No. 16-589

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

REPLY BRIEF FOR PETITIONER

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Respondent opposes review primarily by attacking a straw man, contending that Mr. Morva seeks a "new rule" requiring the admission of any evidence that he "unilaterally" deems relevant to his sentencing. As the petition explains, however, it is this Court's precedent, not a new rule, that clearly establishes a capital defendant's right to introduce evidence that he "would not pose a danger if spared (but incarcerated)." *Skipper* v. *South Carolina*, 476 U.S. 1, 5 (1986). It is this Court that has repeatedly declared such evidence relevant, both as mitigating evidence and to rebut the prosecution's claim of future dangerousness. Respondent concedes that the state courts' refusal to appoint Dr. Cunningham rested solely on the determination that his proposed testimony would be irrelevant. Yet respondent offers little response to *Skipper* or the other decisions of this Court establishing the relevance of that evidence beyond dispute. The Court should grant the petition to ensure that Virginia capital defendants are afforded the constitutional rights recognized by this Court and respected in every other death-penalty jurisdiction.

I. VIRGINIA'S RULE CONTRAVENES CLEARLY ESTABLISHED LAW

A. A capital defendant's right to introduce evidence that he will pose little risk of violence in prison—precisely the evidence Mr. Morva sought to present—is clearly established under this Court's precedent. Respondent's misapprehension of that precedent confirms the need for review.

Future Dangerousness. As the petition explains, a capital defendant has a clearly established due process right to rebut allegations of future dangerousness with evidence that he is unlikely to commit future vio-

lent acts in prison. Pet. 14-17. Respondent does not dispute that proposition, arguing instead (Opp. 19-20) that evidence drawing on "group statistical data" is "not particular" to the defendant and cannot be relevant to an individualized sentencing determination. That position is factually and legally flawed.

As an initial matter, the statistical assessment Mr. Morva sought to introduce was, in fact, "individualized." As the state supreme court acknowledged (Pet. App. 183a)—and respondent elsewhere accepts (Opp. 7-8)—the assessment would have predicted Mr. Morva's individual likelihood of future violence in prison, based not only on security conditions and rates of violence in Virginia prisons, but also on his personal characteristics, including his age, education level, and prior behavior while incarcerated. Pet. 28.

Respondent's argument would fare no better, however, even if it were correct that Mr. Morva sought to present only "group statistical data." This Court has repeatedly described the future-dangerousness inquiry as requiring a prediction of the defendant's *actual likelihood* of future violence. Pet. 14-15. Statistical analysis of inmates that share a defendant's individual characteristics is one type of evidence from which a jury can draw inferences about the defendant's likely future behavior—and a particularly useful type, at that. As the American Psychological Association has explained, such analysis has "proven successful" in assessing likelihood of future violence and is consistently more reliable than many other approaches. APA Amicus Br. 14-15, 19-21, *Coble* v. *Texas*, No. 10-1271 (U.S. May 18, 2011).

Furthermore, this Court has already held that evidence need not be specific to the defendant to be ad-

missible. A jury's determination of future dangerousness can be informed even by general information. For example, *Simmons* v. *South Carolina* held that a defendant is constitutionally entitled to inform the jury that life imprisonment carries no possibility of parole—information that is decidedly not defendant-specific. 512 U.S. 154, 168-169 (1994) (plurality opinion); *see California* v. *Ramos*, 463 U.S. 992, 1003 (1983) (in assessing future dangerousness, jury can consider governor's power to commute a prison sentence). The opposition offers no response.

Respondent thus errs in concluding that no clearly established federal law guarantees a capital defendant the right to introduce rebuttal evidence consisting in part of group statistical data, particularly where the data are analyzed in light of the defendant's individual characteristics. The applicable principle is clear: A defendant must be permitted to rebut the prosecution's claim of future dangerousness with evidence indicating he is unlikely to commit violent acts in the future, regardless of whether the evidence applies to one defendant or many. The "necessity to apply" that principle here should have been "beyond doubt." *White* v. *Woodall*, 134 S. Ct. 1697, 1706 (2014); *see also Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007) (AEDPA does not "prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced'"); Pet. 26-27.[1]

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[1] Respondent also suggests (at 8) Dr. Cunningham's assessment could not be "rebuttal" evidence because the prosecution did not "introduce[] any evidence concerning Morva's prospective life in prison." But a defendant has the right to introduce rebuttal evidence whenever future dangerousness is "at issue." *Simmons*, 512 U.S. at 171 (plurality opinion); *see also Kelly* v. *South Caroli-*

Mitigation. In *Skipper*, this Court held that a defendant's ability to exist in prison without endangering others is "an aspect of his character that is by its nature relevant to the sentencing determination." 476 U.S. at 7; *see* Pet. 27-28. That principle is "clearly established" for AEDPA purposes, *see Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 246-247 (2007), and respondent does not dispute it. Indeed, respondent recognizes (at 23) that "[m]itigating evidence includes the defendant's ability to make a 'well-behaved' adjustment to prison because that adjustability is a feature of his character." Respondent instead invokes *Skipper*'s suggestion that not every facet of a defendant's prospective adjustment will be relevant. For example, the Court indicated that a defendant's "personal hygiene practices" would have no mitigating value. 476 U.S. at 7 n.2. But Mr. Morva's proposed evidence did not concern trivial details. Rather, it tended to show—just as in *Skipper*—that he would be "a well-behaved and disciplined prisoner." *Id.* *Skipper* leaves no doubt that such evidence showing a likelihood of good behavior in prison is "a feature of [his] character that is highly relevant to a jury's sentencing determination." *Id.*

Respondent cites (at 22-24) *Kansas* v. *Marsh*, 548 U.S. 163, 174 (2006), and *Oregon* v. *Guzek*, 546 U.S. 517, 526 (2006), as authority for the State to decide how "strictly or expansively" to apply the Court's mitigation jurisprudence. Neither case supports that proposition. *Guzek* held only that a defendant cannot introduce at

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na, 534 U.S. 246, 252-253 (2002). That was unquestionably the case here, given the prosecution's pretrial notice that it would seek the death penalty based on future dangerousness (CAJA72), and the prosecution's explicit argument in closing that Mr. Morva "without a doubt" would threaten to "hurt or kill[]" prison guards if sentenced to life imprisonment (Pet. 9-10).

sentencing new evidence of innocence that contradicts the guilty verdict. And *Marsh* reaffirmed that States can guide the jury's balancing of aggravating and mitigating factors. Neither decision restricted the admissibility of mitigating evidence. To the contrary, *Marsh* reiterated that the jury must be allowed to consider "*any* evidence relating to *any* mitigating circumstance." 548 U.S. at 176.

Here, too, *Skipper*'s application should have been "beyond doubt." *White*, 134 S. Ct. at 1706. In *Skipper*, as here, the trial court relied on state-law precedent declaring evidence of a defendant's good behavior in prison "irrelevant and hence inadmissible." 476 U.S. at 3, 6-7. This Court held that ruling "[did] not pass muster" under its precedent. *Id.* at 6-7. *Skipper* thus clearly established that state law "cannot bar" consideration of a defendant's proffered mitigation evidence "if the sentencer could reasonably find that it warrants a sentence less than death." *McKoy* v. *North Carolina*, 494 U.S. 433, 441 (1990).

B. Virginia's exclusion of prison-violence risk-assessment evidence violates these clearly established principles. Pet. 23-29. Respondent suggests (Opp. 28-29) that Virginia does not "categorically exclude" such evidence, but the Supreme Court of Virginia's precedent leaves no room for dispute. Three years after this Court considered Mr. Morva's first petition for certiorari, the Supreme Court of Virginia made clear that evidence is inadmissible if it "narrowly assess[es] the defendant's continuing threat to prison society alone," or if it relies upon "a statistical model … to attempt to predict the probability of the defendant's future behavior." *Lawlor* v. *Commonwealth*, 738 S.E.2d 847, 883, 884 (Va. 2013). A prison risk assessment that draws on statistical data to conclude that a defendant will pose a

low risk of violence in prison thus cannot be admitted under Virginia law.

Respondent offers two main defenses of Virginia's approach generally and Mr. Morva's sentencing in particular. Neither has merit.

First, respondent argues (at 25-27) that Mr. Morva's rights were "vindicated" because he was able to present *some* mitigation and rebuttal evidence. But *Skipper* held that excluding the defendant's evidence of good behavior was error even though other defense witnesses had testified on the same subject. 476 U.S. at 7-8. The Court's decisions could not be clearer: A capital defendant has a right to introduce "*any and all* relevant mitigating evidence," *id.* at 8 (emphasis added), and to present any relevant rebuttal evidence when the prosecution alleges future dangerousness, *see Simmons*, 512 U.S. at 164 (plurality opinion).

Nor was the evidence Mr. Morva introduced sufficient to rebut the allegation of future dangerousness. The prosecution urged the jury to sentence Mr. Morva to death because he had a history of "shoot[ing] uniformed officers" and would therefore threaten "the safety and security of guards" if sentenced to life. Pet. 9-10. The prosecution further argued that Mr. Morva would be able to escape from prison as he had escaped from jail, and would "hurt[]" and "murder[]" officers and guards once he did. *Id.* at 9. Only Dr. Cunningham's testimony—unlike Captain Pilkins's (Opp. 25-26)—could rebut those contentions by showing that neither the prior murder of a law enforcement officer nor the defendant's escape history is associated with higher rates of prison violence. Pet. 7-8.

Similarly, the trial court's instruction that a life sentence meant life without possibility of parole could

not compensate for the exclusion of Dr. Cunningham's testimony. *Cf.* Opp. 25. As *Simmons* recognized, the "life-means-life" instruction *complements* a defendant's evidence that he will not commit "further acts of violence once he [is] isolated in a prison setting." 512 U.S. at 157 (plurality opinion); *see id.* at 165; *id.* at 176 (O'Connor, J., concurring in the judgment). It cannot *replace* that evidence. The instruction that Mr. Morva would remain in prison for life could assure the jury of his lack of future dangerousness only if the jury otherwise had reason to believe he would not pose a risk of violence in prison—a proposition Dr. Cunningham's testimony was uniquely capable of demonstrating.

Second, respondent contends (at 30) that Virginia law appropriately requires the jury to "treat the defendant as a 'unique[] individual.'" Mr. Morva agrees that individualized sentencing is "a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). But the Court's emphasis on individualized sentencing arose in response to mandatory sentencing schemes that "treat[ed] all persons convicted of a designated offense … as members of a faceless, undifferentiated mass." *Id.* The principal concern has been to ensure that the jury has the opportunity to consider not merely the crime of conviction, but *all* evidence relevant to the individualized sentencing determination. *See Marsh*, 548 U.S. at 171. Unsurprisingly, then, this Court has rejected the argument that a jury can consider only individualized evidence to engage in individualized sentencing. *See supra* pp. 2-3; *Ramos*, 463 U.S. at 1008 (capital jury is "free to consider a myriad of factors," including governor's commutation power). Admitting Dr. Cunningham's testimony would have furthered the goal of individualized sen-

tencing by giving the jury information that was "relevant and essential to achieving an individualized prediction" of Mr. Morva's likely future behavior. Pet. App. 200a-201a (Koontz, J., dissenting).

II. Virginia Is An Outlier

Virginia alone categorically excludes evidence assessing a defendant's risk of future violence in prison. Pet. 19-22. In arguing otherwise, respondent cites no decision from any other jurisdiction upholding the exclusion of an individualized prison-violence risk assessment where that evidence rebutted a claim of future dangerousness. Opp. 31-35. Most of the decisions respondent cites instead refute an argument Mr. Morva has never made: that evidence of generally harsh prison conditions always amounts to relevant mitigating evidence. *E.g.*, *State* v. *Maestas*, 299 P.3d 892, 965-966 (Utah 2012) (upholding exclusion of evidence regarding manner of execution and conditions in prison); *see generally* Opp. 31-32 n.142.[2]

Several of respondent's other citations only bolster Mr. Morva's position by recognizing that the future-dangerousness inquiry involves a forward-looking prediction of the actual likelihood a defendant will engage in future violence. Those decisions acknowledge the

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[2] In *Galloway* v. *State*, 122 So.3d 614, 641-642 (Miss. 2013), the court upheld the exclusion of testimony about prison conditions that was offered not to predict the defendant's future behavior, but to show that his "life would be a suffering existence." The court expressly noted that opinion testimony about a defendant's future conduct in prison would be admissible if the witness was qualified. And in *People* v. *Clark*, the defendant had forfeited any claim that the excluded testimony was relevant to future dangerousness. 372 P.3d 811, 895 (Cal.), *petition for cert. filed*, No. 16-7413 (U.S. Dec. 30, 2016).

relevance of a defendant's reduced ability to commit violent acts in prison. *E.g.*, *Coble* v. *State*, 330 S.W.3d 253, 268 (Tex. Crim. App. 2010). Indeed, the petition cites many of the same cases to demonstrate the conflict between these jurisdictions and Virginia's approach, under which courts are barred from considering "whether the defendant is physically capable of committing violence." *Lawlor*, 738 S.E.2d at 882; *compare* Pet. 21, *with* Opp. 32 & n.143.

The federal appellate decisions respondent invokes also do not support Virginia's approach. In *United States* v. *Johnson*, 223 F.3d 665, 671 (7th Cir. 2000), the trial court had *allowed* a psychologist to testify about the security conditions that would apply to the defendant. The court explained that "the defendant was of course entitled to counter the government's evidence that he would be a continued menace to society while in prison." *Id.* at 674 (citing *Gardner* v. *Florida*, 430 U.S. 349, 362 (1977) (plurality opinion)). It then noted, in dicta, that generalized evidence about the prison environment is not proper mitigating evidence, *id.* at 675—again, an argument that Mr. Morva has not made.

In *United States* v. *Taylor*, the court held that general information about prison violence *could* be admitted to rebut future dangerousness. 814 F.3d 340, 361-362 (6th Cir.), *petition for cert. filed*, No. 16-6392 (U.S. Oct. 6, 2016). Dr. Cunningham's testimony—which sought to explain, without any individualized analysis, that federal prisons confine inmates securely and that rates of prison violence are low—was properly excluded only because the prosecution had not argued the defendant would endanger other inmates or guards. *Id.* at 362-363. But that is precisely what the prosecution argued here. Pet. 9-10.

III. THIS CASE IS A GOOD VEHICLE

As respondent repeatedly admits (*e.g.*, Opp. 9, 14, 18-19), the sole basis of the Virginia courts' refusal to appoint Dr. Cunningham was the "irrelevan[ce]" of his proposed testimony under state law. The state courts did not purport to exercise discretion to deny his appointment on some other ground, and respondent offers no other reason why Mr. Morva would not have been entitled to Dr. Cunningham's appointment if his testimony had been deemed relevant. The Fourth Circuit accordingly addressed the relevance determination directly, holding that Virginia's rule excluding prison-violence risk-assessment evidence is "not unreasonable under U.S. Supreme Court precedent." Pet. App. 14a; *see* Pet. 33-34. The question presented—whether a state rule barring such evidence as irrelevant violates clearly established law—is thus squarely before this Court. Mr. Morva does not seek a "new rule" establishing his entitlement to the appointment of a particular expert (Opp. 35-36), but rather a straightforward application of this Court's clearly established law on the admissibility of evidence bearing on his likely future conduct in prison.

This Court has often granted certiorari in AEDPA cases—or even summarily reversed—to address the scope of the constitutional rights of criminal defendants, particularly in capital cases. Just two terms ago, the Court granted certiorari in *Brumfield* v. *Cain*, 135 S. Ct. 2269, 2276 (2015), to resolve whether a state court's refusal to grant an indigent petitioner the means to develop his *Atkins* claim was an "unreasonable application of … clearly established Federal law."[3]

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[3] The Court ultimately did not reach the merits of that question, holding that the state court's decision rested on an unreason-

See also, e.g., *Lafler* v. *Cooper*, 566 U.S. 156, 173 (2012) (state court unreasonably applied clearly established law); *Porter* v. *McCollum*, 558 U.S. 30, 44 (2009) (per curiam) (same); *Panetti*, 551 U.S. at 948 (same). In some of those cases, the lower courts had granted relief on grounds this Court determined were not clearly established, *see, e.g.*, *Marshall* v. *Rodgers*, 133 S. Ct. 1446, 1450 (2013) (per curiam); *Howes* v. *Fields*, 565 U.S. 499, 508 (2012); but it is no less important for this Court to intervene when a federal court allows a petitioner's execution to proceed even though his sentencing violated law that *is* clearly established. That is the case here.

Moreover, respondent does not—and could not—dispute the importance of the question presented for cases beyond Mr. Morva's. Unlike defendants in any other jurisdiction, Virginia capital defendants are barred from presenting evidence establishing their low risk of violence in prison—the setting to which they will be confined for life if not sentenced to death. Virginia's rule deprives all capital defendants in the Commonwealth of the most powerful possible rebuttal to the invocation of future dangerousness, leaving them unable to present a complete defense in violation of this Court's precedent. Pet. 29-31; Virginia Ass'n of Criminal Defense Lawyers Amicus Br. 13-16.

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able determination of the facts under 28 U.S.C. § 2254(d)(2). *See Brumfield*, 135 S. Ct. at 2276.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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