior position to judge a prospective juror's responses and make a determination on whether it is proper to seat the juror. *Schmitt v. Commonwealth*, 262 Va. 127, 139, 547 S.E.2d 186, 195 (2001). Our previous decisions have generally held that a particular relationship "does not automatically disqualify a potential juror from being fair and impartial." *Juniper*, 271 Va. at 406, 626 S.E.2d at 411. Instead, a trial court's determination must be based upon consideration of whether the relationship would prevent a potential juror from performing her duties as a juror, i.e., being fair and impartial. *Id.*

Andrews stated that she was not prejudiced one way or the other based on her relationship with law enforcement personnel. Further, she stated that she would not automatically vote for the death penalty, but

would need to hear more evidence before deciding on the appropriate punishment. She stated that she could consider both life imprisonment and the death penalty. Accordingly, there was ample evidence to support the circuit court's finding that her relationship with law enforcement personnel would not lead to an inability to be a fair and impartial juror. As such, we hold that the circuit court did not abuse its discretion in denying the motion to strike Andrews from the jury panel for cause.

Morva also assigns error to the circuit court's decision to strike juror Mary Blevins because of her stated reservations about imposing the death penalty. However, the United States Supreme Court has stated that excluding prospective jurors who will not vote for the imposition of the death penalty does not contravene the constitutional requirement of obtaining a jury that is a fair cross-section of the community. *Lockhart v. McCree*, 476 U.S. 162, 174-77 (1986). Instead, "death-qualifying" a jury serves the state's legitimate interest in obtaining a jury that can impartially apply the law in both the guilt and sentencing phases of trial. *Id.* at 175-76.

This Court has stated that a prospective juror "should be excluded for cause" if the juror's views about the death penalty would "substantially impair or prevent the performance of the juror's duties in accordance with his oath and the court's instructions." *Schmitt*, 262 Va. at 139, 547 S.E.2d at 195. As stated above, a trial court is given deference on appellate review of a decision to retain or exclude a prospective juror. *Id.*

Prospective juror Blevins stated in her juror questionnaire that she might have a problem imposing the death penalty due to her religious faith. During voir dire, she again stated that she was not sure if she could

sentence someone to death. The circuit court questioned her further, and she stated that she did not think that she could vote to impose the death penalty. Thus, there is sufficient evidence to support a holding by the circuit court that Blevins be excluded from the jury "for cause" because of her views about the death penalty. The circuit court did not abuse its discretion in excluding her for cause.

The circuit court did not abuse its discretion in denying the motion to exclude Andrews, and it did not abuse its discretion in granting the motion to exclude Blevins. Morva cites no other objections to jurors as a basis for his assignment of error concerning the empanelling of the jury. Thus, there is no support for Morva's contention that the circuit court erred in empanelling the jurors who heard his case.

C. Jury Instruction

Morva contends that the circuit court erred in approving Jury Instruction 8A, which stated that the jury could "infer that every person intends the natural and probable consequences of his acts." Morva argues that this jury instruction improperly shifted the burden of proof and negated the presumption of innocence in violation of both the United States Constitution and the Constitution of Virginia. This Court held in *Schmitt* that this jury instruction concerns only a permissive inference as opposed to a constitutionally improper presumption. 262 Va. at 145, 547 S.E.2d at 198-99. This Court based its reasoning on *Sandstrom v. Montana*, 442 U.S. 510, 521-22 (1979), a United States Supreme Court case that addressed the same issue. Thus, the circuit court did not err in approving Jury Instruction 8A.

D. Prison Risk Assessment Expert

Morva filed a pretrial "Motion for Appointment of Expert on Prison Risk Assessment, and to Introduce Evidence on Prison Violence and Security" (the motion). Along with this motion, Morva filed a copy of Dr. Cunningham's curricula vitae, which contained a summary of his work as a forensic psychologist, copies of PowerPoint slides describing testimony from a previous case in which Dr. Cunningham had been a witness, and a declaration from Dr. Cunningham concerning the methodology he uses in doing a prison risk assessment and his proposed testimony. The motion was denied. Subsequently, Morva filed a motion to reconsider, attaching a letter from Dr. Cunningham that further explained the prison risk assessment he would perform on Morva and the testimony he would provide. The court denied the motion to reconsider.

Morva claims that the circuit court erred in denying the motion and that in doing so the court violated his due process rights and his rights against cruel and unusual punishment under the United States Constitution because the testimony that Dr. Cunningham would have provided was relevant and mitigating and any relevant mitigating evidence must be admitted. The Commonwealth asserts that Morva did not establish a particularized need to have a prison risk assessment expert appointed on his behalf, and, therefore, the circuit court did not err in denying Morva's request to have Dr. Cunningham appointed as an expert on Morva's behalf.

Due process requires the Commonwealth of Virginia to provide indigent defendants with the "basic tools of an adequate defense." *See Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985). Our Court, in *Husske v. Commonwealth*, 252 Va. 203, 211, 476 S.E.2d 920, 925 (1996),

applied the doctrine set forth in *Ake* to the appointment of non-mental health experts in certain circumstances. We held that due process mandates the appointment of a non-psychiatric expert if the defendant demonstrates that "the subject which necessitates the assistance of the expert is 'likely to be a significant factor in his defense,' and that he will be prejudiced by the lack of expert assistance." *Id.* at 211-12, 476 S.E.2d at 925 (quoting *Ake*, 470 U.S. at 82-83).

An indigent defendant's constitutional right to the appointment of an expert, at the Commonwealth's expense, is not absolute. *Id.* at 211, 476 S.E.2d at 925. The mere fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. Rather, the due process clause requires only that the defendant not be denied "an adequate opportunity to present [his] claims fairly within the adversary system." *Id.* (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974)).

In *Husske*, 252 Va. at 211-12, 476 S.E.2d at 925-26, our Court discussed the circumstances under which the Commonwealth is required, under the Due Process and Equal Protection clauses of the Fourteenth Amendment, to supply, at its expense, an expert to assist an indigent criminal defendant. We have specified that an indigent criminal defendant seeking the assistance of an expert witness must show a "particularized need" for that assistance. *Id.* at 212, 476 S.E.2d at 925. It is the defendant's burden to demonstrate this "particularized need" by establishing that an expert's services would materially assist him in preparing his defense and that the lack of such assistance would result in a fundamentally unfair trial. *Id.*; *accord Green v. Commonwealth*, 266 Va. 81, 91-92, 580 S.E.2d 834, 840 (2003). Mere hope or suspicion that favorable evidence is available is not enough to re-

quire that an expert be appointed. *Husske*, 252 Va. at 212, 476 S.E.2d at 925. Whether an indigent criminal defendant has made the required showing of "particularized need" is a determination that lies within the sound discretion of the trial court. *Id.* at 212, 476 S.E.2d at 926.

In essence, Morva claims that the circuit court abused its discretion in finding that he failed to demonstrate the "particularized need" necessary for appointment of Dr. Cunningham as an expert on his behalf. Thus, we must review Morva's motion and the proffer concerning Dr. Cunningham's testimony that was made to the circuit court to determine if the circuit court abused its discretion.

In the motion, Morva requested that the court appoint Dr. Cunningham, or a similar expert, as an expert on the risk of future dangerousness posed by Morva if incarcerated in a Virginia penitentiary for life. Morva contended that "[b]ecause the only alternative to the death penalty for a defendant convicted of capital murder is life imprisonment without the possibility of parole, the only 'society' to which the defendant can ever pose a 'continuing serious threat' is prison society." 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.

Acknowledging Virginia precedent to the contrary, Morva also argued, in the motion, that this Court's future dangerousness precedent misinterprets the controlling requirements of federal constitutional law by

rejecting evidence concerning the conditions and procedures governing a defendant's future confinement. Citing *Simmons v. South Carolina*, 512 U.S. 154 (1994), *Skipper v. South Carolina*, 476 U.S. 1 (1986), and *Gardner v. Florida*, 430 U.S. 349 (1977), Morva's motion claimed that a defendant has a constitutional right to rebut any evidence upon which the jury might rely in sentencing him to death and that this constitutional right requires appointment of an expert on prison risk assessment and "admission of [a] foundation about such critical considerations as the defendant's future classification if sentenced to life imprisonment; the limitations on his freedom within the prison system; the Virginia Department of Corrections internal safety and security measures; and the actual rates of serious violence in Virginia's prisons."

In Dr. Cunningham's declaration, provided as an attachment to the motion, Dr. Cunningham stated, "A reliable individualized assessment can be made of the likelihood that Mr. Morva will commit acts of serious violence if confined for life in the Virginia Department of Corrections." He further acknowledged that he would testify concerning "[g]roup statistical data (i.e., base rate data)" because the "rates of violence in similarly situated groups is critically important to a reliable violence risk assessment and forms the anchoring point of any individualized risk assessment." If appointed, he would testify that "[r]isk is always a function of context," and consideration of interventions that can be brought to bear on inmates in the Virginia Department of Corrections would be an important part of the violence risk assessment he would perform. He would also testify that "[t]here are conditions of confinement available in the Virginia Department of Corrections that substantially negate the potential/occurrence of

serious violence" and that "[s]hould Mr. Morva be identified as a disproportionate risk of violent or disruptive conduct by the Virginia Department of Corrections, super-maximum confinement could be brought to bear."

Dr. Cunningham further stated "it is necessary to specify the conditions of confinement in order to make a reliable violence risk assessment and to address the implicit inference of the Commonwealth in alleging [a] continuing threat that it is incompetent to securely confine the defendant in the future." He noted that he would testify that "[u]nder an administrative maximum level of confinement at Red Onion or other ultra-high security unit, an inmate is single-celled and locked down twenty-three hours daily, with individual or small group exercise, and shackled movement under escort. Under such conditions of security, opportunities for serious violence toward others are greatly reduced." He opined that "[s]uch increased security measures would act to significantly reduce the likelihood of Mr. Morva engaging in serious violence in prison."

In the letter from Dr. Cunningham accompanying the motion to reconsider, Dr. Cunningham stated that group statistical data regarding similarly situated inmates interpreted in light of characteristics specific to Morva is relevant to future prison conduct. He also expounded upon the scientific validity of making individual assessments based upon group data. He reiterated that risk is always a function of context or preventative interventions and that increased security measures could significantly reduce the likelihood that Morva would engage in serious violence in prison. He opined that informing the jury of the capabilities of the Virginia Department of Corrections to bring higher levels of security to bear was necessary to provide an individualized risk assessment.

The motion filed by Morva for appointment of Dr. Cunningham is strikingly similar to the motion for appointment of Dr. Cunningham filed in the case of *Porter*. In *Porter*, after reviewing the pertinent statutes and our Court's prior decisions in which we considered "prison life" evidence, we approved the circuit court's ruling declining to appoint Dr. Cunningham as a prison risk assessment expert. 276 Va. at 243-55, 661 S.E.2d at 435-42. We reasoned that because such "prison life" evidence was inadmissible, Porter failed to satisfy the *Husske* test regarding appointment of an expert. *Id.* at 255, 661 S.E.2d at 442.

Morva claims that the proffer provided by Dr. Cunningham in this case is distinguishable from the proffer we held insufficient in *Porter*. Morva asserts that in *Porter*, this Court upheld the circuit court's refusal to authorize a risk assessment by Dr. Cunningham 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.'" *Id.* at 252, 661 S.E.2d at 440 (citations omitted). Thus, argues Morva, the central element the Court found to be missing in *Porter* is undeniably present here.

Morva points out that, in this case, Dr. Cunningham has 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 prior behavior while incarcerated, age, level of educational attainment, and appraisals of his security requirements during prior incarceration. 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.

The Commonwealth responds by citing our prior decisions in *Juniper* and *Burns*, as well as *Cherrix v. Commonwealth*, 257 Va. 292, 513 S.E.2d 642, *cert. denied*, 528 U.S. 873 (1999), and *Walker v. Commonwealth*, 258 Va. 54, 515 S.E.2d 565 (1999), *cert. denied*, 528 U.S. 1125 (2000). The Commonwealth notes that according to this precedent, what a person may expect in the penal system is not relevant mitigation evidence and argues that Dr. Cunningham's testimony would have related to conditions of confinement, not to Morva, and that such testimony, therefore, was not "particularized" to Morva.

As in *Porter* and *Burns*, the Commonwealth in this case neither proposed nor introduced any evidence concerning Morva's prospective life in prison, but limited its evidence on the future dangerousness aggravating factor to the statutory requirements consisting of Morva's prior history and the circumstances surrounding the offense. *See Porter*, 276 Va. at 252-53, 661 S.E.2d at 440; *Burns*, 261 Va. at 339, 541 S.E.2d at 893. Thus, Dr. Cunningham's anticipated testimony was not in rebuttal to any specific evidence concerning prison life.

A review of the cases relied upon by Morva in support of his proposition that he is entitled to present evidence concerning prison life is instructive. In *Gardner*, 430 U.S. at 358, the United States Supreme Court held that a defendant is entitled to due process during the sentencing phase of a criminal trial. The Court concluded that the defendant was "denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362.

In *Skipper*, 476 U.S. at 3, 8, the United States Supreme Court held that the trial court erred in excluding evidence that the defendant was well-behaved in jail between the time of his arrest and trial and that such behavior was probative of his future adaptability in prison. The Court stated, "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Id.* at 7.

In *Simmons*, 512 U.S. at 156, the United States Supreme Court held that the defendant was denied due process because the trial court excluded from evidence the fact that the defendant was ineligible for parole if sentenced to life in prison. The Court concluded, based upon evidence in the record, that the jury likely misunderstood the meaning of sentencing the defendant to life in prison. *Id.* at 159-62. The Court stated that the exclusion of evidence that the defendant was ineligible for parole "had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration." *Id.* at 161. The Court was particularly focusing upon the fact that the jury was misled as to the sentencing options. *See id.* at 159-62.

Morva claims that *Skipper* and *Simmons* dictate that he has a constitutional right to present evidence concerning prison life to rebut the allegation of his future dangerousness. However, we have previously addressed this argument and stated in response thereto that "the United States Constitution does not limit 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." *Burns*, 261 Va. at 339, 541 S.E.2d at 893 (internal quotation marks omitted) (quoting *Cherrix*, 257 Va. at 309, 513 S.E.2d at 653).

The 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.

Code § 19.2-264.2 provides in pertinent part:

> 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 … 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 ….

Code § 19.2-264.4(C) similarly provides:

> The penalty of death shall not be imposed unless the Commonwealth [proves] 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 ….

Based upon the language of the controlling statutes, our Court has previously stated the following:

> [T]he relevant inquiry is not whether [a defendant] *could* commit criminal acts of violence in the future but whether he *would*. Indeed, Code §§ 19.2-264.2 and -264.4(C) use the phrase "would commit criminal acts of violence." Accordingly, the focus must be on the particular facts of [a defendant's] history and background,

> and the circumstances of his offense. In other words, 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 ….

Burns, 261 Va. at 339-40, 541 S.E.2d at 893. Stated differently, 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. Code § 19.2-264.2; Code § 19.2-264.4(C).

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. *Juniper*, 271 Va. at 427, 626 S.E.2d at 424. It must be evidence peculiar to the defendant's character, history, and background in order to be relevant to the future dangerousness inquiry. *Id.* at 426, 626 S.E.2d at 423-24. 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. *Id.* at 426-27, 626 S.E.2d at 423-24.

Increased security measures and conditions of prison life that reduce the likelihood of future dangerousness of all inmates is general information that is irrelevant to the inquiry required by Code §§ 19.2-264.2 and 19.2-264.4(C). *See id.*; *Porter*, 276 Va. at 252, 661 S.E.2d at 440. The generalized competence of the Common-

wealth to completely secure a defendant in the future is not a relevant inquiry. 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. *Burns*, 261 Va. at 339-40, 541 S.E.2d at 893-94. We decline Morva's invitation to overrule or ignore that precedent.

With this precedent in mind, we examine the proffered testimony of Dr. Cunningham. It is true that, in this case, unlike *Porter*, Dr. Cunningham proposed to provide testimony that concerns Morva's history and background, prior behavior while incarcerated, age and educational attainment, and such factors might bear on his adjustment to prison. However, other testimony Dr. Cunningham proposed to give, and to rely upon in giving a prison risk assessment for Morva, such as potential security interventions that "could be brought to bear" upon Morva, and the rates of assaults in the Virginia Department of Corrections, is, by statute, not relevant to the determination the jury has to make concerning Morva's future dangerousness and therefore would not be admissible evidence.

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. However, 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. For example, Dr. Cunningham stated that he would testify that "[u]nder an administrative maximum level of confinement at Red Onion or other ultra-high security unit, an inmate is single-celled and locked down twenty-three

hours daily, with individual or small group exercise, and shackled movement under escort. Under such conditions of security, opportunities for serious violence toward others are greatly reduced."

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. *See Juniper*, 271 Va. at 427, 626 S.E.2d at 424.

According to Dr. Cunningham, 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 are essential to Dr. Cunningham's expert opinion on prison risk assessment. Pursuant to our precedent, Dr. Cunningham's proposed testimony concerning prison life is inadmissible. Thus, there is support for the circuit court's ruling that Morva failed to show the "particularized need," for Dr. Cunningham's testimony, necessary to meet the *Husske* test.

Taking into consideration the inadmissibility of the evidence that Morva sought to introduce through Dr. Cunningham, the lack of that expert assistance did not result in a fundamentally unfair trial. Accordingly, the circuit court did not err or abuse its discretion in deny-

ing the motion to appoint Dr. Cunningham as an expert for Morva.

E. Sufficiency Of The Evidence To Show Vileness

Morva argues that the circuit court erred in denying his motion to strike vileness as an aggravating factor for the imposition of the death penalty. Morva contends that the facts in this case are insufficient to establish vileness as an aggravating factor because both victims were killed with a single gunshot wound and the offense did not include physical or psychological torture, attempts to disguise the crime, or a particularly brutal manner of killing. The Commonwealth argues that Morva's gratuitous killings of persons who posed no threat to him, solely to escape lawful custody and to avoid facing trial for other crimes, were outrageously or wantonly vile in that they involved depravity of mind demonstrated by moral turpitude and psychical debasement far beyond ordinary malice and premeditation.

Code § 19.2-264.4(C) states as follows:

> 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.*

(Emphasis added). The Commonwealth may prove "vileness" by proving that the crime involved torture, depravity of mind, or aggravated battery to the victim. *Id.* Proof of any one factor is sufficient to support a finding of vileness and a sentence of death. *Hedrick v. Commonwealth*, 257 Va. 328, 339-40, 513 S.E.2d 634, 640, *cert. denied*, 528 U.S. 952 (1999). In this case, the Commonwealth focused on proving that Morva's conduct in committing the offenses involved depravity of mind.

Depravity of mind is defined as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967 (1979). Although a single gunshot wound, causing instantaneous death, does not constitute an aggravated battery, such an offense may involve depravity of mind. *See Hedrick*, 257 Va. at 338-39, 513 S.E.2d at 640; *Thomas v. Commonwealth*, 244 Va. 1, 24-25, 419 S.E.2d 606, 619 (1992). This Court has upheld a circuit court's finding of vileness based on depravity of mind for a murder involving execution-style killings where the defendant failed to show any remorse or regret for his actions, *Thomas*, 244 Va. at 24-25, 419 S.E.2d at 619-20, and for a murder involving a killing that was unprovoked. *Green*, 266 Va. at 106, 580 S.E.2d at 848-49.

The evidence must be reviewed in the light most favorable to the Commonwealth in determining whether there was sufficient evidence to support a finding that Morva's conduct involved depravity of mind. *See Gray*, 274 Va. at 295, 645 S.E.2d at 452. Morva's words contained in a letter written from jail to his mother described his pre-planned intent to kill guards. Such planning is evidence of Morva's depravity of mind. *See Teleguz v. Commonwealth*, 273 Va. 458, 482-83, 643

S.E.2d 708, 723-24 (2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 1228 (2008); *Lewis v. Commonwealth*, 267 Va. 302, 315-16, 593 S.E.2d 220, 227-28 (2004); *Thomas*, 244 Va. at 25 n.10, 419 S.E.2d at 620 n.10.

Morva viciously attacked a guard who had taken Morva to receive medical treatment, fracturing the guard's face with a metal toilet paper holder that Morva had removed from the wall. Neither of the men killed by Morva posed a physical threat to him. Morva shot McFarland, who was passive and unarmed, in the face at point-blank range; he shot Corporal Sutphin in the back of the head while Sutphin's gun was still holstered. Additionally, Morva had several hours from the time he shot McFarland to consider the consequences of his actions before he shot Corporal Sutphin. This fact indicates a lack of remorse or regret for his actions.

Thus, we hold that the evidence was sufficient to support a finding that Morva's conduct involved depravity of mind in that he acted with a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. A finding of depravity of mind is sufficient by itself to support a finding of vileness under Code § 19.2-264.2; therefore, the circuit court did not err in denying Morva's motion to strike vileness as an aggravating factor for the imposition of the death penalty.

F. Statutory Review Under Code § 17.1-313

Morva contends that the jury and the circuit court erred in sentencing him to death because the sentences were the result of passion, prejudice, or other arbitrary factors and because the sentences were excessive or disproportionate to sentences in similar cases. As this assignment of error is nearly identical to the language contained in Code § 17.1-313(C), we will address it as

we conduct our statutorily mandated review. The overarching purpose of this review is to "assure the fair and proper application of the death penalty statutes in this Commonwealth and to instill public confidence in the administration of justice." *Akers v. Commonwealth*, 260 Va. 358, 364, 535 S.E.2d 674, 677 (2000).

1. Passion, Prejudice, or Arbitrary Factors

After conducting a thorough review, we find that the record supports Morva's sentences of death. The record does not indicate that the jury or the circuit court was influenced to sentence Morva to death as the result of any passion, prejudice, or any other arbitrary factors.

2. Excessive and Disproportionate Sentence

Code § 17.1-313(C)(2) mandates that this Court "consider and determine … [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" even when no argument has been presented. *Porter*, 276 Va. at 267, 661 S.E.2d at 448; *Gray*, 274 Va. at 303, 645 S.E.2d at 456; *Juniper*, 271 Va. at 432, 626 S.E.2d at 427. The purpose of this review is to determine whether "'other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant.'" *Lovitt v. Commonwealth*, 260 Va. 497, 518, 537 S.E.2d 866, 880 (2000), *cert. denied*, 534 U.S. 815 (2001) (quoting *Johnson v. Commonwealth*, 259 Va. 654, 683, 529 S.E.2d 769, 786 (2000)). Additionally, this review is to help this Court "identify and invalidate the aberrant sentence of death." *Lewis*, 267 Va. at 312, 593 S.E.2d at 226. However, this review is not designed to "insure complete symmetry among all death penalty cases." *Muhammad v. Commonwealth*, 269 Va. 451, 532,619 S.E.2d 16,

63 (2005), *cert. denied*, 547 U.S. 1136 (2006) (quoting *Orbe v. Commonwealth*, 258 Va. 390, 405, 519 S.E.2d 808, 817 (1999), *cert. denied*, 529 U.S. 1113 (2000)).

In conducting this review, we take into account the facts of the case and of the defendant, Morva. For this review, we have focused on those cases where, after a finding of both aggravating factors, a sentence of death was imposed: (1) when the murder was committed by a prisoner in a state or local correctional facility, *Remington v. Commonwealth*, 262 Va. 333, 551 S.E.2d 620 (2001), *cert. denied*, 535 U.S. 1062 (2002), *Lenz v. Commonwealth*, 261 Va. 451, 544 S.E.2d 299, *cert. denied*, 543 U.S. 1003 (2001), (2) when the murder was of a law enforcement officer, *Smith v. Commonwealth*, 239 Va. 243, 389 S.E.2d 871, *cert. denied*, 498 U.S. 881 (1990), and (3) when the murder is of more than one person within a three-year period. *Walker*, 258 Va. 54, 515 S.E.2d 565 (1999). In accordance with Code § 17.1-313(E), this Court has also reviewed similar cases in which a life sentence was imposed. Based on this review, we have determined that Morva's sentence was not excessive or disproportionate to sentences imposed in capital murder cases for comparable crimes.

III. CONCLUSION

Upon review of the record and upon consideration of the arguments presented, we find no reversible error in the judgment of the circuit court. Furthermore, we find no reason to set aside the sentences of death. We will, therefore, affirm the judgment of the circuit court.

Affirmed.

JUSTICE KOONTZ, with whom JUSTICE KEENAN joins, dissenting.

I respectfully dissent. Today, the majority effectively adopts a *per se* rule that expert prison risk assessments are inadmissible to rebut evidence of future dangerousness in a capital murder case.

In light of the facts surrounding the three capital offenses committed by William Charles Morva, as recounted here by the majority opinion and proven beyond a reasonable doubt at his trial, there can be no doubt that the issue of primary concern and significance for the defense from day one was whether Morva would ultimately receive a sentence of death or a sentence of life without the possibility of parole under the applicable Virginia statutes. *See Porter v. Commonwealth*, 276 Va. 203, 273-74, 661 S.E.2d 415, 452 (2008) (Koontz, J., dissenting) (outlining Virginia statutory scheme applicable to capital murder cases). Early in the proceedings in the circuit court, the Commonwealth made that concern a reality by notifying Morva's appointed attorneys that it would seek the death penalty in Morva's case in accord with the provisions of Code § 19.2-264.2, which provide the aggravating factors of future dangerousness or vileness so as to make a defendant convicted of capital murder in Virginia eligible for the death penalty. In response, Morva filed a motion for the appointment of Dr. Mark D. Cunningham, a forensic psychologist, to perform a prison risk assessment on Morva and to permit Dr. Cunningham to testify as an expert on Morva's behalf at trial. For the reasons that follow, in my view the circuit court erred in denying Morva's motion, resulting in a fundamentally unfair trial in the sentencing phase of Morva's trial.

As recounted in detail by the majority, the events which led to the murders in this case began when Morva, who was confined in a local county jail pending trial on unrelated criminal charges, violently assaulted Sheriff's Deputy Russell Quesenberry at a local hospital where the officer had taken Morva for medical treatment. Morva armed himself with the officer's gun and escaped from the officer's custody.

Throughout the trial, the Commonwealth made reference to this escape as a significant fact to be considered in the jury's determination of Morva's future dangerousness and the imposition of the death sentence. The Commonwealth argued in response to Morva's motion to strike the Commonwealth's evidence regarding future dangerousness that: "We have the Defendant who is an escaped prisoner, who beat his guard and took his gun. He then used that gun to shoot two people on two different days. And he kept that gun until the very end when he was captured again. That alone would be sufficient for the jury to find future dangerousness."

Later, during oral argument at sentencing, the Commonwealth told the jury that: "It took one month of jail, one month of county jail, to get [Morva] ready to kill a guard.... [A] prospect of life in prison is very frightening. If one month causes you to develop the heart and mind to kill a jail guard, in one year and its done, and you're killing people, what is the prospect of life in prison going to cause that person to feel justified in doing to those prison guards?" Additionally, the Commonwealth told the jury that: "we know what [Morva] does when he escapes, he hurts people and murders people.... You know that [Morva] will do anything to escape.... Could there be anything worse? Yes, there could be one thing. And that would be if [Morva] ever hurt or killed another person."

Thirty years ago, in *Smith v. Commonwealth*, 219 Va. 455, 477, 248 S.E.2d 135, 148 (1978), in rejecting a constitutional challenge for vagueness of Virginia's future dangerousness factor, we made these pertinent observations: "[A]ny sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.... What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." (Quoting *Jurek v. Texas*, 428 U.S. 262, 274-76 (1976)). In the context of deciding between a sentence of death or a sentence of life without the possibility of parole, it simply stands to reason that a jury would engage in a prediction of the defendant's probable future conduct at least to the extent that such a favorable prediction might be persuasive in determining that a life sentence, rather than a death sentence, would be the appropriate punishment in a particular case.

In this case, the Commonwealth expressly sought to persuade the jury to predict that Morva presented a future danger to society sufficient to warrant the death penalty in large part because he would not adapt to a life sentence in prison and would either escape and commit further violent acts or commit such acts on prison guards. *See Frye v. Commonwealth*, 231 Va. 370, 392, 345 S.E.2d 267, 283 (1986) (plan to escape relevant to future dangerousness inquiry). In the absence of Dr. Cunningham's prison risk assessment and testimony, Morva was not permitted the means to effectively respond to the Commonwealth's assertions. Experience with jury trials in the trial courts would surely dictate the conclusion that Morva was left without the constitutionally required "basic tools of an adequate defense" that comport with a defendant's due process rights. *See*

Ake v. Oklahoma, 470 U.S. 68, 76-77 (1985). Indeed, in my view, Morva was left with little, if any, defense to the imposition of the death penalty in his case.

Following the Supreme Court's decision in *Ake*, we have decided a number of cases addressing the constitutional requirements of due process when an indigent defendant seeks, at the Commonwealth's expense, the appointment of non-mental health experts. In *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (1996), we rejected an indigent defendant's request for the appointment, at the Commonwealth's expense, of an expert to help him challenge the Commonwealth's forensic DNA evidence. As pertinent here, we held that due process mandates the appointment of the requested expert if the defendant demonstrates that "the subject which necessitates the assistance of the expert is 'likely to be a significant factor in his defense,' and that he will be prejudiced by the lack of expert assistance." *Id.* at 211-12, 476 S.E.2d at 925 (quoting *Ake*, 470 U.S. at 82-83). In *Husske* we reasoned that "an indigent defendant who seeks the appointment of an expert, at the Commonwealth's expense, must show a *particularized need* for such services." (Emphasis added). *Id.* at 213, 476 S.E.2d at 926.

Following our decision in *Husske*, we have decided a series of cases that expound upon the concept of a "particularized need" for the appointment of a prison risk assessment expert to assist a defendant in the defense of a future dangerousness assertion by the Commonwealth. In *Burns v. Commonwealth*, 261 Va. 307, 338, 541 S.E.2d 872, 892, *cert. denied*, 534 U.S. 1043 (2001), the Court considered the issue of expert testimony regarding generalized "daily inmate routine [and] general prison conditions." In that case, the Court rejected the appointment of a risk assessment expert to

rebut the Commonwealth's future dangerousness assertions because the expert's testimony failed to "focus … on the particular facts of [the defendant's] history and background, and the circumstances of his offense." We reasoned that evidence regarding the "general nature of prison life" is not relevant to the determination of future dangerousness. *Id.* at 340, 541 S.E.2d at 893.

Subsequently, in *Bell v. Commonwealth*, 264 Va. 172, 201, 563 S.E.2d 695, 714 (2002), we held that the defendant had not shown a "particularized need" for the expert who would have offered testimony concerning the conditions of prison life and the kinds of security features utilized in a maximum security facility. We reasoned in that case that such general evidence, not specific to the defendant, was not relevant to the issue of the defendant's peaceful adjustment to life in prison in the context of a future dangerousness determination by a jury. Significantly, however, we preferenced our holding with the acknowledgment that "we do not dispute that [the defendant's] 'future adaptability' in terms of his disposition to adjust to prison life is relevant to the future dangerousness inquiry." *Id.*

In *Juniper v. Commonwealth*, 271 Va. 362, 626 S.E.2d 383, *cert. denied*, 549 U.S. 960 (2006), the Court held that the jury's "determination of future dangerousness revolves around an individual defendant and a specific crime." We again stressed that in admitting expert testimony as relevant in rebuttal of the Commonwealth's attempt to prove future dangerousness, "such evidence should 'concern the history or experience of the defendant.'" *Id.* at 425-26, 626 S.E.2d at 423 (quoting *Cherrix v. Commonwealth*, 257 Va. 292, 310, 513 S.E.2d 642, 653, *cert. denied*, 528 U.S. 873 (1999)). In *Juniper*, we rejected the proposed expert opinion because

> [n]either the actual proffer, counsel's argument, nor [the expert's] explanations … was specific to [the defendant] …. [The expert] offered nothing to the trial court to support his opinion as being based on [the defendant's] individual characteristics that would affect his future adaptability in prison and thus relate to a defendant-specific assessment of future dangerousness.

Id. at 427, 626 S.E.2d at 424 (internal quotation marks omitted).

More recently, in *Porter v. Commonwealth*, 276 Va. 203, 661 S.E.2d 415 (2008), the Court considered the motion of a defendant convicted of capital murder for the appointment of a prison risk assessment expert to assist the defendant in defending against the Commonwealth's assertion of future dangerousness that would qualify the defendant for the death sentence. After reviewing the pertinent statutes regarding the determination of future dangerousness, our prior precedent, and Porter's actual proffer in support of his motion for the appointment of the expert, a majority of this Court held that the trial court did not abuse its discretion in denying Porter's motion for the appointment of the expert. The majority held that:

> 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. As our precedent would render inadmissible the statistical speculation he does offer, Porter has failed to show the "particularized need" necessary to meet the *Husske* test. In light of the inadmissibility of

> the evidence that [Porter] sought to introduce through the expert, he also failed to establish how he would be prejudiced by the lack of the expert's assistance.

Id. at 255, 661 S.E.2d at 442 (internal quotation marks and citation omitted).

Code § 19.2-264.2, in pertinent part, provides that:

> 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.

(Emphasis added.)

Code § 19.2-264.4(C), in pertinent part, also provides that:

> *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.

(Emphasis added.)

In *Porter*, a majority of the Court reasoned that "[t]he 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.'" The majority further observed that "[t]hese standards defining the future dangerousness aggravating factor are the basis of our earlier decisions [in *Burns*, *Bell*, and *Juniper*] which considered motions for appointment of prison risk experts or the proffer of prison risk evidence." 276 Va. at 247, 661 S.E.2d at 437.

Beyond question, these statutes provide the standards defining the future dangerousness aggravating factor which, in the absence of proof of the alternate aggravating factor of vileness, the Commonwealth must prove beyond a reasonable doubt in order to qualify a defendant convicted of capital murder for the imposition of a death sentence. These statutes are equally clear, however, that in the absence of such proof by the Commonwealth "a sentence [or penalty] of death shall not be imposed." Moreover, Code § 19.2-264.4(B) permits the introduction of evidence "relevant to sentence" and "any other facts in mitigation of the offense." Thus, while the "focus" of the future dangerousness determination is statutorily directed to the defendant's past criminal record, prior history, and circumstances surrounding the commission of the offense, these statutes do not, and in my view constitutionally could not, limit the defendant's right to produce relevant evidence either in defense of the Commonwealth's assertions regarding the future dangerousness determination by the jury or the jury's ultimate consideration to impose the death sentence rather than a life sentence without the possibility of parole.

With regard to expert prison risk assessments, this Court has not held in our prior decisions that all such expert evidence is *per se* inadmissible. Rather, the Court has taken a case-by-case approach, beginning with

Bell as instructed by *Husske*, to consider the specific motions for the appointment of a prison risk assessment expert and the proffers of the expert's evidence to determine whether the particular expert would provide evidence sufficiently "particularized" to the defendant. Mindful that the sole purpose of such an assessment if favorably concluded by the expert is to assist the defendant's defense to the Commonwealth's assertion that the death sentence should be imposed on him by the jury, it follows that a *per se* rule of inadmissibility would violate a defendant's due process rights to a fair trial with regard to the jury's consideration of imposing a life sentence without the possibility of parole rather than a death sentence. In other words, when an expert on prison risk assessments can provide evidence to assist the jury to predict that a particular defendant likely would not commit criminal acts of violence that would constitute a continuing serious threat to society while serving a life sentence in prison, it must follow that such evidence is "a significant factor in his defense," *Husske*, 252 Va. at 212, 476 S.E.2d at 925, and the "basic tools of an adequate defense." *Ake*, 470 U.S. at 77.

The requested expert in *Porter* was the same Dr. Cunningham as requested by Morva in the present case, and the majority decision in *Porter* is the primary focus of the assertions made by Morva on appeal. In *Porter*, the thrust of the proffer of Dr. Cunningham's proposed evidence was a statistical analysis of the prison environment in which Porter would serve a life sentence and a resulting analysis to project rates of prison inmate violence. The majority of the Court stressed, however, that "[n]othing in Porter's motion is a proffer of an 'individualized' or 'particularized' analysis of Porter's 'prior criminal record,' 'prior history,' his prior or current incarceration, or the circumstances of the crime for which he has

been convicted." *Id.* at 252, 661 S.E.2d at 440. Morva maintains in this appeal that Dr. Cunningham's proffered evidence is sufficiently particularized to him.

Following the decision in *Porter*, and mindful that the foundation of the issue is a defendant's due process rights to a fundamentally fair trial including the sentence determination by the jury, it arguably remained unclear precisely the manner in which an expert's prison risk assessment can be made sufficiently "particularized" to a defendant so as to be admissible evidence in the defendant's defense to the Commonwealth's assertion that a death sentence should be imposed on him. Today, the majority in the present case, states that "[t]o 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." The majority further instructs that "[c]onditions 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." In my view, while the majority rejects Morva's proffered evidence, such evidence facially appears to meet this test for admissibility announced by the majority.

As in *Porter*, the scientific basis and methodology used by Dr. Cunningham, and similar experts, in assessing a particular defendant in terms of presenting a future danger to society while serving a life sentence is not challenged in this appeal. Nor are Dr. Cunningham's qualifications as an expert in conducting prison risk assessments at issue. Unlike the expert's proffer in *Porter*, in the present case Dr. Cunningham's proffered evidence would include a statistical analysis of specific characteristics that have been shown to reduce

the likelihood of future violent behavior in prison, including Morva's prior behavior while incarcerated, age, education, and appraisals of his security requirements during prior incarceration.

The majority notes that Dr. Cunningham's evidence regarding security measures in the prison environment the effect of which greatly reduce the opportunity for violent acts between or by inmates, is evidence of the effectiveness of general prison security and is not relevant to Morva's future dangerousness. Dr. Cunningham's evidence, however, also addresses whether Morva would likely conform to those security measures. Thus, the majority's concern presents an issue regarding the weight of the evidence, a question for the jury, rather than the admissibility or relevance of that evidence.

The thrust of Dr. Cunningham's proffered evidence is that it can be statistically established that an inmate with Morva's particular characteristics and background is not likely to commit future acts of violence so as to pose a future danger to society while confined to a maximum security prison and serving a life sentence. In my view, Dr. Cunningham's proffered evidence is sufficiently specific to Morva in the "context" of the secure prison environment in which he would surely serve a life sentence without the possibility of parole and thus was admissible evidence at his trial.

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 fu-

ture violent acts, "prison life" evidence is relevant and essential to achieving an individualized prediction.

For these reasons, I would hold that the circuit court erred in denying the motion to appoint Dr. Cunningham as an expert to assist Morva in his defense to the Commonwealth's assertions to the jury that the death sentence should be imposed upon Morva. *See Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986) (noting that "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule … that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement.")

Unlike the circumstances in *Porter*, in this case the jury also determined that Morva's conduct in committing the murders satisfied the vileness aggravating factor as defined in Code § 19.2-264.4(C). I do not disagree with the majority's holding that the evidence was sufficient to support a finding of vileness in this case and, therefore, that the circuit court did not err in denying Morva's motion to strike regarding that aggravating factor. The question then becomes whether under those circumstances any error in denying Morva's motion for the appointment of the prison risk assessment expert was harmless. As a general proposition, because that error is of constitutional dimension, a reversal is required unless the appellate court determines that the error was harmless beyond a reasonable doubt. That determination involves an analysis of whether there is a reasonable possibility that the error might have contributed to the jury's determination to impose the death sentence, rather than a life sentence without the possibility of parole. *See Pitt v. Commonwealth*,

260 Va. 692, 695, 539 S.E.2d 77, 78 (2000); *see also Chapman v. California*, 386 U.S. 18, 24 (1967).

Under the Virginia statutory scheme applicable to capital murder cases, a finding of one or both of the aggravating factors of future dangerousness or vileness under Code § 19.2-264.4(C) does not mandate the imposition of the death penalty. Rather a defendant convicted of capital murder in Virginia becomes eligible for the death penalty only if the Commonwealth proves beyond a reasonable doubt one or both of these aggravating factors. Clearly, the jury's finding of vileness alone made Morva eligible for the death penalty. The jury nevertheless had the responsibility based on all the evidence to determine whether to impose the penalty of death or life without the possibility of parole. Code § 19.2-264.4(A). And "[i]n the event the jury cannot agree as to a penalty, the court shall … impose a sentence of imprisonment for life." Code § 19.2-264.4(E).

Undoubtedly, under the particular facts surrounding the horrific crimes committed by Morva a jury might well have imposed a penalty of death upon Morva once it determined that the Commonwealth had sufficiently proven that Morva's conduct satisfied the vileness aggravating factor. It is just as clear, however, that in making that determination the jury would have engaged in a degree of predicting Morva's probable future conduct in prison if the jury were to impose a life sentence rather than a death sentence.

As a result of the circuit court's rejection of Dr. Cunningham's expert testimony, Morva was denied the means to permit the jury the opportunity to factor that evidence into its prediction of Morva's probable conduct in prison if a life sentence without the possibility of parole were to be imposed upon him. While the jury may

not have given Dr. Cunningham's opinion significant weight, it cannot be said that the error in denying Morva's evidence of the expert's prison risk assessment might not have contributed to the jury's determination to impose the death sentence. In death penalty cases an "underlying concern is whether issues are presented in a manner that could influence the jury to assess a penalty based upon 'fear rather than reason.'" *Yarbrough v. Commonwealth*, 258 Va. 347, 369, 519 S.E.2d 602, 613 (1999) (quoting *Farris v. Commonwealth*, 209 Va. 305, 307, 163 S.E. 575, 576 (1968)); *see also Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"). In this case, the Commonwealth urged the jury to consider Morva's prior escape as a significant factor in the determination that the death sentence should be imposed, and implicitly suggested that it would be reasonable to fear that Morva if unable to escape in the future would "feel justified [in killing] prison guards." In that context, there is a reasonable possibility that in the absence of Dr. Cunningham's evidence the jury decided to impose the death sentence, rather than a life sentence, based on the "fear" that Morva would escape again or harm another prison guard. Accordingly, I would hold that the error in denying Morva's requested expert prison risk assessment was not harmless.

Capital murder cases are always horrible in their impact on the victims, their families, and our general society. As in Morva's case, such cases generally garner no sympathy for the defendant and deserve none. Nevertheless, civilized society does not consider the protection of due process rights to a fair trial as so fickle a concept that a defendant convicted of a capital offense

should be subjected to a death penalty where it can be reasonably debated that a requested expert's prison risk assessment is sufficiently "particularized" to the defendant. Such a risk assessment would afford the defendant the means to assist the jury in its determination whether a life sentence without the possibility of parole, rather than a death sentence, would be the appropriate penalty for the crimes committed by the defendant.

For these reasons, I would reverse the circuit court's judgment, set aside the sentences of death imposed upon Morva, and remand this case to the circuit court for a new sentencing hearing in which Morva would have the benefit of the requested expert's prison risk assessment.

APPENDIX D

CIRCUIT COURT OF
WASHINGTON COUNTY (VIRGINIA)

Nos. CR08-89, CR08-90, CR08-91, CR08-92,
CR08-93, CR08-94, CR08-95

COMMONWEALTH OF VIRGINIA,

v.

WILLIAM CHARLES MORVA,
Defendant.

August 1, 2007

TRANSCRIPT OF PROCEEDINGS

* * *

THE COURT: We will next take up the defendant's appointment for appointment of an expert on prison risk assessment and further to introduce evidence on prison violence and security. Under this motion, the defendant moves this Court to appoint Dr. Mark Cunningham, a forensic psychologist, with expertise in prison risk management to assess before the jury the probability that Mr. Morva, if convicted, will commit serious acts of violence while incarcerated, if sentenced to life imprisonment. This appointment in evidence would allow the defendant to refute the Commonwealth's argument that the defendant would probably commit such serious acts unless he is, in fact, executed.

Additionally, the defendant moves for testimony from the Chief of Operations from the Virginia Department of Corrections as to the extent of security to which the defendant is subjected, should he be convicted and sentenced to life imprisonment without parole. In *Yarbrough* v. *Commonwealth*, a 1999 case, the Supreme Court of Virginia held that a Trial Court, upon request by the defendant, must instruct the jury that life imprisonment means life imprisonment without parole, and this decision has been later codified in Section 19.2 264.4 (A). In *Burns* v. *Commonwealth*, a 2001 case, the Supreme Court rejected the defense argument that an inmate's environment and structure within a maximum security prison is relevant in rebutting evidence of future dangerousness. And this decision appears to be controlling at this time, the motion is, therefore, respectfully denied.

* * *

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1

WILLIAM CHARLES MORVA,
Petitioner-Appellant,
v.

DAVID ZOOK, WARDEN, SUSSEX I STATE PRISON,
Respondent-Appellee.

June 1, 2016

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wynn, Judge Diaz, and Senior Judge Davis.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excess fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, § 1 (excerpt)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254. State custody; remedies in Federal courts

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

* * *