No. ___

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

## PETITION FOR A WRIT OF CERTIORARI

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## CAPITAL CASE

## QUESTION PRESENTED

In Virginia, a defendant convicted of capital murder is subject to only two possible punishments: death, or life imprisonment without the possibility of parole. As in other jurisdictions, the prosecution commonly seeks the death penalty on the ground that the defendant is dangerous. The question presented is whether, as a matter of either due process or the Eighth Amendment right to present evidence in mitigation, the defendant in such a case is entitled to oppose a death sentence by introducing evidence that he will pose a low risk of violence in the prison setting.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark Eric Lawlor respectfully petitions for a writ of certiorari to the Virginia Supreme Court in *Lawlor v. Commonwealth*, No. 120481.

## OPINIONS BELOW

The Supreme Court of Virginia's decision is reported at 738 S.E.2d 847 (2013) and is reprinted at Pet. App. 1a-104a. The trial court's oral rulings are unreported and appear at Pet. App. 105a-281a.

## JURISDICTION

The judgment of the Supreme Court of Virginia was entered on January 10, 2013. On March 8, 2013, that court denied a timely motion for rehearing. Pet. App. 282a. On April 15, 2013, the Chief Justice extended the time to file a petition for writ of certiorari to and including August 5, 2013. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reprinted at Pet. App. 327a-332a.

## STATEMENT

1. Petitioner Mark Eric Lawlor, a man ravaged by addictions to alcohol and crack cocaine, spent his childhood in an atmosphere of almost unrelenting

trauma. *See, e.g.*, JA24:10921-10935.[1] His mother frequently flew into uncontrolled rages, beating him with belts, hairbrushes, and even rolling pins. *See id.*; JA24:10942-10943. It was not unusual for Mr. Lawlor's mother to beat this "skin and bones" child so badly that his sister "thought she was going to kill him." JA24:10956-10957; *see* JA24:10926-10927 (beatings accompanied by phrases such as "I wish I'd never had you").

Mr. Lawlor's father, meanwhile, was a serial pedophile who assaulted Mr. Lawlor's young cousins, groomed Mr. Lawlor's sister as a sexual partner from the age of five, and continued to rape her into her teenage years. *See, e.g.*, JA24:10945-10949; JA24:11090; JA24:11133-11136. When a sixteen-year-old Mr. Lawlor tried to defend his sister against the last of these attacks, his father made him strip to his underwear and forced him at gunpoint out of the house and into the snow. *See* JA24:10990-10991.

From then on, Mr. Lawlor was on his own, falling prey to other adult victimizers and – unsurprisingly – becoming addicted to drugs and alcohol. *See* JA24:11404-11405; JA26:11915. He repeatedly strove to break free of his addictions but did not succeed, falling into a cycle of intoxicant-induced crimes and consequent incarcerations. *See* JA23:10704-10705; JA24:11012; JA24:11369; JA24:11380; JA25:11677-11680; JA26:11916-11922.

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[1] Citations to "JA" are to the Joint Appendix filed in the Supreme Court of Virginia.

While imprisoned, and thus lacking access to drugs and alcohol, Mr. Lawlor was a well-behaved and compliant prisoner who posed no danger to inmates, staff, or anyone else with whom he came into contact. *See, e.g.*, JA25:11724-11725; JA25:11729; JA25:11747-11762; JA25:11816-11822; JA25:11831-11835; JA25:11842-11845.

In 2008, newly released from prison, Mr. Lawlor was working as an apartment leasing agent and undergoing substance abuse counseling. *See* JA23:10819-10824. His addictions again took hold, however, and spiraled out of control. *See* JA23:10825; JA23:10843-10846. During his final binge, Mr. Lawlor ingested an amount of crack more than fifty times the typical street dose and exhibited a dramatic personality change. JA22:10191-10217; JA22:10246 JA22:10285; JA22:10381-10382. It was during this episode that he bludgeoned and killed Genevieve Orange, a resident of the apartment complex where he worked. JA23:10536-10537.

At trial, Mr. Lawlor's counsel acknowledged that he had committed the murder but argued that, because of his intoxicated state, he was incapable of forming the intent necessary for a capital murder conviction. *See* JA21:9461. The jury disagreed and convicted him on two counts of capital murder: murder in the commission of abduction with the intent to defile, in violation of Va. Code § 18.2-31(1), and murder in the commission of rape or attempted rape, in violation of Va. Code § 18.2-31(5).

2. In Virginia, a defendant convicted of capital murder faces only two possible punishments: death, or life imprisonment without the possibility of parole. Va. Code § 19.2-264.4(A). A judge may impose a death sentence only if, following a penalty-phase trial, the jury recommends that the defendant be executed. Va. Code § 19.2-264.2. For the jury to recommend a death sentence, it must find one or both of the two statutory aggravating factors beyond a reasonable doubt. Va. Code § 19.2-264.4(C).

Before Mr. Lawlor's sentencing jury, the prosecution charged both aggravators: that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society," and that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code § 19.2-264.2. The prosecution relied on the brutal nature of Mr. Lawlor's crime, as well as his history of other violent acts. JA28:12814-12824.

The defense, for its part, did not deny the brutality of Ms. Orange's murder. *See* JA28:12824. The defense's theory was that (a) Mr. Lawlor had committed violent crimes, but all while under the influence of intoxicants; (b) while imprisoned in the past, without access to drugs or alcohol, Mr. Lawlor had been a model prisoner; (c) if imprisoned for life without parole, Mr. Lawlor posed only a minimal risk of serious acts of violence; and (d) the fact that he had recently committed a brutal murder outside prison did not change that assessment. *See, e.g.*,

JA28:12847-12860. To support this theory, the defense presented evidence of Mr. Lawlor's good behavior during past periods of incarceration, as well as his struggles with addiction outside prison. *See, e.g.*, JA25:11724-11725; JA25:11729; JA25:11748-11762; JA25:11816-11822; JA25:11831-11835; JA25:11842-11845; JA24:11369; JA24:11380; JA26:11916-11922.

To tie its theory together, the defense sought to present expert testimony from Dr. Mark Cunningham – a psychologist and researcher on prison violence risk assessment who had testified in numerous capital trials – that, if imprisoned for life without parole, Mr. Lawlor would pose a minimal risk of violence in prison and would likely adapt positively to the prison environment. Pet. App. 286a-326a. The prosecution did not contest Dr. Cunningham's qualifications, nor did it challenge the reliability of his opinions. Rather, the prosecution contended that Dr. Cunningham's testimony was irrelevant, under a series of Virginia Supreme Court cases limiting a capital defendant's right to introduce evidence about his risk of violence in prison. *E.g.,* Pet. App. 106a-130a.

The trial court largely excluded Dr. Cunningham's testimony that Mr. Lawlor was unlikely to commit serious acts of violence in prison. *See* Pet. App. 123a-124a, 157a-159a, 160a-162a, 163a, 176a-177a, 179a-180a, 181a-198a, 204a, 215a, 226a, 228a, 230a-231a, 232a-234a, 235a-236a, 240a-241a, 273a-274a, 279a-281a. The court did so notwithstanding the defense's argument that the

testimony was constitutionally protected both as mitigation evidence and as rebuttal evidence.[2] The thrust of the court's rulings – both at the bench and in open court – was that (a) the future-dangerousness inquiry, as defined by statute, requires that the jury consider the defendant's likelihood of committing acts of violence "that would constitute a continuing serious threat to *society*"; (b) "society" includes non-prison society; and (c) evidence of the low risk that a capitally sentenced defendant poses *in prison* therefore is irrelevant, because such evidence does not address the defendant's risk of violence in the non-prison component of society. *See*, *e.g.*, *id.* at 161a-162a, 176a-198a. The court reached these conclusions even though, for a defendant convicted of capital murder in Virginia, the *only* alternative to a death sentence is life imprisonment without parole.

Because Dr. Cunningham's testimony was largely excluded, the defense made a formal written proffer and moved to recall the witness. Pet. App. 277a-278a, 321a-325a. According to the proffer, Dr.

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[2] *See* JA5:1730-1731 (pretrial motion for order admitting Dr. Cunningham's testimony relying expressly on "[Mr. Lawlor's] right to be free from cruel and unusual punishment, his right to due process, . . . and other rights safeguarded by the United States Constitution"); JA8:3025 (in limine filing seeking admission of testimony "as evidence in both mitigation and rebuttal under *Lockett v. Ohio*, *Skipper v. South Carolina*, . . . *Penry v. Lynaugh*, [and] *Tennard v, Dretke*" (citations omitted)); Pet. App. 189a.

Cunningham would have testified that "based on my analysis of all of the relevant risk factors which are specific to Mr. Lawlor's prior history and background, that Mr. Lawlor represents a very low risk for committing acts of violence while incarcerated." Pet. App. 324a. Dr. Cunningham would have explained that his opinion rested on an assessment of seven different risk factors specific to Mr. Lawlor, including his age, his education, and his prior behavior while incarcerated. Pet. App. 322a-324a. The court generally rejected the proffered testimony. Pet. App. 279a-281a.

At the conclusion of the evidence, the jurors deliberated as to Mr. Lawlor's punishment. After nearly two days, they sent a series of notes demonstrating a keen interest in the question of future dangerousness – and, in particular, in how to take account of the setting in which Mr. Lawlor would serve his sentence. *See* JA28:12911 ("Re: Continuing threat to society" – "Society means prison society or society in general?"); JA28:12920 ("In the answer to our question re: 'continuing threat to society' are we to consider 'society in general' is free society or Mark Lawlor as a prisoner in society inside and outside the wire?"); JA28:12920 ("If imprisoned for life, what physical constraints would Mark Lawlor be under outside of his cell while exposed to other persons? inside prison? outside prison?").

Shortly after the court responded to the last of these notes, the jury returned a verdict of death for each of the two convictions. Declining to override the

jury's recommendation, the court imposed two sentences of death.

3. On direct appeal to the Supreme Court of Virginia, Mr. Lawlor argued that the court had committed federal constitutional error by excluding Dr. Cunningham's testimony both as rebuttal evidence (in violation of his due process right) and as mitigating evidence (in violation of the prohibition against cruel and unusual punishment).[3] The court affirmed.

a. As to due process, the court recognized that "[w]here the Commonwealth alleges that the future dangerousness factor applies and adduces evidence to prove it, the defendant has a due process right to rebut that evidence." Pet. App. 64a (citing *Simmons v. South Carolina*, 512 U.S. 154, 164 (1994)). Yet for purposes of that aggravating factor, the court reasoned, "the issue is not whether the defendant is physically capable of committing violence, but whether he has the mental inclination to do so." Pet.

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[3] *See, e.g.*, Opening Brief of Appellant, *Lawlor v. Commonwealth*, No. 120481 (Va. 2012), at 13 (assigning error to trial court's "improperly excluding relevant mitigating evidence in the form of testimony of Dr. Mark Cunningham" and "improperly excluding relevant rebuttal evidence in the form of testimony of Dr. Mark Cunningham"); *id.* at 45-46 (arguing that Dr. Cunningham's opinions were admissible as rebuttal under *Skipper v. South Carolina*); *id.* at 46-49 (arguing that Dr. Cunningham's opinions were admissible as mitigation under *Skipper v. South Carolina*, *Tennard v. Dretke*, and *Lockett v. Ohio*).

App. 66a; *see id.* at 67a ("In short, the question of future dangerousness is about the defendant's *volition*, not his *opportunity*, to commit acts of violence.").

Having defined the aggravating factor in this manner, the court then squarely held that "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" the Virginia Code. Pet. App. 68a. Dr. Cunningham's excluded testimony was inadmissible, the court reasoned, because it "expressed [his] opinion of Lawlor's risk of future violence in prison society only, rather than society as a whole." *Id.*

b. The court reached the same result with respect to the claim that Dr. Cunningham's testimony was admissible as mitigating evidence. The court acknowledged that, under this Court's precedents, "the 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." Pet. App. 70a (alteration in original; quotation marks omitted). It even purported to acknowledge that, under this rule, "a defendant's probability of committing violence, even when confined within a penal environment, is relevant *as mitigating evidence* of his character." *Id.* Yet the court held that this is the rule only if "the evidence establishing that probability arises specifically from his character

and is sufficiently personalized to him." *Id.* Thus, the court reasoned, "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." *Id.* In addition, "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." *Id.* at 71a.

The overwhelming majority of the testimony that Dr. Cunningham proposed to offer, the court maintained, was insufficiently personalized to be admissible. The court reasoned that "[m]erely 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 [Virginia Supreme Court precedent]." Pet. App. 71a. Dr. Cunningham's statistically-based data, under this standard, generally was not probative of Mr. Lawlor's "disposition to make a well-behaved and peaceful adjustment to life in prison,'" and thus was inadmissible. *Id.* at 75a (quoting *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986)).

## REASONS FOR GRANTING THE WRIT

In *Jurek v. Texas*, 428 U.S. 262 (1976) this Court approved Texas's future-dangerousness aggravator – which used language materially identical to Virginia's – as a means to guide the jury's determination whether to sentence a defendant to death. *See id.* at 276-77. Though recognizing that it is "not easy to predict future behavior," the Court reasoned that "[t]he fact that such a determination is difficult . . . does not mean that it cannot be made." *Id.* at 274-75. "What is essential," the court explained, "is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Id.* at 276.

Consistent with *Jurek*'s command as to the breadth of information to be placed before the jury, this Court has twice made clear that a court cannot prevent the jury from hearing context-specific information informing a prediction of the defendant's future dangerousness. First, in *Skipper v. South Carolina*, the Court held that the Eighth Amendment did not permit the exclusion of testimony regarding the defendant's good behavior while incarcerated. 476 U.S. 1, 4-5 (1976); *see id.* at 4 (recognizing that "the jury could have drawn favorable inferences from this testimony regarding petitioner's character and his probable future conduct if sentenced to life in prison"). The Court also explained that "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty," exclusion of evidence on this point violates "the

elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" *Id.* at 5 n.1.

Eight years later, in *Simmons v. South Carolina*, the Court held that, where the prosecution relies on a prediction of future dangerousness in seeking the death penalty, due process entitles the defendant to inform the jury that, if not sentenced to death, he will never be released on parole. 512 U.S. 154, 156 (1994) (plurality opinion); *see id.* at 178 (O'Connor, J., concurring in the judgment) (agreeing that "[w]here the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury – by either argument or instruction – that he is parole ineligible"). "[I]f the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future," the *Simmons* plurality explained, "the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society." *Id.* at 168-69.

Against this background, courts nationwide have recognized that evidence of the specific risk that a defendant poses in a prison environment is relevant and admissible – and, more broadly, have recognized that a defendant's risk of violence *in prison* is a vital component of the future dangerousness inquiry.

Virginia, which has executed more people than any state other than Texas, is the lone exception. As the decision below reflects, Virginia treats evidence bearing specifically on the defendant's in-prison risk of violence, including predictive expert testimony, as inadmissible because such evidence fails to address his likely behavior in a setting *in which he will never be present*. Particularly in view of the "unique . . . severity and irrevocability" of a death sentence, *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), certiorari is warranted to address the gulf between Virginia and the rest of the nation, and to resolve the resulting conflict between Virginia jurisprudence and decisions of this Court.

## I. Virginia Is Alone In Excluding Evidence About The Threat The Defendant Poses In Prison.

*Jurek* prompted Oklahoma, Virginia, Idaho, Oregon, and Wyoming to incorporate future dangerousness predictions into their own capital sentencing statutes. *See* 1976 Okla. Laws 1st Extra. Sess., ch. 1, codified as amended at 21 Okla. Stat. § 701.12; 1977 Va. Acts, ch. 492 (Virginia), codified as amended at Va. Code § 192.264-4; 1977 Idaho Laws ch. 155, codified as amended at Idaho Code § 19-2515; 1985 Or. Laws, ch. 3, codified at Or. Stat. § 163.150; 1989 Wyo. Laws, ch. 171, codified at Wyo. Stat. § 6-2-102. Two other states classify the absence of future dangerousness as a statutory mitigating factor. *See* Wash. Rev. Code § 10.95.070(8); Colo. Rev. Stat. § 18-1.3-1201(4)(k). At least twelve more states – as well as the federal system – now allow consideration of the defendant's future

dangerousness (or lack thereof) as a nonstatutory aggravating or mitigating factor. *See* 18 U.S.C. § 3592(c) ("The jury . . . may consider whether any other aggravating factor for which notice has been given exists."); *Whatley v. State*, No. CR–08–0696, __ So. 3d __, 2010 WL 3834256, at *39-41 (Ala. Crim. App. Dec. 16, 2011); *People v. Thomas*, 269 P.3d 1109, 1149 (Cal. 2012); *Lucas v. State*, 555 S.E.2d 440, 448-49 (Ga. 2001); *State v. Brumfield*, 737 So.2d 660, 665 (La. 1998); *State v. Deck*, 303 S.W.3d 527, 543-44 (Mo. 2010); *State v. Smith*, 705 P.2d 1087, 1103-05 (Mont. 1985); *Redmen v. State*, 828 P.2d 395, 400 (Nev. 1992), *overruled on other grounds by Alford v. State*, 906 P.2d 714 (Nev. 1995); *State v. Steen*, 536 S.E.2d 1, 30-31 (N.C. 2000); *State v. Campbell*, 765 N.E.2d 334, 341-43 (Ohio 2002); *Commonwealth v. Trivigno*, 750 A.2d 243, 253-54 (Pa. 2000); *State v. Tucker*, 478 S.E.2d 260, 270 (S.C. 1996); *State v. Arguelles*, 63 P.3d 731, 759 (Utah 2003).

Thus, consideration of a defendant's prospective risk of violence is integral to capital sentencing proceedings nationwide. Yet 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. Quite the contrary: admission of such evidence is routine in many jurisdictions, and some federal courts have gone so far as to bar future-dangerousness evidence that is *not* specific to the prison context. This Court should grant review to resolve the split between

Virginia, on the one hand, and the settled practice of numerous other jurisdictions, on the other.

### A. Virginia Prohibits Or Sharply Restricts Evidence Of A Defendant's Future Dangerousness In Prison.

1. In a series of decisions, the Supreme Court of Virginia has increasingly cabined, then eliminated, a defendant's right to rebut the prosecution's charge of future dangerousness by introducing evidence that he will not pose a threat of violence in prison. In *Burns v. Commonwealth*, the Virginia court held that "evidence regarding the quality and structure of an inmate's life in a maximum security prison, as well as the prison's safety and security features," is inadmissible to rebut the future-dangerousness aggravator. 541 S.E.2d 872, 893 (Va. 2001). The court maintained that evidence that the defendant's "opportunities to commit criminal acts of violence in the future would be severely limited in a maximum security prison" was irrelevant because "the relevant inquiry is not whether [the defendant] *could* commit criminal acts of violence in the future but whether he *would*." *Id.*; *see Bell v. Commonwealth*, 563 S.E.2d 695, 714 (Va. 2002) (reaffirming holding of *Burns*); *see also Lovitt v. Commonwealth*, 537 S.E.2d 866, 878-79 (Va. 2000) (rejecting argument that "the only society that should be considered in this case for purposes of 'future dangerousness' is prison society").

Relying on *Burns* and *Bell*, the Virginia Supreme Court has expanded its rule of inadmissibility beyond testimony about prison conditions

themselves. In *Porter v. Commonwealth*, 661 S.E.2d 415 (Va. 2008), the court deemed irrelevant an expert's "statistical projection of how prison restrictions could control an inmate (situated similarly to what he would project Porter to face) in a likely prison setting." *Id.* at 440-41. And in *Morva v. Commonwealth*, 683 S.E.2d 553 (Va. 2009), the court ruled inadmissible an "individualized assessment . . . of the likelihood that Mr. Morva will commit acts of serious violence if confined for life." *Id.* at 562, 566. Relying on Virginia's capital sentencing statute, the court insisted that "[t]he relevant evidence surrounding a determination of future dangerousness consists of the defendant's history and the circumstances of the defendant's offense." *Id.* at 565. Meanwhile, the dissent in *Morva* criticized the majority for "effectively exclud[ing] all future prison risk assessment evidence and establish[ing] a *per se* rule of inadmissibility." *Id.* at 572 (Koontz, J., dissenting).

The decision below confirms that the Supreme Court of Virginia's position is exactly as the *Morva* dissent characterized it. Under the court's ruling here, evidence about a defendant's risk of violence, limited to the prison setting, is *categorically inadmissible* as rebuttal to the prosecution's charge of future dangerousness – even though, by law, a convicted capital murderer can never be released on parole. The court could not have put it more clearly: "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." Pet. App. 69a.

2. Virginia is scarcely more forgiving with respect to a defendant's right to present prison-risk evidence by way of mitigation. The story is much the same as with rebuttal evidence: over time, the Supreme Court of Virginia's decisions have become increasingly entrenched against the admissibility of such evidence.

In *Cherrix v. Commonwealth*, 513 S.E.2d 642 (Va. 1999), the Virginia court held that evidence of "the general nature of prison life," including "what prison life would be like for Cherrix if he received a life sentence," was inadmissible as mitigation. *Id.* at 653. The court reasoned that "none of this evidence concerns the history or experience of the defendant." *Id.*; *see Walker v. Commonwealth*, 515 S.E.2d 565, 574 (Va. 1999) (holding similar testimony inadmissible under *Cherrix*); *Bell*, 563 S.E.2d at 714 (similar).

The Supreme Court of Virginia has expanded its rule of inadmissibility in the mitigation context to encompass testimony about how the defendant would likely behave in prison in view of his conditions of confinement. In *Juniper v. Commonwealth*, 626 S.E.2d 383 (Va. 2006), the court ruled the expert's "testimony on future dangerousness in a prison setting" inadmissible as mitigation because it was not "grounded on Juniper's specific characteristics in the context of his future adaptability in a prison setting." 626 S.E.2d at 422-24. The court in *Porter*

reached a similar conclusion, deeming an expert's testimony on "the risk of future dangerousness posed by the defendant if incarcerated in a Virginia penitentiary for life" inadmissible as mitigation because it was insufficiently particularized to the defendant's own character and background. 661 S.E.2d at 435, 439-42. And in *Morva*, the court deemed the proposed expert testimony inadmissible as mitigation, maintaining that it was insufficiently "individualized as to Morva's prior history, conviction record, or the circumstances of his offense." 683 S.E.2d at 566.

The decision in this case demonstrates that the mitigation restriction announced in *Juniper*, *Porter*, and *Morva* bars – as irrelevant – statistically based expert predictions of a defendant's risk of violence in prison. Even when firmly grounded in the defendant's own characteristics, such testimony generally is inadmissible as mitigation because it supposedly is not "peculiar to the defendant's character, history, and background." Pet. App. 71a (quotation marks omitted). In the view of the Virginia Supreme Court, "extracting a set of objective attributes about the defendant and inserting them into a statistical model created by compiling comparable attributes from others . . . does not fulfill the requirement that evidence be 'peculiar to the defendant's character, history, and background' under *Morva*." *Id.*

### B. Other Jurisdictions Embrace Prison-Specific Future Dangerousness Evidence.

In sharp contrast to Virginia, other jurisdictions recognize that prison-specific future dangerousness evidence – including expert testimony similar to that offered in this case – is relevant and, indeed, critical to the jury's prediction of the defendant's risk of violence. This Court should grant certiorari to address the conflict between Virginia and other state courts on the important questions at issue.

*1. Texas*. The Texas Court of Criminal Appeals has repeatedly made clear that the in-prison setting of a defendant's confinement is a vital component of the future dangerousness inquiry. In *Coble v. State*, for instance, the court explained that "the likelihood that a defendant does not or will not pose a heightened risk of violence in the structured prison community *is a relevant, indeed important, criterion*," even though "it is not the exclusive focus of the 'future dangerousness' issue." 330 S.W.3d 253, 269 (Tex. Crim. App. 2010) (emphasis added). It is impossible to square this position with the decision below, under which evidence of a defendant's minimal risk of violence in prison is deemed irrelevant because it supposedly does not tell the whole story. Pet. App. 69a (testimony "must not narrowly assess the defendant's continuing threat to prison society alone").

Confirming that the future-dangerousness inquiry encompasses the specific risk that a

defendant poses in prison, the Texas Court of Criminal Appeals recently overturned a death sentence on the ground that, in the face of prison-specific evidence offered by the defense, the prosecution had failed to prove future dangerousness. In *Berry v. State*, the defense argued that the defendant "had been a threat only to two of her own children, a threat which [would be] virtually eliminated by a sentence of life imprisonment throughout her child-bearing years." 233 S.W.3d 847, 863 (Tex. Crim. App. 2007). The appellate court agreed, observing that the defendant will "be unable to bear more children before she has served the minimum of forty calendar years and has passed the age of 60." *Id.* at 863 n.5; *see id.* at 863 (jury was responsible for determining "whether she would be a continuing danger in the actual circumstances in which she would be living (prison)," not "her continuing dangerousness in circumstances in which she most assuredly would not be (the free world)").

Further illustrations of Texas's acceptance of prison-specific evidence include an ineffective-assistance case in which counsel had presented testimony about the defendant's potential threat within prison. The Court of Criminal Appeals accepted this as a reasonable strategy: it explained that one legitimate defense goal could have been to "persuade the jury that . . . appellant would not be a future danger if imprisoned for life because the prison system's procedures and techniques would control or eliminate his tendency toward violence."

*Garcia v. State*, 57 S.W.3d 436, 441 (Tex. Crim. App. 2001). Defense experts in Texas also testify about the defendant's lack of access to drugs or other inflammatory environmental factors in prison. *See, e.g., White v. Thaler*, No. H-02-1805, 2011 WL 4625361, *2 (S.D. Tex. Sept. 30, 2011) (describing testimony of two psychologists who opined that defendant's danger was associated with his drug use and that he would not have access to drugs in prison), *certificate of appealability denied*, No. 12-70032, 2013 WL 1442568 (5th Cir. Apr. 1, 2013) (per curiam). And Dr. Cunningham, the expert whose testimony was excluded in this case, has provided similar testimony in such Texas cases as *Milam v. State*, No. AP-76,379, 2012 WL 1868458, at *5-6 (Tex. Crim. App. May 23, 2012).

*2. Oklahoma.* The Oklahoma Court of Criminal Appeals has held that prison-specific future-dangerousness evidence is relevant and admissible. In *Rojem v. State*, for instance, the trial court permitted Dr. Cunningham himself to testify about the defendant's "potential for future dangerousness in prison," but then objected to the mention of "DOJ" in a demonstrative crediting the source of his statistics. 207 P.3d 385, 389-92 (Okla. Crim. App. 2009). In reversing the trial court's restriction of the testimony, the Oklahoma high court held that Dr. Cunningham's prison-specific evidence was "relevant and otherwise admissible," relying in part on a defendant's entitlement to a "meaningful chance to present his complete defense." *Id.* at 391.

Decisions of the Oklahoma high court make clear that, in practice, the future-dangerousness inquiry often focuses on the threat the defendant would pose in a structured prison environment. *See, e.g.*, *Underwood v. State*, 252 P.3d 221, 252 (Okla. Crim. App. 2011) (observing that "[i]n the punishment stage, the defense team focused on showing the jury that Appellant was not a continuing threat *if confined to prison*" (emphasis added)); *Hanson v. State*, 206 P.3d 1020, 1030 (Okla. Crim. App. 2009) (describing defense testimony that the defendant "did not pose a continuing threat to society *in a regimented prison environment*" and noting that the jury had rejected the future dangerousness aggravator (emphasis added)); *Magnan v. State*, 207 P.3d 397, 408 (Okla. Crim. App. 2009) (holding that "[the defendant's] prior violent history coupled with his in-court statements about the circumstances of the instant crimes as well as his potential for future violence *if incarcerated* all provided the district court judge with sufficient evidence to conclude beyond a reasonable doubt that [he] presented a continuing threat to society" (emphasis added)).

*3. Oregon.* For purposes of future dangerousness, the Oregon Supreme Court has explained: "Society includes prison society, as well as society at large. When the jury considers the threat that the defendant might pose because of future violent crimes, *it may consider the threat to prison society*." *State v. Douglas*, 800 P.2d 288, 296 (Or. 1990) (emphasis added). Consistent with that principle, the Oregon court has made clear that defense

experts may testify about the minimal danger the defendant poses in prison: "[A]n expert might testify that the defendant would not pose a threat to prison society, because of its structured environment, but would pose a threat to society at large, if released." *Id.* Oregon defense attorneys also make use of such reasoning in closing arguments. *See, e.g.*, *State v. Williams*, 912 P.2d 364, 378 (Or. 1996) ("Jeff Williams in jail is much less of a problem than Jeff Williams on the street. And jail is where he is going to be. . . . *He's not dangerous in the setting that he's going to be in*." (emphasis added)).

To be sure, prison-specific evidence does not always benefit the defendant – yet the admissibility of evidence that prison is a violent place underscores that, in Oregon, evidence is not irrelevant simply because it focuses on prison. For example, where a defense attorney had made clear his intention "to show [the defendant] is not dangerous to the people he is going to be around which are adult males," the prosecution was also entitled to present evidence "describ[ing] part of the violent characteristics of the institution in which defendant would be confined in the immediate future." *State v. Sparks*, 83 P.3d 304, 318-19 (Or. 2004). The Oregon Supreme Court explained that "[e]vidence of that violent institutional environment can assist jurors in understanding whether defendant would face a significant risk *in prison* of involvement in violent acts against others." *Id.* at 319 (emphasis added).

*4. Idaho*. Although the Idaho Supreme Court has not ruled on the admissibility of prison-specific

future-dangerousness evidence, its trial courts appear to admit such evidence as a routine matter. *See, e.g.*, Brief of Appellant, *State v. Carson*, 264 P.3d 54 (Idaho 2011) (No. 33229), 2010 WL 1555415 at *106 (describing expert testimony that "Mr. Carson, based on research and Mr. Carson's history, 'is at low risk for being violent in the future, and particularly within the correctional system'"); Brief of Respondent, *State v. McDermott*, No. 32071 (Idaho March 24, 2009), 2009 WL 909091, at *5 (noting testimony from Dr. Cunningham that the defendant "had an 84% chance of leading a non-violent prison life in part because prison is 'effective . . . at containing the violence even of offenders that have been at some risk'"); Brief of Appellant, *State v. Payne*, 199 P.3d 123 (Idaho 2006) (No. 28589), 2006 WL 3931730, at *39 (explaining that "Mr. Payne presented evidence that . . . he is not likely to present a future danger to others if he is incarcerated for the rest of his life"). One opinion describes a trial judge as having concluded 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" and that the defendant "would likely kill fellow inmates if imprisoned." *State v. Paz*, 798 P.2d 1, 16-17 (Idaho 1990), *overruled in part on other grounds by State v. Card*, 825 P.2d 1081 (1991).

*5. Other states.* States whose statutes do not explicitly classify future dangerousness as an aggravating factor nonetheless frequently admit prison-specific evidence of future dangerousness and recognize that the prison setting must be central to the jury's assessment of the danger that the

defendant poses. *See, e.g.*, *Henry v. State*, 604 S.E.2d 826, 829 (Ga. 2004) (holding that "[a]n argument that a death sentence is necessary to prevent future dangerous behavior by the defendant in prison *must be based on evidence suggesting that the defendant will be dangerous in prison*" (emphasis added)); *In re Yates*, 296 P.3d 872, 894 (Wash. 2013) (noting that defense counsel "presented testimony from the manager of the intensive management unit of the Washington State Penitentiary concerning the infrequency of escapes and assaults"); *People v. Smithey*, 978 P.2d 1171, 1212-13, 1217 (Cal. 1999) (finding no prosecutorial misconduct where prosecutor "urged the jury to return a verdict of death, in part because of the potential that defendant would be dangerous in prison or to society if he escaped"); *Forrest v. State*, 290 S.W.3d 704, 715 (Mo. 2009) (noting that the prosecution had argued: "[Defense Counsel] says putting [Forrest] in prison is enough, for life. You know, well, *unfortunately there are people in prison too*: prisoners and staff and guards. It's not like he's going to be inside of a concrete box with no access to anybody so society is still at risk" (emphasis added)); *State v. Al-Bayyinah*, 616 S.E.2d 500, 513 (N.C. 2005) (holding that defense counsel's closing argument had not been ineffective because "[c]ounsel reminded the jury that defendant's expert had testified that defendant was unlikely to pose a threat of future dangerousness *in prison* and urged the jury that it did not have to sentence defendant to death to protect society" (emphasis added)); *Campbell*, 765 N.E.2d at 343 (discussing future-dangerousness testimony

"suggest[ing] that Campbell can be rendered harmless with appropriate precautions" such as leg irons and a belly chain, but emphasizing that the witness "did not know whether similar precautions would be used in the state prison system").[4]

*6. Federal courts.* Under the Federal Death Penalty Act, courts routinely treat a defendant's future dangerousness as a non-statutory aggravating factor, *see* 18 U.S.C. § 3592(c) – and, under that rubric, admit testimony about a defendant's dangerousness in prison, including testimony from the same expert whose testimony was excluded here. *See, e.g.*, *Robinson v. United States*, No. 05-CV-756-Y, 2008 WL 4906272, at *6-7 (N.D. Tex. Nov. 7, 2008)) (describing testimony of Dr. Cunningham and of a government witness who opined on risk factors for violence in prison and the level of security applicable to the defendant in federal prison). More generally, courts of appeals recognize the importance of the prison context in assessing future

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[4]One state, South Carolina, excludes evidence of prison security conditions themselves, but allows testimony incorporating such conditions as long as it is "narrowly tailored to demonstrate the defendant's personal behavior in those conditions." *State v. Burkhart*, 640 S.E.2d 450, 488 (S.C. 2007); *see also State v. Torres*, 703 S.E.2d 226, 228 (S.C. 2010) (noting trial court's admission of a prison consultant's testimony that "nothing in Torres' records or in [a] video recording shown by the State gave him any concern about Torres' ability to adapt to life in prison because wardens would be able to manage his behavior").

dangerousness. *See United States v. Allen*, 247 F.3d 741, 788 (8th Cir. 2001) ("[W]e have little doubt that future dangerousness . . . *to prison officials and other inmates during incarceration* is relevant to the jury's final determination of whether a death sentence should be imposed." (emphasis added)), *summarily vacated on other grounds*, 536 U.S. 953 (2002) (mem); *see also United States v. Fields*, 516 F.3d 923, 942 (10th Cir. 2008) ("[T]he government effectively tied Fields' incarceration status to his future dangerousness in its only specific reference to the aggravator in closing argument: '. . . Which one of us would want to be in a cell next to someone who is capable of coldly attacking two innocent people who had done nothing to him?'").

Indeed, several federal courts have gone a step further and held that, where the only alternative sentence is life in prison, *all* evidence of future dangerousness must be confined to the prison context. *See, e.g.*, *United States v. Savage*, No. Crim. A. 07-550-03, 2013 WL 1934531, at *16 (E.D. Pa. May 10, 2013) ("[A]ny evidence that the Government intends to present in support of this aggravating factor is limited to potential dangerousness in the prison setting."); *United States v. Johnson*, 915 F. Supp. 2d 958, 1023 (N.D. Iowa 2013) ("[M]y conclusion that the 'future dangerousness' factor should be limited to 'future dangerousness in prison' rests, in large part, on my conclusion that there is a potential for prejudice to Johnson if the jury is allowed to consider a sentence less than death or life without parole, when any lesser sentence is

improbable in this case."); *United States v. Basciano*, 763 F. Supp. 2d 303, 353 (E.D.N.Y. 2011) ("In order to ensure the proper consideration of [the non-statutory future dangerousness factor] by the jury . . . the court will ensure that the Jury's consideration is limited to the expected circumstances of Basciano's confinement should the death penalty not be imposed."); *United States v. Duncan*, No. CR07–23–N–EJL, 2008 WL 711603, at *11 (D. Idaho Mar. 14, 2008) (relying on this Court's decision in *Simmons*).

As the decision below reflects, Virginia is an outlier in excluding (or sharply restricting) evidence that, in the prison setting, the defendant is unlikely to commit acts of violence. And this case presents a suitable vehicle for the Court to address the question presented. *First*, although the jury also found the vileness statutory aggravator, this Court has already held that, where a jury's finding of future dangerousness is set aside because of unlawful constraints on the defendant's ability to introduce evidence in support of a life sentence, the fact that the jury validly found the vileness aggravator does not automatically insulate the death sentence from reversal. *See Tuggle v. Netherland*, 516 U.S. 10, 13-14 (1995) (addressing Virginia's capital sentencing scheme). *Second*, the Commonwealth cannot plausibly argue that the error was harmless beyond a reasonable doubt, particularly in light of the jury's notes demonstrating a keen interest in Mr. Lawlor's

dangerousness in prison.[5] *Third*, although the Commonwealth argued below that Mr. Lawlor's

[5] The Virginia court did hold that one narrow component of Dr. Cunningham's excluded testimony would have been cumulative because he was able to testify that Mr. Lawlor "did not engage in violent behavior during past periods of incarceration" and that "the Virginia Department of Corrections had classified [him] as presenting a low likelihood of committing violence." Pet. App. 75a-76a. But isolated facts about Mr. Lawlor's correctional classification and prior behavior in prison were only a small part of Dr. Cunningham's expert opinion and could not have rendered the court's other rulings harmless. Indeed, the trial court repeatedly communicated to the jury, during Dr. Cunningham's testimony, that the danger Mr. Lawlor posed in prison was simply irrelevant to their decision. *See* Pet. App. 156a-159a (striking testimony as to low likelihood of violent acts "if he were to be sentenced to life imprisonment rather than death"); Pet. App. 161a-163a (striking answer regarding likelihood of violent acts "if in a prison environment"); Pet. App. 176a-177a (striking testimony that age is "the most powerful factor in identifying [Mr. Lawlor's] likelihood of serious violence in prison"); Pet. App. 214a-215a (sustaining objection to question about "the best predictor of future behavior of violence in prison"); Pet. App. 231a (sustaining objection to question about "future risk of violence for a capitally sentenced defendant"); Pet. App. 269a (striking answer to question about risk of future violence "should he be sentenced to life – to a life term, life without parole"); Pet. App. 273a-275a (sustaining objection to answer describing what is "predictive of violence in prison" because of "[t]he in prison aspect"). And the court twice chided the witness – in the jury's presence – in a manner that made clear that in-prison risk of violence was not to be considered because it was irrelevant. *See* Pet. App. 163a (reprimand of Dr. Cunningham for statement that his opinion related to the likelihood that Mr. Lawlor would commit "[s]erious acts of violence that would constitute a continuing threat to society in prison"); Pet. App. 177a ("The issue is not

appeal on these issues was "moot" because Dr. Cunningham managed to offer some testimony without objection, the Supreme Court of Virginia properly declined to resolve the case on that basis and, instead, addressed the merits of Mr. Lawlor's claims. *See* Pet. App. 69a, 75a-76a. Certiorari should be granted to align Virginia with other jurisdictions in how it metes out the gravest punishment the law allows.

## II. The Supreme Court Of Virginia's Decision Conflicts With This Court's Due Process And Eighth Amendment Precedents.

### A. The Decision Below Conflicts With This Court's Due Process Precedents.

In *Simmons v. South Carolina*, 512 U.S. at 156, this Court held that, where the prosecution seeks a death sentence on the basis of a parole-ineligible defendant's future dangerousness, due process requires that the defendant be allowed inform the jury that if he is not sentenced to death, he will serve a term of life in prison without parole. To similar effect, the Court explained in *Skipper v. South Carolina* that – as a matter of due process – "evidence of [a defendant's] probable future conduct *in prison*" is admissible whenever the prosecution is

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life in prison. It's an issue of risk of violence, period."). The record, in short, belies any contention that the testimony Dr. Cunningham managed to present was within the jury's effective reach.

relying on a prediction of future dangerousness to seek the death penalty. 476 U.S. 1, 5 n.1 (1986) (emphasis added). Both of these holdings flow from the broad principle that a defendant may not be faced with evidence that he has no opportunity to deny or explain. *See Gardner v. Florida*, 430 U.S. 349, 362 (1977) (plurality).

The decision below is impossible to square with *Simmons* and *Skipper*. Whereas those cases recognize that the in-prison setting of a defendant's future behavior must be central to any future dangerousness analysis, the Supreme Court of Virginia's decision simply pretends that setting will not affect a jury's predictive judgment. Thus, according to the decision below, a prediction of a defendant's risk for violence in prison is *irrelevant*. Pet. App. 69a. That is because, in the Virginia Supreme Court's view, "society" encompasses both prison *and* non-prison society. *Id.* at 68a.

This Court's precedents 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. To be sure, the jury might find testimony like Dr. Cunningham's unpersuasive, or might choose to give it little weight. *See Kelly v. South Carolina*, 534 U.S. 246, 254 (2002) ("Evidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other

inferences or be described in other terms."). But that is a far cry from permitting a court to exclude the evidence as irrelevant.

Indeed, the rules set forth in *Simmons* and *Skipper* are firmly grounded in common sense and fundamental fairness. Where a jury is tasked with deciding whether the defendant would pose a continuing threat, immediately at hand is evidence of the murder for which the defendant has just been convicted. *Cf. Kelly*, 534 U.S. at 261 (Rehnquist, C.J., dissenting) ("It is difficult to envision a capital sentencing hearing where the State presents no evidence from which a juror might make [a future-dangerousness] inference."). For the defendant, the most credible way to overcome the offense of conviction is to highlight a change in his circumstances. Foremost among these is the fact that, if not executed, the defendant will spend the rest of his life in a structured environment – generally unlike the environment where he committed the offense of conviction. Information that highlights the in-prison setting of a defendant's sentence, as well as the likely impact of that setting on the defendant's behavior, is crucial to enabling the jury to make the "prediction of future criminal conduct" at the heart of any future-dangerousness analysis. *Jurek*, 428 U.S. at 275; *cf. Simmons*, 512 U.S. at 176 (O'Connor, J., concurring in the judgment) (observing that defendant's argument "that he only preyed on elderly women, a class of victims he would not encounter behind bars" could

succeed "only if the jury were convinced that [he] would *stay* in prison").

Finally, the holding below cannot be justified on the ground that the Virginia capital sentencing statute requires the jury to base its assessment of the "probability" of violence on "evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense." Va. Code § 19.2-264.4(C). The Virginia Supreme Court has held that, because of this language, the jury's assessment must be based *exclusively* on such evidence. *See Morva*, 683 S.E.2d at 565. Yet the jury remains responsible for assessing the defendant's "probability" of violence – *i.e.*, making the sort of "prediction of future criminal conduct" envisioned by *Jurek*, 428 U.S. at 275 – and *Simmons* and *Skipper* leave no room for a state to blind the jury to evidence bearing directly on that judgment. Indeed, there can be no better indicator of the relevance of Mr. Lawlor's in-prison risk of violence than the fact that the jury asked three questions directed toward this very subject.

The Supreme Court of Virginia was forced to contort itself in knots to justify excluding Dr. Cunningham's opinions as rebuttal testimony. According to the court, the future-dangerousness aggravator actually does not entail any sort of prediction at all; rather, it calls for the jury to assess whether the defendant has the mere mental "inclination" or "volition" to commit acts of violence. Pet. App. 67a-68a. But the jury was not instructed to undertake that sort of mind-reading exercise. *See*

JA28:12806 (instructing jury to decide whether, "after consideration of the Defendant's history and background, there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing serious threat to society"). And if the Virginia court is serious about redefining future dangerousness, then it has created an entirely new problem: far from performing the channeling function contemplated by *Jurek*, a future-dangerousness aggravator based on mere "inclination" or "volition" would improperly sanction execution of virtually *any* convicted murderer. *See, e.g.*, *Maynard v. Cartwright*, 486 U.S. 356, 362-64 (1988). In any event, neither *Skipper* nor *Simmons* contemplates that future dangerousness may be semantically redefined so that a court may exclude evidence of unchallenged reliability concerning a defendant's likely future behavior in prison.

### B. The Decision Below Conflicts With This Court's Eighth Amendment Precedents.

Besides conflicting with this Court's due process precedents, the decision below also conflicts with decisions on a defendant's broad Eighth Amendment right to introduce evidence in mitigation. This Court has repeatedly held that "a capital defendant is entitled to introduce *any* relevant mitigating evidence that he proffers in support of a sentence less than death." *Dawson v. Delaware*, 503 U.S. 159, 167 (1992) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); and *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion) (emphasis added)). The Court has likewise made clear that a forgiving

relevance standard applies to evidence offered in mitigation: such evidence is relevant as long as it "tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990). In other words, a state "cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less than death." *Id.* at 441.

Applying these principles, this Court has specifically identified "evidence that the defendant would not pose a danger *if spared (but incarcerated)*" as constitutionally protected mitigating evidence. *Skipper*, 476 U.S. at 5 (emphasis added). As the Court held in *Skipper*, "precluding the defendant from introducing otherwise admissible evidence for the explicit purpose of convincing the jury that he should be spared the death penalty because he would pose no undue danger *to his jailers or fellow prisoners* and could lead a useful life *behind bars if sentenced to life imprisonment*" is unconstitutional. *Id.* at 7 (emphasis added); *see also McKoy*, 494 U.S. at 441.

In the face of these decisions, the court below held that Dr. Cunningham's testimony that Mr. Lawlor would present a minimal risk of violence in prison was generally irrelevant. Pet. App. 196a-197a. Yet the proffered testimony plainly was "evidence that the defendant would not pose a danger if spared (but incarcerated)," just like the testimony wrongfully excluded in *Skipper*. 476 U.S. at 5. More generally, Dr. Cunningham's excluded testimony "tend[ed]

logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value," *McKoy*, 494 U.S. at 440 – namely, the fact that, in prison, Mr. Lawlor posed only a minimal risk of violence. Because the jury could have "reasonably [found] that it warrant[ed] a sentence less than death," *id.* at 441, the Virginia decision condoning its exclusion conflicts with this Court's Eighth Amendment precedents.

To justify its holding that exclusion of the proffered testimony did not violate the Eighth Amendment, the Virginia Supreme Court simply took it upon itself to narrow the definition of constitutionally protected mitigating evidence. "As with evidence rebutting the future dangerousness aggravating factor," the court held, "the relevant [mitigation] 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." Pet. App. 70a; *see id.* at 70a-71a (suggesting that prison-risk evidence is inadmissible because it does not relate to a defendant's "character"). Under this Court's decisions, however, such reasoning cannot support the exclusion of testimony like Dr. Cunningham's.

First, this Court has never held that a narrow conception of "character" can limit the range of admissible mitigating evidence. To the contrary, the Court explained in *Skipper* that "the jury could have drawn favorable inferences from [the proffered] testimony regarding petitioner's character *and his*

*probable future conduct if sentenced to life in prison*." 476 U.S. at 4 (emphasis added); *see id.* at 4-5 (observing that "there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death'" (quoting *Lockett*)); *Tennard v. Dretke*, 542 U.S. 274, 284-87 (2004) (relying on *Skipper* and *Lockett* to reject a restrictive "constitutional relevance" test for mitigating evidence).

Second, Dr. Cunningham's testimony *was* grounded in Mr. Lawlor's character, and was not simply about whether prison conditions would make him "incapable" of violence. People often behave differently in different environments, for reasons having little to do with whatever physical restraints may be imposed upon them. Here, Dr. Cunningham took into account Mr. Lawlor's individualized circumstances, including his relationships with friends and family, his level of education, his age, and his employment history – none of which has any obvious connection to "whether prison security or conditions of confinement render him incapable" of committing violence. Pet. App. 70a. The fact that Dr. Cunningham drew statistically based inferences from Mr. Lawlor's circumstances may have been a permissible subject of cross-examination or prosecutorial argument, but it certainly did not render the testimony *irrelevant*.

Finally, the Virginia court's mitigation holding cannot be saved on the ground that it purports to permit prison-risk testimony resting solely on the defendant's actual prior behavior in prison. Having

just convicted the defendant for capital murder, a jury naturally will tend to discount evidence of *earlier* good behavior as an accurate gauge of his future conduct. To offer effective testimony in mitigation, an expert must be permitted to relate his testimony to the full array of circumstances that predict a defendant's future behavior in prison.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

# Appendix A

Supreme Court of Virginia.
Mark Eric LAWLOR
v.
COMMONWEALTH of Virginia.

Record No. 120481.
Jan. 10, 2013.

PRESENT: All the Justices.

Opinion by Justice WILLIAM C. MIMS.

In this appeal, we review convictions for capital murder and the imposition of two sentences of death. We consider whether the circuit court erred when it (a) limited questioning during voir dire, (b) excluded evidence during the penalty phase of trial, and (c) instructed the jury. We review the sufficiency of the evidence to prove the elements of the offenses charged and the aggravating factors required for imposition of a sentence of death. We also consider challenges to the imposition of the death penalty on constitutional and statutory grounds. Finally, as required by Code § 17.1–313(C), we consider whether the sentences of death were imposed under the influence of passion, prejudice or any other arbitrary factor and whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

## I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW

Mark Eric Lawlor was indicted on and convicted of one count of capital murder in the commission of, or subsequent to, rape or attempted rape, in violation of Code § 18.2–31(5), and one count of capital murder in the commission of abduction with the intent to defile, in violation of Code § 18.2–31(1).

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.

Lawlor resided in Orange's apartment building. He also worked there as a leasing consultant and had

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[1] Other wounds may have been consistent with having been struck by a hammer but no hammer was recovered.

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.

After Lawlor's conviction during the guilt phase of trial, the jury proceeded to the penalty phase. The Commonwealth presented its evidence of aggravating factors as required by Code § 19.2–264.4(C). Lawlor presented rebuttal evidence and evidence of

mitigating factors pursuant to Code § 19.2–264.4(B). Over his objection, the court excluded some of his evidence. At the conclusion of the evidence, the court instructed the jury after rejecting some of Lawlor's proffered instructions. The jury found both the vileness and future dangerousness aggravating factors and returned a sentence of death on each count. After denying Lawlor's post-trial motions, the court imposed the jury's sentences.

Lawlor timely filed 217 assignments of error pursuant to Rule 5:22(c) and Code § 19.2–320. We consider his appeal and review the sentences of death pursuant to Code § 17.1–313.

## II. ANALYSIS

Of the 217 assignments of error Lawlor originally filed, 96 are neither listed nor argued in his opening brief and therefore are abandoned under Rule 5:27(c) and (d).[2] *Prieto v. Commonwealth,* 283 Va. 149, 159, 721 S.E.2d 484, 490–91, *cert. denied,* —— U.S. ——, 133 S.Ct. 244, 184 L.Ed.2d 129 (2012) ("*Prieto II*"); *Andrews v. Commonwealth,* 280 Va. 231, 252, 699 S.E.2d 237, 249, *cert. denied,* —— U.S. ——, 131 S.Ct. 2999, 180 L.Ed.2d 827 (2011). Lawlor aggregates the remaining 121 assignments of error into 18 claims,

[2]The abandoned assignments of error are 1, 3, 5, 6, 9, 10, 11, 12, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 28, 30, 32, 33, 36, 37, 43, 65, 66, 68, 69, 70, 71, 73, 92, 94, 99, 100, 101, 102, 104, 105, 106, 107, 108, 109, 110, 112, 118, 121, 122, 126, 127, 129, 130, 133, 138, 139, 140, 142, 143, 144, 150, 151, 152, 153, 154, 155, 157, 158, 159, 161, 163, 166, 169, 170, 171, 172, 173, 174, 175, 176, 178, 181, 182, 183, 184, 191, 192, 197, 201, 203, 205, 211, 212, 216, and 217.

which we will review chronologically based upon when the core of the alleged error in each claim occurred during the course of the proceedings.

## A. PRETRIAL PROCEEDINGS

### CLAIM 4: EXCLUSION OF QUESTIONS DURING VOIR DIRE

This claim consists of 38 assignments of error asserting that the circuit court improperly limited Lawlor's questioning of 19 members of the jury venire during voir dire, and therefore erred by seating the 12 jurors and 2 alternates.[3] Of these, assignments of error 38, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, and 58 each merely state that the court erred generally in limiting Lawlor's questioning of specified members of the venire, providing no basis for the asserted error. Similarly, assignment of error 31 asserts that the court erred by limiting voir dire by excluding unspecified "life qualification" questions and assignment of error 67 asserts the court erred by seating the 14 jurors and alternates "without first ensuring their legal qualification to sit on a capital jury." These 21 general assertions are amplified by 16 assignments of error setting forth the questions he was not permitted to ask or information he sought to elicit and the members of the venire to whom the

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[3]One of these, assignment of error 79, asserts that the court erred by denying Lawlor the follow-up question "And what would it depend on, ma'am?" when the member of the venire answered that her decision to impose the death penalty would "depend on the evidence." We find no argument for this assignment of error in Lawlor's brief and it therefore is abandoned. Rule 5:27(d).

questions were or would have been propounded. The 21 general assignments of error are not independently argued on brief so to the extent they are not encompassed by our review of the 16 specific assignments of error, we will not consider them.[4] Rule 5:27(d).

## 1. STANDARD OF REVIEW

"The purpose of standards of review is to focus reviewing courts upon their proper role when passing on the conduct of other decisionmakers." *Evans v. Eaton Corp. Long Term Disability Plan,* 514 F.3d 315, 320 (4th Cir. 2008). Therefore it is incumbent upon the parties and the appellate court to correctly identify and apply them.

Lawlor has incorrectly identified the standard of review applicable to this issue. Citing *Nelson v. Commonwealth,* 281 Va. 212, 215, 707 S.E.2d 815, 816 (2011), he contends that whether a defendant's right to voir dire the jury was infringed is a mixed question of law and fact reviewed de novo. However, the sole issue in *Nelson* was sufficiency of the evidence to establish a conviction for driving while intoxicated, in violation of Code § 18.2–266. *Id.* Although Nelson was tried by jury, *id.* at 214, 707 S.E.2d at 815, voir dire was not an issue in the appeal.

In prior cases, we have stated that a ruling on a motion to exclude a juror for cause is reviewed as a mixed question of law and fact. *LeVasseur v.*

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[4] The brief also contains no independent argument on assignment of error 76 so to the extent it is not encompassed by assignments of error 74 and 75, it too is abandoned. Rule 5:27(d).

*Commonwealth,* 225 Va. 564, 584, 304 S.E.2d 644, 654–55 (1983), *cert. denied,* 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984); *Briley v. Commonwealth,* 222 Va. 180, 185, 279 S.E.2d 151, 154 (1981). *But see Townsend v. Commonwealth,* 270 Va. 325, 329, 619 S.E.2d 71, 73 (2005) (applying abuse of discretion standard); *Powell v. Commonwealth,* 261 Va. 512, 536, 552 S.E.2d 344, 358 (2001) ("*Powell I*") (same); *Burns v. Commonwealth,* 261 Va. 307, 329–30, 541 S.E.2d 872, 887, *cert. denied,* 534 U.S. 1043, 122 S.Ct. 621, 151 L.Ed.2d 542 (2001) (trial court's decision "will not be reversed on appeal absent a 'showing of manifest error or abuse of discretion.'") (quoting *Mackall v. Commonwealth,* 236 Va. 240, 252, 372 S.E.2d 759, 767 (1988)); *Yeatts v. Commonwealth,* 242 Va. 121, 134, 410 S.E.2d 254, 262 (1991), *cert. denied,* 503 U.S. 946, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992) (trial court's decision "will not be disturbed on appeal unless the refusal amounts to manifest error."). However, the conduct of voir dire, not exclusion for cause, is the issue raised here.

It is well-established that the manner of conducting voir dire, including the exclusion of questions to the venire, is committed to the trial court's discretion and we review its rulings only for abuse of that discretion. *Thomas v. Commonwealth,* 279 Va. 131, 162, 688 S.E.2d 220, 237, *cert. denied,* —— U.S. ——, 131 S.Ct. 143, 178 L.Ed.2d 86 (2010); *Juniper v. Commonwealth,* 271 Va. 362, 390, 626 S.E.2d 383, 402, *cert. denied,* 549 U.S. 960, 127 S.Ct. 397, 166 L.Ed.2d 282 (2006); *Orbe v. Commonwealth,* 258 Va. 390, 403, 519 S.E.2d 808, 815 (1999), *cert.*

*denied,* 529 U.S. 1113, 120 S.Ct. 1970, 146 L.Ed.2d 800 (2000) ("*Orbe I*").

In contrast to the de novo standard of review, "the abuse of discretion standard requires a reviewing court to show enough deference to a primary decisionmaker's judgment that the court does not reverse merely because it would have come to a different result in the first instance." *Evans,* 514 F.3d at 322. Accordingly, "when a decision is discretionary.... 'the court has a range of choice, and ... its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.'" *Landrum v. Chippenham & Johnston–Willis Hosps., Inc.,* 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011) (quoting *Kern v. TXO Production Corp.,* 738 F.2d 968, 970 (8th Cir.1984)); *see also Evans,* 514 F.3d at 322 ("[T]he [abuse of discretion] standard draws a line—or rather, demarcates a region—between the unsupportable and the merely mistaken, between the legal error, disorder of reason, severe lapse of judgment, and procedural failure that a reviewing court may always correct, and the simple disagreement that, on this standard, it may not.").

We recently focused this standard of review by identifying the "three principal ways" by which a court abuses its discretion: "when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a

clear error of judgment." *Landrum,* 282 Va. at 352, 717 S.E.2d at 137 (quoting *Kern,* 738 F.2d at 970). Naturally, the law often circumscribes the range of choice available to a court in the exercise of its discretion. In such cases, "[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions," *id.* at 357, 717 S.E.2d at 139 (Millette, J., concurring) (quoting *Porter v. Commonwealth,* 276 Va. 203, 261, 661 S.E.2d 415, 445 (2008), *cert. denied,* 556 U.S. 1189, 129 S.Ct. 1999, 173 L.Ed.2d 1097 (2009)), because a court also abuses its discretion if it inaccurately ascertains its outermost limits. Such an error may occur when the court believes it lacks authority it possesses, *see id.* at 358, 661 S.E.2d at 140 (discussing court's mistaken belief it lacked authority to supervise courtroom security), when it believes the law requires something it does not, *LaCava v. Commonwealth,* 283 Va. 465, 472, 722 S.E.2d 838, 841 (2012) (court abused its discretion in denying a motion to extend the deadline for filing a transcript based on a flawed interpretation of Rule 5A:8(a)), or when it fails to fulfill a condition precedent that the law requires, *Turner v. Commonwealth,* 284 Va. 198, 208, 726 S.E.2d 325, 331 (2012) (court abused its discretion in ruling a witness unavailable for lack of memory when it failed to inquire into the authenticity of his claim as required by precedent). But whether a court possesses or lacks authority, and whether it has correctly identified and fulfilled the legal prerequisites to a discretionary act, are themselves significant factors in its consideration. Therefore, while our abuse of

discretion standard of review necessarily must include a review of any legal conclusions made concomitant with a lower court's exercise of discretion, that does not mean abuse of discretion review is partially de novo. *See Koon v. United States,* 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996).[5]

In the case of voir dire, a trial court's discretion in excluding questions asked of the venire is limited by statute and the United States Constitution. Code § 8.01–358 establishes a "right to ask [a member of the venire] directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein." To exclude all such questions would be contrary to the statute, thereby constituting an abuse of discretion. *See Powell v. Commonwealth,* 267 Va. 107, 143, 590 S.E.2d 537, 559, *cert. denied,* 543 U.S. 892, 125 S.Ct. 86, 160 L.Ed.2d 157 (2004) ("*Powell II*"); *LeVasseur,* 225 Va. at 581, 304 S.E.2d at 653.

In a capital case, this inquiry of a prospective juror encompasses questions of whether his "views [on the death penalty] would 'prevent or substantially impair

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[5]Lawlor similarly implies a de novo review under the abuse of discretion standard elsewhere in his brief when quoting our statement in *Porter* and subsequent cases that a court "by definition abuses its discretion when it makes an error of law." 276 Va. at 260, 661 S.E.2d at 445. For the foregoing reasons, this statement was not intended to be a back door through which an appellant may convert abuse of discretion review into de novo review.

the performance of his duties as a juror in accordance with his instructions and his oath.'" *Morgan v. Illinois,* 504 U.S. 719, 728, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (quoting *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)); *see also Mackall,* 236 Va. at 251, 372 S.E.2d at 766 ("[E]ither party may require prospective jurors to state clearly that whatever view they have of the death penalty will not prevent or substantially impair their performance as jurors in conformity with their oath and the court's instructions."). But within those perimeters, "[a] party has no right ... to propound any question he wishes, or to extend *voir dire* questioning *ad infinitum.* The court must afford a party a full and fair opportunity to ascertain whether prospective jurors 'stand indifferent in the cause,' but the trial judge retains the discretion to determine when the parties have had sufficient opportunity to do so." *LeVasseur,* 225 Va. at 581, 304 S.E.2d at 653; *accord Thomas,* 279 Va. at 162–63, 688 S.E.2d at 237; *Juniper,* 271 Va. at 396, 626 S.E.2d at 405. We therefore review the challenged jurors' entire voir dire, not merely individual statements taken in isolation. *Powell I,* 261 Va. at 536, 552 S.E.2d at 358; *Burns,* 261 Va. at 329, 541 S.E.2d at 887.

### 2. VIEWS ON CAPITAL PUNISHMENT

In assignments of error 77, 78, and 88, Lawlor asserts that the court erred by preventing him from asking specific members of the venire "[D]o you have strong feelings in favor of the death penalty?" or "[W]hat are your views about the death penalty?" Lawlor asserts that the Supreme Court of the United

States identified such questions as constitutionally protected in *Morgan.* That assertion is not accurate. Rather, in *Morgan* the Supreme Court merely reiterated its earlier holding in *Witt,* 469 U.S. at 424, 105 S.Ct. 844 and *Adams v. Texas,* 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), that a potential juror may be questioned to determine whether his views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 504 U.S. at 728, 112 S.Ct. 2222 (internal quotation marks omitted). Thus there is no statutory or constitutional right to ask Lawlor's questions. *Cf.* Code § 8.01–358.

Accordingly, we have held that a party is not entitled to ask potential jurors their views on the death penalty. *Burns,* 261 Va. at 329, 541 S.E.2d at 887 (citing *Mackall,* 236 Va. at 251, 372 S.E.2d at 766). The relevant inquiry is whether the juror would adhere to them in disregard of the jury instructions and in violation of his or her oath. *Witt,* 469 U.S. at 420, 105 S.Ct. 844 ("[A] juror may not be challenged for cause based on his views about capital punishment *unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.*" (quoting *Adams,* 448 U.S. at 45, 100 S.Ct. 2521) (emphasis in *Witt* )). The court therefore did not abuse its discretion by excluding Lawlor's questions.

### 3. MITIGATING EVIDENCE

In assignments of error 74, 75, 76, 80, 83, 84, 85, and 86, Lawlor argues that the court erred by preventing him from asking specific members of the

venire whether they would consider specific types of evidence as mitigating evidence, including evidence that the defendant was under the influence of extreme mental or emotional disturbance; evidence of childhood neglect; evidence of the defendant's full life history; evidence of a lack of prior violent criminal record; and evidence of drug or alcohol use. Citing *Abdul–Kabir v. Quarterman,* 550 U.S. 233, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007), he argues that by denying him the opportunity to ask about specific types of mitigating evidence, the court prevented him from determining whether the jurors could give meaningful consideration to all mitigating evidence.

However, *Abdul–Kabir* requires that juries consider all mitigating evidence as a whole; it does not require courts to permit defendants to ask jurors how they would weigh every species of mitigating evidence. *See id.* at 246, 127 S.Ct. 1654. Furthermore, we have ruled that questions about the effect of specific mitigating evidence on the jurors' deliberations "are improper in voir dire because they are not relevant to a determination of whether a juror has a particular bias or prejudice, but instead attempt to elicit the juror's views on specific types of evidence." *Powell I,* 261 Va. at 536, 552 S.E.2d at 358. Accordingly, the court did not abuse its discretion by prohibiting this line of questioning.

In assignment of error 81, Lawlor argues that the court erred by preventing him from asking whether specific members of the venire would consider a life sentence in the absence of any mitigating evidence. While we have indicated that a defendant need not

present any evidence pertaining to sentencing, *see Jackson v. Commonwealth,* 267 Va. 178, 194, 590 S.E.2d 520, 529, *cert. denied,* 543 U.S. 891, 125 S.Ct. 168, 160 L.Ed.2d 155 (2004), each of the specified members of the venire was instructed during voir dire that a sentence of death is never mandatory and that the jury could return a sentence of life imprisonment without parole even if the Commonwealth proved both aggravating factors and Lawlor presented no mitigating evidence. The court thereafter asked each member whether he or she understood that the defense was not required to present mitigating evidence. Counsel also asked whether the members of the venire understood and received affirmative responses. However, the court rejected some forms of Lawlor's question and limited his inquiry as repetitive.

Reviewing the entire voir dire of the specified members of the venire, *Powell I,* 261 Va. at 536, 552 S.E.2d at 358; *Burns,* 261 Va. at 329, 541 S.E.2d at 887, we are satisfied that "[t]he circuit court explained the relevant legal principles, asked appropriate questions to ensure that the jurors understood those principles and could apply them to the case, and afforded [Lawlor] a full and fair opportunity to ascertain whether jurors could stand indifferent in the cause." *Bell v. Commonwealth,* 264 Va. 172, 196–97, 563 S.E.2d 695, 711–12 (2002), *cert. denied,* 537 U.S. 1123, 123 S.Ct. 860, 154 L.Ed.2d 805 (2003) (internal quotation marks omitted). While the court restricted his voir dire, Lawlor elicited the information he sought and was not entitled to ask the members of the venire this question repetitively or in

his preferred form. *Thomas,* 279 Va. at 162–63, 688 S.E.2d at 237; *Juniper,* 271 Va. at 396, 626 S.E.2d at 405; *see also Green v. Commonwealth,* 266 Va. 81, 97, 580 S.E.2d 834, 843 (2003), *cert. denied,* 540 U.S. 1194, 124 S.Ct. 1448, 158 L.Ed.2d 107 (2004) ("When ... a trial court affords ample opportunity to counsel to ask relevant questions ... sufficient to preserve a defendant's right to trial by a fair and impartial jury, we will generally not reverse [its] decision to limit or disallow certain questions from defense counsel." (internal quotation marks omitted)). Accordingly, the court did not abuse its discretion.

In assignment of error 87, Lawlor asserts that the court erred by preventing him from asking specific members of the venire if they were substantially impaired from considering a sentence of life imprisonment without parole if the defense presented no mitigating evidence. He argues that the court properly allowed him to ask whether they were "prevented" from considering life imprisonment without parole but improperly prevented him from asking whether they were "substantially impaired" from considering such a sentence. He argues that "prevent" and "substantially impair" are not interchangeable.

As noted above, the terms "prevent" and "substantially impair" come from *Adams,* 448 U.S. at 45, 100 S.Ct. 2521 and have been reiterated in *Witt,* 469 U.S. at 424, 105 S.Ct. 844 *Morgan,* 504 U.S. at 728, 112 S.Ct. 2222 and *Mackall,* 236 Va. at 251, 372 S.E.2d at 766—all cases applying them to a juror's views on capital punishment and their effect on his or

her ability to follow jury instructions and fulfill his or her oath. We need not decide whether the terms "prevent" and "substantially impair" are interchangeable in that context because they were not used for that purpose in the portion of the record relevant to this assignment of error. Rather, Lawlor asked a member of the venire, "[D]o you think you would be substantially impaired from considering life without parole as punishment for the guilty capital murderer where aggravating circumstances were found and you heard no evidence of mitigation?"[6] The question therefore did not seek to elicit the effect of the jurors' views on capital punishment but rather whether they would consider life imprisonment without parole if Lawlor presented no mitigating evidence, which, as noted above, they had already answered.[7] That was the view of the circuit court as well: in excluding the question upon the Commonwealth's objection, it ruled, "They have answered that question about eight times. Each of the prospective jurors have said ['I would consider both, whether there was mitigating evidence or where there wasn't mitigating evidence'] and you continue to ask the question."

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[6] Lawlor also proposed a similar but longer version of the question in written form.

[7] This assignment of error names two additional members of the venire who were not specified in assignment of error 81. However, they too had been fully instructed that the defendant need not present any mitigating evidence and were questioned whether they understood by the court and counsel.

As noted above, a defendant has a right to propound questions relevant under Code § 8.01–358 and the *Adams* line of cases. However, he is not entitled to his preferred form of question and does not have the right to repeat them cumulatively when he already has elicited the relevant information. *Thomas,* 279 Va. at 162–63, 688 S.E.2d at 237; *Juniper,* 271 Va. at 396, 626 S.E.2d at 405; *Green,* 266 Va. at 97, 580 S.E.2d at 843. The information Lawlor sought was whether the jurors would consider life imprisonment without parole in the absence of any mitigating evidence. Any distinction between the terms "prevent" and "substantially impair" in the *Adams* line of cases does not apply to this particular inquiry. Therefore, he had obtained the relevant information and the court did not abuse its discretion by restricting the form or frequency of his questions.

### 4. PRISON CONDITIONS

In assignment of error 72, Lawlor argues that the court erred by preventing him from asking potential jurors whether they could consider a sentence of life imprisonment without parole in the absence of any evidence of prison security. He contends that jurors may have been more willing to sentence him to life imprisonment without parole if they were confident he would be unable to present a danger there or escape.

We have previously ruled that evidence of general prison conditions is not relevant in a capital case, either as mitigating evidence, *Juniper,* 271 Va. at 425, 626 S.E.2d at 423 (citing *Cherrix v. Commonwealth,* 257 Va. 292, 310, 513 S.E.2d 642,

653, *cert. denied,* 528 U.S. 873, 120 S.Ct. 177, 145 L.Ed.2d 149 (1999)), or to rebut the future dangerousness aggravating factor. *Id.* at 426–27, 626 S.E.2d at 424 (citing *Bell,* 264 Va. at 201, 563 S.E.2d at 714); *see also Morva v. Commonwealth,* 278 Va. 329, 350, 683 S.E.2d 553, 565 (2009), *cert. denied,* —— U.S. ——, 131 S.Ct. 97, 178 L.Ed.2d 61 (2010) ("The generalized competence of the Commonwealth to completely secure a defendant in the future is not a relevant inquiry."). Code § 8.01–358 does not entitle or permit the court or a party to examine potential jurors to ascertain what effect the exclusion of irrelevant evidence may have on their deliberations. Accordingly, the court did not abuse its discretion by excluding Lawlor's question.

### 5. MOTION FOR A MISTRIAL

In assignments of error 59 and 61, Lawlor argues that the court failed to remedy its erroneous restrictions on voir dire by denying his motion to re-question 7 members of the venire and by denying his alternative motion for a mistrial. Because we have found that the court did not erroneously restrict voir dire, the court did not err in denying the motion.[8]

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[8] These assignments of error include four members of the venire not specified in assignments of error 81 and 87. However, each of these members had also been instructed by the court that the defendant need not present any mitigating evidence and were questioned whether they understood by the court and counsel. Therefore the reasoning set forth above also applies to them.

## CLAIM 5: THE CIRCUIT COURT'S CONDUCT DURING VOIR DIRE

This claim consists of 10 assignments of error asserting that the circuit court erred by engaging in prejudicial conduct during voir dire.

Lawlor asserts in assignments of error 34, 77, and 82 that the court engaged in prejudicial conduct during voir dire by issuing contradictory rulings. Based on our review of the places in the record to which Lawlor refers, *see* Rule 5:27(c) (requiring an appellant to refer "to the pages of the appendix where the alleged error has been preserved"), the only rulings adverse to Lawlor were those we have refused to reverse under the abuse of discretion standard, including rulings on questions to elicit the jurors' views or feelings on capital punishment, their ability to consider a sentence of life imprisonment without parole in the absence of mitigating evidence, and their willingness to consider specific types of mitigating evidence. Because those rulings were not error, they did not prejudice Lawlor in voir dire. To the extent that the adverse rulings may have been contradicted by favorable rulings at other places in the record, the favorable rulings could not prejudice Lawlor because they enabled him to propound questions that the court could properly, in its discretion, have excluded.

Lawlor also argues in assignments of error 35, 39, 60, 89, 90, and 91 that he was prejudiced by the court's reprimands in the presence of jurors, either in open court or in a loud voice during bench conferences, and in sustaining the Commonwealth's

objections to his voir dire questions in the presence of the jury. Based on our review of the places in the record to which Lawlor refers, *see* Rule 5:27(c), either he did not object that the comments were prejudicial when they were made in open court or there is no indication that the jury heard the comments made during bench conferences.[9] We cannot consider any comments where the record contains no indication that the jury heard them because there is no basis to find prejudice. *Prince Seating Corp. v. Rabideau,* 275 Va. 468, 470, 659 S.E.2d 305, 307 (2008) (per curiam) ("We cannot review the ruling of a lower court for error when the appellant does not ... provide us with a record that adequately demonstrates that the court erred."). We will not consider any comments where Lawlor failed to object because the issue was not preserved. Rule 5:25; *Porter,* 276 Va. at 256, 661 S.E.2d at 442 (noting the issue of prejudice was not preserved because "the record shows that he failed to timely object to any of the circuit court's comments").

In assignment of error 62, Lawlor argues that the court erred by denying his written motion to reopen

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[9] Lawlor did request that the court and counsel keep their voices down in the bench conferences, but there is no indication that the comments he asserts were prejudicial were overheard by the jury. On one occasion, he suggested the possibility they were audible but the court ruled they were not. On another occasion, co-counsel noted that the bench conference could be heard at counsel table and objected to the seating of the members of that panel of the venire. However, the court ruled that counsel had already consented to their qualification and that the objection therefore was untimely. Lawlor has not assigned error to either ruling. Consequently, we will not review them. Rule 5:22(c).

voir dire to permit him to ask additional questions. In that motion, he also sought in the alternative a mistrial on the ground that the court's comments and reprimands could be heard by the jury and were prejudicial. In denying the motion, the court stated that it could only rule on timely objections.

We review denial of a motion for mistrial for abuse of discretion. *Lewis v. Commonwealth,* 269 Va. 209, 213–14, 608 S.E.2d 907, 909 (2005) (citing *Burns,* 261 Va. at 341, 541 S.E.2d at 894). The comments and reprimands Lawlor asserted to be prejudicial in the motion were made during voir dire of the first nine jurors, which occurred on February 2 and 3, 2011. However, he did not file his motion until February 7. The court denied it then as untimely. That ruling was not an abuse of discretion. *See Cheng v. Commonwealth,* 240 Va. 26, 40, 393 S.E.2d 599, 607 (1990) (declining to reverse denial of motion for mistrial where the defendant failed to seek corrective action promptly when the allegedly prejudicial comments were made).

## CLAIM 6: MISLEADING THE JURY

This claim consists of 2 assignments of error, assignments of error 63 and 64, in which Lawlor asserts that by overruling his objections to the Commonwealth's voir dire questions and sustaining the Commonwealth's objections to his, the circuit court misled the jurors into believing they could disregard mitigating evidence.

Lawlor first argues that the court erred by allowing the Commonwealth to state "[W]hen it comes to mitigating evidence the [c]ourt will instruct

you that you shall consider ... the mitigating evidence? But, again, [as with evidence of aggravating factors,] you don't have to accept it?" However, Lawlor did not object to the statement. We therefore will not consider this argument. Rule 5:25.

Similarly, he argues that the court erred by sustaining the Commonwealth's objection to his question, "Do you all understand that you can't reject any kind of mitigation evidence?" The court sustained the objection as the question was worded. Lawlor then expressly accepted the court's ruling and agreed to move on. We therefore will not consider this argument. Rule 5:25.

Lawlor also refers to a written motion in limine he filed to prevent future statements by the Commonwealth that the jury could reject mitigating evidence. However, the court granted the motion. Lawlor is not aggrieved by a ruling in his favor.

## B. THE GUILT PHASE OF TRIAL

### CLAIM 8: CHALLENGES TO COUNT I (CAPITAL MURDER IN THE COMMISSION OF RAPE OR ATTEMPTED RAPE)

This claim consists of 2 assignments of error relating to the first count of the indictment, challenging rulings on a motion to strike and a motion in limine.

#### 1. MOTION TO STRIKE

In assignment of error 93, Lawlor asserts that the court erred by denying his motion to strike the element of rape from Count I of the indictment,

capital murder in the commission of or subsequent to rape or attempted rape, in violation of Code § 18.2–31(5). Citing *Moore v. Commonwealth,* 254 Va. 184, 186, 491 S.E.2d 739, 740 (1997), he contends that there was no evidence of penile penetration, an essential element of rape.

Under Code § 18.2–31(5) willful, deliberate, and premeditated killing is capital murder if committed in the commission of or subsequent to either rape or attempted rape.[10] Proof of either predicate is sufficient to establish the crime of capital murder under the statute. Accordingly, the conviction must be affirmed if the evidence is sufficient to prove the statutory crime charged in the indictment, which in this case includes both rape and attempted rape.

While Lawlor's assignment of error asserts that the evidence was insufficient to prove rape, neither it nor any other challenges the sufficiency of the evidence to prove attempted rape. Consequently, the unchallenged attempted rape predicate is a separate and independent basis upon which to affirm his conviction of the statutory crime as charged in the indictment. We therefore do not review the sufficiency of the evidence to prove the separate rape predicate. *Johnson v. Commonwealth,* 45 Va.App. 113, 116–17, 609 S.E.2d 58, 60 (2005); *see also Manchester Oaks*

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[10] Such a killing also is capital murder if committed in the commission of or subsequent to forcible sodomy, attempted forcible sodomy, or object sexual penetration. Code § 18.2–31(5). These predicates were not included in the indictment and are not relevant in this appeal.

*Homeowners Ass'n, Inc. v. Batt,* 284 Va. 409, 421–22, 732 S.E.2d 690, 698 (2012).

### 2. MOTION IN LIMINE

In assignment of error 114, Lawlor asserts that allowing the jury to consider the rape predicate during the penalty phase may have been prejudicial because jurors may have viewed rape as more reprehensible than attempted rape, thereby influencing them to impose a sentence of death rather than life imprisonment without parole.

Lawlor challenged the sufficiency of the evidence for the rape portion of the charge in his motion to strike. That motion was timely made. However, he did not make this argument regarding prejudice then. Rather, he argued prejudice for the first time in a motion in limine filed after the jury had been instructed in the guilt phase of trial and after it returned its verdict. This prejudice argument was not timely at that stage of the trial.

It is axiomatic that when a jury considers what sentence to impose upon a defendant convicted of a crime, the charge upon which he stands convicted is essential to its deliberation. Both Code § 19.2–295(A) and Code § 19.2–264.3(C) direct that the same jury that returned a conviction shall thereafter determine the sentence to be imposed. The statutes therefore presume that the jury is cognizant of the conviction during its deliberation of the sentence. Further, Code §§ 18.2–10, 18.2–11, 18.2–12, and 18.2–13 set forth the permissible ranges of sentences that juries may impose based upon the offense for which the defendant stands convicted, either directly or as a

result of the classification of the offense. Thus it is by knowing the offense that the jury knows the legal range for the sentence.

Consequently, the charge upon which a defendant stands convicted cannot, as a matter of law, be irrelevant to or prejudicial in the jury's consideration of the sentence to be imposed.[11] Accordingly, because Lawlor's argument that allowing the jurors to consider the rape predicate would prejudice their penalty phase deliberations was first made after they had convicted him, it was not timely. It therefore will not be considered. Rule 5:25.

## CLAIM 7: CHALLENGES TO COUNT II (CAPITAL MURDER IN THE COMMISSION OF ABDUCTION WITH INTENT TO DEFILE)

This claim consists of 7 assignments of error relating to the second count of the indictment, challenging rulings on a motion to strike, a motion in limine, and jury instructions.

### 1. MOTION TO STRIKE

In assignments of error 95 and 96, Lawlor asserts that the court erred by denying his motions to strike the evidence on Count II of the indictment, capital murder in the commission of abduction with the intent to defile, in violation of Code § 18.2–31(1).

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[11] This does not affect those situations wherein the defendant has been convicted on multiple charges based on the same facts, when double jeopardy considerations may compel the Commonwealth to elect which charge to submit to the jury for the imposition of a sentence. *E.g., Andrews,* 280 Va. at 287–88 & n.9, 699 S.E.2d at 269–70 & n.19.

Citing *Powell I,* he contends that there is no evidence of an abduction "separate and apart from, and not merely incidental to" capital murder in the commission of rape or attempted rape.

A motion to strike challenges whether the evidence is sufficient to submit the case to the jury. *Culpeper Nat'l Bank v. Morris,* 168 Va. 379, 384, 191 S.E. 764, 766 (1937). What the elements of the offense are is a question of law that we review de novo. Whether the evidence adduced is sufficient to prove each of those elements is a factual finding, which will not be set aside on appeal unless it is plainly wrong. *George v. Commonwealth,* 242 Va. 264, 278, 411 S.E.2d 12, 20 (1991), *cert. denied,* 503 U.S. 973, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992). In reviewing that factual finding, we consider the evidence in the light most favorable to the Commonwealth and give it the benefit of all reasonable inferences fairly deducible therefrom. *Commonwealth v. McNeal,* 282 Va. 16, 20, 710 S.E.2d 733, 735 (2011) (citing *Noakes v. Commonwealth,* 280 Va. 338, 345, 699 S.E.2d 284, 288 (2010)); *Muhammad v. Commonwealth,* 269 Va. 451, 479, 619 S.E.2d 16, 31 (2005), *cert. denied,* 547 U.S. 1136, 126 S.Ct. 2035, 164 L.Ed.2d 794 (2006).

> After so viewing the evidence, the question is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In sum, if there is evidence to support the conviction, the reviewing court is not permitted to substitute its judgment, even if its view of the evidence

> might differ from the conclusions reached by the finder of fact at the trial.

*McNeal,* 282 Va. at 20, 710 S.E.2d at 735 (citations, internal quotation marks, and alterations omitted).

In *Scott v. Commonwealth,* 228 Va. 519, 323 S.E.2d 572 (1984), we considered the elements of the statutory offense of abduction set forth in Code § 18.2–47. We determined that statutory abduction, unlike common law abduction, required no proof of asportation. Rather, the statutory offense is complete upon "the physical detention of a person, with the intent to deprive him of his personal liberty, by force, intimidation, or deception." *Id.* at 526, 323 S.E.2d at 577. We recognized that some form of detention is inherent in rape, robbery, and assault but postponed consideration of any potential constitutional problems created by the overlap for a future case where they were squarely presented. *Id.*

That case came a year later, in *Brown v. Commonwealth,* 230 Va. 310, 337 S.E.2d 711 (1985). We determined that "the General Assembly did not intend to make the kind of restraint which is an intrinsic element of crimes such as rape, robbery, and assault a criminal act, punishable as a separate offense." *Id.* at 314, 337 S.E.2d at 713. The test enunciated by the Supreme Court in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to ensure that a prosecution does not violate the double jeopardy clause therefore did not apply. *Brown,* 230 Va. at 313–14, 337 S.E.2d at 713–14. Accordingly,

> one accused of abduction by detention and another crime involving restraint of the victim, both growing out of a continuing course of conduct, is subject upon conviction to separate penalties for separate offenses only when the detention committed in the act of abduction is separate and apart from, and not merely incidental to, the restraint employed in the commission of the other crime.

*Id.* at 314, 337 S.E.2d at 713–14.

Lawlor argues that applying the facts of his case to the factors adopted by the Court of Appeals in *Hoyt v. Commonwealth,* 44 Va.App. 489, 494, 605 S.E.2d 755, 757 (2004), leads to the conclusion that there was no abduction separate and apart from the murder and rape or attempted rape.[12] We disagree that *Hoyt* is applicable in this case.

The only issue when abduction is charged alongside an offense for which detention is an intrinsic element is whether any detention exceeded

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[12] According to the Court of Appeals in *Hoyt,* the "'four factors ... central to' determining whether or not an abduction or kidnapping is incidental to another crime" are

> (1) the duration of the detention or asportation; (2) whether the detention or asportation occurred during the commission of a separate offense; (3) whether the detention or asportation which occurred is inherent in the separate offense; and (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense.

44 Va.App. at 494, 605 S.E.2d at 757 (quoting *Gov't of the V.I. v. Berry,* 604 F.2d 221, 227 (3d Cir.1979)).

the minimum necessary to complete the required elements of the other offense.[13] *See Powell I,* 261 Va. at 541, 552 S.E.2d at 360 (stating the question is whether "there is sufficient evidence to support the finding of the jury that [the defendant] used *greater restraint than was necessary*" to commit the other offense. (emphasis added)). We already have stated that murder is not a crime for which detention is inherent as an intrinsic element. *Id.* at 541 n. 1, 552 S.E.2d at 360 n.11. We therefore need only consider whether the evidence in this case proves detention separate and apart from rape or attempted rape.

Lawlor was neither indicted nor convicted upon a charge of rape. However, the charge of capital murder in the commission of or subsequent to rape or attempted rape incorporates the statutory definition of rape. As relevant to this case, the elements of that offense are "sexual intercourse with a complaining witness" "against the complaining witness's will, by force, threat or intimidation." Code § 18.2–61(A).

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[13] In *Brown* and subsequent cases, we have acknowledged some degree of *detention* to be inherent in rape, robbery, and assault but we have not indicated that any *asportation* of the victim is similarly inherent. *Cf. Cardwell v. Commonwealth,* 248 Va. 501, 511, 450 S.E.2d 146, 153 (1994), *cert. denied,* 514 U.S. 1097, 115 S.Ct. 1826, 131 L.Ed.2d 747 (1995) ("[T]ransporting [the victim] from the robbery scene was ... separate and apart from, and not merely incidental to, the robbery and was greater than the restraint intrinsic in a robbery."); *Coram v. Commonwealth,* 3 Va.App. 623, 626, 352 S.E.2d 532, 534 (1987) ( "[A]sportation to decrease the possibility of detection is not an act inherent in or necessary to the restraint required in the commission of attempted rape.").

Because intercourse constituting rape necessarily occurs against the victim's will, we presume that the victim was present only because the offender "deprive[d her] of [her] personal liberty" to escape. *Scott,* 228 Va. at 526, 323 S.E.2d at 576. Thus the restraint necessary to prevent such escape is an intrinsic element of the offense. But additional restraint, either as to duration or degree, is not inherent in rape and therefore is not an intrinsic element. *See Brown,* 230 Va. at 314, 337 S.E.2d at 714 (considering both the "time and distance" between the abduction and other offense and the "quality and quantity" of the force and intimidation used to effectuate the abduction and other offense).

For example, in *Hoke v. Commonwealth,* 237 Va. 303, 311, 377 S.E.2d 595, 600, *cert. denied,* 491 U.S. 910, 109 S.Ct. 3201, 105 L.Ed.2d 709 (1989), the victims' "wrists and ankles were bound securely with ligatures, her mouth was gagged tightly, and she was detained for a lengthy period." We determined that this was sufficient to establish a detention beyond that necessary to complete the separate offenses of robbery and rape. Similarly, in *Fields v. Commonwealth,* 48 Va.App. 393, 400, 632 S.E.2d 8, 11 (2006), the defendant "twice choked [the victim] to the point of unconsciousness." The choking increased the risk of death and injury beyond the rape itself and deprived the victim of the opportunity to resist or call for help in ways not intrinsically encompassed by rape alone. *Id.*

This case is similar to *Fields.* Rendering one's victim unconscious is not an essential, intrinsic

element to complete the offense of rape. The evidence adduced at trial, viewed in the light most favorable to the Commonwealth, established that Orange was beaten 47 times with a blunt object, and she was conscious and alive for part of the beating. This manner of effectuating a capital murder in the commission of rape or attempted rape is not inherent in the elements of those crimes. The evidence therefore is sufficient to establish capital murder in the commission of abduction with intent to defile "separate and apart from, and not merely incidental to," capital murder in the commission of or subsequent to rape or attempted rape. [14] *See Powell I,* 261 Va. at 540–41, 552 S.E.2d at 360; *Brown,* 230 Va. at 314, 337 S.E.2d at 713–14.

### 2. MOTION IN LIMINE

Lawlor also asserts in assignments of error 113, 115, and 116 that the court erred by denying his motion in limine to exclude the conviction for capital murder in the commission of an abduction because it was based on the same operative facts as capital murder in the commission of rape or attempted rape. He argues that allowing the jury to consider both charges violates the double jeopardy clause. We review de novo claims that multiple punishments have been imposed for the same offense in violation of the double jeopardy clause. *Fullwood v. Commonwealth,* 279 Va. 531, 539, 689 S.E.2d 742,

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[14] Having addressed Lawlor's argument on these assignments of error in the context of our own precedents, we express no opinion on the *Hoyt* factors.

747 (2010) (citing *United States v. Imngren,* 98 F.3d 811, 813 (4th Cir.1996)).

We previously examined this issue in *Brown* and *Powell I:*

> The double jeopardy clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb...." It is now well recognized that this clause affords an accused three distinct constitutional guarantees. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."

*Brown,* 230 Va. at 312–13, 337 S.E.2d at 712–13(quoting *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)); *accord Andrews,* 280 Va. at 279, 699 S.E.2d at 264. "The present case involves the third protection because [Lawlor's] convictions, and the death sentences that resulted, occurred in a single trial." *Id.* (citing *Blythe v. Commonwealth,* 222 Va. 722, 725, 284 S.E.2d 796, 797–98 (1981)).

However double jeopardy does not prevent a defendant from suffering separate punishments for separate offenses growing out of the same continuing course of conduct. So long as abduction "is separate and apart from, and not merely incidental to, the restraint employed in the commission of the other crime" the defendant may be punished for both. *Powell I,* 261 Va. at 540–41, 552 S.E.2d at 360;

*Brown,* 230 Va. at 314, 337 S.E.2d at 713–14. As noted above, the evidence in this case supports convictions for capital murder in the commission of abduction with intent to defile and capital murder in the commission of or subsequent to rape or attempted rape. The duration and manner of Orange's detention is separate and apart from the detention inherent in capital murder in the commission of rape or attempted rape. Therefore the conviction and sentence on the charge of capital murder in the commission of abduction with intent to defile do not violate the double jeopardy clause.

### 3. JURY INSTRUCTIONS

In assignments of error 97 and 98, Lawlor asserts that the court erred by failing to instruct the jury that the detention inherent in capital murder in the commission of or subsequent to rape or attempted rape cannot serve as the basis for conviction upon a charge of capital murder in the commission of abduction with intent to defile. The court refused his proffered instruction that the jury must find "beyond a reasonable doubt[ ] that any abduction ... was separate and apart from, and not merely incidental to, the act of rape or attempted rape. The restraint inherent in Count 1 cannot serve as the sole basis for a conviction for Count 2." He argues that in refusing the instruction, the court failed to instruct the jury on a necessary element of the charge.

We review jury instructions "to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." *Cooper v. Commonwealth,* 277 Va. 377, 381, 673

S.E.2d 185, 187 (2009) (internal quotation marks omitted). This is a mixed question of law and fact. It is error to give an instruction that incorrectly states the law; "whether a jury instruction accurately states the relevant law is a question of law that we review de novo." *Orthopedic & Sports Physical Therapy Assocs., Inc. v. Summit Group Props., LLC,* 283 Va. 777, 782, 724 S.E.2d 718, 721 (2012) (internal quotation marks omitted); *see also Velasquez v. Commonwealth,* 276 Va. 326, 330, 661 S.E.2d 454, 456–57 (2008) (finding error when court's instruction was an incorrect statement of law). However, "jury instructions 'are proper only if supported by the evidence,'" *Orbe I,* 258 Va. at 398, 519 S.E.2d at 813 (quoting *Commonwealth v. Donkor,* 256 Va. 443, 445, 507 S.E.2d 75, 76 (1998)), and more than a scintilla of evidence is required. *Andrews,* 280 Va. at 276, 699 S.E.2d at 263; *Juniper,* 271 Va. at 418, 626 S.E.2d at 419. "When reviewing a trial court's refusal to give a proffered jury instruction, we view the evidence in the light most favorable to the proponent of the instruction." *Commonwealth v. Vaughn,* 263 Va. 31, 33, 557 S.E.2d 220, 221 (2002); *accord Cooper,* 277 Va. at 381, 673 S.E.2d at 187.

A trial court has a duty when instructing the jury to define each element of the relevant offense.[15] *Dowdy v. Commonwealth,* 220 Va. 114, 116, 255 S.E.2d 506, 508 (1979). However, as noted above, what the elements *are* is a question of law. *See*

[15] Instructions 6 and 7 set forth the elements of rape and attempted rape. Instruction 12 set forth the elements of abduction with intent to defile. These instructions were granted.

*Kozmina v. Commonwealth,* 281 Va. 347, 349, 706 S.E.2d 860, 862 (2011); *Houston v. Commonwealth,* 87 Va. 257, 262, 12 S.E. 385, 386 (1890). Therefore, whether the detention established by the evidence is "the kind of restraint which is *an intrinsic element* of crimes such as rape, robbery, and assault," *Brown,* 230 Va. at 314, 337 S.E.2d at 713 (emphasis added), is a question of law to be determined by the court. *Fields,* 48 Va.App. at 399, 632 S.E.2d at 10. Accordingly, the court did not err in denying the instruction.

## CLAIM 12: VOLUNTARY INTOXICATION

This claim consists of a single assignment of error, assignment of error 111, in which Lawlor asserts that the circuit court erred by excluding Charles Wakefield's testimony during the guilt phase of trial. He proffered that Wakefield would have testified that Lawlor drank, bought liquor, and often smelled of alcohol during the three weeks preceding the murder. The court ruled that evidence of general alcohol abuse may be relevant as mitigation during the penalty phase but was irrelevant and therefore inadmissible in the guilt phase. Lawlor argues that the court's ruling was error because he sought to establish that he was voluntarily intoxicated at the time of the offense and therefore incapable of forming the requisite intent to commit capital murder.

A ruling that evidence is inadmissible is reviewed for abuse of discretion. *Thomas,* 279 Va. at 168, 688 S.E.2d at 240; *Commonwealth v. Wynn,* 277 Va. 92, 97, 671 S.E.2d 137, 139 (2009). "[E]vidence of collateral facts and facts incapable of supporting an

inference on the issue presented are irrelevant and cannot be accepted in evidence. Such irrelevant evidence tends to draw the jurors' attention toward immaterial matters" and therefore is properly excluded. *Coe v. Commonwealth,* 231 Va. 83, 87, 340 S.E.2d 820, 823 (1986).

We have said that "[a] person who voluntarily has become so intoxicated as to be unable to deliberate and premeditate cannot commit any class of murder that is defined as a wilful, deliberate and premeditated killing." *Giarratano v. Commonwealth,* 220 Va. 1064, 1073, 266 S.E.2d 94, 99 (1980) (citing *Hatcher v. Commonwealth,* 218 Va. 811, 814, 241 S.E.2d 756, 758 (1978)); *accord Essex v. Commonwealth,* 228 Va. 273, 281, 322 S.E.2d 216, 220 (1984). However, proof of mere intoxication is insufficient; the defendant must establish intoxication so great it rendered him incapable of premeditation. *Giarratano,* 220 Va. at 1073, 266 S.E.2d at 99. Consequently, even testimony that the defendant was drinking on the *day of the offense* is insufficient to establish that he was too intoxicated to form the requisite intent. *Waye v. Commonwealth,* 219 Va. 683, 698, 251 S.E.2d 202, 211, *cert. denied,* 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979). Accordingly, testimony about Lawlor's drinking during the three-week period prior to the murder would not be probative of that issue and it therefore was irrelevant. The court did not abuse its discretion by excluding it during the guilt phase.

## CLAIM 13: PRINCIPAL IN THE SECOND DEGREE

This claim consists of 3 assignments of error asserting that the circuit court erred by preventing Lawlor from presenting a defense that he was merely a principal in the second degree.

### 1. REQUESTS FOR FUNDING

In assignment of error 27, Lawlor asserts that the court erred by denying his requests for funding for a private investigator to travel to Uruguay to interview and collect a DNA sample from a third party. Lawlor similarly asserts in assignment of error 29 that the court erred by denying his request for funds for private mitochondrial DNA testing of hair recovered from Orange's body. Lawlor argues that these funding requests were necessary to enable him to present a defense on the ground that (a) someone else actually committed the murder, (b) Lawlor was merely a principal in the second degree, and therefore (c) Lawlor was culpable only of first-degree murder rather than capital murder.

Citing *Crawford,* 281 Va. at 97, 704 S.E.2d at 115 (2011), Lawlor again mistakenly asserts that we review these issues de novo. However, we did not review any denial of a request for funding in that case. To the contrary, denial of funding is reviewed for abuse of discretion. In particular,

> [i]n *Husske v. Commonwealth,* 252 Va. 203, 476 S.E.2d 920 (1996), this Court noted that an indigent defendant is not constitutionally entitled, at the state's expense, to all the

experts that a non-indigent defendant might afford. *Id.* at 211, 476 S.E.2d at 925. All that is required is that an indigent defendant have " 'an adequate opportunity to present his claims fairly within the adversary system.' " *Id.* (quoting *Ross v. Moffitt,* 417 U.S. 600, 612 [94 S.Ct. 2437, 41 L.Ed.2d 341] (1974)).

In *Husske* we held that

> an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is "likely to be a significant factor in his defense," and that he will be prejudiced by the lack of expert assistance.

*Id.* at 211–12, 476 S.E.2d at 925 (citation omitted). In that context, we specified that a defendant seeking the assistance of an expert witness "must show a particularized need" for that assistance. *Id.*

It is the defendant's burden to demonstrate this "particularized need" by establishing that an expert's services would materially assist him in preparing his defense and that the lack of such assistance would result in a fundamentally unfair trial. *Id.; accord Green v. Commonwealth,* 266 Va. 81, 92, 580 S.E.2d 834, 840 (2003). We made clear in *Husske* and subsequent cases that "mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided."

> 252 Va. at 212, 476 S.E.2d at 925 (internal quotation marks omitted). Whether a defendant has made the required showing of particularized need is a determination that lies within the sound discretion of the trial court. *Id.* [at 212], 476 S.E.2d at 926; *Lenz v. Commonwealth,* 261 Va. 451, 462, 544 S.E.2d 299, 305, *cert. denied,* 534 U.S. 1003 [122 S.Ct. 481, 151 L.Ed.2d 395] (2001); *Bailey v. Commonwealth,* 259 Va. 723, 737, 529 S.E.2d 570, 578[, *cert. denied,* 531 U.S. 995, 121 S.Ct. 488, 148 L.Ed.2d 460] (2000).

*Commonwealth v. Sanchez,* 268 Va. 161, 165, 597 S.E.2d 197, 199 (2004)(internal alteration omitted); *accord Thomas,* 279 Va. at 169–70, 688 S.E.2d at 241. The expert services to which a defendant may be entitled following the required showing of particularized need may include those of a private investigator. *Husske,* 252 Va. at 212, 476 S.E.2d at 926; *Bailey,* 259 Va. at 737, 529 S.E.2d at 578.

During a December 9, 2010 motions hearing, Lawlor sought funding to send an investigator to Uruguay. He argued that he wanted the investigator to interview and collect a DNA sample from Rafael Delgado, who lived in Orange's apartment building at the time of the murder but who thereafter left the country. Lawlor admitted that he had known of Delgado's existence since the indictment in March 2009.[16] Nevertheless, in December 2010 he still did

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[16] He had also cited Delgado's presence in Uruguay during a January 21, 2010 hearing as partial basis for a continuance when the trial was scheduled for March 1 of that year.

not know where in Uruguay Delgado might be found and had not asked him whether he would provide a DNA sample.

The court noted that Lawlor had known of Delgado's existence for nearly two years but had not undertaken any significant steps to locate him. It also ruled that it would not approve funding the investigation until Lawlorhad located Delgado and ascertained that he was willing to provide a DNA sample.

Lawlor renewed his request at a January 13, 2011 motions hearing after locating Delgado and ascertaining that he was willing to speak with the investigator and return to testify at trial if appropriate. During that hearing, Lawlor admitted to participating in Orange's murder. The court then again noted that Lawlor had known of Delgado's existence for 22 months but had only obtained the information necessary to justify a request for investigatory funds on the eve of trial. Because Lawlor admitted participation in the murder, he should have known promptly whether there were any potential co-defendants and who those potential co-defendants were. The court then ruled that Lawlor had a right to call Delgado at trial and that it would provide funds to make Delgado available as a defense witness. However, it denied the request for funds to send the investigator to Uruguay.

As noted above, an indigent defendant has the right to an adequate opportunity to present his claims fairly. *Sanchez,* 268 Va. at 165, 597 S.E.2d at 199. However, he bears the burden of establishing a

particularized need for an expert's services—i.e., that the services must "materially assist him in preparing his defense and that the lack of such assistance would result in a fundamentally unfair trial." *Id.; Thomas,* 279 Va. at 169–70, 688 S.E.2d at 241. The court ruled that Lawlor was entitled to call Delgado as a witness and that it would provide the funds necessary to make him available. That ruling adequately preserved Lawlor's right to a fair trial. He did not show any need for further funding for the investigator's trip to Uruguay. Accordingly, the court did not abuse its discretion by denying his request.

On the issue of DNA testing, Lawlor made several successive funding requests. In January 2010, he requested testing of blood recovered from various public places in the apartment building outside Orange's apartment. The court granted that request. The next month, he requested testing of 8 foreign hairs found on Orange's pubic region and the court again granted his request. In April 2010, he requested that a swab be sent to an outside, private laboratory for testing because it did not contain a sample sufficient for testing by the Department of Forensic Sciences ("DFS"). The court also granted that request.

In September 2010, Lawlor requested that hairs and hair fragments in three forensic collections recovered from fingernail scrapings and from Orange's left hand during the autopsy be submitted for testing. Because some hairs and hair fragments did not include the hair root, they were unsuitable for nuclear DNA testing and had to be subjected to more protracted mitochondrial DNA testing. The court

indicated it would revisit the issue after the human hairs were isolated.[17] After further forensic study of the three hair collections, the court ordered the testing of all the complete human hairs. It also ordered DFS to select a random sample from the remaining 91 human hair fragments and to subject the random sample to mitochondrial DNA testing.

In November 2010, Lawlor asked for further testing of the hair fragments. He noted that DFS had classified the 91 fragments from 2 of the forensic collections into 7 distinct groups based on microscopic evaluation of their physical characteristics. He requested that one hair fragment from each group be subjected to mitochondrial DNA testing. The first forensic collection contained 3 groups of hair fragments: one containing 36 fragments, one containing 15, and one containing a single fragment. The second forensic collection contained 4 groups of fragments: one containing 23, one containing 17, and two groups each containing a single fragment. The condition of the majority of the hair fragments indicated that they were not fresh and had likely been in the apartment for some time. Nevertheless, the court again granted his request.

Testing on these 7 final hair fragments resulted in a mitochondrial DNA profile for each fragment. A comparison indicated that the profile for one hair fragment was inconsistent with the profiles of the others. It is not clear from the record whether the

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[17] Orange owned a cat and some of the hair was identified as non-human.

single inconsistent fragment came from a group containing other fragments sharing the same microscopic physical characteristics or from one of the unique, single-fragment groups. In other words, it is not clear whether the single inconsistent hair fragment shared physical characteristics with any untested hair fragments.

On January 3, 2011, based on this single inconsistent mitochondrial DNA profile, the fractional amount of the single inconsistent allele detected in the PCR DNA testing on the non-sperm portion of DNA recovered from Orange's abdominal swab, and the fact that the blood recovered from the public areas of the apartment building could not be attributed either to him or Orange, Lawlor moved for a continuance and requested mitochondrial DNA testing of *all* the forensic evidence. The court denied the motion and the request:

> The Defense [has] asked the Court to test virtually everything that's there, and I have yet to see any basis that would produce evidence of a second participant.... Absent some showing that we're not just continuing to test everything that's there, every hair, every item in the room, it's simply a wish and a hope and speculation, and the motion is denied.

As noted above, a defendant must show a particularized need that expert services will materially assist him in preparing his defense and that denial of such services will result in a fundamentally unfair trial. *Sanchez,* 268 Va. at 165, 597 S.E.2d at 199; *Thomas,* 279 Va. at 169–70, 688

S.E.2d at 241. However, "[a] particularized need is more than a 'mere hope' that favorable evidence can be obtained through the services of an expert." *Id.* at 170, 688 S.E.2d at 241 (quoting *Husske,* 252 Va. at 212, 476 S.E.2d at 925); *accord Sanchez,* 268 Va. at 165, 597 S.E.2d at 199; *Morva,* 278 Va. at 344, 683 S.E.2d at 562. The court repeatedly granted Lawlor's successive requests for additional DNA testing, despite the fact that Lawlor admitted participating in the murder and the overwhelming consistency of the forensic evidence recovered from inside Orange's apartment. It was not an abuse of discretion for the court to rule that a single hair fragment, which was present in the apartment for an undeterminable period of time, was insufficient to justify testing approximately 80 other hair fragments, many of which had different physical characteristics. Similarly, the court did not abuse its discretion by ruling that the single hair fragment, even coupled with blood recovered from the public areas of the apartment building and the single, fractional inconsistent allele discovered during PCR DNA testing, did not justify subjecting all the forensic evidence to mitochondrial DNA testing. Rather, as the court observed, the notion that further DNA testing would establish the presence of a second perpetrator was merely "a wish and a hope and speculation." We therefore will not reverse its denial of the requests.

### 2. JURY INSTRUCTIONS

In assignment of error 103, Lawlor asserts that the court erred by failing to instruct the jurors that

they could not impose a sentence of death if they found he was merely a principal in the second degree. He argues that the evidence was sufficient to support such an instruction based on (a) the DNA evidence attributable to neither Lawlor nor Orange, as described above, and (b) the possibility that some of Orange's wounds were inflicted by a hammer, though no hammer was found either in her apartment or in his.

As noted above in Claim 7, a jury instruction may be given only if it is supported by more than a mere scintilla of evidence. *Andrews,* 280 Va. at 276, 699 S.E.2d at 263; *Juniper,* 271 Va. at 418, 626 S.E.2d at 419. When reviewing the evidence to determine whether it supports a proffered instruction, "we view [it] in the light most favorable to the proponent of the instruction." *Vaughn,* 263 Va. at 33, 557 S.E.2d at 221. This means we grant Lawlor all reasonable inferences fairly deducible from it. *Branham v. Commonwealth,* 283 Va. 273, 279, 720 S.E.2d 74, 77 (2012).

The absence of a possible weapon from the scene of a murder and the defendant's residence is not evidence that a third party participated in the crime. It may support a reasonable inference that someone removed the weapon but not the exclusion of the defendant from the universe of people who may have done so. One also cannot reasonably infer that a defendant did not use a murder weapon based only on its absence from his residence after the crime occurred. Similarly, even assuming that one could reasonably infer from the two minor inconsistencies

in the DNA evidence that a third party was present during the crime, a hypothesis that Lawlor was merely a principal in the second degree extends the inference beyond reasonableness into speculation. Because there was not more than a scintilla of evidence supporting such a hypothesis, the court did not err in refusing the instruction.

## C. THE PENALTY PHASE OF TRIAL

### CLAIM 11: BIFURCATION OF THE PENALTY PHASE

This claim consists of a single assignment of error, assignment of error 13, in which Lawlor asserts that the circuit court erred by denying his motion to bifurcate the penalty phase into two proceedings: one in which the jury must unanimously find one or more of the aggravating factors set forth in Code § 19.2–264.2 beyond a reasonable doubt, thereby making him eligible for a sentence of death, followed by one in which the jurors considered his mitigating evidence to determine whether to impose a sentence of death or life imprisonment without parole. He argues that such a bifurcation is required both by Code § 19.2–264.4(A) and the United States Constitution. These are questions of law we review de novo. *Gallagher v. Commonwealth,* 284 Va. 444, 449, 732 S.E.2d 22, 24 (2012).

Code § 19.2–264.4(A) requires that "[u]pon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment." Lawlor argues that a defendant is

not "guilty of an offense which may be punishable by death" until after at least one aggravating factor has been proved. Therefore, he contends, the separate proceeding referred to in Code § 19.2–264.4(A) must occur after that time.

We construe a statute under familiar principles.

> The primary objective of statutory construction is to ascertain and give effect to legislative intent. When a given controversy involves a number of related statutes, they should be read and construed together in order to give full meaning, force, and effect to each. Therefore we accord each statute, insofar as possible, a meaning that does not conflict with any other statute. When two statutes seemingly conflict, they should be harmonized, if at all possible, to give effect to both.

*Conger v. Barrett,* 280 Va. 627, 630–31, 702 S.E.2d 117, 118 (2010) (citations, internal quotation marks, and alterations omitted). "[A]n undefined term must be given its ordinary meaning, given the context in which it is used. Furthermore, the plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction, and a statute should never be construed in a way that leads to absurd results." *Meeks v. Commonwealth,* 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007) (citations, internal quotation marks, and alteration omitted). Where the same term is used in different places within a statutory scheme, we apply the same meaning unless the legislature clearly intended a different one. *Eberhardt v. Fairfax County Emps.*

*Ret. Sys. Bd. of Trs.,* 283 Va. 190, 195, 721 S.E.2d 524, 526 (2012).

The language at issue in Code § 19.2–264.4(A) is "an offense which may be punishable by death." This phrase is an integrated relative clause narrowing the universe of offenses to which the subsection applies. Under Lawlor's interpretation, an offense is not "an offense which may be punishable by death" until after the jury has found at least one of the aggravating factors set forth in Code § 19.2–264.2. This argument is without merit.

First, Code § 19.2–264.2 also uses the phrase "an offense for which the death penalty may be imposed" to describe the offenses to which that statute applies. It provides:

> In assessing the penalty of any person convicted of *an offense for which the death penalty may be imposed,* a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

Code § 19.2–264.2 (emphasis added). Thus, if the phrase "an offense for which the death penalty may be imposed" truly is defined by this section as Lawlor argues, a jury may not consider the aggravating factors set forth in that section until after it has found at least one of them and has recommended a sentence of death. This is an absurd, circular result. We therefore will not adopt Lawlor's interpretation. *Meeks,* 274 Va. at 802, 651 S.E.2d at 639.

Second, while Code § 19.2–264.2 does not define "an offense for which the death penalty may be imposed," Code §§ 18.2–10 and 18.2–31 do. Code § 18.2–10 states in relevant part that "[t]he authorized punishments for conviction of a felony are: (a) For Class 1 felonies, death ... or imprisonment for life...." Code § 18.2–31 enumerates the offenses "constitut[ing] capital murder, punishable as a Class 1 felony." Accordingly, "an offense for which the death penalty may be imposed" for the purposes of Code §§ 19.2–264.2 and 19.2–264.4(A) is capital murder and it is "a finding that the defendant is guilty of" capital murder that triggers the separate sentencing proceeding. Code § 19.2–264.4(A).

Code § 19.2–264.3supports this interpretation. Code § 19.2–264.3(A) directs the trial court first to submit the question of guilt or innocence to the jury. Thereafter, and only "[i]f the jury finds the defendant guilty of an offense which may be punishable by death," does it commence a penalty proceeding under Code § 19.2–264.4. Code § 19.2–264.3(C). "If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed," there is no Code §

19.2–264.4 penalty proceeding at all. Code § 19.2–264.3(B). Accordingly, the General Assembly could not have intended the phrase "an offense which may be punishable by death" to mean only those offenses for which one or more aggravating factors have been proved beyond a reasonable doubt because the proceeding in which those factors are presented to the jury only commences after the defendant has been convicted of such an offense.

Citing *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), Lawlor also argues that bifurcation of the penalty phase is required by the United States Constitution. However, that was not the Supreme Court's holding in *Ring.* Rather, the Court reiterated its holding in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring,* 536 U.S. at 602, 122 S.Ct. 2428 (citing *Apprendi,* 530 U.S. at 482–83, 120 S.Ct. 2348.) The Court then extended its *Apprendi* rationale to hold that "Arizona's enumerated aggravating factors operate as 'the functional equivalent of' " such factual findings and could not be found by a sentencing judge without a jury. *Id.* at 609, 122 S.Ct. 2428 (quoting *Apprendi,* 530 U.S. at 494 n. 19, 120 S.Ct. 2348).

Lawlor also cites *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), for the proposition that bifurcating the penalty phase is required to

ensure jurors can meaningfully consider all mitigating evidence. However, while the Supreme Court held in that case that a defendant must be allowed to present "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," it did not require the fact-finder to consider that evidence in a separate proceeding. *Id.* at 604, 98 S.Ct. 2954.

Virginia law complies with these constitutional requirements. *See* Code § 19.2–264.4(B) ("Evidence which may be admissible ... may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense."); Code § 19.2–264.4(C) ("The penalty of death shall not be imposed unless the Commonwealth shall prove [one or more aggravating factors] beyond a reasonable doubt...."); *Prieto v. Commonwealth,* 278 Va. 366, 413, 682 S.E.2d 910, 935 (2009), *cert. denied,* —— U.S. ——, 130 S.Ct. 3419, 177 L.Ed.2d 332 (2010) ("*Prieto I*") ("[W]e hold that in the penalty phase of capital murder trials the death penalty may not be imposed unless the jury unanimously finds either one or both of the aggravating factors ... beyond a reasonable doubt."); *Andrews,* 280 Va. at 301, 699 S.E.2d at 277 ("A defendant in a capital case has the constitutional right to present virtually unlimited relevant evidence in mitigation.").

Accordingly, there is no basis for Lawlor's claim that the Constitution requires bifurcation of the

penalty phase. For these reasons, the court did not err in denying Lawlor's motion.[18]

## CLAIM 1: MITIGATING EVIDENCE

This claim consists of 19 assignments of error asserting that the circuit court erred by excluding specific types of mitigating evidence either as hearsay, irrelevant, or both.

### 1. GENERAL ADMISSIBILITY OF HEARSAY MITIGATING EVIDENCE

In assignment of error 117, Lawlor asserts that a court may not exclude mitigating evidence on the basis of hearsay. Citing *Green v. Georgia,* 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979), and subsequent cases, he argues that the exclusion of mitigating evidence as hearsay violates a defendant's constitutional right to due process. This is a question of constitutional interpretation that we review de novo. *Gallagher,* 284 Va. at 449, 732 S.E.2d at 24.

In *Green,* the defendant and another person, Moore, were indicted together but tried separately for a rape and murder. At Moore's trial, a prosecution witness testified that Moore told him that he had killed the victim after ordering Green to leave the scene. However, when Green attempted to introduce the testimony in his trial, the prosecution objected on

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[18] This appeal does not present, and we do not consider, whether the statute *prohibits* a circuit court from exercising its discretion to bifurcate the penalty phase. The question here is limited to whether the statute and applicable precedents *require* it to do so.

the ground that it was hearsay. The objection was sustained and the evidence was excluded. 442 U.S. at 95–96, 99 S.Ct. 2150.

The Supreme Court ruled that excluding the witness's testimony in Green's trial was error. The Court considered both its relevance and reliability and determined that the prosecution's use of the testimony to secure Moore's conviction and sentence of death was "[p]erhaps [the] most important" factor justifying its admission in Green's trial. *Id.* at 97, 99 S.Ct. 2150. It held that "*[i]n these unique circumstances,* 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'" *Id.* (quoting *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)) (emphasis added).[19]

Thus, *Green* turned on the fact that the prosecution had introduced and relied upon witness testimony in a separate prosecution for the same crime: it could not subsequently impugn the reliability of that testimony in the related proceeding.

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[19] The Court also considered that Moore's comment to the witness was made spontaneously to a close friend, was against his penal interest, and was independently corroborated by other evidence. 442 U.S. at 97, 99 S.Ct. 2150. These are the same factors the Court considered in *Chambers,* 410 U.S. at 301–02, 93 S.Ct. 1038. Although the Court ruled that exclusion of the testimony at issue in *Chambers* was improper because the evidence "bore persuasive assurances of trustworthiness," it nevertheless observed that "the accused ... must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* at 302, 93 S.Ct. 1038.

By its own terms, *Green* does not stand for the proposition that evidence may not be excluded on hearsay grounds simply because it is offered as mitigation in the penalty phase of a capital murder trial.

*Sears v. Upton,* 561 U.S. ——, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010), similarly fails to support Lawlor's broad argument. In that case the Supreme Court did not rule that mitigating evidence may not be excluded as hearsay. Rather, citing *Green* and *Chambers,* the Court again emphasized that reliability is the touchstone for determining whether such evidence should be admitted. *Id.* at 3263 & n.6 ("[T]he fact that some of such evidence may have been 'hearsay' does not *necessarily* undermine its value—or its admissibility—for penalty phase purposes." Rather, "*reliable* hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by *rote application* of a state hearsay rule." (emphasis added)).

However, when hearsay evidence does not bear the indicia of reliability present in *Green* and *Chambers,* it may properly be excluded even when offered in mitigation. *Buchanan v. Angelone,* 103 F.3d 344, 349 (4th Cir.1996) ("The excluded statements also lack the inherent reliability of the statement excluded in *Green.* The statement in *Green* was against the declarant's penal interest, made spontaneously to a close friend, and the state itself had relied on the excluded testimony to convict the declarant of capital murder.... The evidence in this case discloses that the application of Virginia's

hearsay rule did not rise to the level of a constitutional violation.").

Accordingly, the circuit court did not err simply because it declined to overrule each of the Commonwealth's hearsay objections to some of Lawlor's mitigating evidence. We must consider each ruling individually.[20]

### 2. SPECIFIC RULINGS

As noted above in Claim 12, we review rulings that evidence is inadmissible for abuse of discretion. *Thomas,* 279 Va. at 168, 688 S.E.2d at 240.

In assignment of error 132, Lawlor asserts that the court erred by excluding Charles Wakefield's testimony that Lawlor showed remorse. Specifically, he proffered that Wakefield would testify that Lawlor said, "I just don't want to hit anyone" several days after the murder occurred. The Commonwealth objected that the statement was hearsay. Lawlor responded that it was admissible as a statement of his then-existing mental and emotional condition—i.e., that at the time he made the statement to Wakefield, several days after the murder, he did not "want to hit anyone." The court ruled that the statement was irrelevant.

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[20] In assignment of error 124, Lawlor generally assigns error to the court's exclusion of "relevant mitigating evidence in the form of reliable hearsay." The brief contains no independent argument on this assignment of error. Consequently, to the extent it is not encompassed by the assignments of error challenging specific rulings and addressed below, it is abandoned. Rule 5:27(d).

To be admissible as evidence of a then-existing state of mind, the state of mind must be relevant to a material issue. *See Clay v. Commonwealth,* 262 Va. 253, 257, 546 S.E.2d 728, 730 (2001) (Statements showing state of mind are admissible "provided the statements are relevant and probative of some material issue in the case."). As proffered by Lawlor, Wakefield would have testified that Lawlor no longer wanted to hit anyone. But such testimony would not establish remorse. While the alleged statement may indicate that Lawlor had purged himself of a desire to do violence at that time, it does not encompass any sentiment of regret for his prior violent acts. Moreover, remorse includes "sympathy" or "concern for the victims of the crimes for which he was convicted." *Smith v. Commonwealth,* 27 Va.App. 357, 364–65, 499 S.E.2d 11, 14 (1998). The proffered testimony includes neither of these attributes. It therefore was not probative of the issue of Lawlor's remorse and the court did not abuse its discretion by excluding it.

In assignments of error 134, 135, 136, 137, and 148, Lawlor asserts that the court erroneously excluded testimony from his former probation officers, Mark Crosby and Kathy Coburn. He argues that they would have testified that Lawlor had suffered childhood sexual abuse. He concedes that the excluded statements were hearsay but contends they are nevertheless admissible. He argues they are reliable because they were made years before to probation officers in the context of supervisory relationships. We disagree.

Lawlor cites no authority for his argument that statements made to probation officers are sufficiently reliable to overcome the hearsay rule. The issue is not whether the probation officers are reliable, but whether the statements Lawlor made to them can be relied upon as truthful under the circumstances, rather than being self-serving or manipulative. The statements at issue are not clothed with any of the indicia of reliability the Supreme Court set forth in *Green* or *Chambers.* They were not made against Lawlor's penal interest, they were not made spontaneously to a close friend, and they were not independently corroborated by other evidence. Accordingly, the court did not abuse its discretion by excluding them.

In assignments of error 146 and 147, Lawlor asserts that the court erred by excluding testimony and written evidence from Woody Couts, who provided a court-ordered alcohol and drug dependency assessment while Lawlor was incarcerated 2 years prior to Orange's murder. Couts also would have testified that Lawlor told him of childhood sexual abuse. Lawlor argues that the testimony was admissible because the statements were made for the purposes of obtaining a medical diagnosis or treatment. Further, he argues that the statements were reliable even if not covered by that exception to the hearsay rule. We again disagree.

We have acknowledged that "a physician [may] testify to a patient's statements concerning his 'past pain, suffering and subjective symptoms' to show 'the basis of the physician's opinion as to the nature of the

injuries or illness.' " *Cartera v. Commonwealth,* 219 Va. 516, 518, 248 S.E.2d 784, 785–86 (1978); *accord Jenkins v. Commonwealth,* 254 Va. 333, 339, 492 S.E.2d 131, 134 (1997). However, Couts was not a physician; he was not even licensed as a substance abuse counselor.

Moreover, a statement made for the purpose of medical diagnosis or treatment in contravention of the hearsay rule is admissible because "a patient making a statement to a treating physician recognizes that providing accurate information to the physician is essential to receiving appropriate treatment." *Jenkins,* 254 Va. at 339, 492 S.E.2d at 134–35. The exception therefore includes an assessment of reliability. However, as the circuit court noted,

> The fallacy [in your analogy] is that you believe that a defendant who is incarcerated who talks to a drug counselor is going to be a hundred percent honest as one would who is seeking treatment from a physician.
>
> If I'm seeking treatment from a physician, I want that treatment to cure me of my ill or illness, whatever it is.
>
> A defendant sitting in jail wants to minimize his time, wants to get probation instead of penitentiary time, depending on what the offense is. And your theory is that [the] defendant will, of course, automatically be one hundred percent honest to the drug treatment counselor.

> And we know that's not true, even through your own witnesses, who have said that the most drug-challenged people are not honest, even with their own—even with their own treatment people....

Accordingly, the rationale underlying the medical diagnosis or treatment exception does not apply to substance abuse assessments in the context of incarceration. The circuit court did not abuse its discretion by excluding this testimony.[21]

In assignment of error 131, Lawlor asserts that the court erred by preventing his investigator, Samuel Dworkin, from testifying about Lawlor's father's failure to appear at trial. Lawlor alleges that his father threatened to commit suicide if he was subpoenaed to testify at trial. He argues that this information was relevant because the Commonwealth had objected, in the presence of the jury, to evidence that his father had sexually abused other children on the ground that "[t]he man's not here to defend himself." He also argues that it may have disposed the jury to impose a sentence of life imprisonment. We again disagree.

The court provided Lawlor the opportunity to call Dworkin to establish that his father was unwilling to

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[21] In assignment of error 119, Lawlor also generally assigns error to the court's exclusion of evidence of his history of sexual abuse. The brief contains no independent argument on this assignment of error. Consequently, to the extent it is not encompassed by the foregoing assignments of error, it is abandoned. Rule 5:27(d).

appear *voluntarily.* However, the court ruled that the reason Lawlor's father did not appear *at all* was that Lawlor chose not to subpoena him and Lawlor's rationale for that decision was not relevant. We agree with the circuit court that a party's litigation strategy is not evidence of a fact at issue in the proceeding. Testimony justifying a party's chosen course at trial therefore is not relevant. The reasoning behind Lawlor's decision not to subpoena his father was irrelevant and the court did not abuse its discretion by excluding Dworkin's testimony.

In assignments of error 14 and 120, Lawlor asserts that the court erred by denying his motion to allow evidence of the effect his execution would have on his family and friends. Similarly, in assignments of error 128, 141, and 145, he asserts that the court erred by excluding testimony from his sister, Elizabeth Cox, mother, Joann Cox, and friend, Richard Poorman, respectively, about the value of their relationships with him. He argues that this was relevant mitigating evidence under our decision in *Andrews* and the Supreme Court's decisions in *Lockett* and *Tennard v. Dretke,* 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004). We disagree.

In *Andrews,* we said "[a] defendant in a capital case has the constitutional right to present virtually unlimited *relevant* evidence in mitigation." 280 Va. at 301, 699 S.E.2d at 277 (emphasis added).

> [T]he meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context, and thus the general evidentiary

> standard—any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence—applies.... Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.

*Tennard,* 542 U.S. at 284, 124 S.Ct. 2562 (citations and internal quotation marks omitted).

In *Lockett,* the Supreme Court defined the circumstances which a fact-finder could reasonably deem to have mitigating value as those relevant to "the 'character and record of the individual offender and the circumstances of the particular offense.'" 438 U.S. at 601, 98 S.Ct. 2954 (quoting *Woodson v. North Carolina,* 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)). *Lockett* does not "limit[ ] the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* at 605 n.12, 98 S.Ct. 2954. Therefore, to be relevant to mitigation in the penalty phase of a capital case, evidence must be relevant to these three factors.

As we noted in *Cherrix,* "Code § 19.2–264.4(B) vests the trial court with the discretion to determine, subject to the rules of evidence governing admissibility, the evidence which may be adduced in mitigation of the offense." 257 Va. at 309, 513 S.E.2d at 653 (citing *Coppola v. Commonwealth,* 220 Va. 243, 253, 257 S.E.2d 797, 804 (1979), *cert. denied,* 444 U.S.

1103, 100 S.Ct. 1069, 62 L.Ed.2d 788, (1980)). In *Coppola,* we expressly declined to reverse as an abuse of discretion a circuit court's exclusion of evidence addressing the effect of the defendant's arrest and trial on his family as irrelevant to the issue of mitigation. 220 Va. at 253, 257 S.E.2d at 804. Although *Coppola* addressed only arrest and trial, not the imposition of a sentence of death, and Code § 19.2–264.4(B) has been amended since that decision, we are not persuaded that the effect on a defendant's family and friends of such a sentence is relevant mitigating evidence "bearing on the defendant's character, prior record, or the circumstances of his offense." *Lockett,* 438 U.S. at 605 n.12, 98 S.Ct. 2954. The court therefore did not abuse its discretion by excluding this evidence.

### 3. RIGHT NOT TO TESTIFY

In assignments of error 125 and 177, Lawlor asserts that the court erred by ruling that he would have to testify to present his mitigating evidence to the jury. He identifies 4 specific statements made by the court referring to Lawlor's failure to take the stand himself.

Each of the identified statements was made as the court ruled on an objection by the Commonwealth.[22] Contrary to Lawlor's assertion, the court did not base its rulings on his exercise of his right against self-incrimination. Rather, it based these rulings on its determination that the evidence Lawlor was

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[22] The comments were made outside the presence of the jury and therefore could not have influenced its deliberation.

attempting to present was inadmissible hearsay. The court noted that while the witnesses would not be allowed to present hearsay evidence by testifying to statements Lawlor made to them, the evidence would be admissible if Lawlor testified himself: then, by definition, it would not be hearsay.

A court does not err by observing outside the presence of the jury that inadmissible hearsay evidence would be admissible if the declarant testified directly—even if the declarant is the defendant.[23]

## CLAIM 3: TESTIMONY OF DR. MARK CUNNINGHAM

This claim consists of 6 assignments of error asserting that the circuit court erred by excluding portions of the testimony of Dr. Mark Cunningham.[24] Lawlor offered Dr. Cunningham as an expert witness to rebut the Commonwealth's evidence on the future dangerousness aggravating factor and to provide

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[23] Lawlor also argues the Commonwealth improperly referred to his failure to testify during an objection in the presence of the jury. However, Lawlor failed to preserve this issue because he did not timely object to the comment or seek a curative instruction or mistrial. Rule 5:25; *Porter,* 276 Va. at 256, 661 S.E.2d at 442; *Cheng,* 240 Va. at 40, 393 S.E.2d at 607.

[24] In assignment of error 185, Lawlor generally assigns error to the court for restricting Cunningham's testimony. The brief contains no independent argument on this assignment of error so to the extent it is not encompassed by the other assignments of error, it is abandoned. Rule 5:27(d). Similarly, we find no argument in the brief related to assignment of error 190 and it too is abandoned. *Id.*

mitigating evidence.[25] As noted above in Claims 1 and 12, we review a ruling that evidence is inadmissible for abuse of discretion. *Thomas,* 279 Va. at 168, 688 S.E.2d at 240.

As an initial matter, we note that a defendant's evidence rebutting the risk of future dangerousness serves a purpose different from mitigating evidence. While the same evidence may be adduced to serve both purposes, the purposes must not be conflated.

Pursuant to Code §§ 19.2–264.2 and 19.2–264.4(C), a sentence of death may not be imposed unless the Commonwealth has proved one or both of the aggravating factors set out in the statutes beyond a reasonable doubt. Where the Commonwealth alleges that the future dangerousness factor applies and adduces evidence to prove it, the defendant has a due process right to rebut that evidence. *Simmons v. South Carolina,* 512 U.S. 154, 164, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (citing *Skipper v. South Carolina,* 476 U.S. 1, 5 n.1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)). However, where the Commonwealth does not pursue the future dangerousness aggravating factor, there is nothing for the defendant to rebut.

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[25] The aggravating factor commonly referred to as the risk of future dangerousness factor provides that "a sentence of death shall not be imposed unless the ... jury shall ... after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society...." Code § 19.2–264.2; *accord* Code § 19.2–264.4(C).

The statutes also define the evidence relevant to prove the future dangerousness aggravating factor, or the probability that the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society." Code §§ 19.2–264.2 and 19.2–264.4(C). The relevant evidence is "the past criminal record of convictions of the defendant," Code § 19.2–264.2, and "evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused." Code § 19.2–264.4(C); *see also Morva,* 278 Va. at 349, 683 S.E.2d at 565 ("The relevant evidence surrounding a determination of future dangerousness consists of the defendant's history and the circumstances of the defendant's offense.").

By contrast, a defendant is always entitled to present relevant mitigating evidence in a capital case. *Andrews,* 280 Va. at 301, 699 S.E.2d at 277 (citing *Tennard,* 542 U.S. at 285, 124 S.Ct. 2562, and *Lockett,* 438 U.S. at 608, 98 S.Ct. 2954). This right is grounded in the Eighth Amendment. *Simmons,* 512 U.S. at 164, 114 S.Ct. 2187 (citing *Skipper,* 476 U.S. at 4, 106 S.Ct. 1669).

Mitigating evidence includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett,* 438 U.S. at 604, 98 S.Ct. 2954. "[A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character" and therefore is relevant mitigating evidence. *Skipper,* 476 U.S. at 7, 106 S.Ct. 1669.

In *Bell,* we described evidence of a defendant's disposition to adjust to prison life as "future adaptability" evidence. 264 Va. at 201, 563 S.E.2d at 714. We also stated that it 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. With these principles in mind, we turn to Lawlor's arguments.

### 1. REBUTTING THE RISK OF FUTURE DANGEROUSNESS

In assignments of error 180 and 188, Lawlor asserts that the court erred by excluding Dr. Cunningham's testimony about his risk of future dangerousness in prison. He argues that the court repeatedly excluded such testimony by sustaining the Commonwealth's objections and by denying him the opportunity to recall Dr. Cunningham following a proffer of additional testimony.

We thoroughly reviewed the evidence that is admissible to rebut the future dangerous aggravating factor in *Morva* based on *Simmons, Skipper,* and Code §§ 19.2–264.2 and 19.2–264.4(C). We reiterated our earlier holding that "[t]he relevant inquiry is not whether a defendant *could* commit criminal acts of violence in the future but whether he *would." Id.* at 349, 683 S.E.2d at 564 (quoting *Burns,* 261 Va. at 339–40, 541 S.E.2d at 893) (internal alterations and quotation marks omitted). 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. *Compare* Webster's Third New International Dictionary 517 (1993) (defining "could"

in part as the conditional of "can") *and id.* at 323, 683 S.E.2d 553 (defining "can" in part as "*to be able* to do, make, or accomplish" (emphasis added)) *with id.* at 2638 (defining "would" in part as the conditional of "will") *and id.* at 2616 (defining "will" in part as "*to be inclined* to" (emphasis added)).

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.

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, 122 S.Ct. 41, 151 L.Ed.2d 14 (2001). In that case we said,

> Code § 19.2–264.2requires 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).

Accordingly, the excluded testimony ran afoul of *Lovitt* to the extent it was offered to rebut evidence of the future dangerousness aggravating factor. 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.

### 2. MITIGATING EVIDENCE

In assignments of error 179 and 189, Lawlor asserts that even if Dr. Cunningham's testimony was properly excluded as rebuttal evidence, it should have been admitted as mitigating evidence.

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, 120 S.Ct. 955, 145 L.Ed.2d 829 (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, 98 S.Ct. 2954). 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, 98 S.Ct. 2954 (quoting *Woodson,* 428 U.S. at 304, 96 S.Ct. 2978). "[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.

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.

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.

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 submitted a written proffer of questions he would propound to Dr. Cunningham, and Dr. Cunningham's expected answers to them. The proffer contains the following proposed exchanges:

> 1. 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.
>
> 2. Q: What is your expert opinion as to how Mark Lawlor's age impacts his future prison adaptability? Does that opinion take into account the fact that Mr. Lawlor committed his current crime at age 43?
>
> > A: Because of Mark Lawlor's age of 45 years old, Mr. Lawlor represents a low

likelihood of committing acts of violence while in prison. The fact that Mr. Lawlor committed his current offense at age 43 has been taken into account in forming this opinion, but it does not change my opinion about his future prison adaptability.

3. Q: What is your expert opinion as to how Mark Lawlor's education impacts his future prison adaptability? Is this risk factor predictive of violence in the free community as well?

A: The fact that Mr. Lawlor has earned his G.E.D. is predictive of a low likelihood of committing acts of violence while in prison. This risk factor is far more predictive of violent conduct in the prison context than it is in the free community context.

4. Q: What is your expert opinion as to how Mark Lawlor's employment history impacts his future prison adaptability?

A: Mark Lawlor's employment history in the community is predictive that Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.

5. Q: What is your expert opinion as to how Mark Lawlor's continued contact with his family and friends in the community impacts his future prison adaptability?

A: Mark Lawlor's continued contact with these individuals while in prison, is predictive that Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.

6. Q: What is your expert opinion as to how Mark Lawlor's past correctional appraisal impacts his future prison adaptability?

A: Mark Lawlor's past correctional appraisal is predictive that Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.

7. Q: What is your expert opinion as to how Mark Lawlor's lack of gang affiliation impacts his future prison adaptability?

A: Mark Lawlor's lack of gang affiliation is predictive that Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.

8. Q: Have you reached an opinion, to a reasonable degree of psychological certainty, based on all of the factors relevant to your studies of prison risk assessment, as to what Mark Lawlor's risk level is for committing acts of violence while incarcerated? And if so, what is your opinion?

A: Yes. It is my opinion based on my analysis of all of the relevant risk factors which are specific to Mr. Lawlor's prior history and background, that Mr.

> Lawlor represents a very low risk for committing acts of violence while incarcerated.
>
> 9. Q: Are all of your opinions concerning the above questions and answers about Mr. Lawlor, grounded in scientific research and peer-reviewed scientific literature?
>
> A: Yes.

Of these proffered answers, only the first meets the standard for admissibility as future adaptability mitigating evidence. The others 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. 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, 106 S.Ct. 1669. Accordingly, the circuit court did not abuse its discretion in excluding these questions and answers.

While the first proffered answer would be admissible because it establishes the fact that Lawlor did not engage in violent behavior during past periods of incarceration, that fact was already known to the

jury through other evidence. For example, 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 fistfights 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. Because the excluded testimony was either cumulative or inadmissible, the court did not abuse its discretion.

## CLAIM 14: THE VILENESS AGGRAVATING FACTOR

This claim consists of 5 assignments of error asserting that the circuit court erred by allowing the jury to consider the vileness aggravating factor.[26]

### 1. EXCLUSION OF EVIDENCE

Lawlor asserts in assignments of error 149 and 156 that the trial court erred by excluding evidence that he originally was charged with first-degree

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[26] The aggravating factor commonly referred to as the vileness factor provides that "a sentence of death shall not be imposed unless the ... jury shall ... find ... that [the defendant's] conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim...." Code § 19.2–264.2; *accord* Code § 19.2–264.4(C).

murder rather than capital murder.[27] He argues that this evidence was relevant to rebut the vileness aggravating factor. However, as explained below, Lawlor did not present this argument to the court for its consideration.

While Lawlor asserted in a hearing on March 8, 2011 that the evidence subject to these assignments of error should be admitted, he argued only that the records were relevant to show his conduct in custody and because they "show [ ] the dates he was brought in[to detention] and why he was brought in and measures taken." The court allowed all evidence showing Lawlor's conduct but excluded the portion that referred to the original charge of first-degree murder having been superseded by a charge of capital murder. Lawlor said, "Your Honor, that's fine.... I don't intend to make the argument in any more of a sophisticated way than I have. If the court disagrees with me, I understand. I don't want to go back and forth but that's why we offered it."

On March 10, 2011, Lawlor filed a more nuanced, written motion in which he raised the argument he makes on appeal: that the original charge was relevant as rebuttal evidence to the vileness aggravating factor. However, our review of the record

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[27] In assignment of error 123, Lawlor also generally assigns error to the court's "limiting and excluding evidence ... to rebut the Commonwealth's allegation of vileness." Because he presents no argument about any rulings other than those challenged in assignments of error 149 and 156, this assignment of error is abandoned to the extent it is not encompassed by them. Rule 5:27(d).

reveals that Lawlor never argued the written motion, sought or obtained a ruling, or otherwise provided the court with an opportunity to rule on it. We therefore will not consider it. Rule 5:25; *Scialdone v. Commonwealth,* 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010) ( "[T]he provisions of Rule 5:25 protect the trial court from appeals based upon undisclosed grounds.... In analyzing whether a litigant has satisfied the requirements of Rule 5:25, this Court has consistently focused on whether the trial court had the opportunity to rule intelligently on the issue. If the opportunity to address an issue is not presented to the trial court, there is no ruling by the trial court on the issue, and thus no basis for review or action by this Court on appeal." (citations, internal quotation marks, and alterations omitted)).

## 2. CONSTITUTIONAL CHALLENGES

In assignments of error 2 and 4, Lawlor asserts that the court erred by allowing the Commonwealth to seek a sentence of death based on the vileness aggravating factor because it is unconstitutionally vague. We have previously considered and rejected these arguments. *Gray v. Commonwealth,* 274 Va. 290, 314–15, 645 S.E.2d 448, 463 (2007), *cert. denied,* 552 U.S. 1151, 128 S.Ct. 1111, 169 L.Ed.2d 826 (2008) (citing *Wolfe v. Commonwealth,* 265 Va. 193, 208, 576 S.E.2d 471, 480, *cert. denied,* 540 U.S. 1019, 124 S.Ct. 566, 157 L.Ed.2d 434 (2003) and *Beck v. Commonwealth,* 253 Va. 373, 387, 484 S.E.2d 898, 907, *cert. denied,* 522 U.S. 1018, 118 S.Ct. 608, 139 L.Ed.2d 495 (1997)). The circuit court did not err in adhering to our controlling precedents. We also find

no reason to modify the views we previously expressed in them.

Lawlor also argues that the composite sub-factors to the vileness aggravating factor must be individually proven beyond a reasonable doubt and agreed upon unanimously by the jury. We recently rejected this argument in *Prieto II,* 283 Va. at 180–81, 721 S.E.2d at 503, which had not been decided at the time of the proceedings in this case. The court's ruling was consistent with our holding in *Prieto II* and we decline Lawlor's invitation to revisit it.

## CLAIM 9: JURY INSTRUCTIONS

In this claim, Lawlor challenges the instructions given to the jury at the conclusion of the penalty phase in 4 assignments of error.[28] As noted above in Claims 7 and 13, we review whether a jury instruction accurately states the relevant law de novo. *Summit Group Props.,* 283 Va. at 782, 724 S.E.2d at 721.

Even if accurate, a jury instruction may be given only if it is supported by more than a mere scintilla of evidence, *Andrews,* 280 Va. at 276, 699 S.E.2d at 263, when viewed in the light most favorable to the proponent of the instruction. *Vaughn,* 263 Va. at 33, 557 S.E.2d at 221. The proponent is entitled to all

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[28] In assignment of error 160, Lawlor also generally assigns error to the court's denial of his proffered instructions. Because he presents no argument about any instructions other than those specifically identified in assignments of error 162, 164, 165, and 168, this assignment of error is abandoned to the extent it is not encompassed by them. Rule 5:27(d).

reasonable inferences fairly deducible from the evidence. *Branham,* 283 Va. at 279, 720 S.E.2d at 77. Nevertheless, a court may exercise its discretion and properly exclude an instruction that both correctly states the law and is supported by the evidence when other "granted instructions fully and fairly cover" the relevant principle of law. *Daniels v. Commonwealth,* 275 Va. 460, 466, 657 S.E.2d 84, 87 (2008) (internal quotation marks omitted); *Juniper,* 271 Va. at 431, 626 S.E.2d at 426.

In assignment of error 168, Lawlor asserts that the court erred by denying his motion to exclude the torture sub-factor from Instructions S–2a and S–3a, relating to the vileness aggravating factor, because there was no evidence that Orange had been tortured. He cites *Quintana v. Commonwealth,* 224 Va. 127, 149, 295 S.E.2d 643, 654 (1982), a case in which the circuit court eliminated the torture element although the victim had been struck with a hammer 11 times.

"Torture" as set forth in the vileness aggravating factor is not defined by statute. However, Virginia's vileness aggravating factor is identical to the State of Georgia's aggravating factor reviewed by the Supreme Court in *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). *Compare* Code §§ 19.2–264.2 and 19.2–264.4(C) *with Godfrey,* 446 U.S. at 422, 100 S.Ct. 1759 (quoting Ga. Code Ann. § 27–2534.1(b)(7) (1978)). The Supreme Court of Georgia has defined the torture element of its statute:

> [T]orture occurs when a living person is subjected to the unnecessary and wanton infliction of severe physical or mental pain,

> agony or anguish. Besides serious physical abuse, torture includes serious sexual abuse or the serious psychological abuse of a victim resulting in severe mental anguish to the victim in anticipation of serious physical harm.

*West v. State,* 252 Ga. 156, 313 S.E.2d 67, 71 (1984) (appendix).[29]

Courts of last resort in other states have similarly formulated definitions of torture that include physical and psychological aspects. *E.g., State v. White,* 668 N.W.2d 850, 857 (Iowa 2003) (" '[T]orture' is either physical and/or mental anguish."); *State v. Ross,* 230 Conn. 183, 646 A.2d 1318, 1361 (1994) (holding torture may be psychological as well as physical). *But cf. Newman v. State,* 353 Ark. 258, 106 S.W.3d 438, 461 (2003) (reciting a statutory distinction between torture and mental anguish under Ark.Code Ann. § 5–4–604(b)(B)(ii)). The psychological aspect of torture may be established, for example, "where the victim is

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[29] "Aggravated battery" is also undefined by Virginia statute, though it was and remains a statutory offense in Georgia. *Godfrey,* 446 U.S. at 431 n.13, 100 S.Ct. 1759 (citing Ga. Code Ann. § 26–1305 (1978)); *see also West,* 313 S.E.2d at 69; Ga. Code Ann. § 16–5–24(a). The elements of that statutory offense define aggravated battery for the purpose of establishing the aggravating factor under Georgia law. *West,* 313 S.E.2d at 71 (appendix). Similarly, though "depravity of mind" is undefined by statute in both Virginia and Georgia, the Georgia Supreme Court has defined it as "a reflection of an utterly corrupt, perverted or immoral state of mind." *Id.* The meanings of these two terms for the purposes of the Virginia vileness aggravating factor are not at issue in Lawlor's appeal and we express no opinion on them.

in intense fear and is aware of, but helpless to prevent, impending death ... for an appreciable lapse of time." *Ex parte Key,* 891 So.2d 384, 390 (Ala.2004).

In this case, unlike *Quintana,* the medical evidence of aspirated blood and defensive wounds established that Orange was alive and conscious during some of the 47 blows she sustained. Viewed in the light most favorable to the Commonwealth, the proponent of the instructions, there is more than a mere scintilla of evidence that Orange was tortured within the meaning of Code §§ 19.2–264.2 and 19.2–264.4(C). Accordingly, the court did not err in giving the proposed instructions.

In assignment of error 164, Lawlor asserts that the court erred by denying his proposed Instruction S–A. He argues that the Commonwealth's Instructions S–2a and S–3a erroneously instructed the jurors that they could not impose a sentence of life imprisonment unless they found that a sentence of death was not justified. In particular, he challenges the portion of the two instructions that included the language:

> However, even if you find that the Commonwealth has proved [one or] both of the aggravating factors beyond a reasonable doubt and the jury has so found unanimously, if you nevertheless believe from all the evidence, including evidence in mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant at [life imprisonment].

However, this argument is not within the scope of the assignment of error.

Assignment of error 164 states, "The trial court erred in denying Mr. Lawlor's proffered penalty phase instruction S–A regarding whether the jury may impose a sentence of life even if it is unanimous regarding the factors necessary to impose a sentence of death." Neither this nor any other assignment of error challenges the Commonwealth's proposed instructions on the basis that they misled the jurors into believing they could not impose a sentence of life imprisonment. We consider only arguments within the scope of the assignment of error. Rule 5:27(d); *Teleguz v. Commonwealth,* 273 Va. 458, 484, 643 S.E.2d 708, 725 (2007), *cert. denied,* 552 U.S. 1191, 128 S.Ct. 1228, 170 L.Ed.2d 78 (2008). We therefore do not consider whether Instructions S–2a and S–3a misled the jurors into believing they could not impose a sentence of life imprisonment.

In assignment of error 162, Lawlor asserts that the court erred by denying his proposed Instruction S–L. He again argues that the instruction would have remedied alleged defects in Instructions S–2a and S–3a which, according to Lawlor, misled the jurors about their ability to impose a sentence of life imprisonment. However, this argument is again outside the scope of the assignment of error.

Assignment of error 162 states, "The trial court erred in denying Mr. Lawlor's proffered penalty phase instruction S–L and in failing to instruct the jury that a sentence of life without the possibility of parole is the default sentence for capital murder." As noted

above, no assignment of error challenges Instructions S–2a and S–3a on the ground that they misled the jurors about their ability to impose a sentence of life imprisonment. Because Lawlor's argument is again outside the scope of the assignment of error, we will not consider it. Rule 5:27(d); *Teleguz,* 273 Va. at 484, 643 S.E.2d at 725.

In assignment of error 165, Lawlor asserts that the court erred by denying his proposed Instruction S–C. However, there is only one Instruction S–C in the record and it is marked "granted." To the extent Lawlor offered another Instruction S–C that was denied, it appears in neither the joint appendix nor the manuscript record.[30] "We cannot review the ruling of a lower court for error when the appellant does not ... provide us with a record that adequately demonstrates that the court erred." *Prince Seating Corp.,* 275 Va. at 470, 659 S.E.2d at 307. Consequently, we cannot consider this assignment of error.

## CLAIM 2: IMPRISONMENT FOR LIFE WITHOUT PAROLE

This claim consists of 11 assignments of error asserting that through rulings on jury instructions and answers to questions from the jury during its penalty phase deliberations, the circuit court erred by misleading the jurors into believing that Lawlor could

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[30] The record does include a description of language from an alternative Instruction S–C but the entire, verbatim instruction is not clear.

be released from prison if they imposed a sentence of life imprisonment.[31]

### 1. JURY INSTRUCTIONS

As noted above in Claims 7, 9, and 13, we review jury instructions "to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." *Cooper,* 277 Va. at 381, 673 S.E.2d at 187 (internal quotation marks omitted). A court may in its discretion properly exclude an instruction when other instructions fully and fairly

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[31] In assignment of error 186, Lawlor asserts the court's error also extended to rulings and comments during Dr. Cunningham's testimony. However, he cites to no place in the record where the court made such rulings and comments or where he preserved objection to them. Accordingly, we do not consider this assignment of error. Rule 5:27(c). The court's rulings during Dr. Cunningham's testimony are also included in assignment of error 187, but we likewise do not consider that portion of it. *Id.*

> Similarly, in assignments of error 193 and 194, he asserts that the court also erred by misleading the jurors that they could not consider his risk of future dangerousness in prison in rulings relating to jury selection and Dr. Cunningham's testimony. Again, he cites to no place in the record where the court made such rulings and comments or where he preserved objection to them. Accordingly, we do not consider those portions of these assignments of error. *Id.* In addition, his argument on jury instructions is limited to his assertion that they misled the jury into believing he would not spend his sentence in prison if sentenced to life imprisonment. The portions of these assignments of error relating to jury instructions therefore are abandoned. Rule 5:27(d).

cover the relevant principle of law. *Daniels,* 275 Va. at 466, 657 S.E.2d at 87.

In assignment of error 167, Lawlor asserts that the court erred by granting the Commonwealth's proposed Instruction S–8a relating to the future dangerousness aggravating factor. He argues that the instruction failed to inform the jury that he would spend the rest of his life in prison if not sentenced to death. In considering Lawlor's objection to the instruction, the court observed that other granted instructions informed the jury that a sentence of life imprisonment meant life without parole and declined to add the information to Instruction S–8a.

Instruction S–4, which the court granted, stated, "The words 'imprisoned for life' mean imprisonment for life without possibility of parole." This instruction adequately informed the jury of the law and the court did not err in declining to modify Instruction S–8a as Lawlor suggested.

In assignment of error 187, Lawlor asserts that the court erred by denying his proposed Instruction S–J. That instruction stated, "The words 'imprisonment for life' mean[ ] imprisonment for life without possibility of parole. In other words, if sentenced to life imprisonment, Mark Lawlor will never be released on parole." The jury was adequately informed of the meaning of life imprisonment by Instruction S–4, which the court granted. The court therefore did not abuse its discretion by refusing Lawlor's proffered instruction.

## 2. ANSWERS TO JURY QUESTIONS

In assignments of error 187, 193, 194, 195, 196, 198, 199, 200, and 202, Lawlor asserts that the court erred by answering the jury's questions during its penalty phase deliberations. We review the court's answers to questions propounded by the jury for abuse of discretion. *Marlowe v. Commonwealth,* 2 Va.App. 619, 625, 347 S.E.2d 167, 171 (1986).

The jury asked three questions. The initial question was, "Re: 'Continuing threat to society[,]' Society means prison society, or society in general?" The court answered, "Society is not limited to 'prison society' but includes all society; prison and society in general. Your focus must be on the particular history and background of the defendant, Mark Lawlor, and the circumstances of his offense." Lawlor expressly consented to the court's answer. Thus, to the extent these assignments of error encompass that answer, they are not preserved. Rule 5:25.

Thereafter, the jury asked two follow-up questions simultaneously. The first follow-up question was "Are we to consider 'society in general' is free society or Mark Lawlor as a prisoner in society inside & outside the wire?" In response, the court directed the jury to its answer to its first question and reiterated, "Society means all of society. All of society includes prison society as well as non-prison, i.e., *all* society."

Lawlor objected to the court's answer, arguing that a sentence of life imprisonment means life without the possibility of parole and the only relevant society therefore was prison society. The court overruled his objection because the jury already had

been instructed that life imprisonment means life without parole and because the relevant inquiry is society in general, not prison society.

The second follow-up question was "If imprisoned for life, what physical constraints would Mark Lawlor be under outside of his cell while exposed to other persons? Inside prison? Outside prison?" The court responded, "The circumstances of Mr. Lawlor once he is delivered to the Department of Corrections is not a matter [with] which you should concern yourself."

Lawlor again objected, arguing that prison conditions could be relevant mitigating evidence. He also argued that the question asked only about imprisonment for life rather than imprisonment for life without parole. The court ruled that the conditions of confinement were not relevant to the jury's deliberations and again ruled that other instructions informed them that life imprisonment meant life without parole.

Instruction S–4 adequately informed the jury that life imprisonment meant life without parole. Further, in *Lovitt,* we expressly determined that "society" for the purposes of the future dangerousness aggravating factor was society as a whole, not merely prison society. 260 Va. at 517, 537 S.E.2d at 879. We reaffirm that holding in Claim 3 of this case. Finally, we ruled that the general conditions of confinement and prison security are not relevant either to future dangerousness or as mitigating evidence in *Morva,* 278 Va. at 350, 683 S.E.2d at 565, *Juniper,* 271 Va. at 425–27, 626 S.E.2d at 423–24, *Bell,* 264 Va. at 201, 563 S.E.2d at 714, *Walker,* 258 Va. at 70, 515 S.E.2d

at 574, *Cherrix,* 257 Va. at 310, 513 S.E.2d at 653, and in Claims 3 and 4 of this case. Accordingly, the court did not abuse its discretion by overruling Lawlor's objections.

## D. GENERAL STATUTORY AND CONSTITUTIONAL CHALLENGES

### CLAIM 10: THE CONSTITUTIONALITY OF CODE § 19.2–264.5

This claim consists of 7 assignments of error challenging Code § 19.2–264.5 generally and as the circuit court applied it in Lawlor's case.

#### 1. FACIAL UNCONSTITUTIONALITY

In assignment of error 7, Lawlor asserts that the court erred by denying his motion to declare Code § 19.2–264.5 unconstitutional. The statute states that "upon good cause shown, the court *may* set aside the sentence of death and impose a sentence of imprisonment for life." Code § 19.2–264.5 (emphasis added). He argues that permitting the court such discretion is unconstitutional.

We have previously considered and rejected Lawlor's argument. *Prieto I,* 278 Va. at 416, 682 S.E.2d at 937 (citing *Juniper,* 271 Va. at 389, 626 S.E.2d at 401, *Teleguz,* 273 Va. at 474, 643 S.E.2d at 719, and *Breard v. Commonwealth,* 248 Va. 68, 76, 445 S.E.2d 670, 675–76, *cert. denied,* 513 U.S. 971, 115 S.Ct. 442, 130 L.Ed.2d 353 (1994)). The circuit court did not err in adhering to our controlling precedents. We also find no reason to modify the views we previously expressed in them.

## 2. UNCONSTITUTIONAL AS–APPLIED

Lawlor also asserts in assignments of error 207, 208, 209, and 210 that the court erred in the exercise of its discretion under the statute because it considered improper factors in denying his motion to set aside the jury's recommendation. Specifically, Lawlor argues that the court erred by considering the defense strategy and representations in pre-trial motions, finding that Lawlor had not expressed remorse, and noting that Lawlor did not testify on his own behalf in the penalty phase.[32]

Code § 19.2–264.5requires the preparation of a post-sentence report prior to the imposition of a sentence of death. "After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life." Code § 19.2–264.5. We review a trial court's decision on a motion to set aside a sentence of death for abuse of discretion. *See Yarbrough v. Commonwealth,* 262 Va. 388, 398, 551 S.E.2d 306, 312 (2001) (noting the trial court's authority under Code § 19.2–264.5 to set aside a

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[32] In assignment of error 206, Lawlor also generally assigns error to the court's failure to find good cause to set aside the jury's recommendation and impose a sentence of life imprisonment. The brief contains no independent argument on this assignment of error. Consequently, to the extent it is not encompassed by his other assignments of error, it is abandoned. Rule 5:27(d). Similarly, in assignment of error 213, Lawlor generally assigns error to the court's denial of his motion to suspend or vacate the final judgment but provides no argument relating to that motion. Therefore, to the extent this assignment of error is not encompassed by the others, it too is abandoned. *Id.*

jury's sentence of death is discretionary), *cert. denied,* 535 U.S. 1060, 122 S.Ct. 1925, 152 L.Ed.2d 832 (2002).

As noted above in Claim 4, there are "three principal ways" by which a court abuses its discretion: "when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." *Landrum,* 282 Va. at 352, 717 S.E.2d at 137 (internal quotation marks omitted).

The court clearly set forth its basis for denying Lawlor's motion:

> So, I have reviewed all of the evidence, all of the materials, the voluminous materials, the letters in support of you, the research articles submitted, and all of the other offered materials proffered in the presentations by your counsel in the sentencing phase.
>
> This was done despite the large quantity of material that was delivered only a few days ago.
>
> I have reviewed all of the Phase II litigation testimony of more than 50—I think the total is 51 witnesses presented by the defense at trial. I've considered the pre-sentence report as well as the statements you've made, the arguments of your attorneys, arguments of the Commonwealth.

There simply has not been a document submitted on behalf of either the Commonwealth or the Defendant that has not been reviewed by the Court.

The jury in this case was selected after a multi-week voir dire, and was selected and approved by both the Commonwealth and the Defendant as to composition of membership.

Over a period of 31 trial days this jury heard the evidence in the guilt [or] innocence phase of this trial, including ... your admission through counsel that you were the perpetrator of this horrific, vile, and unnecessarily cruel and vicious criminal act on Ginny Orange on September 24th, 2008.

Thereafter, the jury found by a unanimous vote that you were guilty of the capital murder, as in alleged in both count one and count two.

I have before me both Exhibit 1 and Exhibit 2 from the trial. Exhibit 1 is a picture of Ms. Orange in life and Exhibit 2 is a picture of Ms. Orange in death. Only discretion prevents me from showing those to you because there are citizens in the courtroom.

In Phase II of this trial, the jury was presented with and heard over 50 mitigation witnesses presented by the Defense in Phase II.

The jury thereafter deliberated for several days and they reviewed the evidence and the argument of both the Commonwealth and the

Defendant. The jury reached their unanimous verdict with the determination that under the facts of this case, the appropriate sentence under the law was the imposition of the death penalty for each of the two counts in the indictment.

I note that upon the reentry of the jury in to the court to deliver their verdict in Phase II, it was clear and obvious that the jury was, I guess the word is distraught, or better word, emotionally drained, and in fact several of the jurors were in tears.

It is clear evidence of the heavy emotional burden placed upon 12 citizens in a capital prosecution, and the seriousness and deliberation with which they addressed their civic duty as jurors.

There simply are no mitigating facts in this case that would convince the Court that the jury failed to properly consider any evidence in this litigation submitted by the defense.

There was abundant evidence and the jury's conclusion that the two crimes as charged contained both the presence of a continuing threat and a violence factor, which has not been discussed today at all in this hearing, and thus warranted punishment by the imposition of death.

Counsel argues that the Defendant has accepted responsibility and the Defendant has said that today. Although I note for the record

> that over 22 months the defense position was that someone else had committed this act.... Even[ ] as late as December 9th of 2010, the defense was asking for funds to send an investigator to Uruguay to interview one Rafael Delgado, who they at least intimated was involved in this crime.
>
> It was only on January 13th in the opening statements that counsel for the Defendant accepted some responsibility.
>
> Mr. Lawlor, I find today, and it is a difficult finding, I will admit to you, no reason to intercede and sentence you contrary to the recommendations of the jury in either count one or count two.
>
> Today the Court affirms and imposes those sentences.

The record also indicates that the court prefaced its remarks by observing that Lawlor did not express remorse prior to sentencing. Lawlor points to a number of statements in which he expressed remorse, but these statements were contained in or attached as exhibits to a pleading filed on June 17, 2011, less than a week prior to the court's June 23 hearing. This 6–day interlude is a distinction without a difference for the purposes of reviewing the court's statement that "up until today, there has not been a scintilla of remorse," particularly when the court expressly noted that it had reviewed these statements when referring to "the large quantity of material that was delivered only a few days ago."

However, the record also indicates that the court considered Lawlor's pre-trial motions for funding to send an investigator to Uruguay to interview and collect DNA from Delgado, whom Lawlor at the time asserted may have committed the murder as principal in the first degree. In addition, the court commented that Lawlor "continued to deny [responsibility] for over 22 months of pretrial investigations, in motions, [and] pleadings by the defense team." It also stated that he accepted responsibility "only on January 13th in the opening statements."

While it is proper for a court to consider a defendant's "*present tense* refusal to accept responsibility, or show remorse," *Jennings v. State,* 339 Md. 675, 664 A.2d 903, 910 (1995) (emphasis added), it may not be linked to his "prior claim of innocence or not guilty plea or exercise of his right to remain silent." *Saenz v. State,* 95 Md.App. 238, 620 A.2d 401, 407 (1993). *See also Smith,* 27 Va.App. at 362–63, 499 S.E.2d at 13–14 (citing *Jennings* and *Saenz*). Lawlor's defense strategy in the 22 months preceding trial, including his assertion that Delgado may have committed the murder and the concomitant denial of responsibility it implied, was not an appropriate factor to consider in weighing Lawlor's sense of remorse at the time of sentencing. Simply put, a defendant must not be penalized at sentencing for having mounted a legal defense to the charge against him.[33] *See Bordenkircher v. Hayes,* 434 U.S.

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[33] As noted, whether the defendant expresses remorse at sentencing is a proper factor for consideration and the trial court

357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.").

Nevertheless, the consideration under Code § 19.2–264.5 is whether there is good cause to set aside the jury's sentences of death; the court correctly noted that the question before it was whether to intercede and overrule the jury's determination. It is clear from the record that in evaluating that question the court considered and gave the greatest weight to the statutory sentencing report; the evidence adduced at trial, including Lawlor's mitigating evidence in the penalty phase; the duration of voir dire and the resulting impartiality of the jury; the seriousness with which jurors undertook and completed their deliberations; the jury's finding of both aggravating factors; and the egregiousness of the offense. These are all proper factors for the court's consideration. While Lawlor's defense strategy was not a proper factor, the court did not give it significant weight in relation to the many other factors stated from the bench when it determined that Lawlor had not shown good cause to set aside the jury's sentences. Accordingly, the court did not abuse its discretion in denying Lawlor's motion. *Landrum,* 282 Va. at 352–53, 717 S.E.2d at 137.

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may weigh the credibility of any such expression, provided it does not consider the defendant's prior legal positions when doing so.

## CLAIM 15: NARROWING THE CLASS OF CAPITAL OFFENSES

This claim consists of a single assignment of error, assignment of error 20, in which Lawlor asserts that the circuit court erred by denying his motion to declare Code § 18.2–31 unconstitutional for failing to narrow the class of murders for which a sentence of death may be imposed. He contends that the number of offenses defined as capital murder in the statute has increased to the point that it no longer satisfies the requirements of *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). We review this issue de novo. *Gallagher,* 284 Va. at 449, 732 S.E.2d at 24 (2012).

Lawlor's argument is without merit. In *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Supreme Court determined that arbitrary imposition of the death penalty was unconstitutional. States responded by narrowing the class of defendants on whom a sentence of death could be imposed. For example, in Texas such a sentence could be imposed after conviction for one of only five categories of murder. *Jurek v. Texas,* 428 U.S. 262, 268, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), overruled on other grounds by *Abdul–Kabir,* 550 U.S. at 258, 127 S.Ct. 1654. The Court determined that limiting the type of murder for which a sentence of death could be imposed was sufficient for *Furman* purposes. *Jurek,* 428 U.S. at 276, 96 S.Ct. 2950.

By contrast, in Georgia every murder was punishable by either death or life imprisonment. *Gregg,* 428 U.S. at 196, 96 S.Ct. 2909. Nevertheless, that state narrowed the imposition of a sentence of death to those cases in which a jury found at least one of ten statutory aggravating factors beyond a reasonable doubt. The Court determined that requirement eliminated the opportunity the *Furman* jury had to impose a sentence of death arbitrarily, "without guidance or direction." *Id.* at 196–97, 96 S.Ct. 2909.

In *Godfrey,* the Court reiterated its holding in *Gregg* that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." 446 U.S. at 428, 100 S.Ct. 1759. "It must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." *Id.* (internal quotation marks and footnotes omitted).

While the Court reversed the death sentence imposed in *Godfrey,* it did so because it determined that the sole aggravating factor upon which the sentence had been imposed had been applied unconstitutionally. *Id.* at 432–33, 100 S.Ct. 1759. Notably, it did not reverse on the ground that Georgia law extended the potential imposition of a sentence of death to too many offenses. To the contrary, in *Zant,* the Supreme Court reaffirmed the principle that appropriate aggravating factors may be sufficient to

narrow the class of defendants upon whom a sentence of death may be imposed. 462 U.S. at 878–79, 103 S.Ct. 2733.

In short, states may avoid the arbitrary imposition of the death penalty either by restricting the types of murder constituting capital offenses *or* by setting forth aggravating factors which must be proved prior to the imposition of a sentence of death. By specifying certain offenses as capital murder in Code § 18.2–31 and setting forth aggravating factors in Code §§ 19.2–264.2 and 19.2–264.4(C), Virginia has done both. Accordingly, the statutory aggravating factors set forth in Code §§ 19.2–264.2 and 19.2–264.4(C) satisfy the constitutional obligation to narrow the cases in which a sentence of death may be imposed regardless of the number of offenses defined as capital murder in Code § 18.2–31. The court therefore did not err in denying Lawlor's motion.

## CLAIM 16: CRUEL AND UNUSUAL PUNISHMENT

This claim consists of a single assignment of error, assignment of error 204, in which Lawlor asserts that the circuit court erred by denying his motion to bar the imposition of a sentence of death because both of the Commonwealth's methods of execution constitute cruel and unusual punishment. He also argues that an evidentiary hearing was necessary to ascertain the changes made to its lethal injection protocol since our last review.

Code § 53.1–234allows a prisoner who has been sentenced to death to elect whether the sentence will be executed by electrocution or lethal injection; if the prisoner fails to make a timely election, the statute

directs that the sentence be executed by lethal injection. We have consistently ruled that execution by electrocution is constitutionally permissible. *Porter,* 276 Va. at 238, 661 S.E.2d at 432 (quoting *Bell,* 264 Va. at 203, 563 S.E.2d at 715–16); *Orbe v. Johnson,* 267 Va. 568, 570, 601 S.E.2d 543, 545 (2004) ("*Orbe I*"). When a prisoner sentenced to death may choose to have his sentenced executed through a constitutionally permissible method, we will not consider a constitutional challenge to an alternative choice. *Porter,* 276 Va. at 237, 661 S.E.2d at 432 ("When a condemned prisoner has a choice of method of execution, the inmate may not choose a method and then complain of its unconstitutionality, particularly when the constitutionality of the alternative method has been established.") (quoting *Orbe II,* 267 Va. at 570, 601 S.E.2d at 546). Accordingly, we will not reverse the court's ruling.

## CLAIM 17: LACK OF MEANINGFUL APPELLATE REVIEW

This claim consists of a single assignment of error, assignment of error 8, in which Lawlor asserts that the circuit court erred by denying his motion to declare the Commonwealth's capital punishment statutory scheme unconstitutional because it fails to provide defendants with an opportunity for meaningful appellate review. We have previously considered and rejected Lawlor's arguments. *Morrisette v. Commonwealth,* 264 Va. 386, 398, 569 S.E.2d 47, 55–56 (2002), *cert. denied,* 540 U.S. 1077, 124 S.Ct. 928, 157 L.Ed.2d 750 (2003); *Bailey v. Commonwealth,* 259 Va. 723, 742, 529 S.E.2d 570,

581, *cert. denied,* 531 U.S. 995, 121 S.Ct. 488, 148 L.Ed.2d 460 (2000). The circuit court did not err in adhering to our controlling precedents. We also find no reason to modify the views we previously expressed in them.

## III. REVIEW UNDERCODE § 17.1–313(C)

Code § 17.1–313(C)requires us to review every sentence of death and "consider and determine: [(1) w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and [(2) w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Lawlor presents his argument relating to this review in his eighteenth and final claim. While we consider Lawlor's arguments concomitantly with our statutory review, they do not restrict its scope. Code § 17.1–313(F).

### A. PASSION, PREJUDICE, OR OTHER ARBITRARY FACTORS

In assignment of error 214, Lawlor asserts that the sentences of death were imposed under the influence of prejudice and an arbitrary factor, i.e., mistake. In particular, he cites the trial court's references to his decision not to testify and his counsel's advocacy. He also argues that the jury's sentences were made without the evidence of his remorse and his asserted lack of risk of future dangerousness excluded by the court's rulings.

We have addressed each of these arguments above and have found no reversible error. In addition, we have reviewed the errors Lawlor assigns to the judgment of the trial court to ascertain whether they suggest prejudice when considered cumulatively. *See Porter,* 276 Va. at 266, 661 S.E.2d at 448 (citing *Waye v. Commonwealth,* 219 Va. 683, 704, 251 S.E.2d 202, 214 (1979)). We conclude that they do not.

Expanding our review beyond the scope of Lawlor's argument, we have thoroughly reviewed the record as mandated by Code § 17.1–313(C)(1). Nothing therein suggests that the jury failed to consider fully all evidence adduced in both the guilt and penalty phases of trial, including Lawlor's relevant mitigating evidence. Likewise, nothing suggests any improper influence in imposing the sentences of death. Accordingly, we conclude that there is no indication that the sentences were imposed under the influence of passion, prejudice, or any other arbitrary factor.

## B. EXCESSIVE OR DISPROPORTIONATE SENTENCE

In assignment of error 215, Lawlor asserts that, although his crime was terrible, it does not compare to those this Court routinely sees in capital cases. However, that is not the standard set forth in the statute. Rather, we "determine whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant." *Morva,* 278 Va. at 354, 683 S.E.2d at 567 (quoting *Lovitt,* 260 Va. at 518, 537 S.E.2d at 880)

(internal quotation marks omitted). "This review is not designed to ensure complete symmetry among all death penalty cases. Rather, the goal of the review is to determine if a sentence of death is aberrant." *Prieto II,* 283 Va. at 188–89, 721 S.E.2d at 507–08 (quoting *Porter,* 276 Va. at 267, 661 S.E.2d at 448) (internal citation, alteration, and quotation marks omitted).

Pursuant to Code § 17.1–313(C)(2) and (E), we examined similar cases in which a sentence of death was imposed following a conviction for capital murder in the commission of abduction with intent to defile or a conviction for capital murder in the commission of or subsequent to rape or attempted rape. Our review was especially attentive to those cases in which both aggravating factors were found, including *Vinson v. Commonwealth,* 258 Va. 459, 522 S.E.2d 170 (1999), *cert. denied,* 530 U.S. 1218, 120 S.Ct. 2226, 147 L.Ed.2d 257 (2000), *Prieto II,* and the cases cited therein.

*Barnabei v. Commonwealth,* 252 Va. 161, 477 S.E.2d 270 (1996), *cert. denied,* 520 U.S. 1224, 117 S.Ct. 1724, 137 L.Ed.2d 845 (1997), and *Payne v. Commonwealth,* 257 Va. 216, 509 S.E.2d 293 (1999), are particularly analogous in that they each involve victims of rape or attempted rape who suffered multiple blows from blunt objects. *Swisher v. Commonwealth,* 256 Va. 471, 506 S.E.2d 763 (1998), *cert. denied,* 528 U.S. 812, 120 S.Ct. 46, 145 L.Ed.2d 41 (1999), is similarly noteworthy in that both capital murder in the commission of abduction with intent to defile and capital murder in the commission of rape were charged in that case as they were in Lawlor's.

We also reviewed capital murder cases in which a sentence of life imprisonment was imposed. Based on the totality of this review, we find that the sentences of death imposed in this case were not excessive or disproportionate to sentences imposed in capital murder cases for comparable crimes.

## IV. CONCLUSION

We find no error in the judgment of the circuit court. Accordingly, we affirm the convictions for capital murder and the sentences of death returned by the jury and the judgment entered by the court.

*Affirmed.*

## Appendix B

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

| | |
|---|---|
| COMMONWEALTH OF VIRGINIA, | |
| -vs- : | CRIMINAL NO. FE-2009-0000304 |
| MARK ERIC LAWLOR | |
| Defendant. | |

Circuit Courtroom 5H
Fairfax County Courthouse
Fairfax, Virginia

Tuesday, March 8, 2011

* * * *

Martin Carroll REDIRECT EXAMINATION

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A F T E R N O O N S E S S I O N
(The Defendant entered the courtroom.)
THE COURT: We're back on the record. Mr. Lawlor is present. We are dealing with Dr. Cunningham and the Commonwealth voiced an objection, so I'll

hear that.
MR. LINGAN: I would note that Dr. Cunningham
is present in the courtroom as we speak.
THE COURT: All right.
Dr. Cunningham, if you'll wait outside, sir.
(Dr. Cunningham was excluded from the courtroom. )
MR. LINGAN: Your Honor, the Commonwealth's
objection is in general to Dr. Cunningham's testimony or
proposed testimony, and then should the Court find that
the testimony is admissible under Morva we would object to
certain aspects of the proposed testimony in particular.
But as a whole, Your Honor, it's still a
violation; Morva as well as Porter. To give the Court a
sense of what essentially has happened, back in Porter,
which is 276 Virginia 203, a 2008 --
THE COURT: I have both of them. I'm familiar
with both of them.
MR. LINGAN: As you recall, Dr. Cunningham --

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there was a proffered testimony of Dr.

Cunningham. He
wasn't appointed. The Court held that his testimony --

THE COURT: He wasn't appointed to either
Porter or Morva.

MR. LINGAN: Correct, Your Honor. And it was
based on the fact that his proposed testimony was not
admissible that they found that there was not a
particularized need under Husk.

What is interesting though is there was
argument made in Prieto suggesting that Morva left open a
particular area in which such testimony could be admitted.
That testimony never came to light, in Prieto.

That was abandoned by defense counsel and
that's essentially the same argument that defense counsel
is proposing here is that this new testimony from Dr.
Cunningham is particularized to the Defendant, but the
Commonwealth contests that, Your Honor. It is not. It
still is in violation of Morva and Porter.

If you recall from Morva, Dr. Cunningham
stated that, general factors concerning prison procedure
and security that are not individualized to, in

that case,
Morva's private history conviction record or the
circumstances of his events, are essential to his expert

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opinion on prison risk assessment.
So that was part of the proffer and part of
the reliance in Morva, and now it's interesting that we
don't have that mentioned, that's cut out. His evaluation
was such an essential part of his evaluation in 2009, in a
two year span, so that he can now testify he's
potentially, I guess, eliminated that -- he would have you
believe.
But if you look at the report that he filed,
Your Honor, it's rife with -- all it is, is general
conditions and statistical analysis of other individuals
not individualized to this Defendant. It's generally
speaking based on studies and statistics.
Then on Page 8, D above 5, it talks about
Virginia DOC inmates grouped out further demonstrate the
rates of serious violent misconduct among inmates in
Virginia DOC are quite low including at higher levels of
security.

19 THE COURT: Where are you reading from?
20 MR. LINGAN: Page 8 of his report, Your Honor,
21 it's D.
22 THE COURT: Subsection D?
23 MR. LINGAN: Yes, Your Honor.

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1 In addition, if you look at the notice of
2 expert testimony filed by the defense, if you go to Dr.
3 Cunningham, it says, "Dr. Cunningham may testify that
4 taking into Mr. Lawlor's past criminal record convictions,
5 his prior history, and the circumstances surrounding the
6 commission of the offense of which he was convicted,
7 assuming conviction in this case," which we have, that
8 tracks the language of Morva. But then it goes on to say,
9 "and all other demonstratively relevant facts and
10 circumstances bearing on his likely future conduct."
11 Your Honor, it's that additional part -- and
12 again this is why when we objected in Prieto -- his
13 analysis is based in these inadmissible aspects which are
14 general prison conditions. He can't separate

them and
that was evident in his proffer made to Morva.
Now, just because he doesn't specifically mention them, now, doesn't mean that they're not a part of
his analysis and as such you can't separate the part from
the whole, Your Honor.
His analysis is based, even individualized aspects such as age, are based on inadmissible evidence
and it's not individualized. It's based on statistics
developed from studies that have nothing to do with the

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Defendant or which the Defendant was not involved.
It's also of note too that you could just note
where Dr. Cunningham is coming from in the beginning of
his report. On Page 4, the first full paragraph, the last
sentence, "Arguably, this application of statistical
methodology and data at capital sentencing moves these
gravest of determinations towards the greater degree of
reliability --
THE COURT: You're on Page 4 now?

MR. LINGAN: Of his report, Your Honor.
THE COURT: The first full paragraph?
MR. LINGAN: The first full paragraph. It starts with the statistical methodology.
THE COURT: All right. I got you.
MR. LINGAN: That last sentence tells you exactly where Dr. Cunningham is coming from, Your Honor.
He goes on to cite Lockett versus Ohio and certainly --
and pretty much writes like novel writer would be writing
in regard to the analysis.
But I submit to, Your Honor, that his proposed testimony is no different than what was proposed
in Morva and Porter, it's just that he's not -- he's glossing over the aspects of inadmissible evidence that

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were denied, and were the basis of denial, denied in his
testimony in part in Morva and Porter and just not
highlighting it, but it's still there, Your Honor, and is
still an inadmissible testimony.
It was essential to his analysis in 2009 and
I submit to you it's essential to his analysis here and
it's just his testimony in whole is inadmissible.

This
does not go to the Defendant's prison adjustment in any
way and is not individualized in any way and we'd ask --
THE COURT: The Court has said clearly that
the three elements that are admissible were the
Defendant's character, his prior record and circumstances
of the offense.
MR. LINGAN: If it's adjusted to speak to his
prison adaptability. Now they don't use prison risk --
because they cite Juniper for the exact language, Your
Honor, but I believe they say, "Evidence of prison life
and the security measures used in the prison environment
are not relevant to future dangerousness unless it
connects to specific characteristics of a particular
Defendant --
THE COURT: I agree with you.
MR. LINGAN: -- to his future adaptability to

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prison environment." This does not address this
particular Defendant. It's talking about statistics in

general and past DOC members or past Federal prison members as well that are not in this particular Defendant, Your Honor, and it's a generalized -- these are generalized studies about life without the possibility of parole, inmates or people on capital murder across the country.

It's not particularized to this Defendant, Your Honor, and his conditions. So it is inadmissible. It doesn't comport with the arguable door that was left open by Morva, although I contend that -- I don't think that door is as big as defense counsel does and I would contend that it really is not a door that is open.

THE COURT: All right. Who is going to argue for the defense?

MR. UNGVARSKY: May it please the Court, Edward Ungvarsky on behalf of Mark Lawlor. I think that, in a way, the Commonwealth's very last sentence is sort of the most telling of the Commonwealth's argument.

The Commonwealth says they don't think that the door was left open at all in Morva. But that's not the language of Morva. The Commonwealth --

Morva does

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distinguish between what is admissible evidence that's particularized to an individual Defendant and prison life testimony.

THE COURT: Do you contend that everything in Dr. Cunningham's report is particularized to this Defendant, because I don't.

MR. UNGVARSKY: I contend that Dr. Cunningham's opinions and decisions are particularized to Mr. Lawlor and that some of his reasoning and analysis comes from studies that had been done in the past which helps provide a framework --

THE COURT: Which are not particularized to this Defendant. It had nothing to do with this Defendant.

MR. UNGVARSKY: He was not a member of those studies, Mr. Lawlor, that's true but --

THE COURT: Nor are those studies applicable to him, are they?

MR. UNGVARSKY: I--

THE COURT: How are they particularized to

this Defendant when they are a generalized study in some other setting?

MR. UNGVARSKY: The studies, Your Honor,

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provide a framework by which one can sort of evaluate the factors that are particularized to Mr. Lawlor. I mean, the factors that are particularized to Mr. Lawlor, I mean sort of going back -- if you go back to the procedure of this case, you know, we were before Your Honor arguing a motion about the appointment of Dr. Cunningham. We argued for a day, I think back in November, Your Honor --

THE COURT: And I denied it, initially, didn't I?

MR. UNGVARSKY: Not at --

THE COURT: Then it went to Judge Smith?

MR. UNGVARSKY: Well --

MR. LINGAN: I think what happened, Your Honor, is --

MR. UNGVARSKY: I'm sorry.

MR. LINGAN: I'm just clearing up what --

MR. UNGVARSKY: I don't think you're

clearing
18 up. I think you're interjecting. I mean, with all
19 respect --
20 THE COURT: Let him finish.
21 MR. LINGAN: I think I can clear it up
22 quickly. What was asked is that he be allowed -- the
23 Court ruled on the admissibility of his testimony ahead

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1 of time when they actually -- and they said we will be
2 coming to ask that he be appointed.
3 When they did come to have him appointed they
4 asked for an ex parte hearing which was granted by Judge
5 Smith. You never did deny his appointment.
6 THE COURT: All right. Thank you.
7 MR. UNGVARSKY: And so, you know, we went to
8 Judge Smith and Judge Smith granted the appointment.
9 Judge Smith ordered that as part of that Dr. Cunningham
10 do a report particularized to Mr. Lawlor and that report
11 be provided to the Court --
12 THE COURT: And he also said that he wasn't
13 sure that the Trial Court was going to admit it; that was
14 up to the Trial Court. To the extent that it was

not
particularized, he suspected it wouldn't be admitted.
MR. UNGVARSKY: To the extent that it was not
particularized.
THE COURT: Right.
MR. UNGVARSKY: Dr. Cunningham has completed
a report. I've marked it for identification purposes and
I'd like to make sure it's in the record; Defense 74 is
Dr. Cunningham's report, dated February 28th, 2011.
Defense 75 is Dr. Cunningham's CV.

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(The documents referred to above were marked Defendant's Exhibit Nos. 74-75, for identification.)
Both of these documents were, of course, provided to Your Honor and to the Commonwealth on March
1st by letter, pursuant to Judge Smith's order.
So Your Honor, I think that when you look at
the language of Porter -- I'm sorry -- when you look at
the language of Morva it notes that evidence relating to

a prison environment must connect the specific characteristics of a particular Defendant to his future adaptability in the prison environment.

Citing Juniper, "There must be evidence peculiar to the Defendant's character, history and background in order to be relevant to future dangerousness inquiry."

Then it goes on to say, also citing Juniper, "Conditions of prison life and security measures utilized in a maximum security facility are not relevant to future dangerousness inquiry and last such evidence is specific to the Defendant on trial and relevant to that specific

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Defendant's ability to adjust to a prison life."

What we wrote previously is, and I'm going to be very clear, Dr. Cunningham is not going to be talking about red onion, twenty-four hour lock down, how people get their meals, you know, he's not going to be talking about prison life, what it will be like for Mr. Lawlor when he is incarcerated. He's not going to be

talking
about that at all.
What he is going to be talking about is, and
as set forth in his report, based upon the particular
characteristics of Mr. Lawlor, the fact of his prior
conduct while incarcerated in jails and prisons in the
past, and the lack of write-ups for lack of violence; Mr.
Lawlor's age; Mr. Lawlor's having connections with
members of the community, and other factors as set forth
in the report that, based upon specific factors that
relate to Mr. Lawlor that are different than me and that
are different than other Defendants.
Based upon all that, Dr. Cunningham will
opine that Mr. Lawlor is a low risk to commit serious
acts of violence in prison and he can put some numbers on
that as set forth in the report; a low risk, a very low
risk.

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That is peculiar to him. That is unique to

him. Dr. Cunningham has done these evaluations for other Defendants and the numbers we have here --

THE COURT: Counsel, don't tell me about other Defendants because, one, it's not particularized to this Defendant. As far as I know, Dr. Cunningham has never testified in the Commonwealth.

In the two cases that I'm aware of, Morva and Porter, both times the Court declined to appoint him and the Virginia Supreme Court affirmed that declination; is that not correct?

MR. UNGVARSKY: I believe that's correct as to those two --

THE COURT: So Dr. Cunningham has never testified in the Commonwealth?

MR. UNGVARSKY: That's not accurate, Your Honor. Dr. Cunningham testified in Gray against Commonwealth, 274 Virginia 290, in 2007.

THE COURT: 274 Virginia 290?

MR. UNGVARSKY: 274 Virginia 290, in 2007, and he's also testified in Rogers against Commonwealth

and --
THE COURT: I stand corrected.

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MR. UNGVARSKY: You know, when we filed this motion to admit his testimony, back in November, one of the things we attached was the transcript from the Rogers hearing. Personally, what I thought was particularly instructive about that transcript was that, that transcript I thought did a very good job of showing the narrow way in which a defense counsel could present Dr. Cunningham's testimony to fit within the prescribement of Morva.

Unlike, for example, the first motion that we filed in this case months ago and unlike the way a lot of lawyers have tried to do it, it wasn't some wide-ranging, free-ranging attempt, and talking about prison life, and lock down, and this and that but it was very narrow applying these factors specifically to the Defendant.

And then I think, you know, Counsel

referenced the Prieto case. Whether it was their own insight or whether they recognize what had been successful in the past in meeting the requirements of the Virginia Supreme Court, I thought that the insight of the defense lawyer, in Prieto, to actually look at Morva and read the language and recognize that Morva distinguished between what is admissible in this type of testimony and

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what isn't?

Prison life isn't, but testimony that's particular to the Defendant as you apply these factors and how these factors, each factor, can predict the risk of violence in a prison setting, is.

THE COURT: I agree with you. What Morva says is, "The testimony must be – the focus must be in the particular fact of the Defendant's history and background and the circumstances of his offense," not what prison life is going to be like, if he's sentenced

to prison; right?
MR. UNGVARSKY: Right.
THE COURT: I don't dispute what you have said so long as it is particularized to this Defendant and stays within the guidelines of Morva, but I think that Dr. Cunningham's report appears to me to be far in excess of that.
And we've been through this before, I make a ruling and I say what can and cannot and then defense proceeds to march down that path that I have said you cannot go down.
So where I think we are is -- I'm going to go read Gray -- is that a total exclusion of Dr. Cunningham

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would be improper under those cases but it's going to have to be limited under the rules of evidence, in all respects, as well as limited to the particularized facts of this Defendant as set forth; his character, his prior record and the circumstances of his offense, not

prison
life and not the effect of prison life.
MR. UNGVARSKY: I'm sorry. Not prison life
and not it's -- ?
THE COURT: Not the effect of prison life on
him.
MR. UNGVARSKY: Very well.
MR. LINGAN: Could I point out one more
objection. It was mentioned in Counsel's argument about
his risk of future dangerousness in prison society.
That's not the question, and the jury is not limited to
considering prison society and that's another danger with
this type of testimony.
THE COURT: That is not the test Morva sets
forth, it is not limited to the population in prison.
That's been argued several times in several cases and in
each instance it has been rejected by the Supreme Court.
MR. LINGAN: Right. And I think that's why
Dr. Cunningham is talking about prison risk, to kind of

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confuse the jury into thinking that's the society they're going to be thinking about, and it's not under the case law, prison risk, it's adjustment to prison life is what they said. They never used the term, "prison risk."

I just want to make clear that the jury, at the end of the day, will be clear that they are not to limit their sights and their consideration on prison society, and whether that comes after Dr. Cunningham testifies in the form of an instruction, I don't know.

But the fact of the matter is, Dr. Cunningham's report and his testimony could lend this jury to be confused that they are to limit their consideration to prison society and under Lovett, a Subsequent case, that is not the case.

THE COURT: The Supreme Court has been very clear; it is the society, it is not the prison society which he is maybe confined to -- it's society, period.

MR. LINGAN: Correct.

THE COURT: I agree with you.

MR. LINGAN: Thank you.
THE COURT: And I don't think Mr. Ungvarsky
disagrees.
MR. UNGVARSKY: Dr. Cunningham will talk, as

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Mr. Lingan talked, about the adjustment to prison life,
adaptability and environment and he'll acknowledge that
in the community the risk is --
THE COURT: In that limited community.
MR. UNGVARSKY: Yeah, but he'll also
recognize that in the free community the risk is high.
THE COURT: Say that again?
MR. UNGVARSKY: Well, I'm sorry. when you're
saying, "that community," Dr. Cunningham will --
THE COURT: Dr. Cunningham is a prison risk
expert. He can't testify what his risk of future
dangerousness may be in a global sense, can he? That's
absolutely not the basis of his research or his position
in his report.
In other words, you couldn't put Dr.
Cunningham on to say that Mark Lawlor is not

a risk of
17 future dangerousness, period.
18 MR. UNGVARSKY: I would not put him on to say
19 that. I would not put him on to say that.
20 THE COURT: Well, then I think we're done
21 until tomorrow morning at 10:00. I'll go read these
22 cases and we'll address this under all of the evidentiary
23 rules that we have, that we deal with.

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1 MR. LINGAN: Can we agree, I think Counsel
2 may agree, Dr. Cunningham is not going to get up and
3 start citing Supreme Court cases or Virginia Supreme
4 court cases. He mentions in his report – I've never
5 seen that of a doctor before.
6 MR. UNGVARSKY: Actually, on that point. I
7 think it's a very good point that Mr. Lingan raises and
8 thank you for it. Dr. Cunningham will not be talking
9 about any case law during his testimony, nor do I expect,
10 of course, the Commonwealth cross-examining Dr.

Cunningham about case law.
THE COURT: Well, let's make it real clear.
Dr. Cunningham -- this is what he does; he's a paid
expert and he has an agenda, for lack of a better term.
So be very careful and make it clear to him that the
Court's not going to tolerate speeches. I'm not going to
tolerate testimony which is outside the question asked.
It's not a bully pulpit for Dr. Cunningham to
espouse his view on prison risk. He has a very limited
role and I'm going to allow him to testify that role. To
the extent he's not able to do that, I'll remove him and
dismiss him.
MR. UNGVARSKY: Very well, and I would --

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THE COURT: He needs to understand that.
MR. UNGVARSKY: I think -- obviously I'll
Pass that on to him. But again, if you look at the --
when the Court looks at, if the Court does, the

Rogers
transcript I think you'll see -- my intention is to have
this not be a lengthy testimony and not be, you know,
some long, expositive answers. I'm planning on a very
focused, within the ground rules of Morva, testimony;
in – out.
THE COURT: I appreciate that but his report
is not that. His report is predominantly full of such
things as, well, I'll just give you a -- I'll just pick
the page I'm on, Page 8; "Utilizing data of 13,341
inmates entering the state prison, inmates sharing
predictive characteristics of Mr. Lawlor, with at best
two percent, i.e., ninety-eight percent of inmates were
likely to be involved in an assaultive conduct in the
first year of confinement."
That's generalized. That's not
particularized to Mr. Lawlor. So that's the kind of
things, when he's making broad generalizations, that are
based on widespread studies of other prisoners and that's

not particularized to Mr. Lawlor and I'm sure the

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Commonwealth will object to that.

* * * *

## Appendix C

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -x

COMMONWEALTH OF VIRGINIA, :

-vs- : FE-2009-0000304

MARK ERIC LAWLOR :

Defendant. :

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -x

Fairfax County Courthouse
Circuit Courtroom 5H
Fairfax, Virginia

Wednesday, March 9, 2011

* * * *

DR. MARK CUNNINGHAM
DIRECT EXAMINATION

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* * * *

DIRECT EXAMINATION
BY MR. UNGVARSKY:
Q Sir, in a loud and clear voice please state

your name.
A Mark Douglas Cunningham.
Q Sir, how are you employed?
A I'm a clinical and forensic psychologist in private practice and also an independent research scientist.
Q How long have you been a psychologist?

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A About 33 years.
Q What is a clinical psychologist?
A Clinical psychology is the evaluation and treatment of psychological disorders. It's what you would think of psychologists doing in terms of interviewing and testing and counseling.
Q What is the difference between a clinical psychologist and a forensic psychologist?
A Forensic psychology is the application of psychological research and techniques to legal issues. It's any way the psychology of the science can be helpful to some issue that's before the court.
So it's not -- clinical psychology is oriented toward assessing and treating disorders. Forensic psychology is about providing scientific information to the court all the way from evaluation of

parenting
17 abilities in child custody cases to psychological injuries
18 in civil cases or in criminal court, things like
19 competency to stand trial, types of offense, or sentencing
20 consideration such as are being considered today.
21 Q Do you hold any license to practice in any
22 state?
23 A Yes, sir, do.

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1 Q Where do you hold a license to practice?
2 A I'm licensed as a psychologist in Alabama,
3 Arizona, Arkansas, Colorado, Connecticut, Idaho, Illinois,
4 Indiana, Louisiana, New Mexico, New York, Oklahoma,
5 Oregon, Pennsylvania, South Carolina, Tennessee and Texas,
6 17 states.
7 Q Thank you.
8 Is it fair to say your practice is national in
9 scope?
10 A Yes, sir, it is.
11 Q I notice that as you were reciting where you
12 hold licenses that you were looking down at a document on
13 the table. What would that document be?
14 A That's my curriculum vitae, which is a

fancy
word for a resume, and it lists the licenses.
Q Very well.
Now, are you -- are you the recipient, or what is the American Psychological Association?
A The American Psychological Association is the
professional association for psychologists. It has about
160,000 members.
Q Are you the recipient of the American Psychological Association award for distinguished

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contributions to research and public policy?
A Yes, sir, I am.
Q Now, I'd like to do a brief overview of your
education and background and I truly mean brief.
A Yes, sir.
Q Can you please tell me where you went to school for undergraduate and what degree you obtained?
A I obtained a Bachelor's degree from Abilene
Christian College with majors in psychology and also a
major in mass communications.
Q Where did you obtain your Master's and Ph.D.?
A From Oklahoma State University.

Q When did you obtain your Ph.D.?
A In December 1977.
Q What is your Ph.D. in?
A Clinical psychology.
Q In the course of your training and education, did you serve an internship?
A Yes, sir, I did.
Q Briefly, please describe what the internship was.
A My internship was at the National Naval Medical Center in Bethesda, Maryland, the large Naval

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Hospital in suburban Washington, D.C., where I was an active duty naval officer and clinical psychology intern. I was trained in that capacity for a year.
Q Thank you.
Have you published in the field -- I want to call them fields, plural. Have you published in the fields of clinical and/or forensic psychology?
A Yes, sir, I have.
Q About how many publications do you have in the fields?
A About 50.
Q Have you published in peer reviewed

journals?
A Yes, sir, I have. About 30 of those are in peer review journals.
Q What is a peer reviewed journal?
A Peer reviewed journals are the primary way that scientists exchange information with each other.
They are scientific journals that a piece of research or a summary of existing research is submitted to.
The editor of the journal is a leading scientist. He reviews it for scholarly merit. He sends it out to several other scientists who have recognized expertise in the area that the study or the analysis is

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written in and they then review it for whether it accounts for the work in the field or whether the methodology is sound, whether the conclusions make sense, and whether it makes some important contribution to the body of knowledge in the field,
Most of the time it's rejected at that screen, but if it does pass through that screen, it's then published and it is said to pass peer review. In

other
words, it has gone through some quality control screen.
Q Have you yourself served as a peer reviewer?
A Yes, sir, I have.
Q Have you served as a board member for any of
these scientific journals?
A Yes, sir, I have.
Q Are you board certified in any particular area?
A Yes, sir.
Q What are you board certified in?
A I'm board certified in clinical psychology and
I'm also board certified in forensic psychology, both by
the American Board of Professional Psychology, which is
the board certification organization that's recognized by
the American Psychological Association.

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Q Have you published any chapters in textbooks
or published any books in the field of clinical and/or
forensic psychology?
A Yes, sir, I have.
Q In particular, I know you have referenced 50

publications, about 30 in peer review journals. Are some of those remainders - - some of that remainder group are in books or book chapters?

A Yes, sir.

Q In particular, are you the author of Evaluation for Capital Sentencing?

A Yes, sir, I am.

Q Who is the publisher of this book?

A This book is published by Oxford University Press as part of their series of best practices in forensic, mental health evaluations.

Q When you say part of their series in best practices, this doesn't talk best practices in forensic mental health assessment. You're saying it is a series.

Are there other books that Oxford has published in this regard or in this series?

A Yes, sir. There are approximately 19 books, each addressing a different type of court related

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evaluation. I was invited to write the text on evaluations for capital sentencing.

Q Thank you.

Now, within your practice, do you have a particular specialty concerning the rates and correlations for assessing the risk of violence in prison?

A Yes, sir.
Q A specialty for how often it happens and how to predict future violence?
A Yes, sir.
Q About how many of your publications concern the consideration of -- I don't want to use -- is it sometimes called prison risk assessment?
A Yes, sir. Violence risk assessment for prison, either one of those.
Q Okay.
And about how many of your publications concern the consideration of violence risk assessment in prison?
A Approximately 30 of them address either the methodology for performing those assessments or providing data and research information that informs those assessments.

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Q Have you also done scholarly presentations on the subject of violence risk assessments in prison?
A Yes, sir, I have. I have provided training for psychologists in this particular area.
Q Do you also provide any training for forensic

psychologists, providing training for those of us who work in the legal world?

A Yes, sir.

Q Have you testified as an expert witness before in courts here in the United States?

A Yes, sir, I have.

Q Approximately how many times have you testified as an expert witness?

A Well over 200, maybe over 300.

Q Have you testified as an expert witness here in the Commonwealth of Virginia?

A Yes, sir, I have.

Q About how many times have you testified as an expert witness here in the Commonwealth of Virginia?

A Specific -- I think I've testified in at least ten cases here.

Q For those what we call courts of records, so at least the Circuit Court level?

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A Yes, sir.

MR. UNGVARSKY: Your Honor, I move to qualify Dr. Mark Cunningham as an expert in the area of the clinical and forensic psychology.

THE COURT: Do you wish to voir dire?

MR. LINGAN: No, Your Honor.
THE COURT: No objection, qualified.
MR. UNGVARSKY: All right.
BY MR. UNGVARSKY:
Q Dr. Cunningham, I now want to turn your attention to an evaluation of assessment you did in connection with this case. Let me just preface it. I'm going to try to ask the best questions I can, as directly as I can, and I ask you to please try to answer directly as you can. I'm really going to do my darndest to at least get my questioning done before the lunch break.
A Yes, sir.
Q Okay. So if you don't understand a question, please let me know you don't understand it.
A Yes, sir.
Q The same thing, if Counsel asks you a question. They'll do their darndest to ask a question and

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please do your best to give a distinct response. Okay?
A Yes, sir.
Q Thank you. All right.
So, Dr. Cunningham, in making that

assessment
for which you are here to testify about today, an evaluation; did you review any records?
A Yes, sir, I did.
Q Okay. Generally speaking, what records did you review, broad categories?
A Broad categories of criminal records, jail records, prison records, mental health records, drug and alcohol rehabilitation related records, a small amount of school records, employment records. Those are the broad categories.
Q Okay. In doing your assessment, your evaluation, did you speak with any witnesses, speak with any people?
A Yes, sir, I did.
Q Who did you speak with?
A I spoke to the Defendant, Mark Lawlor, on two occasions. I spoke to Marty Carroll, who is a former probation officer. I spoke to Mark Crosby, who is a former juvenile probation officer. I spoke to Daryl

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Southerland [ph], who was a corrections industry

supervisor. I spoke to Katherine Walker, who was a friend from his adolescence.

Q And did you -- and in speaking to Mark Lawlor, were you simply obtaining historical information?

A Yes, sir, that's fair.

Q Okay.

Now, did you review any -- let me just, again, I saw you looking down. Did you prepare a report in connection with your assessment in this case?

A Yes, sir, I did.

Q Is that report dated February 28th, 2011?

A Yes, sir, it is.

Q Okay. Is that what you're looking down at right now?

A Yes, sir.

Q Okay. Feel free to do that when you need to. Very well. Okay.

Did you obtain any information about correction information from correctional officers here at the Fairfax Adult Detention Center?

A Yes, sir, I did.

Q What did you have there?

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A I reviewed summaries of interviews of six

deputies or staff members at the Fairfax Adult Detention Center.

Q Did you review any correctional data?

A Yes, sir, I did.

Q Did you review the relevant literature in the field?

A Yes, sir, I did.

Q The field being future risk assessment in prison?

A Yes, sir.

Q Are these -- the data you reviewed, the information, cases of the data, the correctional data, and the literature you reviewed, are these the sources and methods that you and other forensic psychologists reasonably rely upon in coming to an opinion?

A Yes, sir.

Q Are these the materials that specifically in this case you relied upon in coming to an opinion?

A Yes, sir.

Q All right. So let me talk with you specifically about the records you obtained from the prison or jail records. Okay?

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A Yes, sir.

Q Please feel free to refer to your report.
MR. UNGVARSKY: Counsel, I'm going to direct his attention to page 3. This was provided to you on March 1st.
MR. LINGAN: Your Honor, I think he's got to testify from memory. You can refresh his recollection, but to just have him read the report, that's not evidence.
MR. UNGVARSKY: Just to be clear - -
THE COURT: I sustain that objection.
MR. UNGVARSKY: That's fine. I'm not trying to have him - -
THE COURT: Why don't you turn it over and put it on the corner of the desk there? If he needs it, he can refer to it.
MR. UNGVARSKY: Okay. Turn it over, please.
THE COURT: Put it on the corner there.
MR. UNGVARSKY: Very well.
(The Witness complied with the request.)
MR. LINGAN: Your Honor, to the extent, we do have an objection to some of his opinions that are based on interviews with the Defendant or other - -
THE COURT: Come to the bench.

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MR. UNGVARSKY: I think that this - -
THE COURT: Come to the bench.
BENCH CONFERENCE
THE COURT: Mr. Lingan?
MR. LINGAN: This witness has stated that he has interviewed the Defendant and he has read interviews prepared of six people from the Adult Detention Center, prepared by whom, I don't know, but those are not in evidence and until a foundation is laid, we would object to any opinion that he may have, especially any opinions based on such hearsay evidence and opinions based on facts not in evidence.
At this point, too, I will say no foundation has been laid for any opinion. I know Counsel is going to say it's premature, but we do have that objection.
THE COURT: Do you wish to respond?
MR. UNGVARSKY: Your Honor, we don't object to the Commonwealth's motion. We plan on doing that. I will say -- I want to make one thing very clear. I am not

attempting at all to elicit from this witness any statements that Mark Lawlor made to him.

THE COURT: Or anybody else made to him.

MR. UNGVARSKY: That's right. That's why I'm

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not objecting to his motion, but I wanted another thing very, very clear about the Lawlor thing. His testimony will not come from him.

THE COURT: I take it you are in agreement that one of the things he cannot do is say this witness told me this?

MR. UNGVARSKY: Yes, sir.

THE COURT: Or this study says this?

MR. UNGVARSKY: We're not going to do that on direct, that's correct. If the Commonwealth opens the door, that's different.

THE COURT: Okay. The objection is sustained because it was not --

MR. UNGVARSKY: Right. No objection to it.

OPEN COURT

BY MR. UNGVARSKY:

Q Doctor, did you use records from the

Virginia
Department of Corrections?
A Yes, sir.
Q Can you please tell us what records you reviewed from the Virginia Department -- I'm not -- we're not talking about your evaluations and assessments as it pertains to Mark Lawlor.

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So did you review any records -- let me back up. Going back.
Yes. Did you review any records from the Virginia Department of Corrections as it pertains to Mr. Lawlor?
A Yes.
Q Did you review any records from the Virginia Department of Corrections that pertains to Mr. Lawlor from the years 1985 to 1986?
A Yes, sir.
Q Did you review any records from the Virginia Department of Corrections Central Criminal Records from 1998 to 2004?
A Yes, sir.
Q Did you review the records from the Virginia

Department of Corrections mental records from 1998 to 2004?

A Yes, sir.

Q Did you review Virginia Correctional Enterprise Delco Remming employment records, 2002, 2003?

A Yes, sir.

Q Did you review Arlington County Detention Center criminal records 1986 to 1987?

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A Yes, sir.

Q Did you review Fairfax County Adult Detention Center records 1998?

A Yes, sir.

Q Did you review Fairfax County Adult Detention records 2006?

A Yes, sir.

Q Did you review Fairfax County Adult Detention Center records 2007?

A Yes, sir.

Q Did you review Fairfax County Adult Detention Center records 2008 and 2011?

A Yes, sir.

Q Did you review Fairfax County ADC classifications?

A Yes, sir. That's my recollection.

Q Do you need to look at something to refresh your memory?
A As we are now down to more specific things about exactly what was in those records, yes sir.
Q All right. I ask you to take a look, please, at your report. Look at page 3, under the heading binder 4. Look at number 3 and see if that refreshes your

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recollection as to whether you looked at whether Fairfax County ADC classifications.
A Yes, sir.
Q Thank you very much.
A (Witness examining report.)
Q Please turn the report back over.
A (The Witness complied with the request.)
Q Thank you.
Did you review any other records from jails or prisons - - excuse me.
Sir, did you review Culpeper County jail records 2006?
A Yes, sir.
Q Did you review any other records from jails or prisons that pertain to Mark Lawlor?
A Yes, sir. There was a Franklin County jail

record from about 1983, 1984, that described his one year confinement. This is in Rocky Mount, the Franklin County jail, and then the Virginia Department of Corrections records also make reference to that stay in jail in 1983, '84.

Q Okay. All right. Anything else?

A Otherwise I think you have covered the

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records, the correctional records, that I reviewed

Q Then, of course, you said you also reviewed some hospital records, court records, drug program records and the like?

A These are medical records, court records, drug rehab records. I think in a list that I described before I also reviewed expert reports of other experts involved in the case.

Q Okay. All right.

Now, I want to turn to the issue before us today, specifically regarding the facts and circumstances of Mr. Lawlor's prior history, and the circumstances of the offense, and the question, whether Mr.

Lawlor would
14 commit criminal acts of violence that would constitute a
15 continuing serious threat to society in the future.
16 A Yes, sir.
17 Q Okay. All right.
18 Did you --
19 MR. LINGAN: Your Honor, I do have an
20 objection at this point. If we could approach?
21 THE COURT: Yes, sir.
22 BENCH CONFERENCE
23 MR. LINGAN: Your Honor, he just used the

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1 statutory language that this jury is going to eventually
2 have to decide on. We were given notice that he is going
3 to talk about prison, risk assessment, and that's what we
4 are basing our objections on.
5 THE COURT: You are going right to the
6 ultimate issue when you ask him that question?
7 MR. UNGVARSKY: No, I'm actually not.
8 THE COURT: Well, that's what that question
9 is. That question asked him his opinion on the ultimate
10 issue.
11 MR. UNGVARSKY: Respectfully, Your Honor,

respectfully and I -- Ms. Shapiro will pull the case cites to give to you. In Virginia questions that go to the ultimate issue are questions of life or death and questions that go to this aggravating factor and not the ultimate issue, because even if the jury finds this aggravating factor, they can still give life. And there's two Virginia Supreme Court cases that talk --

THE COURT: That is also not the notice -- is that the notice you provided to the Commonwealth?

MR. UNGVARSKY: I think it is. I'm actually happy to rephrase it.

THE COURT: Okay.

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MR. UNGVARSKY: The very next question I was going to talk about limiting it to in prison. That was my very next question.

MR. LINGAN: Your Honor, I just want to make it clear though. I mean this is why I objected yesterday. We can strike that last question, but it's meant to confuse the jury of what society is. It's not

prison.
THE COURT: Well, this witness under the current case law may testify as to his -- what his opinion is of the risk of future dangerousness, period. The community is not the prison.
MR. UNGVARSKY: The case law --
THE COURT: The community, period. It is not only the community, but the prison.
MR. LINGAN: That's what he limited his evaluation to.
THE COURT: He hasn't because he hasn't asked the question. To the extent he asks that questions and there is an objection I'll rule on it, but I think Mr. Ungvarsky knows that he can't ask that question, limited to the prison.
MR. LINGAN: He's already said that to the jury and the jury -- he's already asked that as the

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preliminary question.
THE COURT: He's going to strike that and he's going to re-asked it.
MR. LINGAN: What I understood him to

be
testifying about is his prison adjustment under -- it's
not an issue of his future dangerousness. A prison risk
assessment is --
THE COURT: You have the designation, expert
designation?
MR. UNGVARSKY: I do.
THE COURT: I think I have it. One moment.
(Pause.)
THE COURT: Do you have it?
MR. LINGAN: Yes. Your Honor, right here.
Your Honor, that is not in this report at all.
(The Court reviewed the document.)
THE COURT: Mr. Ungvarsky, the question you
asked was a little different than the designation. If you
want to rephrase it --
MR. UNGVARSKY: I'm happy to rephrase.
THE COURT: Okay. I sustain the objection.
OPEN COURT
THE COURT: I instruct the jury to strike that

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last response and Mr. Ungvarsky is going to

rephrase.

BY MR. UNGVARSKY:

Q Let me just preface it with -- but I still ask you to be as succinct as possible in your answers. Okay?

A Yes, sir.

Q All right.

Sir, I want to get to -- regarding the facts and circumstances of Mr. Lawlor's prior history, as well as circumstances of this offense, whether you have reached an opinion whether Mr. Lawlor would commit criminal acts of violence that would constitute a continuing serious threat to society if he were to be sentenced to life in prison without the possibility of parole rather than death?

A Yes, sir.

Q Okay. All right.

So, that's what I'm going to be asking you about today, your opinion as to whether, based upon looking at historical records and the facts of this case, your opinion as to whether Mr. Lawlor would commit criminal acts of violence that would constitute a continuing serious threat to society if he were to be

sentenced to life in prison without the possibility of

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parole rather than to death. Okay?
A Yes, sir.
Q All right. Sorry if I was unclear.
Now, and in order to make that opinion, did you do what's called a risk assessment analysis?
A Yes, sir.
Q Okay. Are there factors that you and other scientists take into account when you reach conclusions that are about the risk assessment analysis to answer that question, the question of future dangerousness?
A Yes, sir. There are factors that are taken into consideration for violence risk assessment for prison.
Q Thank you and you keep correcting me if I say something wrong.
A Yes, sir.
Q Are those factors based on the training, research and scientific methodology that you and other psychologists employ in reaching those conclusions?
A Yes, sir, they are.
Q Okay. Okay.

And what is your opinion as to whether Mr. Lawlor would commit criminal acts of violence that would

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constitute a continuing serious threat to society if he were to be sentenced to life imprisonment rather than to death?

A That likelihood is very low.

MR. LINGAN: I object to the last portion. If we can approach?

MR. UNGVARSKY: That was the exact quote from -- on their last objection.

THE COURT: Come to the bench.

BENCH CONFERENCE

MR. LINGAN: That is the language from the notice. It's still not admissible. If he is sentenced to life imprisonment without the possibility of parole that is the ultimate decision.

MR. UNGVARSKY: No, it's not.

THE COURT: Life or death is the ultimate decision, is it not?

MR. UNGVARSKY: But the risk assessment --

THE COURT: The question you asked, whether it was life or death --

MR. UNGVARSKY: No. I asked -- the question is whether he would commit criminal acts of violence that would constitute a continuing serious threat to society if

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he were sentenced to life.

THE COURT: As opposed to death?

MR. UNGVARSKY: Yeah. The last part has nothing to do with this.

THE COURT: I sustain the objection. You can't ask that, that's the ultimate issue.

MR. UNGVARSKY: Your Honor, Payne against the Commonwealth, the ultimate issue --

THE COURT: Mr. Ungvarsky, I'm going to give you great latitude with this witness, but he can only testify as to his opinion and his opinion is, is that he would be a -- is the risk opinion is based on what he believes his risk opinion is.

He can't testify as to what he believes his risk opinion is unless you lay a very good

foundation that
16 is based on the difference between life or death. That
17 is not part of his assessment.
18 MR. UNGVARSKY: I'll make sure not to use that
19 phrase, Your Honor.
20 MR. LINGAN: Can we strike that language,
21 Judge?
22 THE COURT: Yes.
23 OPEN COURT

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1 THE COURT: Ladies and gentlemen, disregard
2 that last question. Again, Mr. Ungvarsky will rephrase.
3 BY MR. UNGVARSKY:
4 Q I'm going to try again. Okay?
5 A Yes, sir.
6 Q Have you reached an opinion as to whether,
7 based upon the records you reviewed, the history that you
8 reviewed, the other data, the correctional data, research
9 data and, you know, putting knowledge about -- putting the
10 final conviction in this case, have you reached an opinion
11 as to whether the risk -- the risk that Mr. Lawlor would
12 commit criminal acts of violence that would

constitute a
continuing serious threat to society if he were to be
sentenced to life imprisonment without the possibility of
parole?
MR. LINGAN: Your Honor, objection, same
objection.
THE COURT: I sustain the objection. It's the
same question.
MR. LINGAN: And there's --
MR.UNGVARSKY: No, it's --
THE COURT: I have sustained the objection.
MR. LINGAN: There's also no foundation in the

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question.
THE COURT: Rephrase.
BY MR. UNGVARSKY:
Q Have you reached an opinion as to whether Mr.
Lawlor -- 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?
A Yes, sir, I have.

MR. LINGAN: Your Honor, again that's the same objection, in a prison environment, not limited to that, and the Court has consistently ruled on this.

MR. UNGVARSKY: The Commonwealth is the one who said I'm not allowed to ask the question about --

MR. MORROGH: We object to a speaking objection.

THE COURT: Come to the bench.

BENCH CONFERENCE

MR. LINGAN: This is the third time this has gone and it's not what the Supreme Court has ruled, it's not limited to prison society, and it's misleading to the jury.

THE COURT: It's not limited to prison

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society. The question is have you reached an opinion about future dangerousness, period, not whether it's life or death, not whether it's in a prison society.

Please don't come back here again with that same question. All right.

MR. UNGVARSKY: Thank you.

OPEN COURT

THE COURT: Ladies and gentlemen, disregard again and Mr.Ungvarsky will rephrase.

BY MR. UNGVARSKY:

Q Have you reached an opinion as to Mr. Lawlor's future dangerousness?

A I've reached an opinion of likelihood of acts, not of his future dangerousness.

Q The likelihood that he would commit criminal acts -- the likelihood he would commit acts of violence?

A Serious acts of violence that would constitute a continuing threat to society in prison.

THE COURT: Doctor, that wasn't the question. I'm only going to tell you one more time. Please answer the question that is asked of you. Are we clear?

THE WITNESS: Yes, sir.

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BY MR. UNGVARSKY:

Q Sir, did you do a risk assessment analysis?

A Yes, sir.

Q Doing the risk assessment analysis did you do any sort of factoring in of the Defendant's background history?

A Yes, sir.
Q And the crime of conviction?
A Yes, sir.
Q Based upon doing that risk assessment analysis, did you do a report?
A Yes, sir.
Q Have you also -- have you reached an opinion as to the Defendant's adaptability to the prison environment?
A Yes, sir.
Q Very well.
What opinion have you reached of the Defendant's adaptability in the prison environment?
A That there is a very low likelihood of serious violence from being in prison.
Q Thank you.
Now, I want to talk to you about the factors

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that led to that opinion. Okay?
A Yes, sir.
Q The basis of that opinion. What's the general basis of that opinion?
What are the factors that you take into account in reaching that conclusion?
A I took into account his age, his past patterns of behavior in confinement, his education level --

(Mr. Ungvarsky, writing.)
THE COURT: Mr. Ungvarsky, do you need a flip chart, because there's probably one around somewhere?
MR. UNGVARSKY: Back to my very first trial this is what I did. It was a long time ago. I didn't know we had a flip chart.
THE COURT: You're beyond that, aren't you?
MR. UNGVARSKY: All right. Oh, it's there. Oh. All right. Can we use that?
THE COURT: Yes, you can. You can use anything --
MR. UNGVARSKY: I'm going to use this over here. This is a permanent marker.
Your Honor, we could do this if there's a marker. This is great. Thank you, Your Honor.

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THE COURT: You bet. It looks like a pizza box you're marking. It makes me hungry, which is a good point to bring up. It's 1:00 o'clock. As soon as I mentioned the word pizza that's the end of it.
Ladies and gentlemen, it's time to take our lunch break and this is probably as good a time to break

as any. Let me re-emphasize to each of you, as I will to the witness, don't discuss this case over lunch. Talk about anything else you want, but don't discuss this, don't reach any conclusions. The case is not over, it's not to you.

Doctor, you also are not to discuss the case. Do you understand you are not to discuss the case over lunch with anyone? Do you understand?

THE WITNESS: Yes, sir.

THE COURT: We'll see everybody at 2:15.

THE WITNESS: Yes, sir.

(Whereupon, at approximately 1:03 o'clock p.m., the luncheon recess was taken.)

* * * * *

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A F T E R N O O N S E S S I O N

(The hearing in the above-entitled matter was reconvened at approximately 2:20 o'clock p.m.)

(The following was heard outside the presence

of the jury.)
THE COURT: Bring in Dr. Cunningham and then bring the jury in.
Is the flip chart in the jury room? Let's bring the jurors out first and then we'll go back and get the flip chart. Hold on a second.
MR. MORROGH: Before the jury comes in
THE COURT: Ray, hold on a second.
MR. MORROGH: The witness was apparently looking through his notes and books on this case and I think there was a rule on witnesses and he was told to put his report aside. I think that's a violation if that's in fact the case.
THE COURT: Response, if any?
MR. UNGVARSKY: How is it a violation on the rule on witnesses?
THE COURT: I'm not sure it is either, but I think he can refer to his own notes, so let's move forward.

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Bring the jury out and then once the jury is here and there's nobody in the jury room, bring

the flip chart out.

MR. MORROGH: May the witness sit down? I don't think it is proper for the witness to stand when the jury comes in.

THE COURT: Doctor, have a seat.

THE WITNESS: Yes, sir.

(Whereupon, at approximately 2:22 o'clock p.m., the jury returned to the courtroom and resumed their seats in the jury room.)

THE BAILIFF: Where would you like this?

MR. UNGVARSKY: How about right here (indicating). Thank you.

THE COURT: Mr. Walsh, if you need to move, you can certainly move out.

MR. WALSH: Thank you.

THE COURT: Go ahead, sir.

MR. UNGVARSKY: Thank you.

DIRECT EXAMINATION (Cont.)

BY MR. UNGVARSKY:

Q Dr. Cunningham, where we picked off, we were about to list -- actually can you close that board?

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A Yes, sir.

Q You were about to list the factors that you take into account in your assessment. Tell me what the factors are and I'll just start to write them down.
A Yes, sir. Age.
Q Yes, sir.
A Past pattern of conduct in confinement.
Q Yes, sir.
A Education.
Q Yes, sir.
A Employment.
Q Yes, sir.
A Continued contact and relationship with community members.
Q Yes, sir.
A Correctional appraisal.
Q Yes, sir.
A Prior confinement in prison.
Q Yes, sir.
A Whether he's a member of a prison gang.
Q Yes, sir.
A Whether he is of normal intelligence or at least normal intelligence.

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Q Yes, sir.
A That he's been convicted of murder.
Q Yes, sir.
A That he's been convicted of capital murder.
Q Yes, sir.

A That if so sentenced he would serve a life without parole sentence.
MR. LINGAN: Objection.
THE COURT: Overruled.
BY MR. UNGVARSKY:
Q Yes, sir.
A That --
MR. LINGAN: Can we approach on one other issue now?
THE COURT: Yes, sir.
BENCH CONFERENCE
MR. LINGAN: Your Honor, he can be sentenced to life without parole. That's not an appropriate consideration. It's limited in focus to a life without the possibility of parole.
THE COURT: He just said it's one of the factors he takes in and you can certainly cross-examine on it.

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MR. LINGAN: But he might not be sentenced to life. That's speculation.
THE COURT: You can ask him that, if that is one of the factors he considers.
MR. LINGAN: But, see that kind of hamstrings the Commonwealth, Your Honor, because then

it's going to
be ruled to open up a whole host of prison environment
conditions between the two and that's not fair. This is
clearly a speculative role.
THE COURT: I'm not going to allow the opening
of all of the prison environment stuff.
MR. LINGAN: The other thing I want to mention
is, and maybe Counsel can point out where it is, but this
is the first I've heard about getting involved in --
THE COURT: Prison gangs?
MR. LINGAN: The gang and the intelligence,
and the intelligence is not --
THE COURT: Is average intelligence or prison
gang affiliation, is that the designation --
MR. UNGVARSKY: Your Honor, what was your
question?
THE COURT: Is average intelligence, prison
gang affiliation included in your designation as one of

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the factors that he considers?
MR. LINGAN: It's not in his report.
MR. UNGVARSKY: I don't see it in the

notice
from November that his intelligence or prison gang
membership. I'll look in the report that was supplied.
My review of the report, I don't see a reference to
intelligence or prison gangs.
MR. LINGAN: Your Honor, this is --
THE COURT: So there is no designation?
MR. UNGVARSKY: I think the intelligence would
be linked to education, so I think that's where that is.
In terms of prison gang, I think the reason why he said
that --
THE COURT: But that's the problem with this
witness. You are not allowed to say things that are not
in the designation.
MR. UNGVARSKY: Very well. I didn't realize
it wasn't in it. I think the designation is a summary.
The whole point is the prison gang, a prison gang is like
a group.
THE COURT: It's not relevant at all if he
does not disclose it and if you don't disclose it in your

23 designation. You cannot designate one thing and then

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1 testify to something totally different.
2 MR. UNGVARSKY: Your Honor, I'm happy to
3 delete prison gang. I do think intelligence is linked to
4 education. I think it will come out that way.
5 MR. LINGAN: I'll say that I agree with
6 Counsel on representation, that the notice is a summary of
7 testimony. However, the problem that I have is they don't
8 provide a report seven days -- we were provided a report
9 seven days earlier.
10 In that report -- and that's my issue. In
11 that report, which we're given notice of seven days, and
12 Judge Fitzwater, unless specific factors, which he took
13 into account, and that's the basis of his opinion, and now
14 he's adding and that's what he continues to add and even
15 that --
16 THE COURT: You may certainly cross-examine.
17 If those weren't in his report and in his report he didn't
18 use those factors and now he is giving us a

different --
if you want to do that in cross you can do that.
MR. LINGAN: And I will say, even though it's
a summary, there is no study of gang involvement that we
have even gotten in a notice either.
THE COURT: I'm going to strike that.

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MR. UNGVARSKY: Can I do that, Your Honor?
THE COURT: Sure.
MR. UNGVARSKY: Okay.
OPEN COURT
BY MR. UNGVARSKY:
Q Dr. Cunningham, I want to go back to the gang
membership.
A Yes, sir.
Q When I gave notice to the Commonwealth of your
proposed testimony --
MR. LINGAN: As the Court stated earlier.
It's going to be stricken, but making a speech --
THE COURT: Do it without a speech.
BY MR. UNGVARSKY:
Q So stricken for no notice, I'm going to cross
that out.
A Yes, sir.
Q We're not going to cover that on direct.

A Yes, sir.
Q Okay.
THE COURT: Ladies and gentlemen of the jury,
gang participation is stricken. You are not to consider
it. It's not an element in the consideration of the

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report at all. Is that clear to everyone? All right.
BY MR. UNGVARSKY:
Q So convicted of murder, convicted of capital
murder, life without parole. What else?
A Inmate in Virginia Department of Corrections.
MR. UNGVARSKY: I know I'm skipping a number.
I'm going to mark this as Defense 78.
(The chart referred to above was marked, for identification, as Defendant's Exhibit No. 78.)
BY MR. UNGVARSKY:
Q Did I accurately write down what you just
said.
A Yes, sir.
MR. UNGVARSKY: Your Honor, I move Defense 78
into evidence.
MR. LINGAN: I don't know if that's an exhibit

to be moved into evidence, Your Honor.
THE COURT: It's not an exhibit.
MR. UNGVARSKY: I'm actually moving it in not just for demonstrative purposes.
THE COURT: Response?

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MR. LINGAN: I think it is demonstrative, Your Honor. It's created by Counsel. I think it speaks for itself and can be used for demonstrative purposes. It shouldn't go back to the jury, especially considering what was stricken.
THE COURT: You may use it for demonstrative purposes. You may argue with it. It's not a piece of evidence. His testimony is the evidence.
MR. UNGVARSKY: Very well.
BY MR. UNGVARSKY:
Q I want to talk to you about each of these factors.
A Yes, sir.
Q And I want -- and again, I'm asking you as specifically apply to Mr. Lawlor.
A Yes, sir.
Q As to age, can you please describe the affected age as a factor for predictor of violence?
A Yes, sir. Mr. Lawlor, again age 45, almost

46
on April of 6th, is after past pattern of conduct in confinement, the most powerful factor in identifying his likelihood of serious violence in prison.
At age 45 on a sentence he has only a fraction

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of the likelihood of misconduct or violence --
MR. LINGAN: Your Honor, I ask the Court --
I'm sorry. I keep interjecting.
THE COURT: I sustain -- I take it it is to life in prison?
MR. LINGAN: Yes.
THE COURT: I sustain the objection.
MR. LINGAN: I ask that it be stricken.
THE COURT: It is stricken from the record.
We've already discussed that three times at the bench.
The issue is not life in prison. It's an issue of risk of violence, period.
THE WITNESS: Yes, sir. At age 46 his risk of violence in prison, 45 --
MR. UNGVARSKY: Your Honor, the Court's indulgence. May we approach. Your Honor?
THE COURT: Come to the bench.
Take the jury out, please.

(Whereupon, at approximately 2:35 o'clock p.m., the jury was excused from the courtroom.)

BENCH CONFERENCE

MR. LINGAN: I didn't mean to -- Your Honor, this is a professional witness who

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knows better, knows the difference. He makes hundreds of thousands of dollars testifying in courts throughout the country. He knows what stricken means. He knows what objection sustained means. He is incapable of following the Court's direction.

I ask you excuse him. He's not compliant with the Court and beyond that, he's adding things to this report that we were given seven days ago. He consistently does that. He's done it in prior cases.

THE COURT: Response?

MR. UNGVARSKY: Actually, Your Honor, I'm going to go for a mistrial at this point. I think that based upon the Commonwealth's speaking objections that this jury may have the sense that a life without parole

sentence doesn't mean that someone is going to serve life without parole, that they actually may have the possibility of getting released.

THE COURT: He never said that.

MR. LINGAN: I never said that.

MR. UNGVARSKY: I think that that impression can be given and we move for a mistrial.

THE COURT: I overrule the objection. I will tell the Doctor and then I'll tell you, if it happens

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again I will excuse this witness.

OPEN COURT

THE, COURT: Doctor?

THE WITNESS: Yes, sir.

THE COURT: The issue in this case that you are here to testify about is the likelihood of future violence of Mr. Lawlor. It is not the likelihood of future violence in prison.

I know that you are a professional witness, I know that you do this for a living. I know further that you have been in this courtroom and heard me sustain that objection a number of times.

Please, constrain yourself to your opinion of is likelihood of serious violence in the future, not in prison. If you fail to do that, I will excuse you and you will testify no more in this trial. Are we clear?

THE WITNESS: Yes, sir. I had not realized that was your ruling, sir.

THE COURT: Well, that is my ruling. The issue is the likelihood of future violence of Mr. Lawlor. It is not the jail community. The Virginia Supreme Court has said over and over it is not limited to that community. It is his risk of future dangerousness, as you

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have set forth, and as Counsel has actually set forth, and as indeed your opinions set forth, but we're not going to talk about likelihood of serious violence in prison.

Are we clear?

THE WITNESS: Yes, sir.

THE COURT: Both sides clear?

MR. UNGVARSKY: Actually, Your Honor, could we ask Dr. Cunningham to step out so we can

discuss something
that I don't think we should discuss in front of him?
THE COURT: Something else?
MR. UNGVARSKY: Something related, yes.
THE COURT: All right. Dr. Cunningham, if
you'll step out, sir?
(Dr. Cunningham exited the courtroom.)
THE COURT: Go ahead, sir.
MR. UNGVARSKY: Your Honor, The Virginia
Supreme Court said that it's risk of future dangerousness,
and you're right, not just in prison. It's risk of future
dangerousness in society, and society includes more than
prison.
The expert -- the expert -- but that includes
-- that means that we could have an expert who will
testify about the risk of future dangerousness in prison

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or we can have an expert to talk about -- and we can have
an expert to testify about the risk of future
dangerousness not in prison.
I mean this expert's, you know,

expertise goes
to the risk of future dangerousness when he's in prison.
That's not to say -- I mean frankly that is a limitation
of his opinions, because he is not tendering an opinion
that talks about the rest of society.
His opinion is limited to prison and frankly
that's an area that -- and we are entitled to put him on
to talk about that and that's what Morva allows us to put
on. I mean the Morva language on page 350, it does talk
about prison adaptability.
Even yesterday when we were in court. Your
Honor used phrases like adjustment to prison life, quote,
and quote, adaptability in a prison environment.
THE COURT: Morva says, and it couldn't say it
more clearly, under the Virginia death penalty statute,
the relevant inquiry, relevant, is not whether the
Defendant could commit criminal acts of violence in the
future, but whether he would
The focus -- that's the wrong place. I'm

in
23 the wrong place. Let me find it.

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1 (Pause.)
2 In Morva the Court reads and it says we
3 reason, because such prison life evidence was
4 inadmissible, that Porter failed to satisfy the Husske
5 test regarding even an appointment of a witness.
6 MR. UNGVARSKY: Right. Your Honor, but we're
7 not seeking to put on prison life evidence. We're not
8 seeking to talk about --
9 THE COURT: Yes, you are.
10 MR. UNGVARSKY: No.
11 THE COURT: You're asking him what will his
12 conduct be like if he were sentenced to prison.
13 MR. UNGVARSKY: Your Honor, Morva, page 350,
14 says, to be admissible, evidence relating to a prison
15 environment must connect the specific characteristics of
16 the particular defendant to his future adaptability in the
17 prison environment.
18 It must be evidence peculiar to the
19 defendant's character, history and background in order to

to be relevant to the future dangerous inquiry.
THE COURT: But you're not talking about his
adaptability. You're talking about his future
dangerousness.

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MR. UNGVARSKY: It is his adaptability. It's
an adaptability to whether he will commit acts of violence
or not. That's what adaptability is.
Conditions of prison life and security
measures utilized in a maximum security facility are not
relevant to the future dangerous inquiry unless such
evidence is specific to the defendant on trial and
relevant to that specific defendant's ability to adjust to
prison life.
So he's talking about this specific
Defendant's ability to adjust to prison life.
THE COURT: No, he's not. He's talking about
this -- his testimony is that this Defendant would not
pose a threat, there would be no threat of future
dangerousness if he were sentenced to life.
That's what you're offering this witness for
and that's what he's testified in. It has nothing to do

with adaptability.
MR. UNGVARSKY: No. His adaptability, that he will adapt to prison and he is a low risk to commit acts of violence. That is adapting to prison. He's a low risk of committing violence. Otherwise, again we're -- otherwise there is -- that's what the unless means in

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Morva. That's what the limited Morva exception is. This is exactly it.
He's not going to get up here, he's not the expert to get up here and talk about Mr. Lawlor's risk of adaptability in the free world part of society. It's his ability to adapt to prison life.
THE COURT: In Porter they rejected that and said the argument that Code 19.2-264.2, prison society, what you call prison life, is the only society which should be considered for future dangerousness has been rejected. The Court rejects that.
MR. UNGVARSKY: Your Honor, Morva follows and

interprets Porter and Morva distinguishes between prison life testimony that lawyers used to try to get in and things like single cell, the double cell, whether you're going to be -- whether you can have contact with guards. In some prisons you don't have contact with guards, it's all automated or heavily automated.

That's the sort of stuff that I have instructed Dr. Cunningham not to get into because we're not going to try to get into any of that stuff and what it's like to be in Red Onion, but Dr. Cunningham's testimony is about how will this Defendant adapt to prison

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in terms of his risk of committing acts of violence while in prison and that's what Morva allows.

THE COURT: But Morva doesn't allow that. That's dicta in Morva. The holding in Morva is Dr. Cunningham was not even to be appointed and the Circuit Court was affirmed for choosing not to appoint Dr.

Cunningham.
The remainder of this is pure dicta. That's not the holding in Morva. Holding is what the case stands for when the Court says we hold that. Then you have the holding.
MR. UNGVARSKY: Well, I think --
THE COURT: What you're talking about is pure dicta in this case.
MR. UNGVARSKY: Well, I'm talking about the reasoning -- I'm talking about the reasoning of the Virginia Supreme Court in Morva. I'm talking about the reasoning that distinguishes between -- that distinguishes between different types of expert opinion testimony and I think that Morva does that.
I think that's what, you know, in the Prieto case, I think when they went through all this that was acknowledged. I know it's a different case and I think

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when it was – it was a pre-Morva case, but when the

testimony was done in the Rogers case, I think, you know because it was following what's allowed by the Virginia Supreme Court.

But if he tries to go into things like what's it like in prison, do you get rec? How often do you get rec? You know, do you get good meals; you don't get good meals. That prison life testimony is all about trying to suggest that prison is really bad, really tough, and the fact that whether prison is really bad or really tough on somebody, you know, when they are sentenced on a capital murder, that is something the Virginia Supreme Court said that doesn't go to the jury, but how someone can adapt to prison, that is specific to that person. It is about his individual --

THE COURT: At sentencing it may be admissible. How is it admissible in the selection, the determination phase of this trial, because the only issue is, is has the Commonwealth proved one of two elements,

violence or future dangerousness?
So you are obviously offering this evidence either for future dangerousness or violence. Otherwise it's irrelevant, isn't it?

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MR. UNGVARSKY: We're offering it for two reasons. One, to rebut future dangerousness and, two, as independent evidence of mitigation.
THE COURT: Then it's future dangerousness, period, not future dangerousness in prison. It doesn't rebut it if you're dealing with future dangerousness in prison. Those are the only two issues that are before the Court.
MR. UNGVARSKY: It does rebut future dangerousness in society. Now, arguably --
THE COURT: No, it doesn't.
MR. UNGVARSKY: It doesn't?
THE COURT: By his very terms, you have asked your witness to limit it not to society, but to a very small slice of society.
MR. UNGVARSKY: That's still expert opinion

testimony and that's still relevant testimony. They're welcome to cross-examine on, hey, your testimony, it's only about part of society, it's not all of society, it's only part of society and you're not talking about other parts of society.

If we wanted to -- and maybe I should have done this. Maybe I should have asked the Court for money

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to bring in an expert who would talk about the other part of society, you know, the non-prison part, but we didn't do that.

THE COURT: That's what you asked for for this Witness actually, isn't it?

MR. UNGVARSKY: I don't think so. I think we focused on the prison part of society.

THE COURT: Anything from the Commonwealth?

MR. LINGAN: Your Honor, we're not really sure what was asked for, to be honest with you -- it was an ex parte motion. We can't speak for that.

THE COURT: The order -- there was an order before that on the 22nd of February and they asked for individualized risk assessment and that was what they asked for, individualized risk assessment, not individualized risk assessment in a prison setting under the control of the Department of Corrections.

So the only two issues that we are currently dealing with are future dangerousness or violence and you're trying to limit future dangerousness to a small section of society.

MR. UNGVARSKY: No, we're not trying to limit it. The Commonwealth, they can cross-examine him about

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it, they can get up and argue about it, that it's more than that, but we're putting on evidence as to one part of society and it does rebut future dangerousness, it does.

THE COURT: It does not. You can't rebut future dangerousness because future dangerousness is not

limited, is not limited, to that small section of society.
MR. UNGVARSKY: But it's part of the society,
it's part of the calculus as to whether someone is going
to be future danger to society. Part of the calculus is,
is, well, they're --
THE COURT: So your position is he won't be of
danger in prison, but he can be dangerous anywhere else
and then I take it you're going to argue the only two
choices are prison or the death penalty, so therefore he's
not dangerous? That's your argument, isn't it?
MR. UNGVARSKY: I think that would be our
argument and they might have --
THE COURT: All the more reason why --
MR. UNGVARSKY: They might have a counter-
argument. The other thing, Your Honor, is it is
independent mitigation evidence. Mitigation evidence is
not limited by the aggravation statute. To say that
mitigation evidence is limited by the aggravation statute

would violate Penry against Lynaugh.

Mitigation is not limited by some special relevancy requirements. That would violate Tanard and so it's mitigating evidence that this guy, if you look at his past record and who he is as an individual, based upon his past history, character, and background, and who he is as an individual, his likelihood of committing violent offenses in prison is low. That is mitigating evidence.

I mean that's similar mitigating evidence on a similar plane, though I would suggest far stronger than we put on ADC guards to talk about how he did there. Now we have an expert who uses -- who can talk about it.

THE COURT: Response from the Commonwealth?

MR. LINGAN: Your Honor, could you give Counsel a minute.

MR. UNGVARSKY: The Court's indulgence, please?

(Defense counsel conferred, off the record.)

MR. UNGVARSKY: Mr. Petrovich handed me a

transcript from a November 18th, 2010, hearing before Your Honor in this case. The Court asked the question, a low risk of violence, period, or a low risk of violence in a prison setting, question mark. I think they are

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different.

Mr. Ungvarsky, then I talk, for frankly three pages, and then Your Honor says, yeah, you are asking the Court to say this testimony is admissible and I don't know what that question is, I don't want to be in front of a jury in the heat of the moment and have a question come forward, there be an objection and the argument is, well, Judge, you have already admitted his testimony.

This is when we were moving to have it admitted in advance.

I can't admit evidence. I don't think I can properly admit or deal with evidence from either side unless they have a question, is there not an objection and I deal with the objection.

Then Your Honor says I think you have

read
16 accurately the quote under Morva-. I think there are cases
17 that set forth what the law is in the course of following
18 the law and I don't have any reason not to do that, but
19 you're asking me to rule as a matter of law in this case
20 that certain testimony is admissible. Until I hear the
21 testimony I can't do that.
22 I'm not saying that this colloquy is in any
23 way dispositive or it's crystal clear, but that is what

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1 this paragraph in Morva is about. There is a big
2 difference between a defense lawyer -- of course, we had
3 asked for this before and been denied, don't get me wrong,
4 but a defense lawyer getting up there and saying we want
5 to tell the jury what it's like in prison, we want to tell
6 the jury that prison is a living hell, we want to tell the
7 jury that prison is really restrictive and painful, so the
8 jury can think, hey, when we send this guy to prison,

we're really punishing him, he's not going to a camp, he's not going to a country club, and you said no.

You said no because Morva says no. The Virginia Supreme Court says no to that. We can raise it Federally down the line, but that's a no, but this is different. This is about this individual's adaptability to prison based upon his personal background, history and character, his adaptability to prison.

This is what Morva allows there to be expert opinion testimony about, both going to future dangerousness and independent mitigation.

THE COURT: When you read Morva, the critical language in Morva, and it starts with, it says to be admissible, to be admissible evidence relating to a prison environment, must connect the specific characteristics of

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the particular defendant to his future adaptability in the prison environment.

It must be evidence peculiar to the defendant's character, history and background in order to

be relevant to the future dangerousness inquiry. It doesn't say that future dangerousness in prison. It says the future dangerousness inquiry, period, in order to be relevant.

You are seeking to limit it and say no, no, he's not dangerous in a prison setting and that's just not what Morva says.

MR. UNGVARSKY: How is it not part of the future dangerous inquiry when we're talking about a part of society including the part of society in which he is going --

THE COURT: Because it doesn't take into account --

MR. UNGVARSKY: In which he's going to go.

THE COURT: It doesn't take into account his future dangerousness. It's future dangerousness, period, not future dangerousness in prison, not future dangerousness -- it says future dangerousness.

That's not the law I made. That's the law the

Virginia Supreme Court has handed down for a lengthy period of time. So that's going to be my ruling. We are going to follow Morva and you cannot limit it merely to future dangerousness in prison because that's not relevant. Future dangerousness, not future dangerousness in a prison setting.

MR. UNGVARSKY: Can I raise a different matter, Your Honor?

THE COURT: Let me hear from the Commonwealth. They are standing and want to say something.

MR. LINGAN: I just want out one more thing. Maybe it's because I'm not articulate enough to do it when there's not a demonstrative piece of evidence, but if you look at the factors that he relies on, it's in his report, too, and this is why the Commonwealth's position is that actually this testimony is no different than what was proffered in Morva.

If you look at the language in Morva, it's talking about the Commonwealth's ability to secure

somebody is not something for the jury to be considering and that general conditions that all inmates may encounter is irrelevant.

If you look at the last one he put in, 13

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Virginia DOC Inmate, that's one of his factors. That's one of the underlying factors of his opinion and that's not admissible. He's hiding this now because he knows Morva and he reads these cases, but that's just a clever way of saying he's taking into account those conditions as part of his evaluation and that is not appropriate.

So that should be stricken and then if he's just able to strike items from his evaluation, then to me it smacks of -- it's just not an appropriate evaluation. If he has relied on those --

THE COURT: That goes to weight though, doesn't it? The evaluation and his opinions still come in, but it goes to weight, doesn't it?

MR. LINGAN: I don't think it does if he's

relying on inadmissible aspects.
MR. UNGVARSKY: Well, Your Honor --
MR. LINGAN: That's what Morva said. I mean Morva said it was all part of a bundle that doesn't come in and it wasn't spliced out and for him to rely on inadmissible objects or evidence and conditions, I think, kicks his whole opinion out.
MR. UNGVARSKY: Your Honor, the reason why prison gang members were not a part of his -- and this is

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actually the issue I wanted to raise, wasn't part of the report that he wrote is because there's actually no evidence that Mr. Lawlor has ever had any prison gang affiliation or membership and so it's not -- it doesn't prison gang membership increases the risk of violence, but not being a member of a prison gang doesn't affect --
THE COURT: But that's not what he said when he testified.
MR. UNGVARSKY: Well, no.

THE COURT: He threw that out as though it were a critical factor in his evaluation and that's the problem with a professional witness, whether it's your witness or the Commonwealth's witness.

MR. UNGVARSKY: Well, Your Honor, I would ask that, you know, the reason why he put -- I'll just tell you why he put prison gang members in there, because I asked him in advance of his testimony about prison gang membership and is that like a factor that could increase the likelihood of violence in prison, and he said yes. I wanted to make sure we include not just things that could decrease, but things that could increase.

The problem I have right now is I feel like this jury, you know, it is just the way it happened. I

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don't want this jury to think that that was stricken because Mr. Lawlor is in a gang or there's evidence that he is in a gang. I mean --

THE COURT: There is no evidence he is in a gang.

MR. UNGVARSKY: But I don't want them to be misconstrued, to misunderstand that, and think just because it was put up on the board, this guy was about to talk about it, then it must apply to him.

THE COURT: You can certainly argue there's no evidence of a gang membership. I don't think the Commonwealth would object to it.

MR. UNGVARSKY: I can bring out there's no evidence from the records and the like there is no evidence.

THE COURT: There is no evidence. There is no evidence on this record. There is no evidence of gang participation.

MR. UNGVARSKY: I'll just note an exception to the striking of that portion of his testimony, the prison gang membership or lack thereof.

THE COURT: Mr. Ungvarsky, you have just conceded that there's no evidence whatsoever of

gang

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participation. You have admitted that it shouldn't be on this chart and now you want to note an exception to something you have conceded?

MR. UNGVARSKY: I concede that it doesn't apply to him, but I don't concede it is not something that experts should take into account. An expert takes into account whether someone is or isn't a member.

THE COURT: It has to be particularized. If it doesn't apply to Mr. Lawlor, it cannot by definition be particularized, can it?

MR. UNGVARSKY: Well, it's particularized when you say, okay, he's not a member, therefore there's no weight one way or the other, but you have to think about that. You have to think about it and then you particularize it, oh he's not one, okay, then there's no weight. That's how you particularize it.

THE COURT: All right.

Let's bring the jury back in.

MR. LINGAN: Your Honor, has the Court ruled on the Virginia DOC matter? I think that's clearly something that is not relevant and should be stricken.

THE COURT: I agree with you. Everybody is a member -- an inmate of DOC and the cases have said

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consistently that's not a factor that's particularized to any defendant.

MR. LINGAN: Please have that stricken from the --

THE COURT: I'll let Mr. Ungvarsky do that.

MR. LINGAN: Okay, thank you.

THE COURT: Number 10, all the way at the bottom -- I'm sorry, 13.

All right, let's bring the jury in.

MR. UNGVARSKY: Your Honor, may I move this? I'm told the jurors can't see it. I don't want you not to be able to see though.

THE COURT: I can hear. I have got it written down anyway.

MR. UNGVARSKY: I want you to be able to see the witness.
THE COURT: I can see.
MR. UNGVARSKY: Is Your Honor able to see the witness if it's here?
THE COURT: Yes.
MR. UNGVARSKY: You are?
THE COURT: I can.
MR. UNGVARSKY: Ms. Hartman can't.

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MS. HARTMAN: I don't matter.
MR. UNGVARSKY: All right. Well, you do matter.
MS. HARTMAN: Well, thank you.
(Whereupon, at approximately 3:00 o'clock p.m., the jury returned to the courtroom and resumed their seats in the jury box.)
(Dr. Cunningham resumed his seat in the witness stand.)
BY MR. UNGVARSKY:
Q Dr. Cunningham, in your report did you talk about the DOC inmate as a factor in your report?
A Yes, sir.
Q For purposes of today, I don't want us to talk

about it. I'm going to cross that off.
A Yes, sir.
Q What I want to ask you to do is I want to actually move -- I want to start before getting into further depth on opinions, I want to start to get some facts that underline them.
A Yes, sir.
Q I want to talk to you about what you list as the second factor of past pattern of conduct in

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confinement. Okay?
A Yes, sir.
Q Now, you reviewed a whole host of correctional records for Mark Lawlor; is that right?
A Yes, sir.
Q I think you already testified to the range that you reviewed?
A Yes, sir.
Q Now, let me just sort of go through period by period. Did you review records that pertained to Mark Lawlor's incarceration at the Rocky Mount ADC, in Virginia DOC from October 19, 1983, to October 28, 1985?
A Yes, sir.
Q Did you review records of Mr. Lawlor's

incarceration from November 19, 1998, to March 1st, 2004,
at the Fairfax ADC and then the Virginia Department of
Corrections?
A Give me the dates again?
Q November 19, 1998, to March 1st, 2004.
A Yes, sir.
Q Did you review records from Culpeper ADC from
December 2005?
A I remember reviewing the Culpeper records.

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The month of exactly when that occurred, I don't recall
without review.
Q I'll get back to it. Did you review records from Fairfax ADC from May 2nd, 2006, to December 28th,
2006?
A Yes, sir. That's my recollection.
Q Fairfax ADC, June 8, 2007, to August 8, 2007?
A Again, that's my recollection.
Q Then from August 8, 2008, to March 1st, 2011,
Fairfax ADC?
A Yes, sir. That's my recollection.
Q There was also some records from the Arlington
County ADC; right?

A Yes, sir, very brief.
Q What's the total time of incarceration that Mark Lawlor has had from October, 1983, to March 1st of 2011?
A I have written 120 some odd months, about ten years.
Q In reviewing -- let me just tell you, if I might, all those records are in evidence in this case. Okay?
A Yes, sir.

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Q Okay. All records that you reviewed, that you just testified about.
In reviewing all those records that are in evidence, did you observe any write-ups for Mark Lawlor for violent offenses during the Rocky Mount time?
A No, sir.
Q What about when he was --1998 to 2004 when he was at Fairfax jail and then went to prison at Culpeper -- at Coffeywood?
A Give me the dates again, please?
Q November '98, to March 2004. Any write-ups for violent offenses by Mr. Lawlor?

A No, sir.
Q What about when he was in Culpeper?
A No, sir.
Q What about the eight months in 2006, at Fairfax?
A No, sir.
Q What about the two months in Fairfax in 2007?
A No, sir.
Q Any write-ups for violent offenses from August 8th, 2008, to date -- to March 1st rather?
MR. LINGAN: I think Counsel may have -- it's

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October 8th.
MR. UNGVARSKY: I'm sorry.
MR. LINGAN: You said August.
MR. UNGVARSKY: Yes, sir, October 8. Thank you very much.
BY MR. UNGVARSKY:
Q October 8, 2008, to March 1st, 2011, any write-ups for violent offenses?
A No disciplinary convictions.
Q We'll talk about that, different answer than your previous answers; right? No disciplinary convictions?
A Again, they were provided to me. Some of those periods of time there aren't any disciplinary

records at all and the assumption is in the absence of those, there were not violent offenses. I don't have any documents or records provided me where there are disciplinary convictions for violence at any point in time in those ten years.

Q Within that sort of ten years of incarceration, what period of time do you not have full records?

A Well, for the Rocky Mount -- the year that he

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spent in the Rocky Mount jail, half of that on work release, there are -- there's only a single page of records that I recall from that. Then when he gets to DOC there's a reference to disciplinary infractions that he had there, but I don't have the actual disciplinary file from Rocky Mount.

Q So you're missing some records from Rocky Mount?

A Yes, sir.

Q What else, if any, records?

A There's a month long period of time that

he
was in the Arlington Adult Detention Center in about 1986,
'87, in that time period. I don't have documents reflecting any disciplinary file at all or classification
file at all through that period of time.
Q I see. You have criminal records in that period, but they don't reflect disciplinary findings.
A That's correct. The jail records simply reflect what -- the dates that he was in jail, but no
other information was provided.
Q That was Arlington, '86 to '87?
A Yes, sir.
Q Any other gaps in that period of time, gaps in

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records from the time he was incarcerated?
A I don't recall a disciplinary file one way or the other from Culpeper, but otherwise the Fairfax records
I believe I have, and the Virginia Department of Correction records were complete.
Q Okay. And so how many pages of records do you
have?
A The majority of these binders is correction records and there are three of these binders.
Q So when the records that were able to be made

available to you -- how many incidents of violent offenses are noted?
A There are two reports in Fairfax in January 2009, of fistfights where he is not given a disciplinary ticket.
Q Stop for a second. We'll get there in a second.
A Yes, sir.
Q Fairfax, January, '09, to -- I'll get back to those.
A Yes, sir.
Q I'm just asking for numbers right now and then we'll go back.

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A Otherwise there is no description of violence in his record, in his prison record.
Q Okay. Over the 120 odd months?
A Yes, sir. I guess I should say it's jail and/or prison records.
Q Let me talk about Fairfax. So you put the Fairfax ADC -- I don't know what evidence of them over there on the case right now. I think they had multiple numbers, but you've looked at the records from October 8, 2008, to March 1, 2011, and there were two

write-ups
concerning fistfights; right?
A Yes, sir. There are two incident reports that
describe fistfights.
Q Who was the victim in those two fistfights?
A Mark Lawlor.
Q Did he get written up for being the victim in
either of those fights?
A He was not given a disciplinary ticket for being the victim. There was an incident report description that was placed in his file, but he was not
subject to sanctions or punishment for that.
Q Okay. Anything else anywhere?
A No, sir. That's the only violence.

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Q Okay. Are there any instances of Mr. Lawlor
being - - is there an incident at Fairfax of Mr. Lawlor
being non-compliant to an order?
A Yes, sir.
Q What is that that's in evidence?
A That's an incident that occurred in 2010. Should I describe the incident?
Q Yes. It's in evidence.
A He was speaking loudly or yelling in his cell.
The officer brought him out of the cell to address

the
issue. Mark Lawlor continued to be verbally belligerent
and the officer directed him to go back into his cell and
he did not comply.
The officer told him again. He did not comply. The officer then placed his hand on Mark Lawlor's
back and gently guided him back into the cell without Mark
Lawlor resisting and that was the conclusion of the
matter.
Q Okay. Was this a no fight on Mark Lawlor's
part there?
A That's correct. What I just described was the
officer's report, there was subsequently a hearing where
there were other reports of what had occurred, but that

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was the official officer's report.
Q What was the result of that hearing, if any?
A He was given, as I recall, eleven days of disciplinary suspension -- I'm sorry -- disciplinary
segregation and that entire sanction of eleven days was

suspended.
Q Is the best predictor -- I understand the limits as the Court has set.
Is the best predictor of future behavior of violence in prison past behavior of violence and non-violence in prison?
MR. LINGAN: Objection. You've ruled on that actually.
THE COURT: Sustained.
BY MR. UNGVARSKY:
Q How good a predictor of the future behavior of violence is the lack of prior violence while incarcerated for a capitally sentenced defendant?
MR. LINGAN: Your Honor, again, same objection.
THE COURT: Overruled. That was a general violence question. Overruled.
MR. LINGAN: That was for – he qualified for

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a capitally sentenced defendant.
MR. UNGVARSKY: Right.
THE COURT: Overruled. He may ask that question.
BY MR. UNGVARSKY:
Q Please.

A It is a very strong predictive factor. It is --

THE COURT: Sir, there's no question pending. Wait for the next question.

BY MR. UNGVARSKY:

Q Yeah. I don't actually have any follow up right now on that.

In all the records that you reviewed, all the correction records that you reviewed, did you see any indication of any kind that Mark Lawlor had any affiliation of any kind, no matter how remote, of prison gang membership?

A No, sir.

Q So that is a -- that's something that has nothing to do with him; is that right, prison gang membership?

A It has nothing to do in terms of him being

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identified as a prison gang member.

Q In all the records you reviewed, is there any indication of Mr. Lawlor initiating any violent assault on another inmate?

A No, sir.

Q Is there any indication that Mr. Lawlor initiated any violent assault on a staff member?

A No, sir.
Q Is there any indication that Mr. Lawlor initiated any violent assault on a visitor?
A No, sir.
Q Is there any indication that Mr. Lawlor initiated a violent assault on anyone in those 120 odd months when he was incarcerated?
A No, sir.
Q Now, we talked about whether there's indications or no indications of physical actions by Mark Lawlor in those 120 odd months; correct?
A That's correct.
Q Okay. Now I want to talk with you about-- from all these records that are in evidence about -- no, I want to back up. I want to back up and I want to back up to Rocky Mount. And you say you don't have all the

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records; correct?
A Yes, sir.
Q Okay. But do you have some records from -- not you. Are there some records in evidence that you reviewed that pertain to the stay at the Rocky Mount jail

and VDOC?
A Yes, sir.
Q Do those records reflect that exist -- do those records reflect any write-ups back in 1983, '85 period?
A Yes, sir.
Q What do they reflect?
A The VDOC records reflect 14 disciplinary violations that occurred while he was in jail prior to his admission into VDOC.
Q Do they reflect what the violations report?
A No, sir.
Q Do the VDOC records reflect Mr. Lawlor's -- whether Mr. Lawlor had a position of trust and authority when he was in VDOC?
A They reflect that he had a position of trust in the Rocky Mount jail.
Q I'm sorry. Okay. So the VDOC records reflect

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14 write-ups, Rocky Mount jail; is that right?
A Yes, sir.
Q Then VDOC stands for Virginia Department of Corrections and then the VDOC records, do they also

reflect whether Mr. Lawlor had a position of trust and responsibility while at the Rocky Mount jail?

A Yes, sir.

Q Please tell the ladies and gentlemen of the jury about the records in evidence what they reflect.

A From his admission there, he was a trustee, that his adjustment was positive so that he was then assigned to a work release context where he went out to a job in the community during the day and returned to the jail at night.

Q How old was the Defendant, Mark Lawlor, when he was at the Rocky Mount jail?

A He was 18 and 19-years-old.

Q Do the records reflect if the work release --

where was the work release, where did he go to work, from the records?

A At Fleetwood Mobile Home factory.

Q Do the records reflect how that work release ended? What caused the work release to end?

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A I don't recall precisely what I learned

from
the records as opposed to other sources. I have information about how it ended, but I don't recall the
source.
Q Let me ask you this. Do the VDOC records
reflect that Mr. Lawlor was drinking while on work
release?
A That's my recollection.
Q Because these records are in evidence so --
A Yes, sir.
Q Do the records reflect the drinking was a violation of work release?
A Yes, sir.
Q By drinking, I mean alcohol?
A Yes, sir.
Q Now, do the records that are in evidence and
that you have read, do they reflect an appraisal of
correctional staff as to Mr. Lawlor's likelihood he would
commit acts of violence?
A Yes, sir.
Q Okay. Specifically, what do the records reflect as to a correctional staff appraisal as to whether
Mr. Lawlor would commit acts of violence, the likelihood

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Mr. Lawlor would commit acts of violence?
A The Virginia Department of Correction records reflect a low likelihood of his committing serious violence.
Q Now, you said that you read some memos and some summaries, and this is a yes or no question --
A Yes, sir.
Q Because I don't want hearsay. That you read some memos and some summaries from some guards here at the Fairfax ADC. Do you remember that?
A Yes, sir.
Q Okay. I want you to assume the hypothetical that Fairfax ADC guards came to this trial and they testified that Mr. Lawlor has not been a problem to them, he's been respectful, they have a choice as to whether they cuff him when they're with him or not cuff him when they're with him, he's been a one deputy escort, not a two deputy escort, and assuming that, is that information something that you, as a scientist, would take

out as an
20 appraisal of correctional staff in assessing the
21 prediction of whether someone would commit future acts of
22 violence?
23 A Yes, sir. I would incorporate that

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1 information.
2 Q Did you incorporate -- okay. Actually I want
3 to go back to a write-up.
4 How significant in determining -- predicting
5 future violence would the fact that there was a non-
6 compliance to go into his cell? How significant is that
7 weighted?
8 A The presence of that disciplinary infraction
9 has very little weight in terms of, it does not point to
10 his being violent in the future. It's only the mildest
11 incremental basis for that.
12 Q And does that opinion come from your knowledge
13 of the research and scientific and peer reviewed
14 scientific literature?
15 A Yes, sir.
16 Q Including literature that you have authored?

A Yes, sir.
Q Actually the opinion you gave about past patterns of conduct in confinement and how that affects the evaluation of future risk of violence, is that finding, is that opinion grounded in the scientific research and peer reviewed literature?
A Yes, sir.

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Q Including peer reviewed literature that you have authored?
A Yes, sir.
Q The correctional appraisal, is that finding the effect of certain positive correctional appraisal as to how the safety risk of an inmate is -- is that sort of a factor something which is grounded in scientific research and peer reviewed literature?
A Yes, sir.
Q Including peer reviewed literature that you have authored?
A Yes, sir.
Q Okay. And education, what specifically -- you said education is a factor in determining risk of violence; is that correct?
A Yes, sir.

Q How does that apply, that factor apply, to Mr. Lawlor?
A Because he holds a GED, he is markedly less likely to be violent. I'm not sure in the context of -- That's all I'm going to say.
Q I understand.
Do you understand that the future risk of

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committing violent acts applies within society; right?
A I understand that.
Q Which can include free society, the free world, as well as the prison role? Do you understand that?
A I understand that's an interpretation of that term.
Q Okay.
MR. LINGAN: I object to his classification of interpretation of the term.
THE COURT: You may cross-examine. He can interpret it any way he wants.
MR. LINGAN: I don't want to do a speaking objection.

THE COURT: I understand. I've sustained it. I've overruled the objection. Let's move forward.

BY MR. UNGVARSKY:

Q Is there a difference in how education is considered when you are looking at society as a whole, risk of committing violence in society, you know in future society as a whole or versus society -- versus whether someone is going to be in prison?

A Yes, sir.

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Q Explain the difference, please.

A Level of education has some effect on likelihood of violence in the open community. It is a very powerful factor if somebody has at least a GED or a high school diploma in reducing the risk of violence in prison, even holding all other factors constant like age and offensive condition and all kinds of things.

Education level is a very powerful predictor of violence in prison.

Q In terms of age, is age a -- you said age is after past pattern of conduct in confinement.

Is age a predictor? Does age have predictive

value in considering the likelihood of committing violent acts in society?

A Yes, sir.

Q Is age -- are there differences in the manner in which age is a predictor of committing violent acts in society, whether we're talking about all society, including outside society, or whether in jail?

A Yes, sir. There are differences.

Q Please explain.

A In both contexts, the older someone is the less likely they are to be violent. The difference is

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that even though someone has been violent in the open community at an older age, when they get to prison they still commit violence much less often because of that age.

In other words, being older when they committed the offense in the open community doesn't negate the effect of age when someone is in prison.

MR. LINGAN: Objection, Your Honor. Morva, this is the same ruling you had before and it's general.

MR. UNGVARSKY: He's talking about society and

the only way he can talk about society is talk about the factors --

THE COURT: Come to the bench.

BENCH CONFERENCE

MR. LINGAN: The Commonwealth is getting frustrated. They continue to attempt to back door this evidence. I mean the Court has ruled and it puts the Commonwealth in a bad position any time that Counsel or the witness ignores the Court's ruling and we have to object.

THE COURT: Response?

MR. UNGVARSKY: I think that the last question was a proper question. I'm asking about the risk of committing violence in society and then I'm asking about

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different factors of society. You have to be able to explain society --

THE COURT: This witness continues to say -- and he said it's a powerful factor concerning the violence in prison. The issue is not violence in prison.

I'm not
going to address it again. So, Counsel, your witness as
you must but if he continue to talk about violence in
prison that's not the issue.
I have ruled that it's not the issue --
MR. UNGVARSKY: The violence -- I'm sorry to
Interrupt.
THE COURT: It is risk of violence, period.
It's not risk of violence in prison. If he continues to
do it, I'll excuse the witness.
MR. LINGAN: Your Honor, I would point out in
Morva the Court says the -- I know the Court has ruled,
but the rates of assaults in the Virginia Department of
Corrections is, by statute, not relevant to the
determination the jury has to make concerning Morva's
future dangerousness.
THE COURT: I agree.
(Mr. Morrogh and Mr. Lingan conferred, off the
record.)

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MR. LINGAN: Your Honor, if there's some sort

of demonstrative evidence that's going to be, we do have an objection to. We haven't seen it and the Court did order it the day before. We bent over backwards on this.

THE COURT: I haven't seen it and I don't know that it has been offered.

MR. UNGVARSKY: I'm not going to offer it.

THE COURT:. Okay.

OPEN COURT

THE WITNESS: I will need to request a clarification from the Court in my testimony to be certain that I am not violating some element of my oath.

MR. UNGVARSKY: Fair enough. Your Honor, can we take our afternoon break?

THE COURT: Is the jury ready for a break?

THE JURY: No.

THE COURT: They're not ready for a break. Continue.

MR. UNGVARSKY: Very well.

BY MR. UNGVARSKY:

Q If you can't answer the question you let us know.

A Yes, sir.

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Q All right.
Is age -- how is age a factor in assessing future risk of violence for a capital offense, if any?
MR. LINGAN: Your Honor, again, same objection.
THE COURT: I sustain the objection.
MR. UNGVARSKY: You allowed that very -- you allowed that question.
THE COURT: I allowed it once. It's a repeat, so I'm not going to allow it a second time.
MR. UNGVARSKY: I understand. Your Honor. It's difficult to know what questions to ask when it's a moving target as to what is permissible and what is not permissible.
THE COURT: Counsel, that is your responsibility. That is a duplicate question. You have asked it twice before. I let it go, but they have objected to it. Don't ask it a third time.
MR. UNGVARSKY: I didn't ask the capitally sentence defendant question as to age. I asked it as to a different category. Your Honor.
THE COURT: Counsel, I have sustained

the
objection. Move on.

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BY MR. UNGVARSKY:
Q Is continued contact -- how is continued contact, the relationship with members of the community, a relevant factor in determining the risk of violence, future risk of violence for a capitally sentenced defendant?
THE COURT: Counsel, I just ruled on that. It's a risk of violence, period.
MR. UNGVARSKY: I ask for a break. Your Honor.
THE COURT: Counsel, I have ruled on the objection. Move forward.
MR. UNGVARSKY: Your Honor, I'm asking for a break. I don't know what questions I can ask this witness and the witness doesn't know what questions he can respond to and the Commonwealth has threatened him with perjury if he says something that --
THE COURT:. Stop, stop right there. Come to the bench. No more speaking objections.
Ladies and gentlemen, take a break, take

ten.
(Whereupon, at approximately 3:29 o'clock p.m., the jury was excused from the courtroom.)
BENCH CONFERENCE
THE COURT: Counsel, you know better than

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that. You know better than that. You just keep standing up and making objections, then you stand there in the middle of the courtroom and you make that speaking objection that the Commonwealth has threatened this witness --
MR. UNGVARSKY: They have set him up with a perjury charge.
THE COURT: The Commonwealth is threatening -- I haven't heard any threat.
MR. MORROGH: Judge, we haven't threatened. He stood up in front of the jury and said that the Commonwealth has threatened this man with perjury. We never threatened him with any such.
THE COURT: And you know better. You know that that is a speaking objection and you know that's

going to raise the ire of the other side, as well as the Court.

Now, I have told you over and over the issue is future dangerousness. It's not future dangerousness in prison, it's not future dangerousness -- it's future dangerousness of this individual and you keep trying to back door in the capital sentence, the capital sentence.

MR. UNGVARSKY: That's who he is. That's who

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he is as an individual. He's a capitally sentenced Defendant, Your Honor. That's exactly who he is. He's not me. He's a capitally sentenced defendant.

THE COURT: If you want to say for this defendant, you may do that, but it seems to me what you are trying to do is say one who only has two choices, it's life in prison plus parole, which is a back door way of saying for the one in prison.

You may certainly say for Mr. Lawlor, that would be particularized and I don't think that would be

objectionable, and that's my ruling.
MR. MORROGH: Judge, for the record can I just state that neither Mr. Lingan nor I have threatened this witness with perjury nor have we ever spoke to him outside of the courtroom when he was a witness.
MR. UNGVARSKY: Yeah, but they did say in this courtroom, in the well of this courtroom, that Mr. Morrogh did say that he's going to get this man for perjury.
MR. MORROGH: No, I didn't say that at all. I didn't say that.
MR. UNGVARSKY: The quote that I put --
MR. MORROGH: I didn't say that.
MR. UNGVARSKY: The quote that -- do you want

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to put hand up and take the oath?
The quote that I put on the bench previously before the lunch break was a word for word quote of what Mr. Morrogh said right here.
MR. MORROGH: Can we have the witness go outside?

OPEN COURT

THE COURT: Doctor, go outside for a moment.

THE WITNESS: I need some instruction from the Court before the jury comes back in. Your Honor.

THE COURT: It's very simple, Doctor. You may testify about reasonable future dangerousness, period. You may not testify about jail dangerousness. That is not the issue. The issue is not jail dangerousness. It is future dangerousness. That's all there is to it.

It's very simple and I know you want to talk about whether he's a danger if he's sentenced to life in prison versus capital punishment. That's not the issue. Wait outside, sir.

THE WITNESS: Your Honor, I'm afraid I'm going to violate my oath. My risk assessment is specific to prison. It's not prison and the open community. It is specific to prison.

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THE COURT: Then you may not be able to

testify.
THE WITNESS: Yes, sir. That's what I'm trying to clarify because I don't want to --
THE COURT: You clarify it with Counsel. You are their witness, not mine.
(The witness exited the courtroom.)
MR. UNGVARSKY: On what you just said, may I speak with him during the break?
THE COURT: Sure.
MR. UNGVARSKY: Very well.
BENCH CONFERENCE
THE COURT: Go ahead.
MR. MORROGH: Judge, I know Counsel is upset, but what he's talking about is a conversation, I was whispering to Mr. Lingan this morning. I never spoke to this witness. It isn't exactly what he said. I realize he's upset, but to stand up in front of the jury and say something like that, I threatened this witness with perjury, that's grossly improper and it's an attempt to prejudice the jury.
THE COURT: I have already spoken with Mr. Ungvarsky about it. Mr. Ungvarsky knows very

well. And

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he has said several times in the nature of speaking objections and I told you and I told Mr. Ungvarsky we're not going to have speaking objections.

That is a speaking objection of the worst kind and I have admonished Mr. Ungvarsky.

MR. MORROGH: Now that he's told the jury that and it's not accurate, could we ask the Court just to instruct the jury to disregard his last comments?

MR. UNGVARSKY: No. It could be instruct the jury Mr. Morrogh wants -- Mr. Morrogh himself has not said to this witness that he might go after this witness for perjury. That's one thing, but Mr. Morrogh has said that he's going to get this man for perjury.

MR. MORROGH: No, I didn't say I was going to get him. I didn't say that. You're listening over my shoulder.

MR. UNGVARSKY: I wasn't listening over your

shoulder. You said it loud enough that it could be heard by anyone within multiple feet and that's why we immediately went to the bench, because I didn't want there to be some question as to what was actually said or not. I wanted to put it right there on the record right then.

THE COURT: It doesn't matter because unless

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this witness heard it and it impacts on this witness -- if Mr. Morrogh wants to say in the hallway I hate this witness, he's a bad person, he can do that.

MR. MORROGH: I don't hate him.

THE COURT: But if he wants to do that, he can do that. What he can't say is loud enough for the witness to hear that I may indict you because that would be witness interference and that's not what happened in this case and you know better than to make that standing objection.

MR. UNGVARSKY: He's being set up for a

perjury trial by trying to answer these questions and he is trying --

THE COURT: Counsel, you know better than to make that standing objection, don't you?

MR. MORROGH: I'm not trying to set him up for anything, Judge, honestly. Just so you know, I'm not trying --

THE COURT: I'm not going to address that issue.

MR. MORROGH: I'm sorry you have to deal with this, Your Honor.

THE COURT: I'm not going to address it. I

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know it's late, tempers are short, but we'll take about a ten minute break and then we'll come back and you can deal with the doctor, because he has now told me that he can't give an opinion. He can only give me an opinion about the jail risk.

MR. WALSH: May I ask a question?

THE COURT: Sure.

MR. WALSH: If there's a distinction -- I

don't -- if there's a distinction of age and jail on the outside jail, can he make that distinction? We just want to know where --

THE COURT: A distinction --

MR. WALSH: If a person is on the street at a certain age and it doesn't affect the factor, but if they're in jail at that age and it is a factor, what happens there? That's what I think this witness is worried about. Does that make sense?

THE COURT: It doesn't.

MR. WALSH: It applies differently, education on the street as compared to education in jail. I just want to know what we can tell him.

THE COURT: I think he can't do it. The inquiry is not what is it going to be in jail. The

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inquiry is future dangerousness and I know that this witness wants to talk about dangerousness in prison because I know what his theory is and he wants to talk about he won't be a danger in prison so therefore the jury should sentence him to prison.

That's not the inquiry. As much as he

wants
it to be the inquiry, it is not the inquiry.
MR. WALSH: I think his caution is this, I think there are two factors for one thing being education.
I think that's his caution. He's afraid to say one thing
generically because it may apply differently when someone
is in and when someone is out. That's the only thing I
think he's having problems with.
THE COURT: I don't even know why we're going
through this because he's given his opinion. I suggest to
you if you had quit at the opinion you might be farther
ahead than you are, because he gave, I thought, a very
good opinion, but now we're hashing all this other stuff
and he's not going to be able to testify to those things.
That's all there is to it.
(Brief recess.)
THE COURT: Let's return Mr. Lawlor.

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(Whereupon, at approximately 3:52 o'clock p.m., the
Defendant entered the courtroom.)

(Whereupon, at approximately 3:53 o'clock p.m., the jury returned to the courtroom and resumed their seats in the jury box.)

THE COURT: Ladies and gentlemen of the jury, it's almost 4:00 o'clock. I want to address with you an issue. From time to time Counsel on both sides, their tempers run short, as anyone's might. Anything which is said between one Counsel to the other or one Counsel in the other direction is not evidence.

It is not evidence. It is not an issue that you could consider. I will deal with those, if you want to call them transgressions, regardless of where it comes or goes, I will deal with those from the bench, but they are not part of this case. You should disregard them in their entirety.

You should not ascribe any blame or lack of blame to either Counsel. Merely put it out of your mind. It's not part of this case. This case is too important. Both the attorney for the Commonwealth, the

attorney for
22 the defense, have worked very hard on this case for a long
23 period of time. Don't let that type of interaction have

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1 an impact on the case. Is everybody clear?
2 THE JURY: Yes
3 THE COURT: All right. Mr. Ungvarsky?
4 BY MR. UNGVARSKY:
5 Q Dr. Cunningham, I want to turn your attention
6 to the jail and corrections records that you reviewed.
7 A Yes, sir.
8 Q Speaking of tempers rising, are there
9 instances reported in those ten years worth of jail
10 records of Mr. Lawlor being verbally excessive?
11 A Yes, sir.
12 Q Can you please describe those?
13 A Yes, sir. There's a disciplinary write-up in
14 the Fairfax Adult Detention Center in 2009, where he was
15 verbally abusive and profane towards jail staff.
16 There was the incident that I described
17 earlier in the Fairfax Adult Detention Center of his
18 yelling in his cell when he was taken out and told to get
19 back in and not immediately complying and

they got him
back in. That would be another time where he was verbally
inappropriate.
In the Virginia Department of Correction
records, in or about 1984, '85, there is an assessment of

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him that describes him as being likely to be verbally
inappropriate, but unlikely to engage in physical
violence.
Q Okay. That was in --
A It was back in about '85.
Q In the records, the jail and corrections records that you reviewed, you have already testified
about records reflecting Mr. Lawlor's drinking while on
work release.
A There's another record that I thought of that
has to do with his being verbally inappropriate.
Q Yes.
A There is a Virginia Department of Corrections
record, mental health record, from the time period when he
was in the Virginia Department of Corrections between '98

and 2004, where he would -- where a progress note describes him as being verbally belligerent toward the staff -- a staff member about his medications and that kind of thing and then an hour later, hour and a half later, him coming back and apologizing about that same event.

There is also an incident that happened in -- I believe this was in Steps to Recovery, which is a drug

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rehabilitation center, where early on in his first stay there he said some verbally inappropriate things to staff members, was then suspended from the program for 30 days, then came back and was in the program for a long period of time without incident, but those are the incidents of verbally inappropriate behavior or outbursts.

Then finally there is -- it wasn't a verbal outburst, but what was identified as verbally inappropriate behavior in the Fairfax Adult Detention Center, this was in about -- I believe this was in

April
of 2009, where he made a comment to a female staff member,
I believe she was part of the medical staff, about her the
color of her nail polish complementing her eyes.
That caused her to feel uncomfortable and
there was a subsequent review of his classification and he
was then placed in a classification where any contact that
he had with female staff would be monitored by another
corrections officer, with medical staff it would be
monitored by a corrections officer where he was single
cell -- in a cell by himself and also where he had an
officer now escort him when he moved about the facility.
Q Okay. Including the Steps to Recovery
records, there are some incidents of verbal conduct,

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misconduct, inappropriateness, however it is identified,
but did you see anything of any acts of violence by him?
A No, sir. To clarify, the Steps to Recovery is

not a correctional context. It's an institutional context, not a correctional one, and the best predictors come out of a correctional context, not out of what happens in rehab.

Q Okay.

A But to answer your question, there's no evidence -- no reports of violence, physical violence.

Q I took the chart down. Rather than go through -- did you take into account those verbal -- the incidents you just testified to, did you take into account in coming to the opinion that you testified to prior to lunch?

A Yes, sir.

Q Okay. All right. Put the chart down.

A (The Witness complied with the request.)

Q Rather than go through all the factors, you took into account in making your opinion?

A Yes, sir.

Q Actually in the past he [sic] was a witness for the Commonwealth. Before I do that, I just want to ask you a few

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questions.

A Yes, sir.
Q Were you court appointed in this matter?
A Yes, sir; at your request.
Q Right. What was the rate of compensation for your court appointment?
A Three hundred dollars per hour.
Q Is there a limit up to which you can be paid?
A Yes, sir. The initial authorization -- or the authorization, whether it's initial or not, it was specified as $15,000, fifty hours.
Q How many hours have you put into work in this case thus far?
A My best estimate is I'm between 55 and 60 hours at this point.
Q What work have you done that's taken the 55 to 60 hours?
A The interviews that I have described, the intensive review and analysis of records, the retrieval and review of correctional research and data that could specifically inform my assessment of him and conferences with attorneys.
There is a little time that occurs in

travel

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when I can't have a file open in front of me, when I'm crossing through an airport or something that there are charges for. Then writing the report. Those are the primary areas of function that I engaged in.

Q What day were you initially scheduled to testify? Were you initially scheduled to testify today?

A No, sir. I came in on Monday, anticipating that I would testify yesterday and didn't come on until today.

Q So at this point you've put in more hours than you were authorized for?

A Yes, sir.

Q Of course, there's travel and the like?

A Yeah. I'm not home yet and we're not done here yet.

Q Where is your home?

A Dallas.

Q Okay.

A The greater Dallas area.

How many -- approximately how many times have

you testified in a court of law concerning risk assessment analysis for persons -- in cases in which a person could be convicted of capital murder?

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A I can't give you a specific count. My best estimate is around 90 or 100 times. It may be more or less, but I would say that's a pretty good estimate.

Q Is that in federal and state court?

A Yes, sir.

Q How many states, ballpark?

A I have done forensic work in over -- around 35 states or jurisdictions. Much of that out of state work has been capital.

Q The risk assessments that you have done in various states, are the laws different in each jurisdiction as to what you ultimately may or may not testify about in court or are they the same in every state?

A No, sir. There are differences in terms of what evidence is allowed in.

MR. LINGAN: Objection.

THE COURT: Sustained. That's not relevant.

BY MR. UNGVARSKY:
Q Is it your understanding – regardless of what the law is, is it your understanding that your opinion testimony needs to fit within the – well, the laws as established by the courtroom judge?

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MR. LINGAN: I again object. The jury gets instructed from Your Honor on the law, not a witness and not Counsel.
MR. UNGVARSKY: It goes just to his understanding so --
THE COURT: How is that relevant?
MR. UNGVARSKY: Because there are times when he's hesitant to answer a question because he wanted --
THE COURT: It's not relevant. I sustain the objection.
MR. UNGVARSKY: Okay.
BY MR. UNGVARSKY:
Q The times that you have testified in a capital case, after someone has been convicted of capital murder, how many of those times have you testified for the defense

and how many of those times have you testified for the prosecution?
A I never testify for anyone. In all of those capital cases I have been called by the defense.
Q Have you had instances in which defense counsel have contacted you to do an assessment for their client and after speaking with you, you told them I can't help you in this case or you can give them information

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that led you not to be used in the case?
A I have gained information that led to them deciding not to use me, yes, sir.
Q Based upon individualized risk assessments of their capital defendants?
MR. LINGAN: I object again to Counsel's --
THE COURT: Sustained.
BY MR. UNGVARSKY:
Q Now, has the Commonwealth here ever -- have they ever contacted you to talk to you about your proposed testimony today?
A No, sir.
Q Did anyone from the Commonwealth

seek to speak
with you as you were sitting in the hallway yesterday
about today?
A No, sir.
MR. UNGVARSKY: Okay. Thank you. For now I
have no further questions.
THE COURT: Cross-examine.
CROSS-EXAMINATION
BY MR. LINGAN:
Q Sir, you testified that you have spent 55 to
60 hours at $300 an hour on this case?

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A My best estimate. The rate is certain. The
number of hours is my best estimate.
Q So it's approximately -- I guess approximately
$18,000 that the state is going to pay you?
A If, in fact, additional authorization is
granted. If it's not, then I'll be paid 15,000 if the
Court deems to do that. That will be a decision of the
Court.
Q How much of your income or how much money do
you make a year from testifying?
A A relatively small part of my income comes
from actually testifying because there's such a

limited
number of hours that I'm on the stand, but in terms of all
of my practice, at this point it's forensic in nature. I
may or may not be called. In other words, it's court
related. I no longer do counseling with patients.
(Commonwealth Attorneys conferred, off the record.)

BY MR. LINGAN:

Q Let's narrow it then.

A Yes, sir.

Q Work on cases?

A Yes, sir. All of my professional activities

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at this point are forensic in nature in terms of being
court related. The clinical skills I bring to bear with
those, but I no longer do counseling with patients because
of my private schedule.

Q Again, you testified that you have always been
called by the defense?

A Yes, sir; in capital cases.

Q So going back though, you said you always work
in forensics. How much money do you make working on these
cases and one given year?

A That would vary some year to year. My best estimate of 2009 income, I had to calculate last year, my best estimate of 2009 income is about $450,000.

Q On strictly forensic work?

A Yes, sir. I might make a few hundred dollars in a year from speaking at a workshop or something, but even that is forensic in terms of I'm lecturing about forensic issues.

Q You talked about -- you were very specific in regards to this one incident in the Adult Detention Center about the deputy and not listening to the deputy -- the Defendant; do you remember that?

A Yes, sir.

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Q Then you talk about some verbal altercations that he's had in the past and you referenced one in the Virginia Department of Corrections. You said he made an inappropriate comment. Was that the comment that I will put my foot up the doctor's ass? Is that the one you're

talking about?
A That was the mental health record progress note that I described.
Q Was that what you were referring to?
A Yes, sir.
Q Then when you referred to the incident regarding the violation that was found regarding him getting verbally inappropriate as far as the prison staff, is that the one when he was in the visiting cell?
A I would have to turn to the disciplinary write-up, which I would glad to do --
Q May I approach for you?
MR. UNGVARSKY: May I see it, please?
(Mr. Lingan handed the document to Mr. Ungvarsky.)
BY MR. LINGAN:
Q Does this refresh your recollection as to the write-up you're talking about?

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A This is not a description of what --
Q But that's the write-up you're talking about; right?
A If I could verify the description? Yes, sir, that's correct.
Q Can you read for the jury what exactly he said

so we can get all that out?
A Inmate Lawlor stated that, quote, I have only been here for five minutes, end of quote. Inmate Lawlor visitation started at 1453 and ended at 1527, 27 in minutes. Inmate Lawlor began yelling, using abusive language, stating, quote, and with apologies, this is fucked up, you guys are fucked up, parentheses, 201, closed parentheses, and slammed the phone down. I escorted Inmate Lawlor back to A dash 02D cell without further incident.
Q So that's the incident you're talking about?
A Yes, sir, verbal belligerence.
Q Verbal belligerence.
A I believe I said he was abusive and cursed the staff.
Q That's regarding then -- the issue with the nurse, you base that off of an e-mail that was in the

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court files or in the classification files?
A Yes, sir, and then subsequent discussion of

that in the reclassification documents.
Q Right. Part of the reclassification documents
included reference to his fight with fellow inmates in the
past seven days; correct?
A I don't recall the specifics of that. It may
well, but I don't recall the specifics.
Q The e-mail, it wasn't just the nail polish
bringing out the eyes, it was the --
MR. UNGVARSKY: Objection; hearsay. May we
approach?
MR. LINGAN: It's in evidence.
MR. UNGVARSKY: No. The e-mails --
THE COURT: Is the e-mail in evidence?
MR. LINGAN: Yes; introduced by defense.
MR. UNGVARSKY: Right, but the e-mail is not
-- the e-mail is someone's characterization, it's not what
--
THE COURT: You may ask about the e-mail. If
it's in evidence, you may ask.
MR. LINGAN: He said he got it from the e-
mail.

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THE COURT: Go ahead.
BY MR. LINGAN:

Q I'm sorry, Sir. The e-mail discusses -- would you like to see it?
A Yes, sir.
(Mr. Lingan handed the document to the witness.)
Q You're right that it mentions that nail polish comment, but it also discusses the general discomfort that she gets from his presence; correct?
A That's correct.
Q It also indicates that she feels he is making excuses to see her, correct, or to come get medical attention, correct?
A It doesn't explicitly describe that. She does describe getting an awkward vibe from him and that he may be finding reasons to come out of his cell for medical attention, but doesn't describe it specific to her.
Q She says he comes to see her close in time the same day, I think it is, you have in front of you, after he saw the doctor, correct, and he is saying he forgot something, mentions something else; isn't that right?
A Saw the M.D. yesterday and then saw

her that

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afternoon.
Q So just to be clear, it's a little more than just that comment, correct, that you were addressing from that e-mail?
A Yes, sir. The comment was the precipitating issue. She was feeling awkward about his seeming to seek a lot of medical attention and particularly medical attention where the female staff would respond.
Q Now, Doctor, your testimony to this point, just so we're clear, it's been based on the studies you talked about; correct?
A Yes, sir; correctional data.
Q But your opinions are based on applying statistics from studies; correct?
A Yes and no. It's based on the methodology that is described in the scientific literature and it's based on reigning scientific data from research studies in correctional departments to bear on rates of violence in prison and what it's correlated with. It predicts violence in that setting.

Q If you understand the Judge's admonition about what you can testify to, my question though is in those studies, in any of those studies, is the Defendant a part

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of any of those studies?
A No, ,sir.
Q Okay.
Sir, you spent 55 to 60 hours on this case; correct?
A Yes, sir,
Q You spoke to the Defendant; correct?
A Yes, sir.
Q None of your discussions with the Defendant involved the circumstances of this offense; is that correct?
A That's correct.
Q None of them involved the circumstances of his abduction in 1998?
A Not the circumstances. My recollection is that he referenced that as why he went to prison, but not the circumstances of it.
Q Not the facts of that case; correct?
A That's correct.
Q Not the violence inflicted on Ms.

Glickbar?
A I don't recall asking him about it. Since I
have the records, they go into great detail.
Q You were asked initially on there whether you

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considered the circumstances surrounding the commission of
the offense and made comments to your conclusion; correct?
A Yes, sir.
Q But you did not ask the person who was there
at the offense about the offense; correct?
A That's correct. My focus on that was only on
scientific established relevance of the meaning that that
offense has. There was nothing that he was going to tell
me that was going to interface with that scientific data
that would have predicted value.
Q You understand the circumstances of each
offense is unique to that offense; correct?
A It was relevant to criminal conduct that is
unique, most human conduct is of certain types and the
specific victim, the specific time, the specific

place is
16 unique, but --
17 Q The number of strikes with a hammer to the
18 head?
19 A The number of strikes, but the general
20 features of different types of offenses are typically not
21 unique.
22 Q You understand this is an offense that
23 occurred on or about September 24th, 2008, don't you?

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1 A Yes, sir.
2 Q You understand that it involved a young woman
3 by the name of Genevieve Orange, don't you?
4 A Yes, sir.
5 Q You understand that at the time she was 29-
6 years-old, don't you?
7 A I don't recall her age. I know she was a
8 young woman.
9 Q She would have been 31 yesterday, so she was
10 29 at the time of the offense. Do you know that?
11 A I don't know her date of birth.
12 Q But that's a unique characteristic. You know
13 that she is a unique individual?
14 A Yes, sir.
15 MR. UNGVARSKY: Objection to the

relevance,
Your Honor. Your Honor, it's not -- everyone recognizes
that she is a unique individual. This is not relevant.
It's not relevant to this expert's opinion as to future
risk assessment of Mr. Lawlor.
THE COURT: Why isn't it?
MR. UNGVARSKY: What's relevant --
THE COURT: He's testified that he took into
consideration the factors of this crime.

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MR. UNGVARSKY: He took into consideration the
facts, but this is a capital murder offense. It is the
circumstances of this crime that made it a capital murder
offense and not a first degree murder or a second degree
murder or a manslaughter. He takes that into account, the
fact --
THE COURT: This is cross -- It's a fair question.
MR. LINGAN: Thank you, Your Honor.
BY MR. LINGAN:
Q You understand that -- so to you it didn't
matter that she was struck 30 times in the head

with a
hammer; correct?
A It's not that it doesn't matter to me as a
person --
Q No. I'm talking about in your
evaluation.
A But it is not a feature that is predictive
of
future serious violence in the context that I'm
addressing.
Q So that would be a no, it did not matter
to
your evaluation; correct?
A I've answered as best I can. It matters
to me
as a person. It is not a predictive factor and that
sort

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of thing has been studied and it's not a
predictive
factor. It would seem to be, it calls to us, but --
Q All right.
MR. UNGVARSKY: Judge, I ask that he
allow the
witness to answer.
MR. LINGAN: He's not answering the
question.
MR. UNGVARSKY: He is answering.
He was in
the middle of a sentence.
THE COURT: Let him finish the
question and

then ask the next one.
THE WITNESS: It would seem to be. It calls to you to have a predictive significance, but when you actually study what difference does it make, the person was beaten or stabbed or choked, it does not end up affecting the future risk of violence.
(The Commonwealth Attorneys conferred, off the record.)
BY MR. LINGAN:
Q Just so we're clear, the circumstances -- when you were asked about the circumstances surrounding the commission of the offense, you interpret it to mean that this is a capital murder conviction; correct?
A No, sir. I took into consideration that this

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was a capital offense associated with a sexual assault.
Q But not the circumstances of the number of blows to the head, the number of defensive wounds, the steps that he went through to commit this crime?

Those are not the circumstances you're talking about? And it's a yes or no answer.

A I can't answer that yes or no. I reviewed those details. I'm familiar with them and I have full knowledge of this. I made this assessment in full knowledge of it. Those particular details are not predictive of future violence in this context.

Q But again you reviewed some materials you said, but you did not talk -- you understand there were two people in that room that night; correct?

A Yes, sir.

Q One of them is dead, you understand that; right?

A Yes, sir.

Q The other one, sitting right there, you interviewed and you did not ask him about the circumstances of the crime; correct?

A That's correct.

MR. LINGAN: Your Honor, I have no further

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questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. UNGVARSKY:

Q Sir, did you read the report of Dr. Lee Hagan

where he interviewed Mr. Lawlor about the circumstances of the crime

A Yes, sir.

Q Dr. Hagan is a Commonwealth psychologist; correct?

A Yes, sir.

MR. LINGAN: Your Honor, that's beyond the scope.

MR. UNGVARSKY: It's not.

BY MR. UNGVARSKY:

Q So, you knew --

THE COURT: Wait, wait, wait. You don't just get to keep trucking on. I get to make a ruling and then we will go from there.

MR. UNGVARSKY: Yes, Your Honor.

THE COURT: Your objection is?

MR. LINGAN: This is beyond the scope and it does call for hearsay.

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MR. UNGVARSKY: I'm not asking for the hearsay of what was said in the report, but to ask him whether he interviewed the Defendant --

THE COURT: You may ask him whether he read

the report. He may not testify as to what the report said.

BY MR. UNGVARSKY:

Q Did you read the report that was written by Dr. Lee Hagan, the expert working with the Commonwealth in this case?

A Yes, sir, I did.

Q Did you read that as part of your work in this case?

A Yes, sir.

Q Why didn't you ask -- what was your role as an expert in this case vis-a-vis the Defendant?

A As I understood my role, it was to assess his risk of future violence should he be sentenced to life -- to a life term, life without parole.

Q What is the best --

MR. LINGAN: Objection, Your Honor.

THE COURT: I sustain the objection. The jury will disregard.

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BY MR. UNGVARSKY:

Q What is the best predictor -- what's the best evidence of the prediction of acts of violence by a defendant in the future?

What's the better predictor of that? The Defendant's ten years worth of jail and prison records or what the Defendant says in an interview room?

A His documented pattern of conduct.

Q You were asked questions about your income in 2009?

A Yes, sir. I was asked about my income in general. That's the last year I have and that's approximately correct.

Q Do you maintain an office?

A Yes, sir.

Q A physical office?

A Yes, sir.

Q Do you have expenses associated with the office?

A Yes, sir.

Q What are some of the expenses you have associated with -- you run a business?

A Yes, sir.

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Q What are some of the expenses you run as a business person?

A I have three individuals who work for me doing clerical that represent about on a month anywhere from one a half full-time people to two full-time people.

My wife
is involved in doing the heavy accounting and so she
shares then in that income, a portion of that, is what I
would otherwise have to pay a bookkeeper.
There's rent, there's phone, I'm licensed in
17 states. Those licensing fees alone are 5 to $10,000 a
year. There is premises insurance, malpractice insurance,
travel costs associated with going to seminars,
professional organizations that I belong to, their dues,
board certification renewal fees, phone, FedEx.
I mean it's a very active small business, if
you will, that has all of the expenses and overhead that
small businesses do.
Q You testified in response to Counsel's questions that you have always been called by the defense
in capital cases.
Have you always been called by -- have there
been cases in which you have been consulted with and
called by prosecutors?

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A Yes; non-capital cases.

Q Okay. Do you do other work besides risk assessments in capital cases?
A Yes, sir. I do other work besides capital cases. I do work in other criminal cases about other issues. I do work in civil cases as well.
Q That's forensic work?
A Yes, sir.
Q It's all forensic?
A Yes, sir. It's forensic in terms of it all being court applied. I very actively use my clinical capabilities in doing interviews and in understanding diagnosis and how development affects outcome or even the risk assessment issues of psychological principles involved.
Q You were asked -- in your time, besides the, if you will, the work on cases in which you're appointed, are you writing -- you have written a number of articles. Is that part of the time, your work time?
A I don't get monetary compensation for that directly. I think the book, I get a dollar a copy on, but otherwise the journal articles, there's no direct economic compensation.

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Over time that will contribute, I suppose, to my professional stature and may affect my income indirectly, but otherwise that's a labor of love. That's not like I get paid per published article and whatever.

Sometimes we get grant money to support the research and I divert that grant money to an academic that I work with and don't take compensation for myself.

Q You were asked about sort of the circumstances of the crime, horrific circumstances of the crime in this case.

Are there research, peer reviewed articles that address the impact of the circumstances of crimes as to a predictor of future violence for a capitally sentenced defendant?

A Yes, sir. Our own research has looked at, for example, the weapon that's used to see whether or not that is predictive of violence in prison and other research

studies have as well.
Q Well, I'll ask how --
MR. LINGAN: Object again. Your Honor, this
is -- I don't know how many times the Court --
THE COURT: What is the objection?
MR. LINGAN: The in prison aspect. I don't

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know how many times the Court --
THE COURT: Sustained and it's hearsay. I
sustain on both of those.
BY MR. UNGVARSKY:
Q Counsel questioned you about income and your
testifying business. When you come and testify in cases,
are you're stating some private, personal opinion or are
you stating an opinion as an expert based upon your
research and your peer review literature?
A I'm stating an opinion as an expert based on
the peer reviewed literature and let me clarify that
income issue because I may have left a false impression
based on the sequence of questions.
The income that I described of $450,000 a year

is after office expenses and that sort of thing. That's net income. So I want to be sure that that's clear and that there's not a confusion about what that compensation consists of.

Q Very good.

A That includes -- my wife's comes out of the 450, but that's our joint income together after those expenses are paid.

Q In a case like this one where you are court

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appointed, does it depend upon how much the Court approves for your services?

A Yes, sir:

THE COURT: Counsel, we have been over this before. Why are we going over it again?

MR. UNGVARSKY: It goes to bias.

BY MR. UNGVARSKY:

Q I'll ask it this way. Do you submit a detailed voucher when you seek payment for your services?

A Yes, sir.

Q That's subject to review by whoever is going to pay you?

A Yes, sir.
Q In terms of the time that you spend --
MR. UNGVARSKY: I don't have any further questions at this time. I ask the witness be subject to recall.
THE COURT: Doctor, you may be called again. You're free to go, sir.
THE WITNESS: Thank you, sir.
(The witness stood aside.)

* * * *

## Appendix D

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

| | |
|---|---|
| COMMONWEALTH OF VIRGINIA, | |
| -vs- | FE-2009-0000304 |
| MARK ERIC LAWLOR | |
| Defendant. | |

Fairfax County Courthouse
Circuit Courtroom 5H
Fairfax, Virginia

Wednesday, March 10, 2011

PAT ELLIS
CROSS EXAMINATION

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* * * *

BENCH CONFERENCE

MR. UNGVARSKY: Your Honor, we're about to rest, and before we did, I just wanted to raise just two things. First is we do have -- well, we do have

Dr.
Cunningham subject to recall, and we would move to recall
him. Based upon the information that we put in the
factual proffer that was filed this morning.
THE COURT: I'm sorry? I didn't understand.
MR. UNGVARSKY: We do have Dr. Cunningham
subject to recall. We provided -- we filed, the Court
file, and provided the Court this morning an actual
proffer as to what questions.
THE COURT: I don't have it. I haven't seen
it.
MR. UNGVARSKY: Very well. Well, I don't
think we can rest until we have a denial of our motion to

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recall him based upon the factual proffer. And --
THE COURT: Have you seen it?
MR. MORROGH: I have.
THE COURT: I haven't seen it, so I don't know
what to tell you.
MR. UNGVARSKY: Well, I guess what I would ask

then is if we could --
THE COURT: Do you have a copy of it?
MR. UNGVARSKY: Oh, I sure do.
THE COURT: Let me see it.
MR. UNGVARSKY: Okay.
(Whereupon, a document was handed to the Court for his review.)
(Pause.)
THE COURT: The only one -- what's the Commonwealth's position?
MR. LINGAN: Your Honor, I think these are the same questions that were asked yesterday. I mean, there is definitely the same answer. And it's just a way of -- I don't know if he's trying to revisit --
THE COURT: The issue isn't prison adaptability, that's the problem isn't it? That's what all the cases say.

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MR. UNGVARSKY: Your Honor --
THE COURT: You learned -- the doctor actually saying yesterday, "I don't know anything about it other than prison adaptability --
MR. LINGAN: He didn't say --
THE COURT: -- that's my point. Solely limited to prison adaptability.

MR. LINGAN: He didn't use the word adaptability. He never once said -- he said prison risk. Prison risk, and that's --

THE COURT: There is -- I think you did ask, and I did let you ask yesterday, and it's repeated here, question three. He answered that question. At one point, you said -- let me read it again.

(Pause.)

All right, I've read it. The other thing is that the final paragraph here where you say Dr. Cunningham will describe the basis for his expert opinion. I take it you did not intend for him to tell you what those scientific studies say.

MR. UNGVARSKY: We did, Your Honor.

THE COURT: That's inadmissible.

MR. UNGVARSKY: Your Honor --

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THE COURT: McMunn vs. Tatum.

MR. UNGVARSKY: I respectfully -- this is our proffer, and before I rest, I would need to be able to recall Dr. Cunningham based upon the proffer. I understand the Court may deny the request to

recall him,
but --
THE COURT: Well, I just want to make it --
want you to make it clear that your intent was to offer
evidence that violates McMunn vs. Tatum. Your intent was
to ask him questions to repeat what the scientific
literature says that he used to base his opinions?
MR. UNGVARSKY: Respectfully, we just -- we
understand the Court's ruling. We don't agree with the
Court's interpretation of the law there.
THE COURT: But that's your intent, right?
MR. UNGVARSKY: That's part of the intent in
that paragraph you're pointing to.
THE COURT: The case law is legion on that.
You cannot do that.
MR. UNGVARSKY: Very well.
THE COURT: The ruling stays the same.

* * * *

## Appendix E

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 8th day of March, 2013.

Mark Eric Lawlor, Appellant,

against Record No. 120481
Circuit Court No. FE-2009-304

Commonwealth of Virginia, Appellee.

Upon Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 10th day of January, 2013 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patrick L. Harrington, Clerk

By:

Deputy Clerk

## Appendix F

## COMMONWEALTH *of* VIRGINIA

Edward J. Ungvarsky
Capital Defender

**OFFICE OF THE CAPITAL DEFENDER**
**NORTHERN VIRGINIA REGION**
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Tel (703) 875-0102
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March 1, 2011

Hon. Fairfax Circuit Court Judge Jonathan Thacher
Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, VA 22030

Re: *Commonwealth v. Mark Eric Lawlor*, FE-2009-304
Notice of Filing of Expert Report of Dr. Mark Cunningham

Dear Judge Thacher:

Please find attached a Violence Risk Report and CV of defense expert Dr. Mark Cunningham, appointed pursuant to the January 31, 2011 *ex parte* Order from Judge Dennis Smith in this, the above-captioned, case. At the *ex parte* hearing of two motions for expert appointment pursuant to Va. Code §19.2-264.3:1.3, held January 11, 2011, Judge Smith authorized payment of Dr. Mark Cunningham to conduct a risk assessment of Mr. Lawlor, based particularly on Mr. Lawlor's history and background, and as evidence of Mr. Lawlor's character. At that

hearing, Judge Smith orally ordered that Dr. Cunningham write and submit a report one week prior to his testimony in this case, so that admissibility rulings can be made concerning which of his expert opinion are appropriately particularized to Mr. Lawlor's history, background, or character, and which of his expert opinions, if any, are not. Dr. Cunningham is scheduled to appear as an expert in this matter on March 8, 2011.

In moving for the admission of Dr. Cunningham's expert opinions in this case, as evidence in both mitigation and rebuttal under *Lockett v. Ohio*, 438 U.S. 586 (1978), *Skipper v. South Carolina*, 476 U.S. 1 1986), and *Morva v. Commonwealth*, 278 Va. 329 (2009), Mr. Lawlor respectfully relies upon his previously-filed *Expert Notice* and *Motion for Order that Admits Testimony That, Based Particularly on Mr. Lawlor's Character, History and Background, Mr. Lawlor Has a Low Risk of Committing Future Violence in Prison Environment*, heard on November 18, 2011. In addition Mr. Lawlor relies upon *Perry v. Lynaugh*, 492 U.S. 302 (1989) (violation of the Eighth Amendment to require jurors to consider mitigating evidence only through the lens of the "future dangerousness" aggravating factor), and *Tennard v. Dretke*, 542 U.S. 274 (2004) (violates the Eighth Amendment to add any additional relevancy test to mitigating evidence).

Thank you very much for your time and attention.

Respectfully submitted,

/ss
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Thomas Walsh, VSB #36363
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/ss/
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***Co-counsel for Mark Lawlor***

cc: Hon. Raymond F. Morrogh
Hon. Dennis Smith
Court file

MARK D. CUNNINGHAM, PH.D., ABPP
*Board Certified in Clinical Psychology – Board Certified in Forensic Psychology*
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*Licensed psychologist: Alabama #1564, Arizona #3662, Arkansas #98-17P, Colorado #2305, Connecticut #846, Idaho #PSY-379, Illinois #071-006010, Indiana #20041376A, Louisiana #794, New Mexico #0768, New York #017111, Oklahoma #1002, Oregon #1333, Pennsylvania #PS016942, South Carolina #764, Tennessee #2255, Texas #22351*

02-28-11

Meghan Shapiro, Esq.
Northern Virginia Capital Defender Office
2300 Clarendon Blvd.
Suite 201B
Arlington, Virginia 22201

Re: *Commonwealth of Virginia vs. Mark Eric Lawlor*, capital sentencing violence risk assessment

Dear Ms. Shapiro:

Thank you for your request that I evaluate the likelihood that Mr. Mark Lawlor will adapt to a life term in the Virginia Department of Corrections without serious violence, and how risk factors for his prison adjustment may compare with or vary from risk factors associated with his violence in the community. It is my understanding that these findings may be offered in rebuttal to the

Commonwealth's assertion of an aggravating factor and/or in mitigation as positive prisoner evidence. In performing this evaluation, I have interviewed Mr. Lawlor and several third parties. I have reviewed records and scholarly literature. These techniques, detailed below, are customarily relied upon by clinical and forensic psychologists in coming to their findings and opinions.

At the outset of my interview, Mr. Lawlor was advised that while retained as an agent of the defense, I remained an independent evaluator. Accordingly my findings might not prove favorable to him. He was further advised that any information he provided, as well as my findings and conclusions regarding my review of records and any interviews of third parties, would remain within attorney-client privilege until my report was released by the defense or I was called by the defense to the stand to testify. Queries of the capital offense conduct or past unadjudicated offenses were not authorized by you. The absence of this information does not materially compromise my findings regarding a risk assessment for prison.

## Interviews conducted by Dr. Cunningham:

| *Name* | *Relationship* | *Duration (in minutes)* | *Date* | *Mode* |
|---|---|---|---|---|
| Mark Eric Lawlor | Defendant | 96 | 6/13/10 | Person |
| | | 57 | 2/06/11 | Person |
| Marty Carroll | Probation Officer | 34 | 1/21/11 | Phone |
| Katherine Walker | Friend | 38 | 1/21/11 | Phone |

| | | | | |
|---|---|---|---|---|
| Darell Setterlund | Corrections Industry Supervisor | 10 | 2/09/11 | Phone |

**Record relied upon:**

*INTERVIEW BINDER*
Summaries of interviews of Jail Correction Officer Interviews:

a. Deputy Chris Carrington 1/13/11
b. Deputy Church 1/17/11
c. Deputy Joe Jones 1/13/11
d. Deputy Charlene L. Kim 1/14/11
e. Deputy Queen 1/17/11
f. Sgt. Santmeyer 1/12/11

1. 3/16/09 Indictment and Summary of Offense

*BINDER 1*

2. 1/27/10 Interview of Mike Johnson (about MEL's drug use, night of offense)
3. Commonwealth's Notice of Unadjudicated Acts (& CDO Summaries)
4. Expert Report of Dr. James Hopper (Defense retained expert)
5. Expert Report of Dr. Joette James (Defense retained neuropsychology expert)
6. Expert Report of Dr. Leigh Hagan (Commonwealth 3:1 Expert)
7. Mark Eric Lawlor Birth Certificate
8. MEL 2nd Grade Report Card and School Pictures 1st–5th Grades

9. Frances & Richard Lawlor Divorce Certificate (1976) & Consent Order for Transfer of Custody (1979)
10. Letters: Dorothy Lawlor (pat. Grandma) to Kim Schlottman (mother of MEL's son)
11. Franklin County Circuit Court Records (from 1983 Randy McDaniel incident)
12. 1984 Presentence Report
13. VA Dept. of Corrections "Central Criminal Records" (1985-86)
14. Roanoke Probation File (1986-87)
15. Arlington County General District Court Records (from 1998 Malicious Wounding)
16. Arlington County Detention Center Criminal Records (1986-87)
17. Fairfax County Circuit Court Records (1998), Presentence Report (Glikbarg incident)
18. Fairfax County Adult Detention Center (1998)
19. VA Dept. of Corrections "Central Criminal Records" (1998-2004)

*BINDER 2*

20. Va Dept. of Corrections "Medical Records" (1998-2004)
21. VA Correctional Enterprise Delco-Remy Employment Records (2002-03)
22. Communications Corporation of America Employment Records (2003-04)
23. Culpeper Family Practice Records (2005-06)
24. Snowden Hospital Records (2005)
25. Culpeper County Jail Records (2006)
26. Probation Violation, Violation Report from Fairfax Circuit Court records (2006)

27. Fairfax County Adult Detention Center (2006)
28. Woody Couts Letter to Judge Vieregg (8/9/06)
29. Kennedy Homeless Shelter (12/28/06-2/16/07)
30. Fairfax County Alcohol & Drug Services (7/25/06 – 5/22/07)
31. Second Genesis (2/20/07 – 5/23/07)
32. Fairfax County Alcohol & Drug Service, STR (1st time) (5/22/07 – 6/6/07)

*BINDER 3*

33. Probation Violation, from Fairfax Circuit Court records (6/11/07)
34. Fairfax County Adult Detention Center (only forensics, waiting for Classification) (2007)
35. Fairfax County Alcohol & Drug Services, STR (2nd time) (9/13/07 – 4/30/08)
36. Mt. Vernon Mental Health (1/2/07-3/20/08)
37. Safeway Employment Records (8/9/07 – 3/31/08)
38. Prestwick Employment Records (4/1/08 – 10/3/08)
39. Fairfax County Adult Detention Center (2008-11)

*BINDER 4*

1. Big Brothers Big Sisters Program
2. Social Security Administration Records
3. Fairfax County ADC Classification

**Potential for a positive adjustment to prison (positive prisoner evidence)**

*Prison violence*

Mr. Lawlor's potential to adjust to a life term in prison without serious violence was analyzed utilizing the two approaches that are most reliable in

assessing this issue: 1. Analysis of a defendant's past behavior pattern (in a similar setting) and, 2. the application of specifically relevant statistical data and actuarial models.

Behavior pattern analysis in violence risk assessment at capital sentencing can be a very reliable method for estimating risk assuming that there is sufficient behavior to form a pattern and the context of prediction is sufficiently similar (Morris & Miller, 1985, Cunningham & Reidy, 1998b, 1999; see also Virginia DOC Inmate Classification System Evaluation, 2005). This latter similarity of context is particularly important to attend to if the risk assessment is to be accurate. As studies sponsored by the U.S. Justice Department concluded: a community pattern of violence has not been found to be reliably predictive of violence in prison (Alexander & Austin, 1992; National Institute of Corrections, 1992). This same discontinuity between community violence and prison violence has been confirmed in samples of former death row inmates (e.g., Marquart, Ekland-Olson, & Sorensen, 1989; Marquart & Sorensen, 1989; Reidy, Cunningham, & Sorensen, 2001; Edens et al., 2005; Sorensen & Cunningham, 2009; Cunningham, Sorensen, Vigen, & Woods, 2010), life-sentenced capital offenders (e.g., Cunningham, 2008; Cunningham, Reidy, & Sorensen, 2008; Cunningham & Sorensen, 2007; Marquart et al., 1989) and incarcerated murderers (e.g., Sorensen & Pilgrim, 2000; Cunningham & Sorensen, 2006; Sorensen & Cunningham, 2010). Confirming the predictive significance of past violence when in the same context, however,

Sorensen and Pilgrim found that a history of past prison violence among incarcerated murderers markedly increased the likelihood of prison violence. Thus, it is critical to look to past behavior from a similar context (i.e., jail/prison conduct to jail/prison conduct).

Statistical methodology has been identified as fundamental to reliable violence risk assessments at capital sentencing (e.g., Cunningham, 2006, 2007, 2010; Cunningham & Goldstein, 2003; Cunningham & Reidy, 1998b, 1999, 2002; Cunningham, Sorensen, & Reidy, 2009; Reidy, Cunningham, & Sorensen, 2001; Sorensen & Pilgrim, 2000). For the past 12 years, this methodology had been routinely presented at death penalty trials throughout the United States. Arguably, this application of statistical methodology and data at capital sentencing moves these gravest of determinations toward the "greater degree of reliability" (p. 989) in death penalty litigation called for in *Lockett* v. *Ohio.*

The use of this statistical approach enjoys general scientific acceptance, both as a broad methodology and as the most reliable basis of violence risk assessment (Monahan, 1981; Morris & Miller, 1985; Hall, 1987; Smith, 1993; Serin & Amos, 1995; Cunningham & Reidy, 1998b, 1999; Reidy, Cunningham, & Sorensen, 2001; see also Virginia DOC Inmate Classification System Evaluation, 2005). Statistical methods have been widely cited as superior to clinical methods in predicting the behavior of individuals (Dawes et al., 1989; Meehl, 1954; Monahan, 1981, 1996; Showalter & Bonnie, 1984;

Tonry, 1987). Poythress (1992) summarized the status of this research quite succinctly:

> In virtually every area of behavior that researchers have pitted clinical prediction against statistical prediction, clinical prediction has been shown to be inferior. This is true in the case of violence prediction studies also... (p. 142)

Statistical methodology in violence risk assessment fundamentally relies on the base rate – or frequency of violence in a given sample or population. Monahan (1981) in his influential monograph asserted:

> Knowledge of the appropriate base rate [frequency of behavior observed in a relevant group] is the most important single piece of information necessary to make an accurate prediction. (p. 60)

The fundamental reliance of empirically-supported violence risk assessment models on base rates is not restricted to capital sentencing. The application of statistical methodology in violence risk assessment also includes non-capital sentencing determinations, prison classification, parole eligibility, and civil commitment and release. Scientifically-informed individualization in the medical and mental health sciences in diagnosis, therapeutics, or prognosis (i.e., risk) is, by necessity, based on statistical methodology. Statistical methodology is fundamental to the commercial insurance (i.e., "risk" assessment) industry as well.

With these two approaches in mind (i.e., past pattern in confinement and application of statistical methodology), there are a number of factors that can be analyzed regarding Mr. Lawlor's likelihood of adjusting to a capital life term in Virginia DOC without serious violence. These factors each reflect a particularized assessment of Mr. Lawlor, using characteristics specific to him. Again, these address either a mitigating factor and/or illuminate the risk-implication of factors intuitively employed by the jury and/or asserted or inferred in the Commonwealth's arguments. These factors are specified below.

1. A number of factors are present that lower Mr. Lawlor's risk of prison violence:

    a. *Behavior pattern in custody:* Mr. Lawlor has been confined for more than 28 months in the Fairfax County Adult Detention Center following his arrest on the current charge. Mr. Lawlor has had previous jail confinements from which to base a behavior pattern analysis as well: (time periods and dates approximate) one year in the Rocky Mount County Jail (1983) and one year in the Fairfax County Adult Detention Center (1998). During the above 4+ year (cumulative) tenure, Mr. Lawlor has had few disciplinary infractions (two in past 28 months) and only a single mutual fist fight. He has not been cited for serious violence or weapons contraband in custody. Mr. Lawlor's response to jail custody without serious violence is particularly notable as jail

is generally regarded as a more arduous and challenging setting in which to do time. This is secondary to a number of jail-related factors, including the lack of programming and facilities designed for extended incarceration, and the high level of inmate turnover.

Mr. Lawlor also has an extended prior history of prison confinement from which to project his future adjustment. He served 5-6 months in prison camps in Harrisonburg and Fairfax (1984) and six years in Virginia (1998-2004). During this extended tenure, his disciplinary infractions were rare and none involved assaultive misconduct or weapons contraband. Mr. Lawlor's prior positive prison adjustment is also notable as it occurred when he was substantially younger and thus at greater risk for misconduct and violence (see next section).

b. *Age:* Mr. Lawlor is 45 years old (dob 04-06-65). Age is one of the most powerful predictors for prison misconduct, including among capital offenders sentenced to LWOP terms (Cunningham, Reidy, & Sorensen, 2008), with aging inmates having progressively lower rates of misconduct (e.g., Bench & Allen, 2003; Hirschi & Gottfredson, 1989; Kuanliang, Sorensen, & Cunningham, 2008; Stephen, 1989; Virginia DOC Inmate Classification System Evaluation, 2005) and assaultive misconduct (e.g., Cunningham, Reidy, & Sorensen, 2008; Cunningham & Sorensen, 2006, 2007; Cunningham, Sorensen, & Reidy,

2005; Kuanliang et al., 2008; Sorensen & Pilgrim, 2000). Thus, holding other factors constant, Mr. Lawlor, at age 45, has a markedly lower risk of violence in prison as compared to inmates in their late teens, twenties, or thirties.

c. *Education:* Mr. Lawlor obtained a GED on 01/22/85 while in custody. Inmates who have a high school diploma or its equivalent demonstrate lower rates of assaultive misconduct in federal prison (Harer & Langan, 2001). Similarly, in a large scale study of correlates of prison violence among inmates in a high security state prison, inmates holding a high school diploma or its equivalent were half as likely to be involved in assaultive misconduct, controlling for other factors (Cunningham, Sorensen, & Reidy, 2005).

d. *Employment:* Mr. Lawlor was consistently employed during his tenures in the community. Such employment in the community is associated with a better inmate adjustment (Quay, 1984), as these offenders are more likely to occupy themselves industriously in prison.

e. *Continuing contact with community members:* Mr. Lawlor has maintained relationships through limited visitation, telephone calls, and correspondence with family members and friends during pre-trial custody. To the extent that such relationships continue after he enters Virginia DOC, as is expected, the pro-social influence of these and the associated incentive

to maintain good conduct so as to facilitate visitation and telephone access would contribute to better inmate adjustment.

f. *Correctional appraisal:* During prior jail and prison confinements, Mr. Lawlor has routinely been classified to settings where he has routine, direct physical contact (without restraints) with corrections staff and other inmates. He has been double-celled or housed in group tanks or open-bay dorms. He has had work assignments where he has had access to tools that could be utilized as weapons. These classifications demonstrated that he was not regarded as an imminent predatory risk toward other inmates or staff.

For the first six months following his arrest on the current charges, Mr. Lawlor was double-celled and shared a common dayroom with 19 other inmates for over 12 hours daily. Since April 2009, Mr. Lawlor has been held in administrative segregation where he is single-celled, but is allowed recreation with up to 10 inmates. He is on a single-staff escort for movement within the Fairfax County Adult Detention Center and is not restrained. Though maintained at an enhanced-security level, procedures allowing him unrestrained physical contact with staff and other inmates demonstrate that he is not regarded as an imminent predatory risk. Indeed, Mr. Lawlor has twice been victimized by assaults from other inmates, but was not charged with a disciplinary violation in those incidents.

Interview summaries of corrections staff of the Fairfax County Adult Detention Center reflect

> descriptions of Mr. Lawlor being generally respectful, compliant, and non-threatening in his behavior/demeanor. None reported problems with him. The two disciplinary reports of the past 28 months involving verbal belligerence and noncompliance thus appear to be isolated incidents.

2. A single factor, having served a prior prison term, has been associated with an increased risk of violence in prison, relative to the low base rates. In Mr. Lawlor's case, however, this role of this factor is lessened by a productive and non-violent adjustment to that incarceration.

3. Research demonstrates that the seriousness of the offense of conviction is not a good indicator of prison misconduct or violence for male inmates (see Virginia DOC Inmate Classification System Evaluation, 2005). This is the conclusion of multiple studies, including a recent large scale comparison of the disciplinary misconduct and institutional assaults of murderers with other prison inmates (Sorensen & Cunningham, 2010). Offenders whose capital-eligible murders involved sexual offenses have *not* been demonstrated to be more violent in prison. Similarly, neither the method by which the victim is killed nor the associated "vileness" of the capital offense has been found to increase the risk of serious violence in prison.

4. There are other individualizing factors that can be specified in forecasting Mr. Lawlor's likelihood of serious violence in Virginia DOC.

a. *Convicted murderer:* A recent large-scale study demonstrates that convicted 1st degree

murderers have low rates of serious assault in prison, and that these rates are consistent with those of inmates convicted of other offenses (Sorensen & Cunningham, 2010).

b. *Convicted capital murderer:* Multiple group statistical studies indicate that the majority of individuals convicted of capital murder are not cited for violent misconduct in prison. This has been demonstrated for capital offenders serving life sentences (Cunningham, Reidy, & Sorensen, 2008). Similarly, group statistical data point to capital offenders representing better institutional assault risks than inmates serving shorter sentences.

c. *Long-term inmate or LWOP:* An 11-year comparative study of to life-without-parole (LWOP) inmates and parole-eligible inmates in a high security prison demonstrated that LWOP inmates were half as likely to be involved in assaultive misconduct (Cunningham, Sorensen, & Reidy, 2005). In another large scale study, LWOP inmates were not a disproportionate risk of prison violence as compared to inmates serving lengthy (10+ year) sentences (Cunningham & Sorensen, 2006; see also Virginia DOC Inmate Classification System Evaluation, 2005).

d. *Virginia DOC inmate:* Group data further demonstrate that rates of serious violent misconduct among inmates in Virginia DOC are quite low, including at the higher levels of security.

5. Several actuarial models are available to provide perspectives regarding both likelihood of assaultive

misconduct and comparative risk. In applying the latter two studies, it is important to note that lifetime risk is *not* a multiple of the time period specified in the study. Inmates who exhibit violence in prison tend to do so early in their sentences.

a. Applying group statistical data from a large-scale (*N*=6,390) study (Sorensen & Pilgrim, 2000) of assaultive conduct by convicted murderers in state prison, a convicted murderer would have the following probabilities of serious institutional violence across a capital life term: 16% any serious assault, 1% aggravated assault on staff, and .2% homicide of an inmate.

b. Utilizing data on 13,341 inmates entering state prison (Cunningham & Sorensen, 2006), inmates sharing predictive characteristics with Mr. Lawlor were in the best 2% (i.e., 98% of inmates are more likely to be involved in assaultive misconduct in the first year of confinement). In the risk group corresponding to Mr. Lawlor's characteristics, 4.9% engaged in assaultive misconduct and 95.1% did not.

c. Utilizing a study of capital offenders in state corrections custody (Cunningham & Sorensen, 2007), inmates sharing risk correlates with Mr. Lawlor were in the lowest risk of three groups, with 0% engaging in assaults and 0% engaging in serious assaults during prison tenures that averaged 2.37 years.

d. Utilizing a study of 110 capital offenders averaging over 18 years in state corrections custody (Cunningham, Sorensen, Vigen, &

> Woods, 2011), inmates sharing characteristics with Mr. Lawlor were in the lower of three risk groups, with 0% engaging in serious assaults.

7. The correlates of violence in the community, many of which are present in Mr. Lawlor's background, are distinct from factors associated with violence in prison. Among factors that are associated with violence in the community and found in Mr. Lawlor's history, but have not been demonstrated to predict violence in prison, are childhood trauma, instability, and maltreatment, as well as histories of substance abuse/dependence and the presence of personality disturbance. It is notable that Mr. Lawlor's misconduct and violence in the community have been associated with periods of poly-substance dependence, if not intoxication.

I anticipate that my testimony regarding the above will be accompanied by digital demonstrative PowerPoint exhibits.

Please advise me if additional information is desired. Thank you for your consideration.

Sincerely,

/s/

Mark D. Cunningham, Ph.D., ABPP

# MARK D. CUNNINGHAM, PH.D., ABPP

*Board Certified in Clinical Psychology – Board Certified in Forensic Psychology*
*American Board of Professional Psychology*

6860 North Dallas Parkway, Suite 200 Plano, Texas 75024
972-459-0658 Fax 972-395-3674 mdc@markdcunningham.com

*Licensed psychologist: Alabama #1564, Arizona #3662, Arkansas #98-17P, Colorado #2305, Connecticut #846, Idaho #PSY-379, Illinois #071-006010, Indiana #20041376A, Louisiana #794, New Mexico #0768, New York #017111, Oklahoma #1002, Oregon #1333, Pennsylvania #PS016942, South Carolina #764, Tennessee #2255, Texas #22351*


## CURRICULUM VITAE

Updated 01-31-11

## EDUCATION

**Postdoctoral:** Yale University School of Medicine, New Haven, Connecticut NIMH-sponsored training program, two years (part-time)

**Internship:** National Naval Medical Center, Bethesda, Maryland Specialty: Clinical Psychology, one year (APA accredited)

**Graduate:** Oklahoma State University, Stillwater, Oklahoma

*Doctor of Philosophy*
*Master of Science*
Specialty: Clinical Psychology
(APA accredited)

**Undergraduate:** Abilene Christian University, Abilene, Texas

*Bachelor of Arts*

Majors: Psychology, Mass Communications

## BOARD CERTIFICATIONS

Clinical Psychology: American Board of Clinical Psychology, a specialty board of the American Board of Professional Psychology (ABPP), Diploma #6462

Forensic Psychology: American Board of Forensic Psychology, a specialty board of the American Board of Professional Psychology (ABPP), Diploma #4551

## PROFESSIONAL PRACTICE

*Current:*

Clinical and Forensic Psychologist, independent practice Research Scientist

*Previous:*

Clinical Psychologist (Lieutenant, MSC, USNR), Naval Submarine Medical Center, CT (three years post-doctoral)

## AWARDS. DECORATIONS. AND DISTINCTIONS

*American Psychological Association Award for Distinguished Contributions to Research in Public Policy* – annual award bestowed for distinguished empirical and/or theoretical contribution to research in public policy, either through a single extraordinary achievement or a lifetime of work, 2006 recipient.

*Texas Psychological Association Award for Outstanding Contribution to Science* – annual award in recognition of significant scientific contribution in the discovery and development of new information, empirical or otherwise, to the body of psychological knowledge, 2005 recipient.

*National Association of Sentencing Advocates John Augustus Award* – annual award bestowed for outstanding contributions to the profession of sentencing advocacy, 2004 recipient.

*Al Brown Memorial Award* – award bestowed for outstanding achievement, National Institute of Mental Health (NIMH) Sex Therapy Training Program, Yale University School of Medicine.

*Navy Commendation Medal* – decoration for meritorious service as a clinical psychologist, Naval Submarine Medical Center, United States Navy.

*Fellow, American Psychological Association (Division 41: American Psychology-Law Society)* – distinction reflecting outstanding and uncommon contributions having national impact on the science and practice of psychology, 2007 election.

*Fellow, American Academy of Clinical Psychology* – distinction reflecting diplomate in clinical psychology by the American Board of Professional Psychology.

*Fellow, American Academy of Forensic Psychology* – distinction reflecting diplomate in forensic psychology by the American Board of Professional Psychology.

*Magna cum Laude* – Bachelor of Arts, Abilene Christian University.

## CURRENT PROFESSIONAL LICENSES

*Licensed Psychologist:*

| | | |
|---|---|---|
| Alabama #1564 | Arizona #3662 | Arkansas #98-17P |
| Colorado #2305 | Connecticut #846 | Idaho #PSY-379 |
| Illinois #071-006010 | Indiana #20041376A | Louisiana #794 |
| New Mexico #0768 | New York #017111 | Oklahoma #1002 |
| Oregon #1333 | Pennsylvania #PS016942 | South Carolina #764 |
| Tennessee #2255 | Texas #22351 | |

## PRIOR ACADEMIC APPOINTMENTS

Psychology Department Assistant Professor, two years post-USNR Hardin-Simmons University, Abilene, Texas

Psychology Department Instructor, three years (part-time): Old Dominion University (U.S. Submarine Base Extension); Mohegan Community College, Norwich, Connecticut

Psychology Department Teaching Assistant, three years (part-time) Oklahoma State University, Stillwater, Oklahoma

## PROFESSIONAL AFFILIATIONS

American Psychological Association – *Fellow* (Division 41)

American Board of Professional Psychology – *Diplomate (clinical, forensic)*

American Academy of Clinical Psychology – *Fellow*

American Academy of Forensic Psychology – *Fellow*
Workshop faculty, 1998-
ABFP examiner, 1996-2006

National Register of Health Service Providers in Psychology
Certificate of Professional Qualification in Psychology (CPQ) #1303
Texas Psychological Association
American Association for Intellectual and Developmental Disabilities

**EDITORIAL**

Consulting editor: *Assessment* (2006-)
Editorial board: *Open Access Journal of Forensic Psychology* (2009-)
Guest editor: *Journal of Psychiatry and Law* special issue, 2009)

Ad hoc reviewer: *Behavioral Sciences & the Law:* 2004, 2007, 2008, 2009, 2010
*Criminal Justice and Behavior: 2009*
*Criminal Justice Policy Review:* 2006
*Criminal Justice Review:* 2008
*Journal of Criminal Justice:* 2010
*Journal of Forensic Psychology Practice:* 2009
*Justice Quarterly:* 2009
*Law & Human Behavior:* 2004
*Personality Disorders: Theory, Research, and Treatment:* 2009
*Psychological Assessment:* 2010
*Psychology, Public Policy, and the Law:* 2009, 2010, 2011

*Southwest Journal of Criminal Justice:* 2007

Pre-publication book manuscript reviewer:
John Wiley & Sons, Inc. (2007)
Professional Resource Press (2003)
Southern Illinois University Press (2010)
Taylor & Francis (proposal, 2010)

## PUBLICATIONS

### *Books and edited volumes:*

1. Cunningham, M. D. (2010). *Evaluation for capital sentencing*. A volume in the *Oxford best practices in forensic mental health assessment* series, Series Editors: A. Goldstein, T. Grisso, and K. Heilbrun. New York: Oxford University Press.
2. Cunningham, M. D. (Ed.) (2009). Capital sentencing (special issue). *Journal of Psychiatry and Law, 37* (2-3).

### *Chapters in edited books:*

3. Cunningham, M. D. (2008). Competency to waive appeals. In B. L. Cutler (Ed.), *Encyclopedia of psychology and law* (pp. 123-125). Thousand Oaks, CA: Sage Publications.
4. Cunningham, M. D. (2008). Institutional misconduct among capital murderers. In M. DeLisi &P. J. Conis (Eds.), *Violent offenders: Theory, research, public policy, and practice*

(pp. 237-253). Boston: Jones & Bartlett Publishers.

5. Cunningham, M. D. (2007). Forensic psychology evaluations at capital sentencing. In R. L. Jackson (Ed.), *Learning forensic assessment* (pp. 211-238). Mahwah, NJ: Lawrence Erlbaum Associates, Inc.

6. Cunningham, M. D., & Goldstein, A. M. (2003). Sentencing determinations in death penalty cases. In A. Goldstein (Ed.), *Forensic psychology* (vol. 11 of 12) (pp. 407-436). I. Weiner (Ed.), *Handbook of psychology*. New York: John Wiley & Sons.

*Articles in peer-reviewed journals:*

7. Sorensen, J. R., Cunningham, M. D., Vigen, M. P., & Woods, S. O. (*in press*). Serious assaults on prison staff: A descriptive analysis. *Journal of Criminal Justice*, doi: 10.1016/j.jcrimjus.2011.01.002

8. Cunningham, M. D., Sorensen, J. R., Vigen, M. P., & Woods, S. O. (2011). Correlates and actuarial models of assaultive prison misconduct among violence-predicted capital offenders. *Criminal Justice and Behavior*, 38(1), 5-25. doi: 10.1177/0093854810384 830

9. Cunningham, M. D., Sorensen, J. R., Vigen, M. P., & Woods, S. O. (2010 – *on line first*). Life and death in the Lone Star State: Three decades of violence predictions by capital juries. *Behavioral Sciences & the Law.* doi: 10:1002/bsl.963

10. Cunningham, M. D., & Tasse, M. (2010). Looking to science rather than convention in adjusting IQ scores when death is at issue. *Professional Psychology: Research and Practice*, 41 (5), 413-419. doi: 10.1037/a0020226

11. Cunningham, M. D., Sorensen, J. R., Vigen, M. P., & Woods, S. 0. (2010). Inmate homicides: Killers, victims, motives, and circumstances. *Journal of Criminal Justice, 38 (A),* 348-358. doi:10.1016/j.jcrimjus.2010.03.008

12. Cunningham, M. D., & Sorensen, J. R. (2010). Improbable predictions at capital sentencing: Contrasting prison violence outcomes. *Journal of the American Academy of Psychiatry and the Law, 38 (I),* 61-72.

13. Sorensen, J. R., & Cunningham, M. D. (2010). Conviction offense and prison violence: A comparative study of murderers and other offenders. *Crime & Delinquency, 56(1),* 103-125. doi: 10.1177/0011128707307175

14. Cunningham, M. D., Sorensen, J. R., & Reidy, T. J. (2009). Capital jury decision-making: The limitations of predictions of future violence. *Psychology, Public Policy, and Law, 15(A),* 223-256. doi: 10.1037/a0017296

15. Cunningham, M. D. (2009). Introduction to special issue: Progress, perspectives, and best practices in capital sentencing evaluations. *Journal of Psychiatry and Law, 37* (2-3), 125-130

16. Macvaugh, G., & Cunningham, M. D. (2009). *Atkins v. Virginia:* Implications and

recommendations for forensic practice. *Journal of Psychiatry and Law, 37* (2-3), 131-187

17. Sorensen, J. R., & Cunningham, M. D. (2009). Once a killer always a killer? Prison misconduct of former death-sentenced inmates in Arizona. *Journal of Psychiatry and Law, 37* (2-3), 237-267

18. Kuanliang, A., Sorensen, J. R., & Cunningham, M. D. (2008). Juvenile offenders in an adult prison system: A comparative examination of rates and correlates of misconduct. *Criminal Justice and Behavior, 35* (9), 1186-1201. doi: 10.1177/0093854808322744

19. Cunningham, M. D., Reidy, T. J., & Sorensen, J. R. (2008). Assertions of "future dangerousness" at federal capital sentencing: Rates and correlates of subsequent prison misconduct and violence. *Law and Human Behavior, 32 (I),* 46-63. doi: 10.1007/sl0979-007-9107-7

20. Cunningham, M. D., & Sorensen, J. R. (2007). Capital offenders in Texas prisons: Rates, correlates, and an actuarial analysis of violent misconduct. *Law and Human Behavior, 31,* 553-571. doi: 10.1007/sl0979-006-9079-z

21. Cunningham, M. D., & Sorensen, J. R. (2007). Predictive factors for violent misconduct in close custody. *Prison Journal, 87 (2),* 241-253. doi: 10.1177/0032885507303752

22. Sorensen, J. R., & Cunningham, M. D. (2007). Operationalizing risk: The influence of measurement choice on the prevalence and

correlates of violence among incarcerated murderers. *Journal of Criminal Justice, 35,* 546-555. doi: 10.1016/j.jcrimjus.2007.07. 007

23. Cunningham, M. D. (2006). Dangerousness and death: A nexus in search of science and *reason. American Psychologist, 61* (8), 828-839. doi: 10.1037/0003-066X.61.8.827

24. Cunningham, M. D. (2006). Informed consent in capital sentencing evaluations: Targets and content. *Professional Psychology: Research and Practice, 37* (5), 452-459. doi: 10.1037/0735-7028.37.5.452

25. Cunningham, M. (2006). Special issues in capital sentencing. In Conroy, M. A., Lyons, P. M., Jr., & Kwartner, P. P. (Eds.). *Forensic mental health services in Texas* [special issue, electronic version]. *Applied Psychology in Criminal Justice, 2* (3), 205-236

26. Cunningham, M. D., & Sorensen, J. R. (2006). Actuarial models for assessment of prison violence risk: Revisions and extensions of the Risk Assessment Scale for Prison *(RASP). Assessment, 13* (3), 253-265. doi: 10.1177/1073191106287791

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31. Shuman, D. W., Cunningham, M. D., Connell, M. A., & Reid, W. H. (2003). Interstate forensic psychology consultations: A call for reform and proposal for a model rule. *Professional Psychology: Research and Practice, 34(3),* 233-239. doi: 10.1037/0735-7028.34.3.233

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33. Cunningham, M. D., & Vigen, M. P. (2002). Death row inmate characteristics, adjustment, and confinement: A critical review of the literature. *Behavioral Sciences & the Law, 20* (1-2), 191-210. doi: 10.1002/bsl.473

34. Cunningham, M. D., & Reidy, T. J. (2001). A matter of life or death: Special considerations and heightened practice standards in capital sentencing evaluations. *Behavioral Sciences & the Law, 19 (A),* 473-490. doi: 10.1002/bsl.460

35. Reidy, T. J., Cunningham, M. D., & Sorensen, J. (2001). From death to life: Prison behavior of former death row inmates in Indiana. *Criminal Justice and Behavior, 28*(1), 62-82

36. Cunningham, M. D., & Reidy, T. J. (1999). Don't confuse me with the facts: Common errors in violence risk assessment at capital sentencing. *Criminal Justice and Behavior, 26*(1), 20-43

37. Cunningham, M. D., & Vigen, M. P. (1999). Without appointed counsel in capital postconviction proceedings: The self-representation competency of Mississippi death row inmates. *Criminal Justice and Behavior, 26* (3), 293-321

38. Cunningham, M. D., & Reidy, T. J. (1998). Antisocial personality disorder and psychopathy: Diagnostic dilemmas in classifying patterns of antisocial behavior in sentencing evaluations. *Behavioral Sciences & the Law, 16 (3),* 333-351

39. Cunningham, M. D., & Reidy, T. J. (1998). Integrating base rate data in violence risk assessments at capital sentencing. *Behavioral Sciences & the Law, 16* (1), 71-95

40. Cunningham, M. D., & Murphy, P. J. (1981). The effects of bilateral EEG biofeedback on verbal, visual-spatial, and creative skills in learning disabled male adolescents. *Journal of Learning Disabilities, 14 (A),* 204-208

***Articles in edited legal journals:***

41. Lyon, A. D., & Cunningham, M. D. (2006) Reason not the need: Does the lack of compelling state interest in maintaining a separate death row make it unlawful?

*American Journal of Criminal Law, 33(1),* 1-30

***Case reports, teaching points, profiles, and other commentary:***

42. Cunningham, M. D. *(inpress).* [Professional profile]. In C. R. Bartol & A. M. Bartol (Eds.), *Introduction to Forensic Psychology: Research and Application, 3rd Edition.* Thousand Oaks, CA: Sage

43. Cunningham, M. D. (2010). [Professional profile]. In R. M. Regoli & J. D. Hewitt, *Exploring criminal justice: The essentials.* Boston: Jones & Bartlett Publishers

44. Cunningham, M. D. (2007) Capital violence risk assessment [case report]. In Mary A. Conroy & D. Murrie, *Forensic assessment of violence risk: A guide for risk assessment and risk management* (287-290). New York: John Wiley & Sons

45. Cunningham, M. D. (2002). Capital sentencing [case report]. In K. Heilbrun, G. Marczyk, & D. DeMatteo, *Forensic mental health assessment: A casebook* (152-171). New York: Oxford University Press

46. Cunningham, M. D. (2002). Competence to be executed [case report]. In K. Heilbrun, G. Marczyk, & D. DeMatteo, *Forensic mental health assessment: A casebook* (96-114). New York: Oxford University Press

47. Cunningham, M. D. (2002). How do you evaluate the accuracy of different sources of third-party information? [teaching point]. In K. Heilbrun, G. Marczyk, & D. DeMatteo, *Forensic mental health assessment: A casebook (111-113).* New York: Oxford

University Press

48. Cunningham, M. D. (2002). Why and how do you attribute information to sources in a forensic mental health assessment? [teaching point]. In K. Heilbrun, G. Marczyk, & D. DeMatteo, *Forensic mental health assessment: A casebook (1*14-115). New York: Oxford University Press

49. Cunningham, M. D. (1995-2005). Your move [weekly column]. *Abilene Reporter-News*

***Articles in professional periodicals:***

50. Cunningham, M. D. (2001). Bias in capital sentencing evaluations [invited opinion column]. *American Psychology and Law Society News, 21, 2,* 8-9

51. Cunningham, M. D., & Reidy, T. J. (1998). Antisocial personality disorder vs. psychopathy as diagnostic tools. *Prosecutor's Brief: California District Attorneys Association, 20,* 9-11

52. Marcy, M. R., Hopkins, J. B., & Cunningham, M. D. (1978). A behavioral treatment of nocturnal enuresis, *U.S. Navy Medicine, 69,* 26-28.

***Manuscripts in preparation:***

1. Cunningham, M. D. *(invited manuscript in preparation).* Evaluations at capital sentencing. In R. Roesch and P. Zapf (Eds.) *Forensic assessments in criminal and civil law: A handbook for lawyers.* New York: Oxford University Press

2. Cunningham, M. D. *(invited manuscript in preparation).* Inmates on death row. In L.

Gideon (Ed.) *Special needs offenders in correctional institutions.* Thousand Oaks, CA: Sage Publications

3.Cunningham, M. D. *(invited manuscript in preparation).* Untitled editorial. *Criminal Justice and Behavior*

4.Cunningham, M. D., & Goldstein, A. M. *(invited manuscript in preparation).* Sentencing determinations in death penalty cases. In R. Otto (Ed.), *Forensic psychology* (vol. 11 of 12). I. Weiner (Ed.), *Handbook of psychology,* 2nd *edition.* New York: John Wiley & Sons

5.Salekin, K., Derning, T., Macvaugh, G., & Cunningham, M. D. *(invited manuscript in preparation).* Relevance of other assessments. In *AAIDD Guide to Death Penalty Cases*

6.Tasse, M., Macvaugh, G., & Cunningham, M. D. *(invited manuscript in preparation).* Professional practice. In *AAIDD Guide to Death Penalty Cases*

7.Mintz, C, Cunningham, M. D., & Cunningham, M. B. *(manuscript in preparation).* Justice at 24 frames second: Victim impact and mitigation video in capital trials

8.Reidy, T. J., Sorensen, J. R., & Cunningham, M. D. *(manuscript in preparation).* The accuracy of juror predictions of future violence in Oregon death penalty trials.

## INVITED SCHOLARLY SYMPOSIA / ADDRESSES

1.Have credentials will travel: Questions and answers regarding interjurisdictional

practice. Symposium with Solomon M. Fulero, Ph.D., Alex M. Siegel, Ph.D., Joseph Rollo, Ph.D., and Joel A. Dvoskin, Ph.D., American Psychology-Law Society Annual Conference. San Antonio, Texas, March 2009

2. How research can inform death penalty determinations. Invited address. Sam Houston State University: Spring Colloquium. Huntsville, Texas, February 2009

3. Informed consent: Essential consultations with attorneys in death penalty cases. Invited seminar for doctoral psychology students. Sam Houston State University. Huntsville, Texas, February 2009

4. The role of the forensic psychologist in death penalty litigation. Presenter. American Academy of Forensic Psychology: Workshop Series. San Francisco, California, May 2008

5. Death penalty on trial. Symposium with Joel Dvoskin, Ph.D., Solomon Fulero, Ph.D., & Christopher Slobogin, J.D., Ph.D., American Psychological Association 115* Annual Convention. San Francisco, California, August 2007

6. Implications of developmental research for juvenile adjudications. Invited address. Alabama Council of Community Mental Health Boards, Southern Poverty Law Center: 33rd annual conference. Birmingham, Alabama, May 2007

7. The role of the forensic psychologist in death penalty litigation. Presenter. American Academy of Forensic Psychology: Workshop Series. San Diego, California, January 2007

8. Dangerousness and death: A nexus in search of science and reason. Invited award address, American Psychological Association 114th Annual Convention. New Orleans, Louisiana, August 2006

9. The role of the forensic psychologist in death penalty litigation. Presenter. American Academy of Forensic Psychology: Workshop Series. La Jolla, California, March 2005

10. Informed consent in forensic evaluations. Symposium with Mary Connell, Ph.D., William Foote, Ph.D., & Daniel Shuman, J.D., American Psychology-Law Society Annual Conference. LaJolla, California, March 2005

11. Psychological evaluations in death penalty litigation. Presenter. Texas Psychological Association, Pre-convention workshop. Dallas, Texas, November 2003

12. The role of the forensic psychologist in death penalty litigation. Presenter. American Academy of Forensic Psychology: Workshop Series. Cincinnati, Ohio, September 2003

13. Competency to be executed. Symposium with Stanley Brodsky, Ph.D. & Patricia Zapf, Ph.D., American Psychology-Law Society Annual Conference. Austin, Texas, March 2002

14. The role of the forensic psychologist in death penalty litigation. Presenter. American Academy of Forensic Psychology: Workshop Series. San Diego, California, February 2002

15. The role of the forensic psychologist in death penalty litigation. Presenter. American Academy of Forensic Psychology: Workshop

Series. Monterey, California, January 2000

16. Psychological expertise and criminal justice. Panel member. American Psychological Association / American Bar Association Conference. Washington, DC, October 1999

17. The role of the forensic psychologist in death penalty litigation. Presenter. American Academy of Forensic Psychology: Workshop Series. Austin, Texas, February 1999

18. The role of the forensic psychologist in death penalty litigation. Presenter. American Academy of Forensic Psychology: Workshop Series. Milwaukee, Wisconsin, March 1998.

## AMICUS CURIAE

*Consultation and assistance in preparation of:*

Brief of the *Amici Curiae* Texas Psychological Association and Texas Appleseed in Support of Appellant, *Noah Espada vs. The State of Texas,* in the Court of Criminal Appeals of Texas at Austin (2007).

Brief of *Amicus Curiae* American Psychological Association in Support of Defendant-Appellant, *U.S. v. Sherman Lament Fields* in the United States Court of Appeals for the Fifth Circuit (2005).

## TESTIMONY BEFORE COMMISSIONS AND LEGISLATIVE COMMITTEES

Texas State Senate, Criminal Justice Committee, 79th Legislative Session, Austin, 2005

Texas State Senate, Criminal Justice Committee, 78th Legislative Session, Austin, 2003

Illinois Governor's Commission on Capital Sentencing, Chicago, 2002

## Appendix G

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

| | |
|---|---|
| COMMONWEALTH OF VIRGINIA : | |
| | : |
| vs. | :Criminal No. FE 2009-304 |
| | : |
| MARK ERIC LAWLOR | : |
| Defendant. | :Proffer of Questions And |
| | :Answers For Witness, Dr. |
| | :Mark Cunningham |

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## PROFFER OF QUESTIONS AND ANSWERS FOR WITNESS DR. MARK CUNNINGHAM

Mark Lawlor, by counsel, submits this written proffer for purposes of the record in the above-styled matter. Specifically, it is noted that the Court precluded Lawlor's attorney from posing certain questions to Dr. Cunningham during Lawlor's examination attempts of the witness. Lawlor made his position and exception to the rulings known to Court at the time, and continues to maintain that the Court's rulings in this regard constitute reversible error. Lawlor files these papers now, not reargue the issues which the Court has already ruled on, but rather to make it clear on the record – and before Dr. Cunningham is released as a witness – what questions Lawlor would ask of the witness if not prevented by the Court. At counsel's request to the Court on the record at the conclusion of the witness's testimony, Dr. Cunningham remains subject to recall

in this matter; however, based on the Court's rulings which have precluded these questions, Lawlor will not recall Cunningham to ask the questions contained herein. For the record, the proffered questions and answers are:

1. Q: What is your expert opinion as to how Mark Lawlor's behavior pattern while 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.

2. Q: What is your expert opinion as to how Mark Lawlor's age impacts his future prison adaptability? Does that opinion take into account the fact that Mr. Lawlor committed his current crime at age 43?

   A: Because of Mark Lawlor's age of 45 years old, Mr. Lawlor represents a low likelihood of committing acts of violence while in prison. The fact that Mr. Lawlor committed his current offense at age 43 has been taken into account in forming this opinion, but it does not change my opinion about his future prison adaptability.

3. Q: What is your expert opinion as to how Mark Lawlor's education impacts his future prison adaptability? Is this risk factor

predictive of violence in the free community as well?

A: The fact that Mr. Lawlor has earned his G.E.D. is predictive of a low likelihood of committing acts of violence while in prison. This risk factor is far more predictive of violent conduct in the prison context than it is in the free community context.

4. Q: What is your expert opinion as to how Mark Lawlor's employment history impacts his future prison adaptability?

   A: Mark Lawlor's employment history in the community is predictive that Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.

5. Q: What is your expert opinion as to how Mark Lawlor's continued contact with his family and friends in the community impacts his future prison adapatability?

   A: Mark Lawlor's continued contact with these individuals while in prison, is predictive that Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.

6. Q: What is your expert opinion as to how Mark Lawlor's past correctional appraisal impacts his future prison adaptability?

   A: Mark Lawlors's past correctional appraisal is predictive that Mr. Lawlor

represents a low likelihood of committing acts of violence while in prison.

7. Q: What is your expert opinion as to how Mark Lawlor's lack of gang affiliation impacts his future prison adaptability?

   A: Mark Lawlors's lack of gang affiliation is predictive that Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.

8. Q: Have you reached an opinion, to a reasonable degree of psychological certainty, based on all of the factors relevant to your studies of prison risk assessment, as to what Mark Lawlor's risk level is for committing acts of violence while incarcerated? And if so, what is your opinion?

   A: Yes. It is my opinion based on my analysis of all of the relevant risk factors which are specific to Mr. Lawlor's prior history and background, that Mr. Lawlor represents a very low risk for committing acts of violence while incarcerated.

9. Q: Are all of your opinions concerning the above questions and answers about Mr. Lawlor, grounded in scientific research and peer-reviewed scientific literature?

   A: Yes.

Dr. Cunningham would then have described the bases for his expert opinions, which consist of scientific research he has personally conducted, as well as peer-reviewed scientific literature, all of which are commonly, consistently and reasonably relied upon by experts in his fields.

Respectfully submitted,

MARK LAWLOR
By Counsel

By: /ss/

/ss/

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**CERTIFICATE OF SERVICE**

We/I hereby certify that a true copy of the foregoing Motion was delivered and/or mailed, first class mail to:

Raymond F. Morrogh, Esquire
Casey Lingam, Esq.
Fairfax County Commonwealth's Attorney
4110 Chain Bridge Road
Fairfax, Virginia 22030

And the original was forwarded for filing to:

Hon. John T. Fey
Clerk
Fairfax County Circuit Court
4110 Chain Bridge Road
Fairfax, Virginia 22030

On this 10th day of March, 2011.

/s_____
/handwritten_____/ss/_____

# Appendix H

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

### U.S. Const. amend. VIII

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

### U.S. Const. amend. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### Va. Code § 18.2-31

The following offenses shall constitute capital murder, punishable as a Class 1 felony:

1. The willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit or with the intent to defile the victim of such abduction;

2. The willful, deliberate, and premeditated killing of

any person by another for hire;

3. The willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

4. The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery;

5. The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration;

6. The willful, deliberate, and premeditated killing of a law-enforcement officer as defined in § 9.1-101, a fire marshal appointed pursuant to § 27-30 or a deputy or an assistant fire marshal appointed pursuant to § 27-36, when such fire marshal or deputy or assistant fire marshal has police powers as set forth in §§ 27-34.2 and 27-34.2:1, an auxiliary police officer appointed or provided for pursuant to §§ 15.2-1731 and 15.2-1733, an auxiliary deputy sheriff appointed pursuant to § 15.2-1603, or any law-enforcement officer of another state or the United States having the power to arrest for a felony under the laws of such state or the United States, when such killing is for the purpose of interfering with the performance of his official duties;

7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction;

8. The willful, deliberate, and premeditated killing of

more than one person within a three-year period;

9. The willful, deliberate, and premeditated killing of any person in the commission of or attempted commission of a violation of § 18.2-248, involving a Schedule I or II controlled substance, when such killing is for the purpose of furthering the commission or attempted commission of such violation;

10. The willful, deliberate, and premeditated killing of any person by another pursuant to the direction or order of one who is engaged in a continuing criminal enterprise as defined in subsection I of § 18.2-248;

11. The willful, deliberate, and premeditated killing of a pregnant woman by one who knows that the woman is pregnant and has the intent to cause the involuntary termination of the woman's pregnancy without a live birth;

12. The willful, deliberate, and premeditated killing of a person under the age of fourteen by a person age twenty-one or older;

13. The willful, deliberate, and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism as defined in § 18.2-46.4;

14. The willful, deliberate, and premeditated killing of a justice of the Supreme Court, a judge of the Court of Appeals, a judge of a circuit court or district court, a retired judge sitting by designation or under temporary recall, or a substitute judge appointed under § 16.1-69.9:1 when the killing is for the purpose of interfering with his official duties as a

judge; and

15. The willful, deliberate, and premeditated killing of any witness in a criminal case after a subpoena has been issued for such witness by the court, the clerk, or an attorney, when the killing is for the purpose of interfering with the person's duties in such case.

If any one or more subsections, sentences, or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair, or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid.

### Va. Code § 19.2-264.2

In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

### Va. Code § 19.2-264.4

A. Upon a finding that the defendant is guilty of an

offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. Upon request of the defendant, a jury shall be instructed that for all Class 1 felony offenses committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

A1. In any proceeding conducted pursuant to this section, the court shall permit the victim, as defined in § 19.2-11.01, upon the motion of the attorney for the Commonwealth, and with the consent of the victim, to testify in the presence of the accused regarding the impact of the offense upon the victim. The court shall limit the victim's testimony to the factors set forth in clauses (i) through (vi) of subsection A of § 19.2-299.1.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) the defendant has no significant

history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense, or (vi) even if § 19.2-264.3:1.1 is inapplicable as a bar to the death penalty, the subaverage intellectual functioning of the defendant.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.