No. 16-589

In The
Supreme Court of the United States

WILLIAM CHARLES MORVA,

Petitioner,

v.

DAVID ZOOK, WARDEN,
Sussex I State Prison,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

WARDEN'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ALICE T. ARMSTRONG
Senior Assistant Attorney General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
202 North 9th Street
Richmond, VA 23219
(804) 786-5315 direct dial
(804) 786-1108 facsimile
aarmstrong@oag.state.va.us

MARK R. HERRING
Attorney General of Virginia

MICHAEL T. JUDGE
MATTHEW P. DULLAGHAN
Senior Assistant Attorneys General

December 22, 2016

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

CAPITAL CASE

RESTATED QUESTION PRESENTED

A federal court may grant a state prisoner habeas corpus relief only if the state court's judgment resulted from an unreasonable application of clearly established federal law. Federal law is "clearly established" when this Court has addressed the specific question presented by a state prisoner's claim. This Court has not held that an indigent capital defendant is entitled to a "prison risk assessment" expert to present group statistical data to the sentencing jury. Was the state court's judgment refusing such an expert unreasonable under clearly established federal law?

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STATEMENT OF THE CASE

The touchstone of this Court's capital sentencing jurisprudence is that defendants must be treated as "uniquely individual human beings."[1] A State's capital sentencing procedures must "permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime."[2] Once that threshold has been met, "a State enjoys a range of discretion in imposing the death penalty."[3] Virginia's capital sentencing procedures fit comfortably within the range of discretion this Court's precedent affords because they permit the jury to consider the defendant's record, personal characteristics, and the circumstances of his crime.

I. The facts of Morva's crimes

On the night of August 19, 2006, Morva had been incarcerated in the Montgomery County, Virginia jail for approximately a year, "awaiting trial on charges of attempted burglary, conspiracy to commit burglary, burglary, attempted robbery, and use of a firearm."[4] When Morva requested treatment for "an injury to his

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[1] *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

[2] *Kansas v. Marsh*, 548 U.S. 163, 174 (2006) (emphasis added).

[3] *Id.*

[4] *Morva v. Commonwealth*, 683 S.E.2d 553, 556-57 (Va. 2009), *cert. denied*, 562 U.S. 849 (2010) (*Morva I*); Pet. 161a-204a.

leg and forearm," Sheriff's Deputy Russell Quesenberry transported Morva to the Montgomery Regional Hospital in the early hours of August 20, 2006.[5] Deputy Quesenberry "was in uniform and armed with a Glock .40 caliber semi-automatic pistol," which was fully loaded with 15 rounds of ammunition.[6]

Before transporting Morva to the hospital, Deputy Quesenberry placed Morva in "waist chains, but Deputy Quesenberry did not secure Morva's allegedly injured arm."[7] At the hospital, Morva repeatedly disregarded Deputy Quesenberry's instruction to walk on his left side because he wore his gun on his right side.[8] A nurse at the hospital noticed that Morva appeared to be feigning the injury to his leg.[9]

After receiving medical treatment but before leaving the hospital, Deputy Quesenberry permitted Morva to use the bathroom.[10] While in the bathroom, Morva removed a metal toilet paper holder from the wall and used it to bludgeon Deputy Quesenberry when he entered the bathroom, "breaking Quesenberry's nose, fracturing his face, and knocking him unconscious."[11] Morva then stole Deputy Quesenberry's

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[5] *Morva I*, 683 S.E.2d at 557.

[6] *Id.*; CA4JA 288.

[7] *Morva I*, 683 S.E.2d at 557; CA4JA 339, 341.

[8] *Morva I*, 683 S.E.2d at 557.

[9] *Id.*; CA4JA 291, 339.

[10] *Morva I*, 683 S.E.2d at 557.

[11] *Id.*

gun, chambering a round before leaving the bathroom.[12]

> 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.
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> 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."
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> 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.
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> 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

[12] *Id.*

> 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.[13]

The trial evidence also included a letter from Morva to his mother stating that he would "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."[14]

The jury convicted Morva of three counts of capital murder, two counts of use of a firearm in the commission of murder, assault and battery of a law enforcement officer, and escape by force.

During the penalty phase of the trial, Morva presented evidence of his peaceful adjustment to life in the New River Valley Regional Jail following the murders of Derrick McFarland and Corporal Sutphin.[15] Specifically, Captain Pilkins testified that not only had she not had any discipline problems with Morva in the year that he had been at the New River Valley

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[13] *Id.*

[14] *Id.*; CA4JA 978-79.

[15] CA4JA 734-37.

Regional Jail, the jail records did not reflect "any other disciplinary problems with any team."[16]

Morva also presented multiple mitigation witnesses who testified regarding his intellect and intellectual curiosity;[17] passivity;[18] "caring" and "compassionate" nature, including specific acts of kindness;[19] health concerns;[20] concern for "social justice";[21] and living circumstances.[22] The jury also heard testimony from Father Arsenault, the Catholic priest who had been counseling Morva weekly since the murders, that Morva was "very respectful and polite."[23]

Both of Morva's court-appointed mental health experts also testified on his behalf at sentencing.[24] In particular, Dr. Cohen explained to the jury that Morva appeared to have a genetically-based mental health condition "that influences how he sees the world and how he acts."[25] That is, Morva's "personality and the way he views his circumstances plays a role in helping

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[16] CA4JA 735.

[17] CA4JA 662, 673, 675, 703, 738-39.

[18] CA4JA 663-64, 684.

[19] CA4JA 679-80, 690-91, 703-04, 721, 723, 743.

[20] CA4JA 683-84, 697-98, 708, 729, 742.

[21] CA4JA 663, 682, 691, 704.

[22] CA4JA 664, 694, 706, 730.

[23] CA4JA 752.

[24] CA4JA 755-83 (Dr. Scott Bender); CA4JA 784-859 (Dr. Bruce Cohen).

[25] CA4JA 823-24.

to understand, not excuse, but helping to understand how he ended up acting the way he did."[26]

The trial court specifically instructed the jury that "[t]he words imprisonment for life, means [sic] imprisonment for life without possibility of parole."[27] It also instructed the jury that it could sentence Morva to life imprisonment even if it found one, or both, of the statutory aggravators.[28] The jury sentenced Morva to death on all three capital murder convictions after unanimously finding both of Virginia's statutory aggravating factors: "future dangerousness" and "vileness."[29]

II. Prior proceedings

On appeal, Morva challenged the trial court's refusal to appoint Dr. Mark D. Cunningham, Ph.D., as a "prison risk assessment expert."[30] Morva argued that Dr. Cunningham would have provided "an assessment of the likelihood that Morva would commit violence if he were sentenced to life in prison" based on "group statistical data" concerning rates of prison violence among "similarly situated inmates."[31] According to Morva, not appointing Dr. Cunningham violated his

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[26] CA4JA 824.

[27] Direct Appeal appendix at 2405.

[28] *Id*. at 2406; CA4JA 873.

[29] *Morva I*, 683 S.E.2d at 559; *see also* Va. Code Ann. § 19.2-264.4(C).

[30] *Morva I*, 683 S.E.2d at 561-66.

[31] *Id*. at 557-58.

due process rights and his Eighth Amendment rights because Dr. Cunningham's testimony "was relevant and mitigating and any relevant mitigating evidence must be admitted."[32]

Because *Ake v. Oklahoma*[33] did not apply to Dr. Cunningham, the Supreme Court of Virginia applied state precedent, which required Morva to show a "particularized need" for the expert.[34] The Supreme Court of Virginia then carefully analyzed Dr. Cunningham's proffered testimony.[35] It noted that Morva's motion seeking Dr. Cunningham's appointment was "strikingly similar" to the motion seeking his appointment in *Porter v. Commonwealth*.[36] In *Porter*, the court had held that because general "'prison life' evidence was inadmissible," Porter had not satisfied the "particularized need" test.[37] The Supreme Court of Virginia acknowledged Morva's contention that, unlike in *Porter*, Dr. Cunningham's testimony "would have been 'individualized' to him."[38] Specifically, Dr. Cunningham would have "factor[ed] into his statistical analysis individualized characteristics that have been shown to

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[32] *Id.* at 561.

[33] 470 U.S. 68 (1985).

[34] *Morva I*, 683 S.E.2d at 562 (citing *Husske v. Commonwealth*, 476 S.E.2d 920, 925 (Va. 1996)).

[35] *Id.*

[36] 661 S.E.2d 415, 435-42 (Va. 2008), *cert. denied*, 556 U.S. 1189 (2009).

[37] *Morva I*, 683 S.E.2d at 563 (quoting *Porter*, 661 S.E.2d at 435-42).

[38] *Id.*

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."[39]

The Supreme Court of Virginia held that the proffered testimony was not "rebuttal" evidence because "the Commonwealth . . . 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."[40] In the context of Morva's case, "Dr. Cunningham's anticipated testimony was not in rebuttal to any specific evidence concerning prison life."[41]

The state court then evaluated Morva's claim that Dr. Cunningham's proposed testimony was "mitigation" evidence. It began that analysis by reviewing Virginia's capital sentencing statutes and found that the statutory language defining the "future dangerousness" aggravator dictated "what evidence [was] relevant to the inquiry concerning future dangerousness."[42] The statutes address the defendant's character,

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[39] *Id*.

[40] *Id*.

[41] *Id.* at 563-64 (citing *Porter*, 661 S.E.2d at 440; *Burns v. Commonwealth*, 541 S.E.2d 872, 893 (Va.), *cert. denied*, 534 U.S. 1159 (2001)).

[42] *Id.* at 564.

so "the relevant inquiry is not whether [a defendant] *could* commit criminal acts of violence in the future but whether he *would*."[43] "Stated differently, [Virginia] 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."[44]

Within that framework, Dr. Cunningham's proposed testimony concerning prison "procedures and security interventions that would act to significantly reduce the likelihood of an inmate engaging in serious violence in prison," was irrelevant to the future dangerousness aggravator because Dr. Cunningham did not claim that the use or effectiveness of prison interventions was "related in any way to Morva's individual history, conviction record, or circumstances of his offense."[45] Instead, Dr. Cunningham's testimony would be "true for any other inmate as well," and so was "evidence of the effectiveness of general prison security, which is not relevant to the issue of Morva's future dangerousness."[46] Considering that Dr. Cunningham's proffered testimony was not specific to Morva's future adaptability in prison, "the lack of that expert assistance did not result in a fundamentally unfair trial.

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[43] *Id.*

[44] *Id.* at 565.

[45] *Id*.

[46] *Id*.

Accordingly, the circuit court did not err or abuse its discretion in denying the motion to appoint Dr. Cunningham as an expert for Morva."[47]

Two justices dissented. In their view, Morva's proffered evidence appeared to meet the court's admissibility test because the proffered testimony was "sufficiently specific to Morva in the 'context' of the secure prison environment."[48] Thus, the testimony would have aided "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 Morva's capital crimes.[49]

The Virginia Supreme Court affirmed Morva's convictions and sentences on September 18, 2009, and denied rehearing on December 9, 2009. This Court subsequently denied certiorari on the same question presented here.[50] When Morva's state habeas corpus challenge was also unsuccessful,[51] he sought federal habeas corpus relief.

Following extensive briefing and two hearings, the district court denied Morva's claims and dismissed his

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[47] *Id.* at 566.

[48] *Id.* at 572 (Koontz, J., dissenting).

[49] *Id.* at 574.

[50] *Morva v. Virginia*, 562 U.S. 849 (2010).

[51] *Morva v. Warden*, 741 S.E.2d 781 (Va. 2013). The Virginia Supreme Court denied Morva's petition for rehearing on June 14, 2013.

petition.[52] In dismissing the prison-risk-assessment-expert claim, the district court evaluated the state court record and held that Dr. Cunningham's own materials supported "the reasonableness of the Supreme Court of Virginia's conclusion."[53]

The district court thoroughly reviewed Dr. Cunningham's proposed presentation to the jury and noted that the presentation "concluded by stating that Virginia's correctional programming and security measures could reduce the risk that any capital inmate could commit assaultive conduct."[54] The district court found that the proffer made "apparent" Dr. Cunningham's thesis:

> 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.[55]

The district court acknowledged that Morva's due process argument was "superficially appealing," but found that it did not withstand scrutiny because it "ignore[d] the reality of the closing arguments given at

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[52] *Morva v. Davis*, No. 7:13-cv-00283, 2015 U.S. Dist. LEXIS 49699 (W.D. Va. Apr. 15, 2015) (*Morva II*); Pet. 31a-159a.

[53] *Morva II*, 2015 U.S. Dist. LEXIS 49699, at *37-38.

[54] *Id.* at *38-39.

[55] *Id.* at *39.

trial."[56] In the context of Morva's trial, his reliance on *Gardner v. Florida*,[57] *Skipper v. South Carolina*,[58] and *Simmons v. South Carolina*[59] was misplaced because "unlike in *Gardner*, Morva was not sentenced based on confidential information he had no opportunity to rebut."[60] Likewise, "unlike in *Skipper*, Morva introduced testimony from a jailer as to his good behavior while on pretrial detention."[61] Finally, "unlike in *Simmons*, the circuit court told the jury that life imprisonment meant imprisonment without parole."[62] The district court concluded that "Morva's argument did not cross the § 2254(d) threshold" because this Court has not held "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.' "[63]

The Fourth Circuit unanimously affirmed the denial of habeas corpus relief "because Morva ha[d]

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[56] *Id.* at *52.

[57] 430 U.S. 349 (1977).

[58] 476 U.S. 1 (1986).

[59] 512 U.S. 154 (1994).

[60] *Morva II*, 2015 U.S. Dist. LEXIS 49699, at *48.

[61] *Id.*

[62] *Id*.

[63] *Id.* at *50 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

identified no clearly established federal law requiring the appointment of a nonpsychiatric expert."[64]

After reviewing Virginia's capital sentencing framework,[65] the Fourth Circuit held that "[t]he Supreme Court of Virginia did not unreasonably reject Morva's claim that he was constitutionally entitled to a state-funded prison-risk-assessment expert."[66] The court found that Morva had framed his claim "'at too high a level of generality.'"[67] The proper issue before it, the Fourth Circuit found, was "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."[68] The Fourth Circuit held that the Supreme Court of Virginia's conclusion was neither contrary to, nor involved an unreasonable application of, clearly established federal law because *Gardner*, *Skipper*, and *Simmons* "do not clearly establish a capital defendant's right to a state-funded nonpsychiatric expert."[69]

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[64] *Morva v. Zook*, 821 F.3d 517, 520 (4th Cir. 2016) (*Morva III*); Pet. 1a-29a.

[65] *Morva III*, 821 F.3d at 522 (citing Va. Code Ann. §§ 19.2-264.2, 19.2-264.4(C)).

[66] *Id.* at 524.

[67] *Id.* (quoting *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (per curiam)).

[68] *Id.*

[69] *Id.* at 525-26.

The Fourth Circuit further held that the Supreme Court of Virginia's separate holding that Morva had failed to show a particularized need for the expert also did "not run afoul of clearly established law" because classifying "prison-environment evidence as irrelevant and therefore inadmissible" was not unreasonable under this Court's precedent.[70] The same conclusion applied to "statistical evidence of similarly situated inmates and instances of prison violence" because a capital "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."[71] So the Fourth Circuit unanimously held 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."[72]

Morva timely filed his petition on October 28, 2016, and the case was docketed on November 1, 2016.

[70] *Id.* at 526.

[71] *Id.*

[72] *Id.* at 527. The Fourth Circuit denied Morva's petition for rehearing on June 1, 2016. Pet. 207a.

REASONS FOR DENYING THE WRIT

The Fourth Circuit correctly applied this Court's precedent on the proper scope and application of the Anti-terrorism and Effective Death Penalty Act (AEDPA).[73] This Court has never held that the Constitution requires the States to provide an expert at a capital sentencing proceeding to present group statistical data. Without such a clear directive, the state court reasonably rejected Morva's claimed right to such an expert.

Although clearly established federal law demands that a capital defendant received an individualized determination of punishment, that requirement was satisfied here. Morva presented individualized rebuttal and mitigation evidence. Moreover, Virginia's admissibility rule is well-calibrated to existing precedent and compatible with the rules applied in other jurisdictions.

Finally, this case is a poor vehicle to address the question Morva presents because the Court would have to announce a new constitutional rule to afford Morva relief. Morva seeks a constitutional command that he should have been appointed an expert to opine based on "group statistical data" rather than information specific to his character, background, and the circumstances of his offense. This Court previously declined to address the same question on direct review;

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[73] 28 U.S.C. § 2254.

it is even less compelling now when viewed through AEDPA's highly deferential lens.

I. The Fourth Circuit properly determined that federal habeas corpus relief was foreclosed because the Supreme Court of Virginia's judgment was not an unreasonable application of clearly established federal law.

This case seeks review of the Fourth Circuit's routine resolution of Morva's claim under AEDPA. After correctly identifying the claim that Morva actually had presented to the state court and applying this Court's AEDPA precedent, the Fourth Circuit readily concluded that no "clearly established federal law" governed Morva's claim. No pressing issue of constitutional magnitude requires this Court's attention.

A. AEDPA limits the scope of federal review.

"Federal courts may grant habeas corpus relief if the underlying state-court decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by' the Supreme Court."[74] But "clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as

[74] *Woods*, 135 S. Ct. at 1374 (quoting 28 U.S.C. § 2254(d)(1)).

opposed to the dicta, of this Court's decisions."[75] So "where the precise contours of [a] right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims."[76] This Court has instructed that where none of its precedents has confronted "the *specific* question presented"[77] by a petitioner's claim, the state court's decision cannot have been "contrary to"[78] clearly established federal law. This is such a case.

B. Clearly established federal law did not mandate appointment of a prison-risk-assessment expert.

The courts below properly found that the Supreme Court of Virginia reasonably rejected Morva's claim that he was constitutionally entitled to appointment of a "prison risk assessment" expert.

The law concerning an expert psychiatrist is clear: "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires

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[75] *Id.* at 1376 (internal quotations and citations omitted); *see also White v. Woodall*, 134 S. Ct. 1697, 1702 (2014); *Howes v. Fields*, 565 U.S. 499, 505 (2012).

[76] *Woods*, 135 S. Ct. at 1377 (internal quotations and citations omitted) (alteration in original).

[77] *Id*. (emphasis added) (internal quotations and citations omitted); *see also Howes*, 565 U.S. at 505 ("our precedents do not clearly establish the categorical rule on which the Court of Appeals relied").

[78] 28 U.S.C. § 2254(d)(1). *See also Woods*, 135 S. Ct. at 1376; *White*, 134 S. Ct. at 1702.

that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one."[79] This Court has not held that due process mandates appointment of other kinds of experts.[80] And it has noted that "the jury may make up its mind about future dangerousness unaided by psychiatric testimony."[81]

Under *Ake*, "the obligation of the State is *limited to* provision of one competent psychiatrist."[82] Virginia satisfied that obligation when the trial court appointed Morva both a forensic psychiatrist[83] and a neuropsychologist.[84] Virginia precedent permits an indigent defendant additional expert assistance if he demonstrates a "particularized need" for the expert by showing "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."[85] The Supreme Court of Virginia held that

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[79] *Ake*, 470 U.S. at 74; *see also Medina v. California*, 505 U.S. 437, 444 (1992).

[80] *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) (declining to extend *Ake* to fingerprint and ballistics experts because the proffered need for the experts amounted only to undeveloped assertions).

[81] *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983); *see also id*. at 897 (noting that "there was only lay testimony with respect to dangerousness" in *Jurek v. Texas*, 428 U.S. 262 (1976)).

[82] *Ake*, 470 U.S. at 79 (emphasis added).

[83] CA4JA 784.

[84] CA4JA 756.

[85] *Morva I*, 683 S.E.2d at 561-62 (quoting *Husske*, 476 S.E.2d at 925).

Morva had not satisfied that standard because the proffered expert opinion was not individual to Morva and that rendered it irrelevant under Virginia's statute and, therefore, inadmissible.[86]

Based on the expert's proffer,[87] the Virginia court reasonably found that his opinion did not connect specifically to Morva because the opinion rested on "general factors concerning prison procedure and security" that were not individualized to Morva's prior history, conviction record, or the circumstances of his offense.[88] "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."[89]

The Supreme Court of Virginia squarely addressed *Gardner*, *Skipper*, and *Simmons*. The dispositive distinction between those holdings and the proffered testimony here was that they concerned evidence that was specific to the individual defendant—*i.e.*, that Gardner was entitled to challenge information in his pre-sentence report,[90] that Skipper had made a

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[86] *Id.* at 564-66.

[87] CA4JA 144-57 (noting use of "group statistical data" in reaching a conclusion and summarizing proposed testimony).

[88] *Morva I*, 683 S.E.2d at 566.

[89] *Id.* at 565-66 (emphasis added).

[90] 430 U.S. at 362.

peaceful adjustment to the jail environment,[91] and that Simmons was ineligible for parole.[92]

In contrast, Dr. Cunningham's opinion rested on "group statistical data"[93] that was "not particular to Morva" but demonstrated instead "the effectiveness of general prison security."[94] That evidence was not relevant to Morva's character or propensity for violence and, so, was inadmissible as a matter of state law.[95] That conclusion fully comports with this Court's precedent mandating individualized sentencing determinations.[96] To be sure, the use of "group statistical data" would contravene this Court's emphasis on "the uniqueness of the individual."[97]

The "task at hand"[98] for Morva's jury was to assess his character, considering his background and his propensity for violence, and then to determine his moral culpability for the murders of Derrick McFarland and Corporal Eric Sutphin. Morva had no constitutional right to demand a state-funded expert whose opinion

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[91] 476 U.S. at 7.

[92] 512 U.S. at 164.

[93] CA4JA 144-57.

[94] *Morva I*, 683 S.E.2d at 565.

[95] *Id.*

[96] *United States v. Taylor*, 814 F.3d 340, 360 (6th Cir.), *petition for cert. filed* (U.S. Oct. 6, 2016) (No. 16-6392) ("testimony regarding generalities of prison invites the jury to make decisions based upon group characteristics and assumptions" (citation omitted)).

[97] *Lockett*, 438 U.S. at 605.

[98] *Ake*, 470 U.S. at 80.

was not individualized to him. Morva's cited authorities establish the admissibility of specific mitigating evidence, not a constitutional entitlement to a hand-picked expert to opine based on "group statistical data."

The general principles upon which Morva relies do not "clearly establish" the rule he seeks.[99] "All that matters" for purposes of the § 2254(d)(1) inquiry is that the Court has not held that *Ake*—or any other precedent—"applies to the circumstances presented in this case."[100] Where, as here, "the precise contours" of the asserted right remain unclear, the state court's decision was not unreasonable. Accordingly, the Fourth Circuit correctly concluded that Morva was not entitled to federal habeas corpus relief.

II. Clearly established federal law requires an individualized assessment of a capital defendant's moral culpability based on his character, background, and the circumstances of his offense.

The Supreme Court of Virginia understands and faithfully applies this Court's precedent "that evidence peculiar to a defendant's character, history and background is relevant to the future dangerousness inquiry

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[99] *See Weisheit v. State*, 26 N.E.3d 3, 10 (Ind. 2015) (noting that *Skipper* did not involve "expert testimony projecting the defendant's likelihood of future positive adjustment to imprisonment").

[100] *Woods*, 135 S. Ct. at 1378.

and should not be excluded from a jury's consideration."[101] Whether Virginia applies that precedent strictly or expansively is a matter within the "range of discretion"[102] this Court affords the States.

A. The Eighth Amendment demands an individualized sentencing proceeding.

"[F]undamental respect for humanity"[103] and "the uniqueness of the individual"[104] dictate that a capital sentencing jury "must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense."[105] "What is essential is that the jury have before it all possible relevant information

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[101] *Bell v. Commonwealth*, 563 S.E.2d 695, 714 (Va. 2002), *cert. denied*, 537 U.S. 1123 (2003); *Andrews v. Commonwealth*, 699 S.E.2d 237, 277 (Va. 2010) (allowing expert testimony on developmental risk factors to explain defendant's background because a capital defendant "has the constitutional right to present virtually unlimited relevant evidence in mitigation"). The trial court also understood that Morva was "entitled to, really a great deal of latitude in [presenting] mitigating circumstances." CA4JA 750.

[102] *Marsh*, 548 U.S. at 174.

[103] *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (quoting *Woodson*, 428 U.S. at 304).

[104] *Lockett*, 438 U.S. at 605.

[105] *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263-64 (2007).

about the *individual defendant* whose fate it must determine."[106]

Relevant mitigation evidence, this Court has said, concerns "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."[107] Mitigating evidence includes the defendant's ability to make a "well-behaved" adjustment to prison because that adjustability is a feature of his character.[108] This Court expressly has *not* held, however, "that all facets of the defendant's ability to adjust to prison life must be treated as relevant and potentially mitigating."[109]

This Court's precedent 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."[110] To the contrary, "the Eighth Amendment does not deprive the

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[106] *Jurek*, 428 U.S. at 276 (emphasis added); *accord Zant v. Stephens*, 462 U.S. 862, 879 (1983) ("What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.").

[107] *Abdul-Kabir*, 550 U.S. at 247-48 (quoting *Lockett*, 438 U.S. at 604); *see also Simmons*, 512 U.S. at 163 ("The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing appropriate punishment.").

[108] *Skipper*, 476 U.S. at 4-5, 7 n.2.

[109] *Id.* at 7 n.2.

[110] *Lockett*, 438 U.S. at 604 n.12 (emphasis added).

State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the *manner* in which it is submitted."[111] "States are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty."[112] So unless the state's procedure "offends" a fundamental principle of justice, it is not subject to proscription under the Due Process Clause.[113]

Due process commands that a capital defendant must be afforded an opportunity to "deny or explain"[114] any evidence the sentencing jury will consider in making its individual assessment of the appropriate sentence, including the right to inform the jury that he is ineligible for parole.[115] This Court has not held, however, that the right to rebut includes the additional right to a so-called rebuttal expert, or that the rebuttal evidence must take a particular form; it has not held

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[111] *Oregon v. Guzek*, 546 U.S. 517, 526 (2006) (emphasis added).

[112] *Id*. (internal quotations and citations omitted).

[113] *Medina*, 505 U.S. at 443-45 (internal quotations and citations omitted). *See also Ake*, 470 U.S. at 80 ("*[W]here permitted by evidentiary rules*, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand.") (emphasis added); *cf. Franklin v. Lynaugh*, 487 U.S. 164, 185-86 (1988) ("Nothing in *Lockett* or *Eddings* requires that the sentencing authority be permitted to give effect to evidence beyond the extent to which it is relevant to the defendant's character or background or the circumstances of the offense.") (O'Connor, J., concurring).

[114] *Gardner*, 430 U.S. at 362.

[115] *Simmons*, 512 U.S. at 164, 169.

that rebuttal evidence includes "group statistical data" that is not specific to the individual defendant.

"In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence *ends* here."[116]

B. Morva presented relevant, individualized information to the sentencing jury.

Morva continues to wrongly argue as though the question he presented to the state court concerned his right to rebut the future dangerousness allegation or to present mitigation evidence as such. Morva vindicated his rights to rebut the allegation of future dangerousness and to present mitigation evidence.[117]

As *Simmons* requires,[118] the trial court specifically instructed the jury that "[t]he words imprisonment for life, means [sic] imprisonment for life without possibility of parole."[119] The jury also was instructed that it had the right to sentence Morva to life imprisonment even if it found either, or both, of the statutory aggravators.[120] Morva also presented testimony from

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[116] *Marsh*, 548 U.S. at 175 (emphasis added).

[117] CA4JA 659-858.

[118] 512 U.S. at 164.

[119] Direct Appeal appendix at 2405.

[120] *Id*. at 2406; CA4JA 873.

Captain Pilkins that Morva had not had any disciplinary problems in the year that he had been awaiting trial at the New River Valley Regional Jail.[121] Captain Pilkins also testified regarding Morva's conditions of confinement at the jail.[122] That testimony, however, was specific to Morva, as opposed to Dr. Cunningham's "group statistical data." Thus, Morva presented evidence to rebut the future dangerousness claim. The judge's instruction permitted Morva to inform the jury that if spared he would not be released. And Captain Pilkins's testimony permitted Morva to demonstrate and argue to the jury—through a disinterested witness—exactly what he wanted his expert to say: that there were conditions of confinement that could be imposed upon him that would assure that he was not a disciplinary problem or threat to his jailors.

Captain Pilkins's testimony was also mitigating because it demonstrated that Morva's character was such that he could make—indeed, had made—a well-behaved adjustment to his confinement.[123] The jury also heard of Morva's character and history, including specific acts of kindness and compassion, from friends,

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[121] CA4JA 734-37.

[122] CA4JA 735-37.

[123] *See Galloway v. State*, 122 So. 3d 614, 642 (Miss. 2013) (holding that jury could infer from testimony of two corrections officers who testified that defendant had not caused any problems during his prior incarceration that he "had the ability to make a well-behaved and peaceful adjustment to life in prison and would not pose any danger in the future") (internal quotations and citation omitted).

former teachers, and a religious advisor.[124] And Dr. Cohen provided the mental health context for Morva's conduct to help the jury "understand how he ended up acting the way he did."[125]

So the jury had before it information specific to Morva that permitted it to consider fully "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."[126]

C. Virginia's rule hews closely to this Court's precedent and comports with that of other jurisdictions within the range of discretion this Court permits.

Efforts by Morva and amicus Virginia Association of Criminal Defense Lawyers (VACDL) to isolate Virginia are unavailing because they misstate Virginia's rule and also mischaracterize the rules of other jurisdictions. Following the command of *Woodson* and its progeny, the Virginia rule requires that mitigating evidence be particular to the individual defendant. The fundamental flaws in Morva's argument are his assumption that his proffered evidence was "mitigating" and his insistence that anything that he unilaterally

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[124] CA4JA 662-64, 673, 675, 679-80, 682-84, 690-91, 694, 697-98, 703-04, 706, 708, 721, 723, 729-30, 739, 742-43, 752. *Accord Franklin*, 487 U.S. at 186 ("Evidence of voluntary service, kindness to others, or of religious devotion might demonstrate positive character traits that might mitigate against the death penalty.") (O'Connor, J., concurring).

[125] CA4JA 824.

[126] *Woodson*, 428 U.S. at 304.

labels "mitigating" is automatically relevant. Like Virginia, other jurisdictions reasonably have rejected those arguments.[127]

1. Virginia's admissibility rule permits individualized predictions of future dangerousness.

Virginia does not "categorically exclude[]"[128] prison-risk-assessment testimony. Instead, the Supreme Court of Virginia repeatedly has stated its rule of *admissibility*: "evidence relating to a prison environment must connect the specific characteristics of the particular defendant to his future adaptability in the prison environment. It must be evidence peculiar to the defendant's character, history, and background in order to be relevant to the future dangerousness inquiry."[129] In fact, Morva's own proffer to the trial court demonstrated that other courts in the Commonwealth,

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[127] *See Weisheit*, 26 N.E.3d at 9 (holding that "the trial court is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance or to give the proffered mitigating circumstances the same weight the defendant does") (internal quotations and citation omitted); *Owens v. Guida*, 549 F.3d 399, 419 (6th Cir. 2008) (noting that "*Lockett* 'does not mean that the defense has *carte blanche* to introduce any and all evidence that it wishes' ") (quoting *United States v. Purkey*, 428 F.3d 738, 756 (8th Cir. 2005)).

[128] Pet. 19, 29 ("categorical exclusion").

[129] *Morva I*, 683 S.E.2d at 565 (citing *Juniper v. Commonwealth*, 626 S.E.2d 383, 423-24 (Va.), *cert. denied*, 549 U.S. 960 (2006)); *see also id*. at 572 (Koontz, J., dissenting) (concluding that Morva's proffered evidence met Virginia's admissibility test).

in the exercise of their discretion, *had* admitted Dr. Cunningham's testimony.[130]

Nor has Virginia's rule "hardened" over time as Morva contends.[131] In *Lawlor v. Commonwealth*, the Virginia court merely applied its precedent defining the boundaries of admissible rebuttal and mitigation evidence to the specific facts of that case.[132] In fact, Dr. Cunningham testified at Lawlor's trial—just not about "group statistical data" or a dangerousness prediction limited to "prison society."[133]

Amicus VACDL offers a list of cases that purportedly illustrate application of "the aberrant Virginia Rule,"[134] but it fails to note that only one of those cases is pending, *Commonwealth v. Hamilton*.[135] VACDL's other five cases have been resolved by guilty pleas. In

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[130] *Id.* at 557 (maj. op.) (noting Dr. Cunningham's proffer of his prior testimony in *Commonwealth v. Jose Rogers*); CA4JA 107-19.

[131] Pet. 30.

[132] 738 S.E.2d 847, 881-85 (Va.), *cert. denied*, 134 S. Ct. 427 (2013). The Supreme Court of Virginia expressly relied on this Court's holdings in *Lockett*, *Skipper*, *Simmons*, and *Woodson* in reiterating its rule. *Id*.

[133] *Id*.; *accord Buntion v. State*, 482 S.W.3d 58, 68 (Tex. Crim. App. 2016) (rejecting "argument that, as the future dangerousness issue applied to him, the only relevant society was prison society"); *State v. Douglas*, 800 P.2d 288, 296 (Or. 1990) ("Society includes prison society, *as well as* society at large.") (citation omitted) (emphasis added).

[134] VACDL Br. at 14-15.

[135] Circuit Court of Prince William County, Nos. CR16000897-906, CR16001257, CR16001260-1262, CR16001264-1266, CR16002205 (currently scheduled for trial June 5, 2017 through July 27, 2017).

four of those five cases,[136] the defendants were sentenced to multiple life-without-parole sentences; and in the fifth case,[137] the defendant was sentenced to multiple term-of-years sentences. As such, those cases are not germane to the individualized jury sentencing inquiry at issue here.

With its focus on an individualized assessment, Virginia's admissibility rule comports with—indeed, insists on—this Court's requirement that the jury's sentencing determination treat the defendant as a "unique[] individual" rather than a "faceless member" of a statistical group.[138]

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[136] *See Commonwealth v. Smith*, Circuit Court of Augusta County, Nos. CR15000032-00, CR15000032-03, CR15000032-08 (sentenced March 23, 2016 to 2 consecutive life terms, plus 5 years); *Commonwealth v. Arrington*, Circuit Court of Rockingham County, Nos. CR14000476-481 (sentenced June 25, 2015 to 3 consecutive life terms, plus 11 years); *Commonwealth v. Reyes-Alfaro*, Circuit Court of Prince William County, Nos. CR11000854-855, CR11000857, CR11000907-914, CR11001129 (sentenced June 18, 2014 to 7 consecutive life terms, plus 23 years); *Commonwealth v. Wilson*, Circuit Court of Prince William County, Nos. CR10001031, CR10001033 (sentenced September 4, 2012 to 2 consecutive life terms).

[137] *See Commonwealth v. Edmonds*, Circuit Court of Arlington County, Nos. CR13000602, CR13000605-608 (sentenced December 16, 2014 to a total aggregate sentence of 85 years' imprisonment).

[138] *Woodson*, 428 U.S. at 304.

2. Rules from other jurisdictions do not inform the AEDPA analysis.

Morva's invocation of what he characterizes as the rules from other jurisdictions[139] misses the mark because the procedures available elsewhere are irrelevant to the AEDPA inquiry. Only this Court's holdings define clearly established federal law,[140] so Morva "may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to this Court, be accepted as correct."[141] In any event, Morva's contention is wrong.

Other jurisdictions also have held that:

- "testimony about general prison conditions and the anticipated effectiveness of security protocols is insufficiently individualized to meet [the *Lockett*] standard."[142]

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[139] Pet. 19-22.

[140] *Woods*, 135 S. Ct. at 1376; *White*, 134 S. Ct. at 1702; *Howes*, 565 U.S. at 505.

[141] *Marshall v. Rodgers*, 133 S. Ct. 1446, 1451 (2013) (per curiam).

[142] *Taylor*, 814 F.3d at 361; *see also People v. Clark*, 372 P.3d 811, 897 (Cal. 2016) (reiterating "general rule" that "evidence concerning conditions of confinement for a person serving a sentence of life without possibility of parole is not relevant to the penalty determination because it has no bearing on the defendant's character, culpability, or the circumstances of the offense"); *Galloway*, 122 So. 3d at 642 (holding that testimony regarding "generalities of prison life" was properly excluded "because it was irrelevant to Galloway's character, his record, or the circumstances of his

- the question of future dangerousness "focuses upon the character for violence of the particular individual, not merely the quantity or quality of the institutional restraints put on that person,"[143] and
- "[m]itigating evidence must be sufficiently particularized to the defendant on whose behalf it is offered—to his character, his behavior, or the nature of his

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crime"); *State v. Maestas*, 299 P.3d 892, 966 (Utah 2012) (holding that "because information regarding . . . conditions of imprisonment does not relate to Mr. Maestas's personal culpability, we reject his claim that such information is constitutionally required"); *State v. Burkhart*, 640 S.E.2d 450, 453 (S.C. 2007) (evidence of general prison conditions "is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment"); *Wilcher v. State*, 697 So. 2d 1123, 1133 (Miss. 1997) ("The harshness of a life sentence in Parchman [prison] in no way relates to Wilcher's character, his record, or the circumstances of the crime. Therefore, it was properly excluded."). *Cf. People v. Banks*, 934 N.E.2d 435, 458 (Ill. 2010) ("[T]he prison-privileges evidence was not relevant to the circumstances of the offense or the character or rehabilitative potential of defendant and it should not have been admitted." (citation omitted)).

[143] *Coble v. State*, 330 S.W.3d 253, 268 (Tex. Crim. App. 2010) (footnotes omitted). *See also id*. at 269 ("[T]his special issue focuses upon the internal restraints of the individual, not merely the external restraints of incarceration."); *Renteria v. State*, 2011 Tex. Crim. App. Unpub. LEXIS 301, at *9, 2011 WL 1734067 (Tex. Crim. App. May 4, 2011) (same); *Douglas*, 800 P.2d at 296 (noting that "the task of the jury is to consider, not *where* the defendant would be dangerous, but *whether* the defendant would be dangerous"). *Accord Woodson*, 428 U.S. at 304 ("justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender" (citation omitted)).

> offense—so as to cause the defendant or his crime to seem less severe or harsh to the jury."[144]

Using language that echoes the Supreme Court of Virginia's holding in this case, the Sixth Circuit recently affirmed the exclusion of Dr. Cunningham's "risk assessment" testimony in a federal capital case. The Sixth Circuit held that the "generalized nature" of Dr. Cunningham's testimony made it "an argument against the death penalty itself, not an argument for sparing a particular defendant from the death penalty."[145] The Seventh Circuit likewise has rejected the

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[144] *Taylor*, 814 F.3d at 362 (citations omitted); *United States v. Johnson*, 223 F.3d 665, 675 (7th Cir. 2000) ("A mitigating factor is a factor arguing against sentencing this defendant to death; it is not an argument against the death penalty in general."); *Coleman v. Saffle*, 869 F.2d 1377, 1393 (10th Cir. 1989) ("Even in *Skipper*, in which the Court arguably gave its broadest reading of what constitutes mitigating evidence, the evidence in question directly concerned the petitioner's own conduct, and thereby his character."); *Maestas*, 299 P.3d at 965 ("Evidence concerning the defendant's background, character, and circumstances of the crime is considered 'relevant mitigating evidence' under the Eighth Amendment because such evidence allows the sentencing body to make 'an *individualized* determination' that the death sentence should be imposed in the specific circumstance."); *State v. Lynch*, 787 N.E.2d 1185, 1207 (Ohio 2003) ("mitigating factors are facts about the defendant's character, background, or record, or the circumstances of the offense, that may call for a penalty less than death" (citation omitted)). *Cf. United States v. Hager*, 721 F.3d 167, 195 (4th Cir. 2013) (disallowing evidence regarding effect of execution on defendant's family because it went "beyond testimony about the defendant's character, prior record, or the circumstances of the crime").

[145] *Taylor*, 814 F.3d at 362 (citing *Johnson*, 223 F.3d at 674).

admissibility of an argument that matched the "contours of Dr. Cunningham's thesis"[146] as "illogical," because it amounted "to saying that because this defendant is *so* dangerous, he does not deserve to be sentenced to death, since his dangerousness will assure his secure confinement."[147]

Some of Morva's cases simply are inapposite. For example, in *State v. Addison*, the New Hampshire court upheld the *state's* evidence concerning general prison conditions, finding that "evidence of the defendant's potential exposure to and interactions with other inmates, as well as his opportunity to access potential weapons [bore] upon whether he would pose a future danger in a prison setting" and was "fair rebuttal to his prison adjustment mitigating factor."[148] And in *Hanson v. State*, the court remanded the case for a threshold determination concerning the reliability of the expert's opinion but refused to "speculate" regarding its admissibility.[149]

None of the cases upon which Morva relies appears to have addressed the dispositive threshold question at issue here: whether the defendant was constitutionally entitled to appointment of an expert who would *then* opine concerning matters that Morva

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[146] *Morva II*, 2015 U.S. Dist. LEXIS 49699, at *39.

[147] *Johnson*, 223 F.3d at 675.

[148] 87 A.3d 1, 119-20 (N.H. 2013). *See also State v. Sparks*, 83 P.3d 304, 319 (Or. 2004) ("The state offered [prison environment] evidence to explain and demonstrate the nature of 'prison society' and the opportunities for violence within that setting.").

[149] 72 P.3d 40, 52-53 (Okla. Crim. App. 2003).

claims would have been mitigation and rebuttal evidence. The real import of all the cases is that determining what is, in fact, relevant mitigating or proper rebuttal evidence is a highly fact-specific inquiry. Virginia's rule focusing that inquiry on whether the proposed evidence is particular to the individual defendant offends no constitutional principle.

III. Morva asks the Court to announce a new rule.

This Court recognizes that "direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception."[150] "When the process of direct review—which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari—comes to an end, a presumption of finality and legality attaches to the conviction and sentence."[151] That presumption applies with particular force here because the Court previously denied review of the same claim on direct review.[152] It has not improved with age.

As the courts below correctly understood, Morva does not seek application of "clearly established federal law," but a new rule that would significantly expand this Court's precedent regarding mitigating evidence and expert assistance. In particular, Morva asks this Court to hold as a matter of federal constitutional law

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[150] *Barefoot*, 463 U.S. at 887.

[151] *Id*.

[152] *Morva v. Virginia*, 562 U.S. 849 (2010).

that he was entitled to appointment of a non-psychiatric expert to opine on his future dangerousness based on "group statistical data" that did not rebut any evidence the Commonwealth had presented and that was not specific to him.[153]

Morva tacitly concedes that the Constitution does not mandate that a criminal defendant may present evidence that is *irrelevant* as a matter of state law.[154] But at bottom his argument is that any information which he unilaterally labels "mitigating" is automatically "relevant" irrespective of how it addresses (or fails to address) any aspect of *his* character, personal history, or offense. No precedent supports that one-sided analysis.[155]

In addition, new rules cannot be announced on collateral review, absent one of two narrow exceptions that Morva has not suggested apply here.[156] To be sure,

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[153] *Morva I*, 683 S.E.2d at 563-66.

[154] Pet. at 23.

[155] *Taylor*, 814 F.3d at 362 ("*Jurek* does not command district courts to admit as mitigating evidence any information that might conceivably help a defendant's case."); *Owens*, 549 F.3d at 419 ("*Lockett* does not mean that the defense has *carte blanche* to introduce any and all evidence that it wishes" (citation omitted)); *Weisheit*, 26 N.E.3d at 9 ("the trial court is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance or to give the proffered mitigating circumstances the same weight the defendant does") (citation omitted).

[156] *See, e.g.*, *Graham v. Collins*, 506 U.S. 461, 477 (1993) (denying federal habeas corpus relief because the ruling sought "would be a 'new rule' under *Teague [v. Lane*, 489 U.S. 288 (1998)]"); *Saffle v. Parks*, 494 U.S. 484, 486 (1990) (holding petitioner not entitled to federal habeas relief because the principle

even new rules that merely expand or refine an existing right cannot be applied to cases on collateral review.[157] And this Court's precedent does not support such a rule in any event. Underpinning all of this Court's precedent is the demand that each defendant be treated as a "uniquely individual human being[]" and *not* as a member of "a faceless, undifferentiated mass."[158] The jury must consider "the unique characteristics of the perpetrator."[159] This Court should reject Morva's suggestion that "group statistical data" that demonstrates only the effectiveness of prison security measures[160] should inform a capital sentencing jury's individualized assessment of the defendant's moral culpability.

Morva demonstrates no error, no unsettled legal issue, no conflict, and no other reason for the Court to grant certiorari. Virginia treated Morva as a unique individual and provided his jury "with an adequate vehicle for expressing its reasoned moral response to his

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he asserted for relief was "a new rule within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989)").

[157] *See, e.g.*, *Chaidez v. United States*, 133 S. Ct. 1103, 1113 (2013) (holding that *Padilla v. Kentucky*, 559 U.S. 356 (2010), announced a new rule governing what constituted the effective assistance of counsel; thus, *Teague* barred application of the rule to "defendants whose convictions became final prior to *Padilla*").

[158] *Woodson*, 428 U.S. at 304.

[159] *Franklin*, 487 U.S. at 182.

[160] *Morva I*, 683 S.E.2d at 565.

mitigating evidence"[161] when determining his punishment for the murders of Derrick McFarland and Corporal Eric Sutphin.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ALICE T. ARMSTRONG
Senior Assistant Attorney General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
202 North 9th Street
Richmond, VA 23219
(804) 786-5315 direct dial
(804) 786-1108 facsimile
aarmstrong@oag.state.va.us

MARK R. HERRING
Attorney General of Virginia

MICHAEL T. JUDGE
MATTHEW P. DULLAGHAN
Senior Assistant Attorneys General

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[161] *Abdul-Kabir*, 550 U.S. at 263 (internal quotations and citation omitted).