No. 13-167

IN THE

Supreme Court of the United States

MARK ERIC LAWLOR,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

REPLY BRIEF OF PETITIONER

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INTRODUCTION

At the sentencing phase below, the prosecution argued that Petitioner Mark Lawlor's history of violence – including the brutal murder for which the jury had just convicted him – made him likely to commit violence in the future. The defense, in turn, sought to present an evidence-based assessment, of unchallenged reliability, that Mr. Lawlor was extremely unlikely to commit violence in prison – where, by law, he would spend the rest of his life if not executed. The Supreme Court of Virginia ruled that, notwithstanding the guarantees of the federal Due Process Clause and Eighth Amendment, such evidence was inadmissible. And in defense of its rulings, it maintained that Virginia juries must determine merely whether the defendant "has the mental inclination" to commit violence in the future, Pet. App. 66a, without regard to any likelihood that such acts will actually occur.

The Commonwealth makes a variety of arguments against a grant of certiorari. None is persuasive.

ARGUMENT

1. The Commonwealth maintains that the decision below "certainly involved no issue of federal law, much less the question Lawlor now asks this Court to answer." Opp. 19. That is incorrect. At trial and on appeal, Mr. Lawlor maintained that exclusion of Dr. Cunningham's testimony violated his due process right to rebut the Commonwealth's evidence, as well as his Eighth Amendment right to

present evidence in mitigation. *See* Pet. 5 n.1, 6 n.2. Obviously apprehending that Mr. Lawlor had raised federal constitutional claims, the Supreme Court of Virginia began by canvassing this Court's due process and Eighth Amendment precedents. Pet. App. 64a-65a. Indeed, the court titled the two sections of its analysis "REBUTTING THE RISK OF FUTURE DANGEROUSNESS" and "MITIGATING EVIDENCE." *Id.* at 66a, 69a. And it concluded, notwithstanding Mr. Lawlor's federal constitutional arguments, that the evidence in question was inadmissible. *Id.* at 69a, 75a. The decision can be read only as a rejection of the federal constitutional claims.

To be sure, the court relied on Virginia's capital sentencing statute, as well as prior Virginia decisions, in rejecting these claims. *Id.* at 65a–72a. But that does not alter the fact that the court rejected them on their merits. Whether the court ultimately was *justified* in using the Virginia statute (or its own case law) to limit a defendant's federal constitutional right to introduce evidence in rebuttal or mitigation is ultimately a merits question. *Cf., e.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 313, 319-28 (1989) (holding that state law "special issues" were defined in a manner that unconstitutionally prevented the jury from giving effect to mitigating evidence). It is not a reason to conclude that the court decided no issue of federal law.

2. The Commonwealth also seeks to minimize the import of the decision below, or to suggest that

Virginia's position is not that extreme at all. These efforts are unpersuasive.

For instance, the Commonwealth asserts that the decision below "addressed no categorical rule regarding the inadmissibility of risk assessment evidence." Opp. 19. That is false. The decision could scarcely have been clearer: "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. Thus, an expert's testimony that a defendant poses minimal risk of violence in prison – the setting in which the defendant will necessarily find himself if spared the death penalty – *is categorically inadmissible* in rebuttal. Meanwhile, as to mitigation, it appears that any prison-specific assessment of the defendant's risk of violence is inadmissible if it is the product of a statistical model. *Id.* at 71a.

Alternatively, the Commonwealth repeatedly suggests that the decision below held only that evidence of prison security conditions is inadmissible. Opp. 9-10, 15-16, 33. Yet Mr. Lawlor did not seek to present testimony regarding prison security conditions; he sought to present testimony about *how he would likely behave* in prison. *See, e.g.*, Pet. App. 118a-119a. Consistent with this fact, the Virginia court did not limit its holdings to evidence of prison security conditions. Rather, as to rebuttal, the court held that a defendant has no right to introduce an expert's "opinion of [his] risk of

future violence in prison society only, rather than society as a whole." *Id.* at 69a. Meanwhile, as to mitigation, the court apparently recognized that the excluded testimony was evidence of Mr. Lawlor's "future adaptability" to prison – not evidence of prison security conditions – yet ruled it inadmissible because it was statistically derived. *Id.* at 70a; *see id.* at 71a-72a.[1]

The Commonwealth likewise is mistaken to suggest that earlier Virginia decisions somehow soften the impact of the decision below. For instance, the Commonwealth argues that *Andrews v. Commonwealth*, 699 S.E.2d 237 (Va. 2010), "expressly held that expert opinion on 'risk factors' is admissible as mitigation evidence." Opp. 22. Yet the cited holding had nothing to do with the risk of in-prison violence – or, indeed, with *any* prediction of future conduct by the defendant. *See* 699 S.E.2d at 276–77. The "risk factors" that *Andrews* addressed were ruled admissible "to explain Andrews' background and to show that the person he is today was the product of forces beyond his control." *Id.* at 277. The reason why the petition "fail[ed] to inform this Court" of *Andrews*' holding, Opp. 23, is that it has nothing to do with the question presented.

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[1] Equally meritless is the suggestion (Opp. 19) that review is unwarranted because the Virginia court applied an abuse-of-discretion standard. Mr. Lawlor's claim is that the courts below incorrectly decided a question of law – and a court necessarily abuses its discretion when it commits legal error. *See, e.g.*, *Koon v. United States*, 518 U.S. 81, 100 (1996).

The opposition also asserts that the decision below does not merit review because "Virginia's cases [do not] bar the jury from considering any relevant evidence; they provide the trial court with a measure for determining relevance." Opp. 21. That is sophistry. Mr. Lawlor's argument is that the "measure for determining relevance" articulated in Virginia's cases – culminating in the decision below – is itself unconstitutional and warrants review. The Commonwealth cannot insulate Virginia's decisions from scrutiny on the basis that they merely involve a "measure for determining relevance," any more than the respondent in *Skipper v. South Carolina* could prevail on the basis that the evidence excluded there was "irrelevant." 476 U.S. 1, 6–7 (1986); *see, e.g.*, *Smith v. Texas*, 543 U.S. 37, 43-48 (2004).

Edmonds v. Commonwealth, 329 S.E.2d 807 (Va. 1985), cited for the proposition that Virginia "long has upheld the admissibility of expert opinion on 'future dangerousness,'" Opp. 23, is of no more help to the Commonwealth. *Edmonds* upheld the *prosecution's* introduction of expert testimony on that score. That the prosecution is entitled to introduce such testimony merely accentuates the lopsided inequity in barring the defendant from introducing risk-assessment testimony focusing on the location where he will spend the rest of his life.[2]

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[2] Nor does *Porter v. Commonwealth*, 563 S.E.2d 415, 439 (Va. 2008) aid the opposition. *See* Opp. 23. Although *Porter* recited that a defendant's "adaptability" to prison life is relevant, the court here did the same thing (Pet. App. 70a) – and that did not

3. Meanwhile, even as it portrays Virginia as taking a more moderate approach than the decision below reflects, the opposition attempts to explain away other courts' cases that look favorably upon the introduction of prison-risk evidence. These efforts are unpersuasive. Notably, the opposition identifies no case from outside Virginia that excludes or sharply limits testimony about the defendant's own minimal risk of violence simply because it is specific to the prison setting.

a. In asserting consistency between the cases cited in the petition and the decision below, the opposition often fails to contend with what those cases say or with what the Virginia court held. In the limited space permitted for this reply, we offer several examples below.

The opposition asserts that Texas applies a rule "indistinguishable" from that articulated here. Opp. 24. That is false. Although Texas (like Virginia) has held that society encompasses both prison and free society, it has *not* held that, consequently, the defendant's right to introduce prison-specific evidence is nonexistent or sharply limited. To the contrary, Texas has gone so far as to hold that the prosecution's evidence may be insufficient if it is not specific to prison. *See Berry v. State*, 233 S.W.3d 847, 863 (Tex. Crim. App. 2007). It also has held that the defendant's specific risk of violence *in prison*

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stop it from largely excluding evidence-based assessments of in-prison risk.

"is a relevant, indeed important criterion" – a position incompatible with the Virginia court's determination to keep evidence of that risk from the jury. *Coble v. State*, 330 S.W.3d 253, 269 (Tex. Crim. App. 2010). And it is difficult to understand how *Garcia v. State*, 57 S.W.3d 436, 441 (Tex. Crim. App. 2001) could have deemed presentation of prison-risk evidence "sound trial strategy" if such evidence is not admissible in the first place.

As to Oklahoma, the opposition insists that *Rojem v. State*, 207 P.3d 385 (Okla. Crim. App. 2009) "did not decide the admissibility, or relevance, of Dr. Cunningham's testimony." Opp. 27. It nowhere mentions the appellate court's ruling that the trial court had improperly effected a "blanket prohibition of relevant and admissible demonstrative evidence," *Rojem*, 207 P.3d at 391 – a conclusion flatly at odds with the Virginia court's position.

The opposition claims that Oregon's cases are consistent with Virginia's because in assessing future dangerousness, Oregon juries "may consider the threat to prison society." Opp. 30 (quoting *State v. Douglas*, 800 P.2d 288, 296 (Or. 1990)). The Commonwealth's argument thus is that Virginia is entitled to exclude prison-risk evidence because Virginia juries are *not* permitted to consider a defendant's threat to prison society. That extreme position, under which a jury is barred from considering the defendant's risk in the only setting where he will live, merely reinforces Virginia's outlier status. *Compare State v. Sparks*, 83 P.3d 304 (Ore. 2004) (reaffirming that "whether a defendant

will be a danger to 'society' includes the consideration of whether that defendant will be a danger to prison society" and holding evidence of threat to prison society admissible).

With respect to the federal system, meanwhile, the opposition highlights two appellate decisions declining to limit the jury's consideration to evidence of in-prison dangerousness. Opp. 35. But Mr. Lawlor's position is not that a jury may consider *only* evidence of in-prison dangerousness; it is that such evidence may not be *excluded* from the jury's consideration. As the petition explained, these cases' recognition of the prison context's centrality is inconsistent with Virginia's sharp limits on the admissibility of prison-specific testimony. Pet. 27.

b. More generally, the opposition argues that many cases cited in the petition did not squarely rule on the admissibility of prison-risk evidence. *See, e.g.*, Opp. 25–28, 32. With respect to these cases, however, some appear to regard it as obvious that such evidence is admissible. *See, e.g.*, *State v. Campbell*, 765 N.E.2d 334, 341, 343 (Ohio 2002); *State v. Douglas*, 800 P.2d 288, 296 (Ore. 1990); *Milam v. State*, 2012 WL 1868458, at *13-*14 (Tex. Crim. App. 2012). Others, meanwhile, are impossible to square with Virginia's position that evidence of in-prison risk is always inadmissible as rebuttal, and often inadmissible as mitigation. *See, e.g.*, *State v. Henry*, 604 S.E.2d 826, 829 (Ga. 2004); *Underwood v. State*, 252 P.3d 221, 252–53 (Okla. Crim. App. 2011); *Hanson v. State*, 206 P.3d 1020, 1030–31 (Okla. Crim. App. 2009); *In re Yates*, 296

P.3d 872, 894, 901 (Wash. 2013). In any event, to the extent that the admissibility of prison-specific future dangerousness evidence has not squarely come before other courts of last resort, that likely is because existing case law makes it plain to lower courts that such evidence should be admitted as a matter of course. *See* Pet. 19-38. It is not a reason to deny certiorari, or to conclude that Virginia is in the mainstream.

c. Nor do variations in the language of different sentencing statutes make Virginia any less of an outlier. *See* Opp. 21, 23, 37. Regardless of the specific language that different statutes use – or, indeed, whether they expressly incorporate the concept of future dangerousness at all – the fact remains that juries nationwide routinely choose whether to impose death sentences based on a "prediction of future criminal conduct." *Jurek v. Texas*, 428 U.S. 262, 275 (1976); *see* Pet. 13-14. As the petition demonstrates, Virginia is alone in sharply limiting the evidence that the defendant can present to persuade the jury that his risk of future violence is minimal.

d. Finally, the opposition distinguishes this Court's own cases in only the most literal sense. *See* Opp. 19-20. Most notably, it makes no attempt to grapple with the Court's recognition that the prison setting must be central to any prediction of future dangerousness. As to due process, the Commonwealth nowhere addresses *Skipper*'s holding that "evidence of [a defendant's] probable future conduct in prison" is admissible whenever the

prosecution relies on a prediction of future dangerousness to seek death. 476 U.S. at 4–5. And as to the Eighth Amendment, the Commonwealth nowhere addresses *Skipper*'s recognition that "evidence that the defendant would not pose a danger if spared (but incarcerated)" is constitutionally protected mitigating evidence. *Id.* at 5.

4. The Commonwealth next argues that Mr. Lawlor's claims are "moot" because some of Dr. Cunningham's testimony was admitted without objection. As the petition explained, however, the Virginia Supreme Court declined the Commonwealth's plea to resolve the case on that basis. Pet. 29-30; *see* Brief of Commonwealth at 37, *Lawlor v. Commonwealth*, No. 120481 (Va. Aug. 6, 2012). Nor should this Court be led astray by the fact that Dr. Cunningham managed to offer some limited testimony.

For one thing, the record overwhelmingly is one of the jury being told *not to consider* the testimony that the Commonwealth cites. For instance, the Court struck Dr. Cunningham's testimony as to Mr. Lawlor's low likelihood of violence "if he were to be sentenced to life imprisonment rather than death," Pet. App. 158a-160a; did the same for his testimony as to Mr. Lawlor's likelihood of violent acts "if in a prison environment," *id.* at 161a-163a; and reprimanded him in open court for identifying Mr. Lawlor's age as "the most powerful factor in identifying his likelihood of serious violence in prison," *id.* at 177a; s*ee* Pet. 29-30 & n.5 (cataloging

similar rulings in jury's presence); *see also* Pet. 5 (citing to court rulings excluding Dr. Cunningham's testimony). The unmistakable message to the jury was that any evidence of Mr. Lawlor's low risk of violence *in prison* was to be disregarded.

For another thing, the testimony that Dr. Cunningham presented was only a small part of what was proffered. Dr. Cunningham was able to testify about Mr. Lawlor's correctional history, and was permitted to offer a limited explanation of the factors supporting his risk assessment. But for an expert testifying about a capital defendant's risk of future violence, it is insufficient to merely discuss the defendant's correctional history, or to offer a bare-bones opinion about his risk of future violence. Having just convicted the defendant of capital murder, a sentencing jury will naturally discount his earlier good behavior in prison – and will look askance at an expert opinion asserting that his likelihood of future violence is low, unless that opinion is fully explained. Here, Dr. Cunningham managed to offer – at most – a minimally supported opinion about Mr. Lawlor's risk of in-prison violence. Particularly in view of the trial court's repeated admonitions that this risk was irrelevant, Dr. Cunningham's limited testimony does not make this case a poor vehicle to consider the question presented.

5. Finally, the Commonwealth wrongly argues that the jury's finding of the vileness aggravator insulates Mr. Lawlor's death sentences and thus makes this case unsuitable for review.

In particular, the Commonwealth's argument grossly misreads *Zant v. Stephens*, 462 U.S. 862 (1983), and *Tuggle v. Netherland*, 516 U.S. 10 (1995). *Zant* "held that a death sentence supported by multiple aggravating circumstances need not always be set aside" if one aggravator is held infirm. *Tuggle*, 516 U.S. at 11 (describing *Zant*). Whether to set the death sentence aside, however, depends on the *reasons* for which that aggravator cannot stand. In *Zant*, which addressed an aggravator's facial invalidity, there had been "no claim that inadmissible evidence was before the jury during its sentencing deliberations or that the defendant had been precluded from adducing relevant mitigating evidence." *Tuggle*, 516 U.S. at 13. *Tuggle*, by contrast, involved evidentiary limitations: the defendant there had been "prevented . . . from developing his own psychiatric evidence to rebut the Commonwealth's evidence and to enhance his defense in mitigation." *Id.* As the Court explained, "the absence of such evidence may well have affected the jury's ultimate decision . . . to sentence petitioner to death rather than life imprisonment." *Id.* at 14.

This case is just like *Tuggle*: Mr. Lawlor was unconstitutionally prevented from introducing evidence that would have "rebut[ted] the Commonwealth's evidence" in aggravation. *Id.* at 13. Further, as in *Tuggle*, the excluded evidence would have "enhance[d] his defense in mitigation." *Id.* The vileness determination therefore does not prevent reversal and, accordingly, does not make this case a poor vehicle for considering the question presented.

Still, the Commonwealth seeks to limit *Tuggle* to violations of the defendant's right under *Ake v. Oklahoma*, 470 U.S. 68 (1985), to have a psychiatrist appointed to develop evidence in his favor. But the *reason* why the *Ake* error potentially warranted reversal in *Tuggle* was that "the absence of such evidence may well have affected the jury's ultimate decision, based on all of the evidence before it, to sentence petitioner to death rather than life imprisonment." *Tuggle*, 516 U.S. at 14. As evidenced by the jury's keen focus on how to take account of the prison setting when assessing Mr. Lawlor's dangerousness, *see* Pet. 7, that is equally true here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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