No. 16-589

In the
Supreme Court of the United States

WILLIAM CHARLES MORVA,
PETITIONER,

v.

DAVID ZOOK, WARDEN,
RESPONDENT.

On a Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF *AMICUS CURIAE*, THE VIRGINIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONER MORVA

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CAPITAL CASE

QUESTION PRESENTED

The question presented is:

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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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37, the Virginia Association of Criminal Defense Lawyers ("VACDL") respectfully requests that this Court accept the following *amicus curiae* brief in support of Petitioner, William Charles Morva. Petitioner and Respondent have consented to the filing of this brief. (See letters of consent in addendum).

VACDL was originally incorporated in 1992 as the Virginia College of Criminal Defense Attorneys, but changed its name in December 2002 to the Virginia Association of Criminal Defense Lawyers. VACDL is a statewide organization of Virginia attorneys whose practices are primarily focused on the representation of those accused of criminal violations. It operates exclusively for charitable, educational, and legislative purposes, and has approximately 530 members.

VACDL's mission is to improve the quality of justice in Virginia by seeking to ensure fairness and equality before the law. In particular, VACDL works to protect those individual rights which are guaranteed by the Virginia and United States

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[1] Pursuant to S. Ct. R. 37.6, *Amicus* states that no counsel for a party authored any part of this brief, and that no counsel or another other party or entity, other than *amicus*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

Constitutions in criminal cases; resists efforts to curtail those rights; and encourages, through educational programs and other assistance, cooperation and collaboration among lawyers. To achieve these goals, VACDL participates in legislative matters relating to issues of criminal justice, works with the judiciary to improve the services available to those who appear in court, and provides continuing legal education to practitioners seeking to enhance their skills. VACDL has appeared as amicus curiae in appellate cases in the Commonwealth of Virginia and has also appeared before this Court in cases addressing issues relating to criminal justice. *See Bell v. Kelly*, No. 07-1223 (2008); *Walker v. Washington*, No. 05-6942 (2005).

VACDL's members are actively involved in representing defendants in death penalty cases in trial, appeals, and post-conviction proceedings. In the course of these representations, VACDL's members have developed expertise in the investigation and presentation of mitigation evidence. By virtue of its members' knowledge of, and experience with Virginia's criminal justice system, VACDL has a perspective on the issues before this Court in this case that might not be as adequately conveyed by another party.

The members of VACDL have a strong interest in having Virginia adhere to the same rule of fairness as the other death penalty states and federal circuits on the admissibility of mitigating evidence about conditions of confinement for defendants whom we represent that are facing either a death sentence or sentence to life in prison without parole based on claims of future dangerousness. VACDL accordingly

supports Petitioner's request that this Court grant certiorari, hear this case, and reverse the judgment of the Fourth Circuit.

VACDL requests that this Honorable Court accept this brief of *amicus curiae* in support of Petitioner Morva.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has held that the death penalty, the ultimate penalty, is so serious that a jury considering whether or not to impose it is entitled to be presented with evidence that might lead them to impose a sanction other than death. In cases where future dangerousness is a claimed basis for the death sentence, evidence about the degree of danger a defendant poses in the future is allowed in federal courts and death penalty states nationwide. Virginia stands alone in excluding evidence about conditions of confinement as it relates to the question of future dangerousness. Even though Virginia recognizes and admits that such evidence can establish a lower risk of future dangerousness, its highest court refuses to allow a jury to consider that evidence. In that court's view, the only constitutionally relevant evidence about future dangerousness is the defendant's prior record, the circumstances of the offense, and his character or background. Virginia looks only to inclination, and refuses to consider capability, when it comes to future dangerousness. The Fourth Circuit decision sustaining Virginia's position is inconsistent with this Court's precedent and denies Virginia capital defendants the same due process rights they would have in the other courts in this Country.

ARGUMENT

I. This Court's prior decisions hold that a defendant facing the death penalty based on a claim of future dangerousness is entitled to present mitigating evidence relating to how much of a risk he poses.

This Court has rightfully insisted that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). The imposition of death by public authority is so profoundly different from all other penalties, that a defendant in a capital case must be treated with a degree of respect that is far more important than in noncapital cases. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). When making a determination about whether the state will execute a defendant, this Court has found that it is essential to have that decision made by an informed sentencer. The routine exclusion in Virginia's capital cases, such as this case, of evidence about the conditions of confinement imposed on a defendant, if a jury chooses prison and life without parole instead of death, means that the decision to condemn a defendant to death is not informed and reasoned. That is not consistent with due process, as required by this Court's precedent, including the leading cases of *Skipper v. South Carolina*, 476 U.S. 1 (1986) and *Simmons v. South Carolina*, 512 U.S. 154 (1994).

This Court has recognized that due process in death penalty cases entitles a defendant to present all mitigating evidence which could support a decision that the defendant not be sentenced to death. *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), affirmed and expanded on the line of due

process decisions, including the decision in *Eddings v. Oklahoma*, *supra*, which requires that the sentencer in capital cases consider a broad range of mitigation evidence that cannot be limited to narrow categories. 455 U.S. at 112. In *Eddings*, this Court rejected the application of the death penalty because the sentencing court would not consider mitigating evidence about Eddings's traumatic upbringing. 455 U.S. at 112-117. The sentencing court limited what kind of evidence could be considered in mitigation, and those narrow limits were not consistent with due process. *Eddings*, 455 U.S. at 113-115. State courts may not prevent the presentation of mitigating evidence bearing on the claimed basis for the death penalty, nor may the sentencer refuse, as a matter of law, to consider such relevant mitigating evidence. What is relevant to the decision to impose the death penalty is not to be narrowly limited. Instead, the sentencer is required to consider a broad range of mitigation evidence, which, in *Eddings,* was the specific characteristics of the defendant and the impact of his horrendous childhood on him.

In *Skipper*, this Court expanded on the application of the principle that there is a due process right to a broad range of mitigation evidence and allowed Skipper to present evidence about his peaceable adjustment to prison life, which was necessary to allow him to rebut the claim that he would pose a risk of future dangerousness in prison. 476 U.S. at 6-7. In *Skipper*, this Court found that mitigation evidence may not be limited so as to prevent the defendant from meeting the claim that death should be imposed. *Id.* at 4-5. Mitigation evidence is relevant when it could serve "as a basis for a sentence less than death." *Id.* The sentencer

may not refuse to consider nor be precluded from considering "any relevant mitigating evidence." *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (citing *Eddings*, 455 U.S. at 114). As this Court noted in *Skipper*, "[t]hese rules are now well established". 476 U.S. at 4.

Future dangerousness is an aggravator that a sentencer is often asked to consider when determining whether to impose the death penalty. Future dangerousness determinations call for a prediction of whether a defendant *will* pose a danger in the future to others in the environment where they will be, *i.e.*, in cases like this in Virginia, prison for the rest of their life. Evidence that the defendant would not pose a danger if spared, but incarcerated, "must be considered potentially mitigating." *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986). A defendant's "probable future conduct in prison" is a critical aspect of the inquiry. *Skipper*, 476 U.S. at 5 n.1. Indeed, "the question of a defendant's likelihood of injuring others in prison is precisely the question posed by" the future dangerousness issue. *See Franklin v. Lynaugh*, 487 U.S. 164, 179 n.9 (1988). *Skipper,* and the authorities cited within, make it plain that deciding future dangerousness requires the sentencer to consider the context of the environment in which the defendant will be kept when deciding whether or not they present a future danger to others and whether they should be executed to prevent a likely future danger.

In *Simmons v. South Carolina* this Court held 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." *Simmons v. South Carolina*, 512 U.S. 154, 164 (1994)

(citing *Gardner v. Florida*, 430 U.S. 349, 362 (1977)). In *Simmons*, the state argued that the defendant would pose a future danger to society unless he was executed. The jury was not informed that a life sentence, which was the only alternative to the death penalty, would mean that he would be sentenced to spend the rest of his natural life in prison without parole. *Simmons,* 512 U.S. at 158. The trial court did not allow Simmons to inform the jury deciding his fate that the alternative to the death penalty would ensure that he would be in prison for the rest of his life and would not be released on parole, which was evidence that he would not pose a future danger to society at large, as argued by the state. 512 U.S. at 158, 165. The jury, during its deliberations on sentencing in that case, sent a note to the trial court asking about Simmons's parole eligibility, but the court responded that the jury could not consider Simmons's parole eligibility in reaching its decision. *Id.* at 160. This Court recognized that the jury may have believed it possible that Simmons would be released on parole if he were not executed. *Id.* at 161. Refusing to allow evidence that established that Simmons would not be paroled had the effect of creating a false choice for the jury between sentencing him to death and sentencing him to what they could have mistakenly believed was a limited period of incarceration. *Id.* at 161-162. Handicapped in this way and uninformed, the jury chose death. That sentence was vacated.

This Court, applying the principle that a sentencing jury in a capital case needs to know facts that could cause them to make a choice other than death, *i.e.* relevant mitigating facts, found that denial of true and accurate information about the

nature of the incarceration that Simmons would face as an alternative to the death penalty denied Simmons due process. *Simmons*, 512 U.S. at 163-164. The trial court denied Simmons the ability to rebut the claim that he posed a future threat if not executed, and this lack of knowledge about the condition of incarceration without release, which occurred with the alternative sentence, led to the imposition of the death penalty. *Id.* at 162. The state was not allowed to raise the specter of Simmons's future dangerousness generally, and then deny him the right to demonstrate that he would not actually be a danger to society because he would be locked away in prison for the rest of his life and would not be present in society. *Id.* at 165. This Court condemned the "grievous misperception" that "was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility". *Id.* at 162. The true alternative, actual life without parole, was kept from the jury to induce them to sentence the defendant to death. *Id.* at 161-162 (1994). That denial violated his right to due process.

This Court's precedent makes it plain that the sentencing jury, in capital cases, must be allowed to have the full panoply of mitigating evidence presented to it that might cause them not to sentence to death when making the serious and profound decision about whether the state will kill a convicted defendant. Such evidence is relevant to this momentous decision. The government is not allowed to create a false impression to mislead a sentencer into imposing the death penalty based on incomplete information about the actual danger posed by a defendant facing a death sentence based on a claim

of future dangerousness. Such a practice denies fundamental due process rights when the most serious sanction the state possesses is being considered.

II. Virginia does not permit mitigating evidence about what risk a defendant actually poses when the state seeks the death penalty based on a claim of future dangerousness.

Virginia's Supreme Court does not allow the admission of mitigation evidence about a defendant's confinement in prison which goes directly to the issue of whether a defendant possesses a risk of future dangerousness when the state seeks death based on a claim of future dangerousness. Courts in Virginia ignore the clearly established rule from this Court that a sentencer must be allowed to consider evidence which might serve as a basis for a sentence other than death. *Simmons*, 512 U.S. at 164; *Skipper*, 476 U.S. at 4-5 (citing *Eddings*, 455 U.S. at 114). Virginia courts exclude mitigating evidence regarding future dangerousness unless it is narrowly limited to a particular defendant's prior criminal record, the circumstances of the offense, or the defendant's character and background. *Morva v. Commonwealth*, 278 Va. 329, 349-350, 683 S.E.2d 553, 564-565 (2009); *Lawlor v. Commonwealth*, 285 Va. 187, 250-251, 738 S.E.2d 847, 883-884 (2013). This erroneous exclusion of constitutionally required evidence can be traced to the Virginia Supreme Court's expressed misconception about what information is relevant when deciding whether to

sentence a defendant to death on a claim of future dangerousness.

The Virginia Supreme Court has clearly pronounced its view that the relevant inquiry for future dangerousness only permits the narrow and limited consideration of whether a defendant is *inclined* towards violence, not whether the defendant is actually *capable* of violence. *Lawlor,* 738 S.E.2d at 883-884. The focus, according to that court, is on attitude or inclination, and evidence that the defendant is not capable of violence and does not pose an actual risk of future danger is not considered relevant because that court erroneously believes that the sentence of death is to be based solely on whether or not there is an inclination towards future dangerousness. *Id.* That a defendant does not actually present a risk of future danger is not admissible in Virginia. *Id.* This *sui generis* rule flies in the face of this Court's precedent. If only those narrow, limited categories of mitigation that Virginia allows were all that is relevant to future dangerousness, then there would have been no need to render the decision in *Skipper*, about adjustment to prison life, nor in *Simmons*, about being removed from general society and placed in a prison without possibility of release for the rest of his natural life. *Simmons*, and its holding on life without parole, in particular, makes it clear that evidence about the defendant's capacity to engage in future acts of violence is relevant and admissible. The decision to execute a defendant may not be based, as it is in Virginia, merely on the attitude or inclination of a defendant. A sentencing jury must also be allowed to consider capability which, as in *Simmons,* means knowing about his confinement.

In Petitioner's direct appeal to the Virginia Supreme Court, that court rejected his claim that he was entitled to have the sentencer consider the actual conditions that he would face in prison if not put to death, and whether, given those conditions, he would pose a future danger to society. That court even admitted that "[t]he 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." *Morva*, 683 S.E.2d at 565-566 (emphasis added). Despite acknowledging that the evidence of prison conditions would show that Petitioner would pose less of a danger to society in the future because of the nature of his confinement, that court nevertheless held that such information must be withheld from the jury deciding life or death on a claim of future dangerousness because actual risk of future danger is not relevant; only attitude counts. *Id.* The withholding of facts, which the Virginia Supreme Court agreed directly bore on future dangerousness, left the sentencer with an incomplete and mistaken picture and denied them the opportunity to consider mitigating facts that could be found to justify imposing a sentence other than death. That rule of excluding facts about the actual risk of future danger is the controlling rule from the highest court in Virginia. It should not have been upheld by the Fourth Circuit in this case because it conflicts with this Court's prior decisions

and how other death penalty states and federal courts apply those decisions.

Denying sentencing juries, which are deciding life and death, the access to facts directly related to whether a defendant poses a risk of future danger was rightfully condemned in *Simmons*. *See Simmons,* 512 U.S. at 161-162. The decision in *Simmons* was not about circumstances unique to him alone. Requiring the admissibility of evidence about what life without parole meant for all such inmates was the application of the principle that the sentencer must be allowed to consider, as relevant evidence, that might lead to imposing a penalty other than death. In *Simmons*, that evidence was whether Simmons would pose a future danger by being present in society at large again when he actually would be locked up in prison for the rest of his life. The mitigating evidence was about his capacity, and the jury was entitled to know that he would never be released from prison. That evidence went directly to his capacity to be a future danger. This Court recognized its relevance. It was not the limited, narrow evidence related to the offense of conviction, the prior record, or the background and characteristics of the defendant, which is all that is allowed in Virginia.

Despite this Court's rulings, the Virginia Supreme Court, supported by the Fourth Circuit, adamantly claims that all that is constitutionally relevant to future dangerousness are the defendant's prior record, the circumstances of the offense, and the character and background of the defendant. *See Lawlor,* 738 S.E.2d at 883-884; *Morva*, 683 S.E.2d at 565. The Virginia Supreme Court is quite clear that the *actual likelihood* of danger or risk of harm posed

by one confined in prison for life is not relevant when deciding between confinement for life without parole or death:

> 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.

Morva v. Commonwealth, 683 S.E.2d at 565.

The Virginia Supreme Court's rule, narrowly limiting mitigation evidence, is at odds with the holding in *Skipper* that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." *Skipper*, 476 U.S. at 5. The rationale for Virginia's singular rule, is not only contrary to this Court's holding in *Skipper* and *Simmons, et al.*, but it is also contrary to the application of those decisions by other death penalty states and federal courts applying this Court's precedent. *See* Pet. for Cert. at 19-22. Virginia's rule denying due process for capital defendants is based on its mistaken view that the only thing that matters for a future dangerousness determination is the defendant's attitude and predisposition towards violence, not his actual capacity for violence while in prison:

> [T]he relevant inquiry is not whether [a defendant] ***could*** commit criminal acts of violence in the future but whether he ***would*** [be inclined to] . . . 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 . . .

Morva v. Commonwealth, 683 S.E.2d at 564-565 (emphasis added).

Four years after that decision in *Morva*, the Virginia Supreme Court reaffirmed their error in *Lawlor*. 738 S.E.2d at 882-883. There, that court, consistent with its misapprehension of what is relevant in future dangerousness cases, held that "the question of future dangerousness is about the defendant's ***volition***, not his ***opportunity***, to commit acts of violence. Evidence of custodial restrictions on opportunity therefore is not admissible." *Lawlor,* 738 S.E.2d at 882 (emphasis added). Virginia maintains that the "issue is not whether the defendant is physically capable of committing violence, but whether he has the mental inclination to do so." *Lawlor*, 738 S.E.2d at 882. This erroneous approach to mitigation evidence in future dangerousness cases was approved by the Fourth Circuit when it accepted the Virginia Supreme Court's ruling limiting mitigation evidence in Mr. Morva's case. *Morva v. Zook*, 821 F.3d 517, 526-527 (4th Cir. 2016). It is, therefore, a Virginia defendant's attitude which condemns them to death, without regard to whether or not they pose an actual risk of future danger. In Virginia, the state can and does sentence people to death for a bad attitude. That is not consistent with this Court's precedent, and the Fourth Circuit's decision sustaining Virginia's mistaken interpretation is in error.

Under this misguided standard, carried to its logical end, Virginia would execute an angry paraplegic who could not harm anyone merely

because of his unattainable inclinations. As a matter of law, Virginia's rule excluding evidence about whether or not a defendant actually poses a risk of a future danger does not allow the sentencer to consider the complete information about future dangerousness mandated by *Simmons*, *Skipper*, and *Eddings*. 512 U.S. at 161-162; 476 U.S. at 4; 455 U.S. at 110.

III. Virginia's rule significantly impacts defendants facing death on a claim of future dangerousness.

Since the Virginia Supreme Court decisions in *Morva*, *supra,* and *Lawlor*, *supra,* there have been many death penalty cases in Virginia. Those defendants and those yet to come are denied the fundamental due process right to have the sentencing jury deciding life or death based on future dangerousness informed of facts directly bearing on whether or not the defendant actually poses a future danger.

A fundamental principle in our adversary system is that a defendant, in a criminal case, has the right to present evidence countering a prosecution claim that has been made against them. *See, e.g., United States v. Nixon*, 418 U.S. 683, 709 (1974) ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of

evidence."). When the prosecution claims that a defendant should be put to death because, if not, they pose a serious risk of future danger, then a defendant has the right to call for and present evidence which counters that claim. If a defendant can show, for example, that he will not be free in the community at large, but will be locked up in prison for the rest of his natural life, then that evidence about whether he poses a risk of future danger is relevant and must be allowed. By the same token, a defendant is entitled to let the jury know the conditions of that confinement which directly impact the risk he could pose to other inmates, guards, or prison staff. The Virginia Supreme Court even acknowledged in Petitioner's case that solitary confinement, exercising alone or only in a very small group, and being shackled and escorted whenever moved directly reduces the risk of future danger posed by an inmate, such as Petitioner, because of such conditions. That court's decisions, however, do not allow the sentencer to know or consider that evidence. That evidence, which admittedly makes it less likely that a defendant poses a future danger, is not admissible in Virginia. *Lawlor v. Commonwealth*, 738 S.E.2d at 882-883; *Morva v. Commonwealth*, 683 S.E.2d at 565-566. Virginia's errant rule is out of step with this Court's prior decisions, and the application of those prior decisions by other states and federal courts.[2]

The following trial level death penalty cases are a sample of cases, collected by the VACDL, where Virginia's trial courts, applying the aberrant Virginia

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[2] *See* Petition for Cert. at 19-22.

Rule, would not allow defendants to present relevant evidence about conditions of confinement that might persuade a sentencer not to impose the death penalty but to sentence them to life without parole:

- *Commonwealth v. Richard Clay Smith*, Augusta County, case number CR15-32-00-03-08;
- *Commonwealth v. Ronald Hamilton*, Prince William County, case numbers CR16000897-906; -1257; -1260-62; -1265; -1266;
- *Commonwealth v. Sapien Edmonds*, Arlington County, case number CR13000602-608;
- *Commonwealth v. Javon Arrington*, Rockingham County, case number CR14000476-481;
- *Commonwealth v. Natalia Wilson*, Prince William County, case numbers CR10000989-90; -1031-37;
- *Commonwealth v. Jose Reyes-Alfaro*, Prince William County, case numbers CR11000854-857; -907-914.

The VACDL is very concerned about the fundamental lack of fairness for Virginia's capital defendants facing claims they should be executed because of future dangerousness. Defendants in capital cases in Virginia are entitled to the same fair opportunity to defend themselves that they would enjoy in federal death penalty cases, or in the various death penalty states. That requires allowing consideration of the actual risk of future danger and not confining the question to the limited, narrow assessment of inclination. The Fourth Circuit erroneously sustained Virginia's aberrant rule of limiting mitigation evidence which withholds from the jury evidence of the actual risk of future dangerousness. Morva's Petition ought to be granted

so that the Fourth Circuit's decision upholding the Virginia rule, and that rule itself, can be overturned.

* * *

This Court has held that there ought to be uniformity and fairness in cases where the ultimate penalty is to be imposed, and if that is not done, a death sentence ought to not be allowed. That is an important principle in our legal system and can only be brought to bear for cases in Virginia if this Court grants this Petition, hears this case, and protects the rights of capital defendants in our Commonwealth to a fair chance to have an informed jury make the ultimate decision.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari, and reverse the judgment of the United States Court of Appeals for the Fourth Circuit and remand with instructions to grant habeas relief.

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