No. 13-167

In The
Supreme Court of the United States

MARK ERIC LAWLOR,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

Should this Court grant certiorari to review Lawlor's claim that the Constitution mandates a defendant be allowed to present evidence at sentencing which the state supreme court has ruled is irrelevant under the state statute, where this claim presents no compelling reason for review?

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STATEMENT OF THE CASE

A. Proceedings

On March 16, 2009, Mark Eric Lawlor was indicted in the Circuit Court for Fairfax County, Virginia, on two counts of capital murder: premeditated murder of Genevieve Orange in the commission of abduction with the intent to defile, and premeditated murder of Genevieve Orange in the commission of rape or attempted rape. *See* Va. Code Ann. § 18.2-31(1) and 18.2-31(5). From February 9 through 22, 2011, a jury in Fairfax County, Virginia, tried Lawlor for his crimes, finding him guilty of both counts. From February 23 through March 14, 2011, the same jury heard evidence in a separate sentencing proceeding.

On March 16, 2011, after two days' deliberation, the jury sentenced Lawlor to death for the capital murders he committed, finding beyond a reasonable doubt both that there was a probability, based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense, that he would commit criminal acts of violence that would constitute a continuing serious threat to society and that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim. *See* Va. Code Ann. § 19.2-264.4(C). On July 1, 2011, following a post-verdict hearing, the trial court imposed the sentences which had been fixed by the jury.

On January 10, 2013, the Supreme Court of Virginia affirmed Lawlor's convictions and sentences.

Lawlor v. Commonwealth, 738 S.E.2d 847 (Va. 2013). Lawlor filed his certiorari petition in this Court on August 5, 2013, and it was placed on the docket on August 6, 2013.

B. Facts

The Virginia Supreme Court found the following facts regarding Lawlor's crimes:

> The victim, Genevieve Orange, was found on the floor of the living area of her studio apartment. She was naked from the waist down, her bra and t-shirt had been pushed up over her breasts, and semen was smeared on her abdomen and right thigh. Her soiled and bloodied shorts and underpants had been flung to the floor nearby. She had been struck 47 times with one or more blunt objects.
>
> A bent metal pot was found near Orange's body. Its wooden handle had broken off and was found in the kitchen sink, near a bloody metal frying pan that had been battered out of its original shape. Some of Orange's wounds were consistent with having been struck with the frying pan.[1] Subsequent medical examination established that she had aspirated blood and sustained defensive wounds, together indicating that she had been alive and conscious during some part of the beating.
>
> [1] Other wounds may have been consistent with having been struck

by a hammer but no hammer was recovered.

Lawlor resided in Orange's apartment building. He also worked there as a leasing consultant and had access to keys to each apartment. On the eve of trial, Lawlor admitted "participation" in the murder.

A blood sample from Orange's body and a buccal swab from Lawlor resulted in the compilation of a polymerase chain reaction ("PCR") DNA profile for each person, consisting of type characteristics or alleles from 16 genetic regions on their respective DNA strands. Police and medical personnel also collected forensic evidence from Orange's body. This forensic material, the wooden pot handle, and the frying pan were subjected to DNA analysis resulting in the compilation of a PCR DNA profile for each sample. A comparison of the PCR DNA profiles revealed that every allele at each of the 16 genetic regions from the forensic material and the frying pan was consistent with either Orange or Lawlor, with one exception: DNA from a non-sperm sample recovered from Orange's abdomen included a fractional amount of a single allele that was not consistent with either person's DNA profile. However, each of the alleles at the 15 other genetic regions in the sample was attributable to either Orange or Lawlor, as was each of the alleles at all 16 genetic regions from the other forensic material and the frying pan. The statistical probability that an unrelated person other than

> Lawlor contributed the DNA foreign to Orange was 1 in more than 6.5 billion.

Lawlor, 738 S.E.2d at 859.

Lawlor's expert witness, Dr. Mark D. Cunningham, testified to his expert opinion that Lawlor posed a "very low likelihood of serious violence from being in prison." (Pet. App. 164a).

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

I. The state court's decision, applying state law, that evidence about the risks of violence by inmates generally, or the ability of prison authorities to restrain a defendant, is irrelevant under the state statute, presents no compelling issue of federal law, much less a compelling reason to grant certiorari.

Lawlor alleges that Virginia prohibits a capital defendant from presenting, during the sentencing phase of his trial, evidence of the risk that he will commit criminal acts of violence while in prison. He argues that such a prohibition violates both his Fourteenth Amendment right to rebut the prosecutor's evidence of "future dangerousness" and his Eighth Amendment right to mitigate the weight of that evidence. The Supreme Court of Virginia made no such categorical ruling. It committed no Constitutional error in holding that the trial court had not

abused its discretion by sustaining the prosecutor's specific objections to the proffered testimony of Mark D. Cunningham, M.D., Lawlor's expert.

Dr. Cunningham previously has offered similar evidence in Virginia capital cases, where it has been held not specific to the particular defendant and irrelevant. *See*, *e.g.*, *Morva v. Commonwealth*, 683 S.E.2d 553, 561-66 (Va. 2009), *cert. denied*, 131 S. Ct. 97 (2010), and *Porter v. Commonwealth*, 661 S.E.2d 415, 435-42 (Va. 2008), *cert. denied*, 556 U.S. 1189 (2009). In *Morva*, Dr. Cunningham summarized his methodology as follows:

> Dr. Cunningham . . . stated that in forming his opinion concerning the risk of Morva committing violent acts in prison, he would interpret Morva's criminal history, capital murder conviction, and projected life sentence in light of group statistical data regarding similarly situated inmates. . . . Dr. Cunningham stated that in doing the assessment, he would take into consideration Morva's prior behavior while incarcerated, his security requirements during prior incarcerations, his age, and his level of educational attainment. He also stated that preventative interventions and increased security measures could significantly reduce the likelihood that Morva would engage in violence in prison and that such information was essential to his expert opinion.

Morva, 683 S.E.2d at 558. The Commonwealth's objections detailed the same characteristics in

Dr. Cunningham's report for Lawlor. (Pet. App. 108a-113a, *see also* Pet. App. 291a-301a). The trial court correctly sustained the objection, holding that the report was "far in excess" of the testimony *Morva* allowed and limited Dr. Cunningham to evidence particularized to Lawlor. (Pet. App. 123a). The Virginia Supreme Court properly found no abuse of discretion in its so doing:

> We stress that characteristics alone are not character. Merely extracting a set of objective attributes about the defendant and inserting them into a statistical model created by compiling comparable attributes from others, to attempt to predict the probability of the defendant's future behavior based on others' past behavior does not fulfill the requirement that evidence be "peculiar to the defendant's character, history, and background" under *Morva*. 278 Va. at 350, 683 S.E.2d at 565. To the contrary, it is mere "statistical speculation." *Porter*, 276 Va. at 255, 661 S.E.2d at 442.

Lawlor, 738 S.E.2d at 884.

Critically, despite the trial court's correctly having sustained numerous objections to Dr. Cunningham's testimony, Lawlor ultimately was able to present the challenged testimony to his jury.

When Lawlor asked Dr. Cunningham, "have you reached an opinion as to the likelihood that Mr. Lawlor would commit criminal acts of violence that would constitute a continuing serious threat to society

if – in a prison environment?" the Commonwealth objected. (Pet. App. 161a). The Commonwealth argued, and the court agreed, that the Virginia Supreme Court has made clear that the issue of "future dangerousness" may not be limited to prison society. (Pet. App. 162a). The trial court properly held that narrowing the language from "society" to "prison society" was "misleading to the jury." *Id.*

Lawlor then asked Dr. Cunningham if he had reached an opinion on "future dangerousness." Dr. Cunningham testified, "I've reached an opinion of likelihood of acts, not of his future dangerousness." (Pet. App. 163a). When Lawlor asked, "the likelihood he would commit acts of violence?" Dr. Cunningham testified, "Serious acts of violence that would constitute a continuing threat to society in prison." The Commonwealth again objected, and the trial court had to correct Dr. Cunningham for not answering the question asked by Lawlor. *Id*.

However, when Lawlor next asked Dr. Cunningham for his opinion on risk assessment and Lawlor's adaptability to the prison environment, Dr. Cunningham gave his opinion, "That there is a very low likelihood of serious violence from being in prison," without any objection. (Pet. App. 164a). Indeed, Dr. Cunningham then explained that he took into account Lawlor's age, past behavior, education, employment, relationship with community members, correctional appraisal, prior confinement, intelligence, and other factors about Lawlor. (*See* Pet. App. 164a-170a). Dr. Cunningham was able to testify to

the very factors Lawlor now cites from his proffer of how Dr. Cunningham would testify. (Pet. at 6-7). Further, in discussing the factors he considered, "Dr. Cunningham testified without objection that Lawlor's records of incarceration covered a period of 120 months of intermittent custody and the only violent behavior recorded for the entire duration of that time was when he was the victim of two fist-fights in January 2009, for which he incurred no disciplinary action. Dr. Cunningham also testified that the Virginia Department of Corrections had classified Lawlor as presenting a low likelihood of committing violence." *Lawlor*, 738 S.E.2d at 885. Given that testimony, Lawlor's arguments to this Court are moot: he obtained the testimony he now says he wanted to present.[1]

The Virginia Supreme Court affirmed the trial court's evidentiary rulings on the merits. It first carefully reviewed its long-standing precedent defining the requirements for admitting the evidence Lawlor proffered as rebuttal evidence, including *Juniper v. Commonwealth*, 626 S.E.2d 383 (Va.), *cert. denied*, 549 U.S. 960 (2006). "The relevant inquiry is not whether a defendant could commit criminal acts

[1] Lawlor includes a lengthy footnote arguing that other testimony by Dr. Cunningham somehow did not "reach" the jury because the trial court repeatedly was obliged to sustain the same objection, whenever Lawlor or Dr. Cunningham refused to follow its rulings. (Pet. 29 n.5). Lawlor, however, does not acknowledge the unobjected testimony by his expert.

of violence in the future but whether he would." *Morva*, 683 S.E.2d at 564 (quoting *Burns v. Commonwealth*, 541 S.E.2d 872, 893, *cert. denied*, 534 U.S. 1043 (2001)). "In other words, 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.

> Accordingly, evidence of restrictions on a prisoner's physical capacity to commit violence due to generalized prison conditions is not relevant:
>
> > Increased security measures and conditions of prison life that reduce the likelihood of future dangerousness of all inmates is general information that is irrelevant to the inquiry required by Code §§ 19.2-264.2 and 19.2-264.4(C). *See* [*Juniper*, 271 Va. at 426-27, 626 S.E.2d at 423-24]; *Porter*, 276 Va. at 252, 661 S.E.2d at 440. The generalized competence of the Commonwealth to completely secure a defendant in the future is not a relevant inquiry. Our precedent is clear that a court should exclude evidence concerning the defendant's diminished opportunities to commit criminal acts of violence in the future due to the security conditions in the prison. *Burns*, 261 Va. at 339-40, 541 S.E.2d at 893-94.

> *Morva*, 278 Va. at 350, 683 S.E.2d at 565. In short, 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.

Id.

Lawlor asserts that *Morva* "ruled inadmissible an 'individualized assessment . . . of the likelihood that Mr. Morva will commit acts of serious violence if confined for life.'" (Pet. 16). The Virginia Supreme Court did not find that Morva ever presented an "individualized assessment." Lawlor instead quotes the unproven assertion by Morva's expert, the ubiquitous Dr. Cunningham: "A reliable individualized assessment *can be made* of the likelihood that Mr. Morva will commit acts of serious violence if confined for life in the Virginia Department of Corrections." *Morva*, 683 S.E.2d at 562 (emphasis added). No such assessment was in fact prepared or proffered; Morva "failed to demonstrate the 'particularized need' necessary for appointment of Dr. Cunningham as an expert on his behalf." *Id*. The Virginia Supreme Court instead held inadmissible Dr. Cunningham's proposed testimony regarding "general factors concerning prison procedure and security that are *not individualized* as to Morva's prior history, conviction record, or the circumstances of his offense," which Dr. Cunningham said were "essential" to his expert opinion. *Id.* at 566 (emphasis added).

The Virginia Supreme Court found that Dr. Cunningham's proffered testimony in Lawlor's case did not satisfy its longstanding precedent:

> Lawlor argues that Dr. Cunningham's testimony was not about generalized prison conditions. He argues it was sufficiently particularized based on attributes such as his age, prior behavior while incarcerated, education, and employment history, which are admissible under *Morva*. He asserts that the court excluded the testimony simply because Dr. Cunningham's opinion was restricted to Lawlor's risk of dangerousness to "prison society" or "while in prison." He contends this was error because if sentenced to life imprisonment, prison society would be the only society to which he could pose a risk.
>
> We previously considered and rejected this argument in *Lovitt v. Commonwealth*, 260 Va. 497, 537 S.E.2d 866 (2000), *cert. denied*, 534 U.S. 815 (2001). In that case we said,
>
> > Code § 19.2-264.2 requires that the jury make a factual determination whether the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society." The statute does not limit this consideration to "prison society" when a defendant is ineligible for parole, and we decline Lovitt's effective request that we rewrite the statute to restrict its scope.

> *Id.* at 517, 537 S.E.2d at 879. Thus, evidence concerning a defendant's probability of committing future violent acts, limited to the penal environment, is not relevant to consideration of the future dangerousness aggravating factor set forth in Code §§ 19.2-264.2 and 19.2-264.4(C).

Lawlor, 738 S.E.2d at 882-83. Applying that precedent, it found that the testimony excluded by the trial court "ran afoul of *Lovitt* to the extent it was offered to rebut evidence of the future dangerousness aggravating factor," based on its findings of the nature of the proffered evidence:

> It expressed Dr. Cunningham's opinion of Lawlor's risk of future violence in prison society only, rather than society as a whole. To be admissible as evidence rebutting the future dangerousness aggravating factor under the statutes, expert opinion testimony must not narrowly assess the defendant's continuing threat to prison society alone. The court therefore did not abuse its discretion by excluding Dr. Cunningham's testimony as rebuttal evidence on the future dangerousness aggravating factor.

Lawlor, 738 S.E.2d at 883.

The Virginia Supreme Court next detailed the requirements for admissible mitigation evidence, including the factors defined in its decision in *Cherrix v. Commonwealth*, 513 S.E.2d 642 (Va.), *cert. denied*, 528 U.S. 873 (1999), and in this Court's decisions in

Lockett v. Ohio, 438 U.S. 586 (1978), and *Woodson v. North Carolina*, 428 U.S. 280 (1976):

> General conditions of prison life also are inadmissible as mitigating evidence. *Walker v. Commonwealth*, 258 Va. 54, 70, 515 S.E.2d 565, 574 (1999), *cert. denied*, 528 U.S. 1125 (2000), and *Cherrix*, 257 Va. at 309-10, 513 S.E.2d at 653. Our determination that such evidence may properly be excluded was based on the description of relevant mitigating evidence the Supreme Court set forth in *Lockett*. As noted above in Claim 1, that case did "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.'" *Cherrix*, 257 Va. at 309, 513 S.E.2d at 653 (quoting *Lockett*, 438 U.S. at 605 n.12). Evidence of general prison conditions therefore may properly be excluded even as mitigating evidence.
>
> Significantly, though, *Lockett* made clear that "'consideration of the character and record of the individual offender'" is required by the United States Constitution. 438 U.S. at 604 (quoting *Woodson*, 428 U.S. at 304). "[T]he sentencer [must] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* (emphasis in original). As noted above, future adaptability evidence is relevant character evidence. *Bell*,

> 264 Va. at 201, 563 S.E.2d at 714. Nevertheless, future adaptability evidence must be specific to the individual defendant or relevant "as a foundation for an expert opinion." *Id.*; *accord Juniper*, 271 Va. at 427, 626 S.E.2d at 424.
>
> In this context, a defendant's probability of committing violence, even when confined within a penal environment, is relevant as mitigating evidence of his character and is constitutionally mandated under *Lockett*, provided the evidence establishing that probability arises specifically from his character and is sufficiently personalized to him. As with evidence rebutting the future dangerousness aggravating factor, the relevant inquiry is narrowly focused on whether the particular defendant is inclined to commit violence in prison, not whether prison security or conditions of confinement render him incapable of committing such violence. Unlike inclination or volition, capacity – *i.e.*, what a prisoner could do – is not relevant to character.

Lawlor, 738 S.E.2d at 883, also citing *Bell v. Commonwealth*, 563 S.E.2d 695, 714 (Va. 2002) (whether evidence of defendant's disposition to adjust to prison life is admissible as "future adaptability" evidence), *cert. denied*, 537 U.S. 1123 (2003).

Lawlor argues that *Tennard v. Dretke*, 542 U.S. 274 (2004), rejected a "constitutional relevance" test for mitigation evidence. (Pet. 37). The rejected "test"

had nothing to do with *Lockett*'s recognition of the limits of relevant evidence. *See Lockett*, 438 U.S. at 605 n.12. *Tennard* rejected only the Fifth Circuit's narrower rule that mitigation evidence must have some "nexus" to the crime in question for its admission to be constitutionally required. 542 U.S. at 284, 289.

Lawlor objects that the Virginia Supreme Court "simply took it upon itself to narrow the definition of constitutionally protected mitigating evidence" by holding that "whether prison security or conditions of confinement render him incapable of committing such violence" is irrelevant. (Pet. 36). The Virginia Supreme Court simply defined the Virginia statute. But other courts have long held that evidence of prison security can never be "mitigating" in any sense.

> We add as a detail that while the defendant was of course entitled to counter the government's evidence that he would be a continued menace to society while in prison, that being evidence offered to establish an aggravating factor, 18 U.S.C. § 3593(c); *cf. Gardner v. Florida*, 430 U.S. 349, 362 (1977), he should not have been permitted to present to the jury, as he was, evidence of the existence of maximum-security federal prisons decked out with control units, in order to establish a mitigating factor. A mitigating factor is a factor arguing against sentencing this defendant to death; it is not an argument against the death penalty in general. *See Penry v. Lynaugh*, 492 U.S. 302, 328

> (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 n. 12 (plurality opinion). The argument that life in prison without parole, especially if it is spent in the prison's control unit and thus in an approximation to solitary confinement, sufficiently achieves the objectives aimed at by the death penalty to make the latter otiose is an argument addressed to legislatures, not to a jury.

United States v. Johnson, 223 F.3d 665, 674-75 (7th Cir. 2000), *cert. denied*, 534 U.S. 829 (2001). "Individualized sentencing of a capital defendant is one of the most important decisions the jurors will ever make in their own lives and testimony regarding generalities of prison invites the jury to make decisions based upon group characteristics and assumptions. This presentation, as the Seventh Circuit said in *Johnson*, could be directed to Congress to convince it there is no need for the death penalty, rather than to a jury." *United States v. Taylor*, 583 F. Supp. 2d 923, 942-43 (E.D. Tenn. 2008). The Virginia Supreme Court's decision simply recognized the same distinction:

> Further, testimony relevant to a defendant's propensity to commit violence while incarcerated necessarily must be personalized to the defendant based on his specific, individual past behavior or record. Otherwise it cannot constitute evidence of the defendant's personal character and would be irrelevant even for purposes of mitigation. *See Morva*, 278 Va. at 350, 683 S.E.2d at 565; *Juniper*, 271 Va. at 426-27, 626 S.E.2d at 423-24.

* * *

> To satisfy *Morva*'s standard, the evidence must consist of more than the recitation of shared attributes as the basis for predicting similar behavior. Evidence of a defendant's objective attributes may be relevant as foundation for expert opinion establishing his character, history, and background under this standard. *See Juniper*, 271 Va. at 427, 626 S.E.2d at 424; *Bell*, 264 Va. at 201, 563 S.E.2d at 714. However, the mere fact that an attribute is shared by others from whom a statistical model has been compiled, and that the statistical model predicts certain behavior, is neither relevant to the defendant's character nor a foundation for expert opinion. *See Porter*, 276 Va. at 255, 661 S.E.2d at 442. Merely stating that the percentage of violent crimes committed by a specified demographic group sharing one of the defendant's attributes is lower, based on statistical models, than others who do not share it does not suffice.

Lawlor, 738 S.E.2d at 883-84.

Lawlor proffered his expert's expected testimony in question-and-answer form. *Lawlor*, 738 S.E.2d at 884-85. The first question-and-answer proffered the following:

> Q: What is your expert opinion as to how Mark Lawlor's behavior pattern while [previously] in custody/incarceration, impacts his future prison adaptability?

> A: Because of Mark Lawlor's prior adaption in prison and jail, and particularly because of his lack of violent activity in these settings, Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.

Lawlor, 738 S.E.2d at 884. The Virginia Supreme Court held that this first proffered answer met "the standard for admissibility as future adaptability mitigating evidence," but also found that "the fact that Lawlor did not engage in violent behavior during past periods of incarceration . . . was already known to the jury through other evidence." *Lawlor*, 738 S.E.2d at 885. It held that all the other proffered questions and answers did not meet the standard: they "merely (a) supply an item of demographic data coupled with an unexplained, conclusory opinion that the datum indicates Lawlor will present a low risk of violence while incarcerated or (b) lay the foundation that the opinion is based on statistical models." *Id.*

> While each datum is extracted from Lawlor's personal history, it sheds no light on his character, why he committed his past crimes and the crime for which he stood convicted, or how would it influence or affect his behavior while incarcerated. It therefore is not personalized for the purposes of establishing future adaptability. In short, the proffered testimony is not probative of Lawlor's "disposition to make a well-behaved and peaceful adjustment to life in prison." *Skipper*, 476 U.S. at 7.

Lawlor, 738 S.E.2d at 885, citing *Skipper v. South Carolina*, 476 U.S. 1 (1986). "Because the excluded testimony was either cumulative or inadmissible, the court did not abuse its discretion." *Id.*

The Virginia Supreme Court's finding that trial court's rulings demonstrated no abuse of discretion certainly involved no issue of federal law, much less the question Lawlor now asks this Court to answer. Its judgment was based upon the fact-bound record of the nature of Dr. Cunningham's proffered testimony. It addressed no categorical rule regarding the inadmissibility of risk assessment evidence. Even if the state-law issue of abuse of discretion could be reviewed by this Court, the Court would have to refuse to take Lawlor's case because there so clearly was no such abuse here.

In *Lockett*, this Court held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604 (emphasis in original). The trial court excluded no such evidence from Dr. Cunningham. Likewise, in *Skipper*, this Court held that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison" is relevant exactly because it "is itself an aspect of his character that is by its nature relevant to the sentencing determination." 476 U.S. at 7. Skipper's proffer of specific evidence of his own character was found to be

exactly within the scope of *Lockett*. *Id*. at 4-5. Again, the trial court excluded no such evidence from Dr. Cunningham.

In *Gardner v. Florida*, 430 U.S. 349 (1997), this Court identified the critical failing as the absence of an "opportunity for petitioner's counsel to challenge the accuracy or materiality" of a pre-sentence report, relied upon by the court in imposing the death sentence, but which never had been disclosed. 430 U.S. at 356. The plurality opinion decided a precise question, that the defendant "was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362. Lawlor's proffer from Dr. Cunningham did not "deny or explain" any evidence introduced by the prosecution.

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), this Court held that "truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness." 512 U.S. at 169. No such circumstances are in Lawlor's case: the jury properly was instructed about parole ineligibility. *Lawlor*, 738 S.E.2d at 889.

The Virginia Supreme Court's decision here was squarely in line with this Court's precedent. *See Schmitt v. Kelly*, 189 Fed. Appx. 257, 265 (4th Cir.), *cert. denied*, 549 U.S. 1028 (2006) (agreeing with the Virginia Supreme Court that *Simmons*, *Gardner*, and *Skipper* "do not define rebuttal evidence to include evidence that merely describes the general conditions

of incarceration, as opposed to evidence about how the conditions of confinement would affect a particular defendant.").

Lawlor argues that this Court's cases "do not permit a state to bar the jury from considering evidence directly bearing on the defendant's dangerousness in the setting where he will actually live, simply because the evidence does not bear on his dangerousness in a setting where he will never be." (Pet. 31). The cases from this Court cited by Lawlor, of course, never attempted to define "dangerousness," much less to define it for purposes of Virginia's statute. Indeed, all of Lawlor's arguments importing other court's interpretations of "dangerousness" are beside the point. The word "dangerousness" is not even in the Virginia statute. It is merely a shorthand reference to the actual statutory aggravating factor, whether "there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense that he would commit criminal acts of violence that would constitute a continuing serious threat to society." *See* Va. Code Ann. § 19.2-264.4(C). The Virginia cases define those terms as enacted by the Virginia legislature. Cases from other jurisdictions discussing "dangerousness" do not. Nor do Virginia's cases "bar the jury from considering" any relevant evidence; they provide the trial court with a measure for determining relevance.

Lawlor argues that "courts nationwide have recognized that evidence of the specific risk that a

defendant poses in a prison environment is relevant and admissible," and that Virginia "is the lone exception." (Pet. 12-13). He asserts that "no jurisdiction other than Virginia has interpreted its capital sentencing scheme to forbid – or sharply restrict – the admission of evidence bearing on the specific risk of violence that the defendant would pose in prison." (Pet. 14). However, nothing in the record, any decision of the Virginia Supreme Court, or any case Lawlor cites supports this sweeping generalization.

Lawlor utterly fails to acknowledge that the Supreme Court of Virginia has expressly held that expert opinion on "risk factors" is admissible as mitigation evidence. *Andrews v. Commonwealth*, 699 S.E.2d 237 (Va. 2010). In *Andrews*, the defendant made a proffer of the testimony the trial court had ruled inadmissible, that his expert, Dr. Burry, would testify "to the risk factors that the Department of Justice has identified in youth that are predictive of future violent conduct." 699 S.E.2d at 276-77. In support of Dr. Burry's testimony, Andrews argued "that given the mitigation evidence they heard regarding his background, the jurors could have put Andrews into a framework of risk factors versus protective factors. . . . Andrews asserts that Dr. Burry's testimony would have helped the jury to understand why his horrific and traumatic background diminishes his moral culpability." 699 S.E.2d at 277. Citing *Tennard* and *Lockett*, the Virginia Supreme Court held that "[a] defendant in a capital case has the constitutional right to present virtually

unlimited relevant evidence in mitigation. . . . Accordingly, upon remand, Andrews will be permitted to introduce evidence such as that proffered generally by Dr. Burry for the purpose of mitigation." *Id.* Lawlor argued in his opening brief to the Virginia Supreme Court that *Andrews* required admission of his proffered testimony, but he now fails to inform this Court of its holding.

Indeed, in reliance on this Court's decision in *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Supreme Court of Virginia long has upheld the admissibility of expert opinion on "future dangerousness." *See Edmonds v. Commonwealth*, 329 S.E.2d 807, 813 (Va.), *cert. denied*, 474 U.S. 975 (1985). The Supreme Court of Virginia does "not dispute that [the defendant's] 'future adaptability' in terms of his disposition to adjust to prison life is relevant to the future dangerousness inquiry." *Porter*, 661 S.E.2d at 439, quoting *Bell v. Commonwealth*, 563 S.E.2d at 714.

Lawlor discusses only four jurisdictions which he asserts have a statute similar to Virginia: Texas, Oklahoma, Oregon, and Idaho. He cites eight cases from seven other states and seven cases prosecuted under federal law, but each of those cases was decided under a statute which Lawlor admits do not include "future dangerousness" as a statutory aggravating factor. (Pet. 14, 24). None of those cases, therefore, are in any sense applicable to Virginia, which has the statutory aggravating factor and a body of state law interpreting that very specifically worded statute.

A. Texas.

Lawlor argues that *Coble v. State*, 330 S.W.3d 253, 269 (Tex. Crim. App. 2010) demonstrates that Texas would allow the sort of evidence he claims Virginia bars because *Coble* noted that evidence of risk of violence in prison is a relevant "criterion" to "future dangerousness." (Pet. 19). The rule *Coble* actually applied is indistinguishable from the rule applied in Lawlor's case: "The special issue focuses upon the character for violence of the particular individual, not merely the quantity or quality of the institutional restraints put on that person." 330 S.W.3d at 268-69 (footnotes omitted).

> We have found nothing to indicate that the Legislature has intended that the future-dangerousness special issue should, contrary to this Court's prior holdings, be construed to ask a jury to determine whether a life-sentenced-without-parole capital defendant would be dangerous only to prison society unless the State could prove beyond a reasonable doubt that the defendant would get out of prison through means of escape or otherwise. We reaffirm this Court's prior holdings that the future-dangerousness special issue asks a jury to determine whether there is a probability that the defendant would constitute a continuing threat to society "whether in or out of prison." *See Muniz*, 851 S.W.2d at 250.

Coble, 330 S.W.3d at 283-84 (citing *Muniz v. State*, 851 S.W.2d 238, 250 (Tex. Crim. App. 1993)).

Lawlor argues that *Berry v. State*, 233 S.W.3d 847, 863 (Tex. Crim. App. 2007) held that "future dangerousness inquiry encompasses" risks of violence in prison. (Pet. 19-20). Texas specifically rejected the reading Lawlor would give to *Berry*:

> We understand appellant to argue that *Berry* should be read to require the future-dangerousness special issue to first ask a jury whether a life-sentenced capital defendant would be dangerous to prison society while incarcerated in prison and then whether the defendant would be dangerous to free society if the defendant is ever released on parole. . . .
>
> We do not read *Berry* as adopting appellant's interpretation of the future-dangerousness special issue. This Court's case law has construed the future-dangerousness special issue to ask whether a defendant would constitute a continuing threat "whether in or out of prison" without regard to how long the defendant would actually spend in prison if sentenced to life.

Estrada v. State, 313 S.W.3d 274, 280-82 (Tex. Crim. App. 2010) (citing cases).

Lawlor contends that *Garcia v. State*, 57 S.W.3d 436, 441 (Tex. Crim. App. 2001), allowed trial counsel to argue that "the prison system's procedures and techniques would control or eliminate his tendency toward violence." (Pet. 20-21). *Garcia* did not decide the admissibility of such evidence; the record is silent

whether the State even objected to it. *Garcia* instead decided a claim that his trial counsel was ineffective in asking Garcia's expert whether the defendant's race was a factor in assessing "dangerousness" in prison. 57 S.W.3d at 438. *Garcia* simply found that there was plausible strategy behind the question – not that the defendant was entitled to the expert opinion.

Lawlor also cites two unpublished decisions from Texas. (Pet. 21). *White v. Thaler*, No. H-02-1805, 2011 U.S. Dist. LEXIS 113554 (S.D. Tex. Sept. 30, 2011), a federal habeas case, notes only that two psychologists attributed the defendant's violence to drug abuse. 2011 U.S. Dist. LEXIS 113554 at *6. Neither their testimony, nor its admissibility, was relevant to or even discussed in any of the particular habeas claims. Lawlor alleges that Dr. Cunningham gave "similar" testimony in *Milam v. State*, No. AP-76,379, 2012 Tex. Crim. App. Unpub. LEXIS 547 (Tex. Crim. App. May 23, 2012). In both cases, the record again is silent whether the State ever objected to the testimony; neither case discusses any rule that entitles a defendant to such testimony.

B. Oklahoma.

Lawlor argues that *Rojem v. State*, 207 P.3d 385, 389-92 (Okla. Crim. App. 2009), held that "prison-specific future dangerousness evidence is relevant and admissible." (Pet. 21). *Rojem* in fact presented a much narrower issue: whether the trial court erred in

refusing to allow Dr. Cunningham to use certain slides as demonstrative evidence during his testimony. 207 P.3d at 390. *Rojem* did not decide the admissibility, or relevance, of Dr. Cunningham's testimony; indeed, it specifically found that the State's only objection to the slide "was the possibility that jurors might have it as a separate exhibit." *Id.*

Lawlor argues that other Oklahoma cases he cites show that "the future-dangerousness inquiry often focuses" on the danger in prison. (Pet. 22). The cases show nothing about the admissibility of such an approach. *Underwood v. State*, 252 P.3d 221, 252 (Okla. Crim. App. 2011) decided a claim of ineffective assistance of counsel, not admissibility. As in *Garcia*, the record is silent as to whether the State objected to the evidence, and the court decided only whether there was plausible strategy behind their decision *not* to call an expert – not that the defendant was entitled to present evidence that he would not be a risk in prison. *Id.* Similarly, *Hanson v. State*, 206 P.3d 1020 (Okla. Crim. App. 2009), did not address admissibility of such testimony. Hanson instead complained that "the prosecutor erroneously argued that Hanson had previously been convicted of escape in an effort to show he posed a future danger." 206 P.3d at 1030. In rejecting Hanson's claim, the appellate court noted that Hanson called an expert "to testify that he did not pose a continuing threat to society in a regimented prison environment." *Id.* Its only reference to the expert's testimony was to establish that she explained the "escape" charge to the jury, that it resulted from

Hanson's failing to keep an appointment with his parole officer. *Id.*

Lawlor quotes the court's conclusion in *Magnan v. State*, 207 P.3d 397 (Okla. Crim. App. 2009), that Magnan's "in-court statements about . . . his potential for future violence if incarcerated," together with other evidence, were sufficient for the trial court to find "that Magnan presented a continuing threat to society." 207 P.3d at 408. The only evidence of such a "potential" was the statement volunteered by Magnan during his guilty plea colloquy, that if the court did not sentence him to death, "I am going to start hurting." *Id.* While the trial court was certainly correct to consider all of Magnan's statements, its doing so has no bearing on the admissibility of expert opinion on such risks.

C. Oregon.

Lawlor cites three cases from Oregon; however, none dealt with the admissibility of risk assessment evidence. (Pet. 22-23). *State v. Douglas*, 800 P.2d 288 (Or. 1990), offers only dicta that "an expert might testify that the defendant would not pose a threat to prison society." 800 P.2d at 296. The actual holding found error in granting an instruction on the possibility of release on clemency when no testimony established any such possibility. Whatever an expert "might" testify, in *Douglas* there was no evidence making any distinction between the threats of violence in prison or while at large. *Id*. Lawlor places

great stock in the defense counsel's argument in *State v. Williams*, 912 P.2d 364, 378 (Or. 1996), that the defendant would not be a danger if imprisoned for life. (Pet. 23). But the court noted no objection to that argument. The appellate court cited that closing argument only to rule, under Oregon precedent, that the defendant was not allowed to argue for consecutive life sentences as an alternative to the death penalty. *Id.*

The admissibility of the prosecution's photographs, weapons, and testimony tending to prove a generally violent prison environment was the issue in *State v. Sparks*, 83 P.3d 304 (Or.), *cert. denied*, 543 U.S. 893 (2004). But that challenged evidence was offered only in rebuttal to the defendant's claim that his imprisonment assured against any future violence. Once again, the decision did not address whether the defendant's argument had been proper in the first place.

Douglas, *Williams*, and *Sparks* are inapposite to Virginia's statute for an additional reason. The Virginia Supreme Court has held that Virginia's statute demands an assessment of violence in society as a whole, as opposed to prison society, and without respect to how the defendant may or may not be restrained by particular prison conditions. *See Lovitt*, 537 S.E.2d at 879. Lawlor admits that the Oregon Supreme Court has adopted the opposite rule: "When the jury considers the threat that the defendant might pose because of future violent crimes, it may

consider the threat to prison society." *Douglas*, 800 P.2d at 296 (Or. 1990). (*See* Pet. 22).

D. Idaho.

Lawlor admits that Idaho has not ruled on the admissibility of the evidence Lawlor claims Virginia excludes. (Pet. 23-24). He nevertheless cites appellate *briefs* which he asserts show that trial courts, at least in three cases, "appear to admit such evidence as a routine matter." (Pet. 24). The briefs are, naturally, not objective reports of the cases: they are intended to advocate for one party's view. More tellingly, none of the ultimate decisions in the cases whose briefs he cites actually addresses the admissibility of such evidence. *State v. Carson*, 264 P.3d 54 (Idaho 2011) ruled only that the trial court did not err in excluding evidence that the infant victim's mother had been unfaithful to the defendant. *State v. Payne*, 199 P.3d 123 (Idaho 2006) held that the trial court did not err in denying the defendant's motion to suppress incriminating statements he made to police. Even the unpublished case whose brief Lawlor cites, *State v. McDermott*, No. 32071, 2009 Idaho App. Unpub. LEXIS 219 (Idaho Ct. App. July 2, 2009), simply rejected claims that the trial court abused its discretion at sentencing by failing to consider the defendant's brain injury and remorse, by expressing its strong views about the crime, and by relying on the lyrics of the defendant's song.

The one reported case Lawlor cites directly does not, as Lawlor implies, consider prison as a separate society. (Pet. 24). *State v. Paz*, 798 P.2d 1, 16-17 (Idaho 1990), *overruled in part on other grounds*, *State v. Card*, 825 P.2d 1081 (1991). Its conclusion "that the prison population was just as much a part of the society which it was his duty to protect in reaching the sentencing decision" did not separately consider the risk the defendant posed in prison. Rather, the court's statement "that its primary consideration was the protection of society" clearly considered society as a whole. 798 P.2d at 16.

E. Other States.

Lawlor argues that other states "frequently admit prison-specific evidence," but admits that the "other states" whose cases he cites do not classify "future dangerousness" as a necessary element for a death sentence. (Pet. 24). The purposes for which they might admit such evidence have no bearing on whether it would be relevant to the statutory element defined by 34 years of Virginia precedent. *See Smith v. Commonwealth*, 248 S.E.2d 135, 148-49 (Va. 1978), *cert. denied*, 441 U.S. 967 (1979). None of these cases cited by Lawlor hold that a defendant is entitled to present expert evidence that a defendant would not be dangerous in prison.

Henry v. State, 604 S.E.2d 826 (Ga. 2004), held only that the prosecution's arguments must be based on the evidence: it can argue that the defendant will

be dangerous in prison only if there is evidence of that specific danger. 604 S.E.2d at 829. *In re Yates*, 296 P.3d 872 (Wash. 2013), did not admit evidence of the "dangerousness" of the defendant but of the rate of escapes and assaults by other prisoners. 296 P.3d at 894. The admissibility of that evidence was not at issue, and *Yates* specifically rejected the claim that "it was deficient performance for trial counsel to not additionally hire an expert to assess Yates's future dangerousness." *Id. People v. Smithey*, 978 P.2d 1171 (Cal. 1999), simply noted a prosecutor's comprehensive argument that the defendant was always dangerous, either in prison or in free society. 978 P.2d at 1217. The only relevance on appeal was to establish that the prosecutor had argued for a death sentence based on "future dangerousness," and that the defendant was therefore entitled under *Simmons* to an instruction on the unavailability of parole. *Id.*

Forrest v. State, 290 S.W.3d 704 (Mo. 2009), noted the defense argued that it was "enough" to sentence the defendant to life, because he would not be a danger in prison, and the prosecutor answered by reminding the jury of the people inside prison who would still be at risk. 290 S.W.3d at 715. *Forrest* made no ruling whether the defense's or the prosecutor's arguments were proper under Missouri law, much less whether the defendant was entitled to present expert testimony about the risks. *State v. Al-Bayyinah*, 616 S.E.2d 500 (N.C. 2005) decided a claim of ineffective assistance of counsel, not admissibility. It simply found that counsel had not been ineffective

in arguing for a life sentence because he argued, *inter alia*, his expert's opinion that the defendant would not be dangerous in prison. 616 S.E.2d at 513.

In *State v. Campbell*, 765 N.E.2d 334 (Ohio 2002), the State introduced extensive evidence of the defendant's "record of fooling and manipulating those who have dealt with him in the past," even while in prison. 765 N.E.2d at 342-43. The appellate court found that this history, together with the defendant's threats and violence while in prison, "tend to refute his claim that he is likely to behave well in prison." 765 N.E.2d at 343. The only contrary testimony discussed detailed precautions taken to transport the defendant from jail to trial. *Id.* While the appellate court allowed the inference "that Campbell can be rendered harmless with appropriate precautions," it also characterized the precautions as "extraordinary" and found no evidence "whether similar precautions would be used in the state prison system." *Id.*

In a footnote, Lawlor cites two South Carolina cases. (Pet. 26 n.4). *State v. Burkhart*, 640 S.E.2d 450 (S.C. 2007), affirmed that South Carolina adopted, in *State v. Bowman*, 623 S.E.2d 378, 387 (S.C. 2005), the same rule that Virginia has followed: that evidence of general prison conditions "is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment." 640 S.E.2d at 488. South Carolina also closely follows the same requirement for evidence to be individualized to the defendant to be admissible:

> We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life in general. We note, however, that evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions.

Id. In *State v. Torres*, 703 S.E.2d 226 (S.C. 2010), the State had introduced a graphic video of the defendant resisting a search, and the appellate court upheld admission of the video. 703 S.E.2d at 228. While it noted that the defendant had called a "prison consultant" who testified he had no concerns "about Torres' ability to adapt to life in prison because wardens would be able to manage his behavior," it made no ruling about the admissibility of such evidence, nor did it rely on the expert testimony to uphold admissibility of the video. 703 S.E.2d at 229-30.

F. Federal cases.

Despite arguing that federal courts "routinely . . . admit testimony about a defendant's dangerousness in prison," Lawlor identifies only two circuit court cases and five district court trial decisions, three of which are unreported. (Pet. 26-28). Even those do not address the issue Lawlor argues: none of them required the admission of expert opinion on the risk of prison violence.

In *United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), the defendant argued that he could not be sentenced to death because there was no evidence of his "dangerousness" in prison. 247 F.3d at 788. The Eighth Circuit rejected the defendant's reliance on *Simmons* to argue that evidence of "future dangerousness" of a parole-ineligible defendant must be limited to his "dangerousness" in prison. "Because the jury was informed of his ineligibility for parole, we find no basis for drawing such a distinction." *Id.* at 788-89. The Tenth Circuit likewise rejected any requirement which would "explicitly limit the jury's consideration to the prison setting." *United States v. Fields*, 516 F.3d 923, 942 (10th Cir. 2008). "We agree with *Allen* that an explicit prison-setting limitation need not be included in a future-dangerousness aggravator where, as here, the jury is clearly informed that the defendant would not be eligible for parole if a life sentence were imposed." *Id.* at 943.

The district court in *United States v. Johnson*, 915 F. Supp. 2d 958 (N.D. Iowa 2013), acknowledged that *Allen* and *Fields* are still good law. 915 F. Supp. 2d at 1022-23. It nevertheless made a case-specific ruling limiting the *prosecution* to "future dangerousness in prison." It found, based on the specific charges against the defendant, that he theoretically could receive a sentence less than life without parole, but that any sentence less than life was "improbable." *Id.* at 1023. Based on that finding, it held that allowing the prosecution to argue "dangerousness" outside prison could otherwise prejudice the defendant if it

persuaded a juror "to switch from life to death to ward off . . . any chance of a lesser sentence by the judge." *Id.* at 1023, quoting dissent in *Jones v. United States*, 527 U.S. 373, 416 (1999). The district court in *United States v. Basciano*, 763 F. Supp. 2d 303 (E.D. N.Y. 2011), also made a case-specific ruling, limiting the non-statutory factor to evidence of "dangerousness" in prison where both the crimes charged and the conduct which the prosecution planned to introduce to establish "dangerousness" all occurred in prison. 763 F. Supp. 2d at 353.

In *Robinson v. United States*, Civ. Act. No. 4:05-CV-756Y, 2008 U.S. Dist. LEXIS 90879, 2008 WL 4906272 (N.D. Tex. Nov. 7, 2008), a habeas case, prison risk evidence was mentioned only in the case narrative. 2008 U.S. Dist. LEXIS 90879 at *17. As with the federal habeas case from Texas, the opinion discusses no standard for admissibility, nor was the admissibility of the risk evidence the subject of a claim in the habeas petitions.

The other two unreported district court orders cited by Lawlor split the issue before them by denying the defense's pre-trial motion to strike the non-statutory aggravating factor of future dangerousness but limiting the government evidence of "future dangerousness" in prison. *United States v. Duncan*, No. CR07-23-N-EJL, 2008 U.S. Dist. LEXIS 20198 (D. Idaho Mar. 14, 2008); *United States v. Savage*, No. 07-550-03, 2013 WL 1934531, at *16 (E.D. Pa. May 10, 2013). Neither *Duncan* nor *Savage* addresses

either *Allen* or *Fields*, instead relying exclusively on rulings by other district courts.

The federal court decisions do not discuss the relevancy of such evidence to a specific statute such as Virginia's statute. Indeed, as Lawlor admits, the federal cases all deal with a statute which did not require the prosecution to prove "future dangerousness" or a "continuing threat" of violence. (Pet. 26). *See* 18 U.S.C. § 3592. A court's analysis of the scope of an aggravator which is not defined by statute simply is not relevant to the analysis required under the Virginia statute: an assessment not of how violent the defendant will be in prison, but rather in society as a whole. *See Lovitt*, 537 S.E.2d at 879.

The Virginia Supreme Court's judgment involved no conflict among the circuits or other state supreme courts. The rules as applied in most of the cases Lawlor cites are not significantly different from the state law applied by the Virginia Supreme Court. In other cases, Lawlor identifies, at most, differences in how each jurisdiction interprets its own statutes and then determines what evidence is relevant to those statutory standards. The Virginia Supreme Court's decision was a very state-statute specific, fact-based ruling, ultimately about the discretion of the trial court to define the scope of admissible expert testimony. It involved no federal issue in need of resolution.

Lawlor demonstrates no compelling reason for this Court to grant certiorari to review this interpretation of a state statute by the Virginia Supreme Court.

II. There is no compelling reason to grant certiorari where the judgment below rests upon an independent finding that Lawlor does not challenge.

This Court previously found the argument presented here not worthy of review in *Porter v. Virginia*, 556 U.S. 1189 (2009), and *Morva v. Virginia*, 131 S. Ct. 97 (2010). This Court denied review in *Porter* when "future dangerousness" was the sole basis for the death sentence imposed. Here, as in *Morva*, the jury expressly and unanimously also found "that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." *Lawlor*, 738 S.E.2d at 860; *see* Va. Code Ann. 19.2-264.4(C) (Pet. App. 332a). Lawlor admits that at trial he "did not deny the brutality of Ms. Orange's murder." (Pet. 4).

In *Zant v. Stephens*, 462 U.S. 862 (1983), this Court held that a death sentence supported by more than one aggravating factor need not be set aside if one factor is found to be invalid. The ruling that Lawlor argues was error was not prejudicial, presents no federal question and casts no shadow upon the jury's independent finding of vileness. That finding

separately undergirds Lawlor's sentences of death and renders his appeal an academic exercise, in which he seeks an advisory opinion from this Court.

Lawlor argues that *Tuggle v. Netherland*, 516 U.S. 10 (1995), limited *Zant* in the context of Virginia's statute and held "the fact that the jury validly found the vileness aggravator does not automatically insulate the death sentence from reversal." (Pet. 28). In *Tuggle*, the failure to appoint the defendant an independent psychiatrist to rebut the prosecutor's psychiatric evidence of his future dangerousness violated *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Tuggle* distinguished *Zant* by finding that, in the absence of a defense expert, Tuggle's jury "was allowed to consider materially inaccurate evidence." *Tuggle*, 516 U.S. at 14. In this case, the prosecution presented no expert witness on "future dangerousness," and Lawlor was appointed the very expert he sought. His own expert simply refused to answer the relevant questions with admissible answers.

Lawlor gives this Court no reason to review a claim which is not dispositive of the validity of his sentences.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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