

May 2014

Death by Irrelevance: The Unconstitutionality of Virginia's Continued Exclusion of Prison Conditions Evidence to Assess the Future Dangerousness of Capital Defendants

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**DEATH BY IRRELEVANCE: THE UNCONSTITUTIONALITY
OF VIRGINIA’S CONTINUED EXCLUSION OF PRISON
CONDITIONS EVIDENCE TO ASSESS THE FUTURE
DANGEROUSNESS OF CAPITAL DEFENDANTS**

Andrew Lindsey*

This Note argues that Virginia statutory and case law requiring the exclusion of prison conditions evidence in capital trials where the jury must determine defendants’ future dangerousness is unconstitutional. In Part I, I present certain portions of a hypothetical capital trial in Virginia to introduce readers to the concepts of prison conditions evidence and future dangerousness, and why they are important to capital defendants. In Part II, I trace the development of the constitutional right that is violated by the exclusion of this evidence, as well as how Virginia has come to justify its exclusionary stance based on a flawed standard of evidentiary irrelevance. In Part III, I present various legal and logical arguments against this standard of irrelevance. In Part IV, I offer explanations as to why this standard of irrelevance has remained uncorrected, and draw conclusions about a potential solution.

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* I owe special thanks to Doug Wham (former Deputy Capital Defender for the Central Region of Virginia) and David Bruck (Clinical Professor of Law at Washington & Lee). Their initial and ongoing guidance regarding my position on this topic was an invaluable source of input which I could not have done without. I also want to thank David Baugh (former Capital Defender of the Central Region of Virginia) and Mason Lowe (Legal Writing Professor at William & Mary) for their encouragement along the way.

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I.

A. A Hypothetical Illustration of What Prison Conditions Evidence Is and How It Relates to Future Dangerousness in a Capital Trial

Imagine you are a criminal defense lawyer in Virginia. One day you end up representing a Virginia resident in his late sixties who is on trial for capital murder.¹ The indictment alleges that your client abducted a little girl in his neighborhood and committed acts of sexual misconduct with her before ultimately strangling her with a plastic bag and burying her body in a nearby patch of woods.² The Assistant Commonwealth Attorney prosecuting the case has a considerable amount of evidence against your client, and the jury eventually produces a guilty verdict despite your best efforts to raise a reasonable doubt that your client committed the crime. At this point, the trial procedurally shifts from what is commonly referred to as the “guilt phase” to the “penalty phase”³—the difference being that in the guilt phase the jury is only deciding whether your client committed the crime and in the penalty phase it is only deciding what his punishment should be for that crime.⁴

In the penalty phase, the prosecution will have to prove at least one of two sentencing factors (known as “aggravators”) before the jury can impose a death sentence;⁵ either that the defendant would probably pose a “continuing serious threat

¹ The Virginia Code lists the fifteen different ways one can commit “capital murder” in Virginia, which (like in many other states) is an offense that is punishable either by execution or life imprisonment without the possibility of parole. *See* VA. CODE ANN. § 18.2-31 (2012); *see also* VA. CODE ANN. § 18.2-10 (2012); VA. CODE ANN. § 19.2-264.4 (2010).

² Under Section 18.2-31 this could qualify either as “[t]he 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,” or “[t]he willful, deliberate, and premeditated killing of a person under the age of fourteen by a person age twenty-one or older.” § 18.2-31.

³ This is also referred to as the “sentencing phase,” and I use these terms interchangeably throughout this paper.

⁴ This procedural division of capital trials is known as “bifurcation,” and it is done in an attempt to protect defendants from hasty or overly impassioned jury sentences that do not properly account for reasons why a particular defendant’s life should be spared. Bifurcation is statutorily required in Virginia under Section 19.2-264.4.

⁵ This does not mean, however, that the jury *must* impose a sentence of death once either of these aggravators is proven. Even if both aggravators are proven, it would be unconstitutional to require a death sentence in any capital trial. *See* *Gregg v. Georgia*, 428 U.S. 153,

to society” if imprisoned for life, or that his conduct in committing the crime “was outrageously or wantonly vile.”⁶ The former is referred to as the “future dangerousness aggravator” and is a typical aggravator included in several state capital sentencing statutes.⁷ The latter aggravator is referred to as the “vileness aggravator”⁸ but is less important for purposes of this paper.

To cover his tracks, the prosecutor attempts to prove that both aggravators apply to your client in case you are successful in disputing one of them. One way to successfully dispute these aggravators would be to present countervailing sentencing factors known as “mitigators,” which are facts such as a defendant’s lack of a significant prior criminal record or the defendant’s age at the time he committed the offense.⁹ These factors are the opposite of aggravators because they are reasons why a defendant should be spared from a death sentence.¹⁰ Another way to dispute aggravators would be to directly rebut the application of them to your client by proving that he neither committed his crime in a particularly vile way nor is he a future danger to society.¹¹

Attempting to save your client’s life by killing two birds with one stone, you approach the jury box and make the following remarks:

Ladies and gentlemen, no one can dispute the fact that the victim suffered a disturbingly tragic fate at the hands of my client, but he is now nearing his seventieth birthday and has an otherwise pris-

177–78 (1976) (plurality opinion); *see also infra* Part II.A.

⁶ § 19.2-264.4. The necessity of proving definable aggravators to the sentencer before executing a defendant is a central development of constitutional jurisprudence under the Eighth Amendment’s proscription of cruel and unusual punishment, which prohibits juries from imposing death sentences in an arbitrary or capricious manner. *See generally infra* Part II.A (discussing the historical development of capital jurisprudence beginning in the late 1900s).

⁷ For an example of another state’s statutory formulation of this aggravator, see TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2013) (“[W]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society . . .”). Virginia’s formulation in Section 19.2-264.4 used to be identical to Texas’s formulation. *See Smith v. Commonwealth*, 248 S.E.2d 135, 148 (Va. 1978) (stating that Virginia’s statutory “language defining the first aggravating circumstance, *i.e.*, the potential ‘dangerousness’ of the defendant, is identical to that in the Texas statute upheld in *Jurek [v. Texas]*”).

⁸ *See generally* Douglas R. Banghart, *Vileness: Issues and Analysis*, 12 CAP. DEF. J. 77 (1999).

⁹ *See* VA. CODE ANN. § 19.2-264.4(B) (2010).

¹⁰ *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (describing a “mitigating factor” as “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”).

¹¹ Although the distinction illustrated here between mitigating against capital aggravators and rebutting capital aggravators is important in some legal and strategic contexts, *see, e.g., infra* note 75 and accompanying text, it is not consequential in terms of the constitutional right to due process and I generally mention these concepts interchangeably throughout this paper.

tine legal record. Execution is not your only option for punishing this man, and it is unnecessary for two people to die from this crime instead of one. Instead, you can sentence him to live out the rest of his few remaining years under maximum security in a state prison without the possibility for parole,¹² where he will have no access to plastic bags or children, and where his pedophilia will not pose a danger to other adult male inmates or armed prison guards. In a minute I will call an officer from the Virginia Department of Corrections to the stand to explain that under maximum security conditions, my client will not have a cellmate, and will not be let out of his cell for more than a few hours a day.¹³

You are interrupted mid-sentence as the prosecutor suddenly rises to his feet and states:

Your honor, I object to counsel's comments about prison guards, other inmates, and his proposed witness testimony on general prison protocols. This amounts to evidence of what prison life is like for any defendant sentenced to life in prison for any Class 1 felony in this state, and the Virginia Supreme Court has made clear through numerous decisions¹⁴ that this kind of evidence is completely irrelevant to sentencing. I further request that these remarks be stricken from the record and that defense counsel be prevented from presenting any more evidence that does not relate uniquely to this defendant or his crime.

As you begin to respond to the objection the judge halts you and orders the jurors to take a ten-minute recess so that they do not incidentally hear anything more of what you might say. Once they have exited the courtroom the judge signals for you to proceed with your response:

Your honor, opposing counsel has explicitly argued to the jury that my client will pose a serious future danger to society if he is allowed to remain alive in our state prison system, and nothing

¹² Informing a jury that a life imprisonment sentence for a capital offense carries no possibility for parole under state law has been recognized as a constitutional right for capital defendants. See *infra* Part III.A.

¹³ See generally *U.S.: Red Onion State Prison: Super-Maximum Security Confinement in Virginia*, HUMAN RIGHTS WATCH (May 1, 1999), <http://www.unhcr.org/refworld/docid/3ae6a84f8.html> (describing the treatment of inmates in Virginia's "super-maximum security" prisons).

¹⁴ These decisions are comprehensively surveyed in Part II.B.

could be more relevant in disputing this contention than the actual security conditions that he will be subjected to while incarcerated. Short of breaking out of prison, how is an elderly man like my client going to harm anyone further if he doesn't have a cellmate and is locked down for twenty-something hours a day in nearly complete isolation? This is central to my client's defense, and he has a constitutional right to rebut the prosecution's case under the Due Process Clause of the Fourteenth Amendment.¹⁵

Acknowledging your response, the judge replies:

Counselor, I see where you are coming from, but opposing counsel is absolutely right that this sort of general evidence about prison life for inmates has been ruled irrelevant on every single occasion the Virginia Supreme Court has addressed the matter. These decisions are clear and I have to follow them, so I'm going to sustain the objection. If you have any other evidence that pertains directly to your client's criminal record, character, or the circumstances of his offense, you are free to present it to the jury.¹⁶

Having none, you finish presenting the rest of your mitigation evidence, and rest your case. At the conclusion of the penalty phase, the jury retires to another room to begin deliberating the verdict. It is not long before you see the bailiff being summoned back-and-forth between the deliberation room and the judge's bench carrying pieces of paper in his hand. You are informed that he is passing handwritten notes from the jurors to the judge, asking specific questions about the conditions of incarceration that they want to know before sentencing your client.¹⁷ The questions ask things like, "Will the defendant ever share a prison cell with another inmate?"; "How much free time will the defendant be able to spend outside of his cell per week?"; and "Will the defendant ever be allowed to mix with the general inmate

¹⁵ The development of the due process "right to rebut" and its implications for introducing evidence of prison conditions in Virginia are examined in Parts II and III, respectively.

¹⁶ These are the only three categories of evidence that are considered to be legally relevant in Virginia for proving or disproving the future dangerousness aggravator. *See infra* Part II.B; *see also* VA. CODE ANN. § 19.2-264.4(C) (2010) (explicitly mentioning "evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused").

¹⁷ This process of jurors sending inquiries to the judge during deliberations about matters they are still unsure of after the close of the evidence is not an infrequent occurrence in capital trials, and defendants have a Sixth Amendment right to be notified of the judge's responses. *See Rogers v. United States*, 422 U.S. 35, 39-40 (1975).

population during meals, showers, or leisure time?”¹⁸ You repeat your request to introduce evidence on these questions before the court, and the judge again denies your request. Instead, he issues the following response to the jury:

All the information I can provide concerning the potential consequences of the sentence you choose for the defendant is set forth in the jury instructions you were given. Further information about the incarceration conditions that the defendant would be subjected to as a consequence of his sentence is not a proper issue for your consideration, and you are accordingly instructed not to give any weight to such information—whether based on personal speculation or comments made by counsel—during your deliberations.¹⁹

An hour or so later the jurors file back into the courtroom and take their seats while the person they elected to be their foreman hands their verdict to the judge. You and your client remain standing as the judge announces that the jury, having found the future dangerousness aggravator to have been proven beyond a reasonable doubt based on the evidence before it, has sentenced your client to be executed by intravenous injection. As court personnel handcuffs your client and begin to escort him out of the room, you look at him for the last time and wish him luck in his continued struggle to avoid death at the hands of the law. You both know that you fought your hardest, and that his sentence would probably be different had you been able to present your prison conditions evidence to the jury. Your client will probably appeal both his conviction and his sentence—delaying his scheduled execution by approximately five to six years²⁰—and the impropriety of the trial judge’s exclusion of the prison conditions evidence will be one of the many arguments his appellate lawyers make for reversing his death sentence. You head back to your office to get started on the next case, hoping that the Constitution is that much stronger by the time your client’s case reaches the Supreme Court of Virginia for review.²¹

¹⁸ These questions are modeled after jury inquiries from a capital case in South Dakota. *See Rhines v. Weber*, 608 N.W.2d 303, 310 (S.D. 2000). For an example of jury inquiries about future dangerousness in a Virginia capital case, see *Bell v. Commonwealth*, 563 S.E.2d 695, 716 (Va. 2002).

¹⁹ This response instruction is jointly modeled after the response instructions given in the cases mentioned in the previous footnote, *see Rhines*, 608 N.W.2d at 310; *Bell*, 563 S.E.2d at 716, as well as the trial that led to the famous future dangerousness case of *Simmons v. South Carolina*, 512 U.S. 154, 160 (1994), discussed *infra* Part III.A.

²⁰ *See* Charlene Hall, *Capital Offense Conviction Appeals Process in Virginia*, PRO-DEATH PENALTY.COM, <http://www.prodeathpenalty.com/virginia/capitalappeals.html> (last visited Apr. 15, 2014).

²¹ *See id.* (“A defendant who is sentenced to death is [statutorily] entitled to an automatic appeal to the Supreme Court of Virginia.”).

II.

A. The General Constitutional Right to Rebut in Capital Cases

The right of a defendant to “respond to the . . . case against him”²² is perhaps the most intuitive and necessary right of any regime with an adversarial legal system. Without this basic right, it would be impossible to justify the deprivation of life, liberty, or property upon any notion of fairness, as litigation would be a one-sided charade. In the criminal context, “this right to rebut the prosecutor’s arguments is a ‘hallmar[k] of due process’”²³ and thus a “‘fundamental constitutional right.’”²⁴ Due to the age and breadth of this right, its specific guarantees were never comprehensively delineated by a single landmark case. Instead, numerous formulations of its guarantees were developed over time²⁵ that came to embrace other related provisions of the Constitution.²⁶

There are many ways that the right to rebut can be violated, but the classic violation that arises in the context of evidentiary rulings is when the prosecution is “permitted to exclude competent, reliable[, and exculpatory] evidence . . . [which] is central to the defendant’s claim[s] . . . [i]n the absence of any valid state justification [for] exclusion.”²⁷ Federal and state rules of evidence contain justifications for excluding evidence in criminal and civil litigation,²⁸ and the right to rebut does not override these rules when they are properly designed and applied.²⁹ But these rules become constitutionally invalid when they are “arbitrary” or “disproportionate to the purposes they are designed to serve,” and they “infringe[] upon a weighty interest of the accused.”³⁰ Avoiding a government-imposed death is arguably the weightiest

²² *O’Dell v. Netherland*, 521 U.S. 151, 171 (1997) (Stevens, J., dissenting).

²³ *Id.* (quoting *Simmons v. South Carolina*, 512 U.S. 154, 175 (1994) (O’Connor, J., concurring)).

²⁴ *Id.* (quoting *Crane v. Kentucky*, 476 U.S. 683, 687 (1986)).

²⁵ *See, e.g.*, *California v. Trombetta*, 467 U.S. 479, 485 (1984) (restating the right as “a meaningful opportunity to present a complete defense”); *In re Oliver*, 333 U.S. 257, 273 (1948) (restating the right as a defendant’s “opportunity to be heard in his defense”).

²⁶ *See, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” (quoting *Crane*, 476 U.S. at 690) (internal quotation marks omitted)).

²⁷ *Crane*, 476 U.S. at 690.

²⁸ *See, e.g.*, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS* 2–4 (7th ed. 2011). One of these justifications is irrelevance. *Id.* at 49.

²⁹ *Id.* at 760–61 (giving various examples of when evidentiary concerns for reliability and the integrity of the attorney-client privilege can trump the right to rebut).

³⁰ *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

legal interest of all, and evidence rules inflict the ultimate evidentiary injustice when they improperly exclude evidence that could have saved a defendant's life.

Consequently, capital defendants are viewed as the most in need of constitutional protections during trial,³¹ and they retain the right to rebut in sentencing proceedings.³² For most of our nation's history, states were permitted to conduct the capital-sentencing process in a highly unrestricted manner, and the imposition of death sentences became so unguided and comparatively erratic that the Supreme Court eventually declared the states' administration of the death penalty unconstitutional.³³ In the wake of this monumental decision, states attempted to salvage their invalidated capital punishment schemes by amending their criminal codes to provide greater procedural protections for capital defendants.³⁴ These procedural protections

³¹ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion) ("There is no question that death as a punishment is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to insure that every [constitutional] safeguard is observed." (citations omitted)).

³² See *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) ("[T]he [capital] sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.").

³³ *Furman v. Georgia*, 408 U.S. 238 (1972) (plurality opinion). As one of the Justices phrased it:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968 . . . the petitioners are among a capriciously selected random handful upon whom the sentence of death has . . . been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Id. at 309–10 (Stewart, J., concurring). This oscillating justification between the Eighth and Fourteenth Amendments for the Court's inroads against states' capital practices has largely endured, and is a primary reason why many of the Court's capital decisions continue to feature complicated, narrow holdings comprised of shifting pluralities and coalitions of Justices. For an example of this in the context of future dangerousness cases, see *Simmons v. South Carolina*, 512 U.S. 154, 179–80 (1994) (Scalia, J., dissenting) ("[R]egard[ing] . . . the new schemes of capital sentencing imposed upon the States by this Court's recent [future dangerousness] jurisprudence . . . [t]he opinions of Justice BLACKMUN and Justice O'CONNOR rely on the Fourteenth Amendment's guarantee of due process, rather than on the Eighth Amendment's 'cruel and unusual punishments' prohibition, as applied to the States by the Fourteenth Amendment. But the prior law applicable to that subject indicates that petitioner's due process rights would be violated if he was 'sentenced to death on the basis of information which he had no opportunity to deny or explain.' . . . Both opinions try to bring this case within that description, but it does not fit." (citations omitted)).

³⁴ See *Gregg*, 428 U.S. at 179–80 (stating that as part of "the legislative response to *Furman* . . . [t]he legislatures of at least 35 States have enacted new statutes that provide for the death penalty These recently adopted statutes have attempted to address the concerns expressed by the Court in *Furman* primarily (i) by specifying the factors to be weighed

ushered in standard features of state capital trials and sentencing proceedings as they are conducted today, such as bifurcation of the guilt and penalty phases, and the creation of statutory aggravators and mitigators to reasonably confine the penal discretion of the sentencer.³⁵ Automatic appellate review after a capital conviction was also implemented by some states to further protect capital defendants.³⁶

These additional protections further entailed corresponding expansions of the types of evidence available for capital defendants to use in their defense.³⁷ Although some states' statutes were again invalidated in a subsequent, related case despite their enacted reforms,³⁸ the Justices devoted notable portions of that opinion for acknowledging that their prior decision was an enormously disruptive judicial intrusion into traditional areas of state power, and indicated hesitance to ever produce another capital decision of such magnitude again.³⁹ Accordingly, the Court has since

and the procedures to be followed in deciding when to impose a capital sentence, or (ii) by making the death penalty mandatory for specified crimes"); see also Jason J. Solomon, *Future Dangerousness: Issues and Analysis*, 12 CAP. DEF. J. 55 (1999) ("In 1976, the waves created by *Furman v. Georgia* were cascading across the land. States faced with emptied death rows scrambled to find constitutionally acceptable ways to impose the ultimate punishment.").

³⁵ See *Gregg*, 428 U.S. at 162–64 ("[T]he Georgia statutory scheme for the imposition of the death penalty . . . as amended after our decision in *Furman* [now provides that] . . . [t]he capital defendant's guilt or innocence is determined . . . in the first stage of a bifurcated trial [after which] . . . [t]he judge [or jury] shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas The judge [or jury] shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed." (citations omitted) (internal quotation marks omitted)).

³⁶ Elizabeth S. Vartkessian, *What One Hand Giveth, the Other Taketh Away: How Future Dangerousness Corrupts Guilty Verdicts and Produces Premature Punishment Decisions in Capital Cases*, 32 PACE L. REV. 447, 449 n.9 (2012). As mentioned *supra* in note 21, Virginia is one of these states.

³⁷ *Gregg*, 428 U.S. at 164 ("The defendant is accorded substantial latitude as to the types of evidence that he may introduce. Evidence considered during the guilt stage may be considered during the sentencing stage without being resubmitted.").

³⁸ See *id.* at 227 (Brennan, J., dissenting); see also Adam L. VanGrack, *Serious Error with "Serious Error": Repairing A Broken System of Capital Punishment*, 79 WASH. U. L.Q. 973, 999–1000 n.206 (2001) ("The 1976 Supreme Court decision reinstating capital punishment, *Gregg v. Georgia*, 428 U.S. 153 (1976), allowed capital punishment to exist *only if* the process included a bifurcated trial." (emphasis added)).

³⁹ See, e.g., *Gregg*, 428 U.S. at 176 ("Caution is necessary lest this Court become, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility throughout the country. A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off [by decisions like *Furman*]. Revisions cannot be made in the light of further experience." (citations omitted) (internal quotation marks omitted)).

protected states' use of the future dangerousness aggravator against constitutional attacks,⁴⁰ as well as defendants' right to rebut this aggravator.⁴¹ The Court has also consistently acknowledged that predicting a person's future behavior, capital defendant or otherwise, is a "difficult"⁴² task for the sentencer. Consequently, the Court has held that it is "essential . . . that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."⁴³

This individualized consideration of the defendant by a jury⁴⁴ is a unique and "constitutionally indispensable part of the process of inflicting the penalty of death,"⁴⁵ and is consistent with affording capital defendants the comparatively greatest amount of procedural protection.⁴⁶ Challenges to state laws which exclude certain evidence

The Court's institutional concern over the substantial federalism implications that *Furman* triggered in the capital context has not abated, but rather recurs in the disagreements which continue to plague some of its capital jurisprudence.

⁴⁰ *E.g.*, *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding the constitutionality of Texas's future dangerousness aggravator). This decision in particular was heavily relied on in the first case to sustain Virginia's future dangerousness statute from a challenge of unconstitutional vagueness. *See Solomon, supra* note 34, at 56–60.

⁴¹ *See, e.g.*, *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986) ("Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only [precedent] that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also 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.'" (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977))).

⁴² *California v. Ramos*, 463 U.S. 992, 1002 (1983) (quoting *Jurek*, 428 U.S. at 274). Some argue that this task is so difficult that even with expert evidence, death sentences should not be predicated on future dangerousness predictions. *See, e.g.*, Eugenia T. La Fontaine, *A Dangerous Preoccupation with Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases Are Unconstitutional*, 44 B.C. L. REV. 207 (2002).

⁴³ *Ramos*, 463 U.S. at 1003 (quoting *Jurek*, 428 U.S. at 276).

⁴⁴ The Supreme Court has held that when statutory aggravators must be found in order to sentence a defendant to death, the aggravators effectively operate as elements of a different crime entailing greater punishment (that is, a crime with a maximum punishment of death as opposed to life imprisonment), and thus must be proven beyond a reasonable doubt to a jury rather than proven by some less-demanding standard to a judge. *Ring v. Arizona*, 536 U.S. 584 (2002).

⁴⁵ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *see also, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) ("[W]e cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases . . . [where a] variety of . . . postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases."); *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (plurality opinion) (stating that the holding of *Furman v. Georgia* was that "the decision to impose [the death penalty] had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant").

⁴⁶ *See supra* note 31 and accompanying text.

from being introduced to rebut future dangerousness are unsuccessful when those laws assure that all possible relevant information about the individual defendant “will be adduced.”⁴⁷ As many have recognized, the advent of this liberal, individualized standard of consideration in capital jurisprudence was clearly meant to effect a one-way advantage for capital defendants seeking to avoid death sentences.⁴⁸ However, as shown below, Virginia has succeeded in turning this standard on its head in the context of prison conditions evidence.⁴⁹

B. The Lockett v. Ohio Standard of Relevance and Virginia’s Approach to Excluding Prison Conditions Evidence in Future Dangerousness Cases

It was not until *Lockett v. Ohio* that the Court specifically confronted the crucial question of what adduced information is “relevant” for rebutting capital aggravators.⁵⁰ The Court concluded that it is unconstitutional to exclude evidence of “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.”⁵¹ The Court attached an important footnote to this conclusion (Footnote 12) that stated “[n]othing in this opinion limits 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.”⁵² Because the Ohio sentencing statute in question did not permit the jury to choose life imprisonment over death on the basis of this evidence, it was declared unconstitutional.⁵³

Lockett was decided after the Court’s series of watershed, fractured decisions⁵⁴ mentioned above on the constitutionality of the death penalty, which understandably “engendered confusion”⁵⁵ amongst the states as to what revisions were required in order for their capital-punishment statutes to survive constitutional challenges. These decisions were relatively close together in time, and the *Lockett* Court explicitly

⁴⁷ *Ramos*, 463 U.S. at 1003 (quoting *Jurek*, 428 U.S. at 276).

⁴⁸ *See, e.g.*, *Callins v. Collins*, 510 U.S. 1141, 1141–42 (1994) (Scalia, J., concurring) (“[O]ver the years since 1972 this Court has attached to the imposition of the death penalty two quite [defendant-friendly] sets of commands: The sentencer’s discretion to impose death must be closely confined, but the sentencer’s discretion *not* to impose death (to extend mercy) must be unlimited”(citations omitted)).

⁴⁹ *See infra* note 79 and accompanying text.

⁵⁰ *Lockett*, 438 U.S. at 604.

⁵¹ *Id.*

⁵² *Id.* at 604 n.12 (emphasis added).

⁵³ *Id.* at 608–09.

⁵⁴ *Id.* at 598–600 (discussing the highly divergent stances taken by Justices in the *Furman* and *Gregg* pluralities).

⁵⁵ *Id.* at 599.

characterized its ruling as an attempt to eliminate this confusion.⁵⁶ Accordingly, the Footnote 12 language concerning relevant mitigation evidence was incorporated directly (and oftentimes verbatim) into subsequent state court decisions interpreting the boundaries of capital defendants' right to present mitigation evidence.⁵⁷

Virginia was one such state, and the exact language of the Footnote 12 is featured prominently in the first Virginia Supreme Court opinion to establish the practice of excluding "prison life"⁵⁸ evidence.⁵⁹ The defendant, Brian Cherrix, sought to dispute the claim that he would be a future danger to society by introducing evidence from various social science experts, officials from the Virginia Department of Corrections, and from an inmate currently serving a life sentence regarding "the ability of the penal system to contain Cherrix."⁶⁰ Although "immaterial[ity]" was only one of several grounds listed by the trial court for excluding this evidence,⁶¹ it was regarded as the singularly sufficient reason for exclusion in the Virginia Supreme Court's analysis.⁶² Unwilling to tether Cherrix's proposed evidence to one of the three airtight Footnote 12 categories, the *Cherrix* court concluded that "[a]s the

⁵⁶ *Id.* at 602 ("The signals from this Court have not, however, always been easy to decipher. The States now deserve the clearest guidance that the Court can provide; we have an obligation to reconcile previously differing views in order to provide that guidance.").

⁵⁷ For examples of this shortly after the *Lockett* decision, see *Horton v. State*, 295 S.E.2d 281, 284 (Ga. 1982), *Williams v. State*, 445 So. 2d 798, 815 (Miss. 1984), and *State v. Johnson*, 632 S.W.2d 542, 548 (Tenn. 1982).

⁵⁸ This is the term generally used by the Virginia Supreme Court to refer to evidence concerning any aspect of the conditions that prison inmates are subjected to while incarcerated. Although the Virginia court's frequent reference to this type of evidence as "the general nature of prison life" or "what prison life would be like for [the defendant] if he received a life sentence" potentially carries a dismissive, belittling connotation of those conditions and the evidentiary points for which they are offered, it nonetheless has come to embrace all features of the incarceration experience including security measures in Virginia's various prisons. For an example of the Virginia Supreme Court's use of "prison life," see *Burns v. Commonwealth*, 541 S.E.2d 872 (Va. 2001). To avoid this connotation, I generally use the term "prison conditions" instead of "prison life" when referring to this kind of evidence throughout my paper.

⁵⁹ *Cherrix v. Commonwealth*, 513 S.E.2d 642, 653 (Va. 1999), *cert. denied*, 528 U.S. 873 (1999) ("Although the United States Constitution guarantees the defendant in a capital case a right to present mitigating evidence to the sentencing authority, it 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.'" (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 n.12 (1978))).

⁶⁰ *Id.*

⁶¹ The trial court also mentioned the timeliness of Cherrix's corresponding motions and the cost estimates of arranging for some of the witnesses to testify. *Id.* These reasons more closely resemble the traditional authority of a court to exclude evidence, even if it is relevant. See, e.g., FED. R. EVID. 403 (allowing federal trial courts to exclude relevant evidence on grounds including "undue delay" and "wasting [of] time").

⁶² *Cherrix*, 513 S.E.2d at 653.

trial court observed, none of this evidence concerns the history or experience of the defendant. We agree with the conclusion of the trial court that ‘what a person may expect in the penal system’ is not relevant mitigation evidence.”⁶³ In a footnote to its conclusion,⁶⁴ the court distinguished this evidence from that in a U.S. Supreme Court case called *Skipper v. South Carolina*,⁶⁵ where the Court upheld the defendant’s right to admit as mitigating evidence testimony by jailers and a regular visitor describing defendant’s good behavior during the seven months he spent in jail awaiting his trial.⁶⁶

The fact that *Cherrix* was the first decision by the Virginia Supreme Court to rule on prison conditions evidence is evinced by the opinion’s cursory analysis and lack of citation to any other Virginia precedent on the matter. This is probably partially attributable to the enactment of a new law just a few years before *Cherrix* that made “[a]ny person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995 . . . [in]eligible for parole.”⁶⁷ However, every subsequent Virginia Supreme Court case dealing with prison conditions evidence either cites directly back to *Cherrix*, or refers to an intervening case that contains a direct citation to the decision.⁶⁸

*Walker v. Commonwealth*⁶⁹ was the first case to follow *Cherrix* and was decided within the same year, dedicating even less attention to the defendant’s arguments supporting admission of prison conditions evidence.⁷⁰ A year later, a new attempt to convince the court to admit prison conditions evidence was made in *Lovitt v. Commonwealth*⁷¹ by arguing that “the only [relevant] society” for the jury’s consideration of defendant’s “future dangerousness was prison society” because the defendant was ineligible for parole if sentenced to life in prison.⁷² This argument was

⁶³ *Id.*

⁶⁴ *Id.* at n.4.

⁶⁵ *Skipper v. South Carolina*, 476 U.S. 1 (1986).

⁶⁶ *Id.* at 4.

⁶⁷ VA. CODE ANN. § 53.1-165.1 (1994). This unavailability of parole for defendants convicted of capital offenses strengthens the argument that they would not be a future danger to society if given a life imprisonment sentence because the only other ways they could reenter society would be to break out of prison or receive executive clemency for the felony convictions pursuant to Article 5, Section 12 of the Virginia Constitution—both considerable feats for any inmate in any Virginia prison.

⁶⁸ *See, e.g.,* *Teleguz v. Warden of Sussex I State Prison*, 688 S.E.2d 865, 879 (Va. 2010); *Morva v. Commonwealth*, 683 S.E.2d 553, 563 (Va. 2009).

⁶⁹ 515 S.E.2d 565 (Va. 1999), *cert. denied*, 528 U.S. 1125 (2000).

⁷⁰ *Id.* at 574 (“Walker asserts that this evidence was relevant and properly admissible because it would mitigate against his receiving the death penalty, and therefore, the trial court erred in refusing to admit it. However, we have previously held that such testimony is not proper mitigating evidence.” (citing *Cherrix v. Commonwealth*, 513 S.E.2d 642, 653 (1999))).

⁷¹ 537 S.E.2d 866 (Va. 2000), *cert. denied*, 534 U.S. 815 (2001).

⁷² *Id.* at 878. This conceptual distinction between society at large and “prison society” when assessing the alleged future dangerousness of capital defendants has been advocated

sufficiently unique that the court was not able to rely solely on *Cherrix* and *Walker* in rejecting the argument as it had before. Instead, the *Lovitt* court characterized the argument as an “effective request that we rewrite the [future dangerousness] statute to restrict its scope.”⁷³

Yet another innovative attempt was unsuccessful the following year in *Burns v. Commonwealth*,⁷⁴ where a defendant argued (in addition to the general relevance argument from *Cherrix* and the prison society argument from *Lovitt*) that all of the prior Virginia Supreme Court decisions excluding prison life evidence, as well as *Lockett* itself, did so in the context of mitigation evidence rather than rebuttal evidence.⁷⁵ After reiterating the prior holdings of *Cherrix* and *Lovitt* to reject *Burns*’s familiar arguments, the court provided some new arguments in turn. The court reasoned that because the prosecution did not open the door to such evidence by making any related claims about the nature of prison life (such as the general incidence of inmate-caused violence or escapes), “*Burns*’ evidence was not in rebuttal to any evidence concerning prison life.”⁷⁶ The court also emphasized that the literal language of the future dangerousness statute⁷⁷ focused on whether a defendant *would* commit criminal acts of violence, as opposed to whether a defendant *could* commit criminal acts of violence.⁷⁸ The court described this as being consonant with the individualized consideration requirement of capital cases.⁷⁹ Finally, the court

in many other state and federal cases on the subject, and I address its usefulness in Parts III and IV. For another example of when this argument was acknowledged in a U.S. Supreme Court case, see *Kelly v. South Carolina*, 534 U.S. 246, 261 (2002) (Rehnquist, C.J., dissenting) (“That today’s decision departs from *Simmons* is evident from the Court’s rejection of the South Carolina Supreme Court’s distinction between evidence regarding danger to fellow inmates and evidence regarding danger to society at large. *Simmons* itself recognized this distinction.”).

⁷³ *Lovitt*, 537 S.E.2d at 879. By rejecting the prison society argument on state statutory interpretation grounds, the court directly contravened the *Simmons* Court’s acceptance of the “logic and effectiveness of [this] argument” in life-without-parole future dangerousness cases. *Simmons v. South Carolina*, 512 U.S. 154, 165–66 (1994) (plurality opinion). Unfortunately, the *Lovitt* court ignored the obvious truth that any state statute at odds with the Supreme Court’s interpretation of the Constitution *should be* restrictively rewritten.

⁷⁴ 541 S.E.2d 872 (Va. 2001), *cert. denied*, 534 U.S. 1043 (2001).

⁷⁵ *Id.* at 892–93.

⁷⁶ *Id.* at 893. This rationale seems to limit itself to the facts of *Burns*; however, like the prison society argument, it too appears in many other prison conditions cases.

⁷⁷ VA. CODE ANN. § 19.2-264.4 (2010) (“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 . . .”).

⁷⁸ *Burns*, 541 S.E.2d at 893. The apparent defect of this interpretation is addressed in Part IV.

⁷⁹ *Id.* at 893–94. This twisted application of the individualized consideration standard is blatantly at odds with all U.S. Supreme Court precedent on the matter except *Lockett*. As shown

distinguished U.S. Supreme Court cases that Burns cited in his arguments,⁸⁰ pointing out that unlike Burns's trial, those cases involved concealment of aggravator evidence from the defendant,⁸¹ exclusion of evidence of the defendant's good behavior in jail while awaiting trial,⁸² and a refusal to inform the jury of parole ineligibility when the prosecutor made it an issue in the case.⁸³

The same year that *Burns* was decided, the Virginia Supreme Court extended the implications of its exclusionary policy in *Lenz v. Commonwealth*⁸⁴ to indigent capital defendants seeking to appoint prison conditions experts as "basic tools of an adequate defense"⁸⁵ pursuant to corresponding U.S. Supreme Court decisions⁸⁶ and Virginia Supreme Court decisions.⁸⁷ Because the standard for appointment of such experts requires that the expert's assistance "is likely to be a significant factor in [a defendant's case],"⁸⁸ the court denied the requested appointment of a former commissioner of a state department of corrections to testify about how prison conditions and procedures would affect the defendant's future dangerousness assessment.⁸⁹ One year after *Lenz*, the defendant in *Bell v. Commonwealth*⁹⁰ urged the court to reconsider its stance from *Cherrix* and its progeny on prison conditions evidence both in terms of its general relevance to mitigation and rebuttal arguments as well as its importance related to requesting state-appointed experts.⁹¹ Edward Bell made a slightly different argument from *Lenz* in that he claimed that evidence of

in *supra* note 45, the individualized consideration standard was intentionally designed to shield capital defendants by providing them disproportionately more ways to escape death sentences than to receive them. The Virginia Supreme Court's interpretation effectively turns the standard into a sword against capital defendants, providing them with disproportionately fewer avenues to address prosecutor's future dangerousness arguments.

⁸⁰ *Burns*, 541 S.E.2d at 893–94.

⁸¹ *Gardner v. Florida*, 430 U.S. 349 (1977).

⁸² *Skipper v. South Carolina*, 476 U.S. 1 (1986).

⁸³ *Simmons v. South Carolina*, 512 U.S. 154 (1994) (plurality opinion). The propriety of distinguishing this case in particular from *Burns* and other Virginia Supreme Court prison conditions decisions will be challenged in Part III.A.

⁸⁴ 544 S.E.2d 299 (Va. 2001), *cert. denied*, 534 U.S. 1003 (2001).

⁸⁵ *Id.* at 305 (internal quotation marks omitted).

⁸⁶ *E.g.*, *Ake v. Oklahoma*, 470 U.S. 68 (1985) (stating that when a defendant's sanity is at issue, the state must give access to a psychiatrist as a tool for an adequate defense).

⁸⁷ *E.g.*, *Husske v. Commonwealth*, 476 S.E.2d 920 (Va. 1996) (stating that Virginia must, upon request, provide indigent defendants "the basic tools of an adequate defense").

⁸⁸ *Lenz*, 544 S.E.2d at 305 (quoting *Ake*, 470 U.S. at 82–83).

⁸⁹ *Id.* Though the court did not clearly articulate the reason behind this denial, it was presumably justified in light of the fact that the court had rejected prison conditions evidence in every preceding case where it was an issue on appeal, such that the evidence would not be a significant factor in the defendant's case at all because it is generally inadmissible.

⁹⁰ 563 S.E.2d 695 (Va. 2002), *cert. denied*, 537 U.S. 1123 (2003).

⁹¹ *Id.* at 713.

prison life is inherently relevant to consideration of “future adaptability”⁹² claims (like the claim upheld in *Skipper*⁹³) because “[a] jury . . . cannot assess a defendant’s likelihood of adjusting to life in prison if evidence describing the conditions of confinement is excluded from the jury’s consideration.”⁹⁴ Perhaps in light of the nuance of this argument, the court devoted a fair amount of attention to the defendant’s claims before rejecting them.⁹⁵

A period of four years separated *Bell* from the next case—*Juniper v. Commonwealth*⁹⁶—where a capital defendant unsuccessfully sought to introduce expert prison conditions testimony by claiming that such testimony contained an individualized consideration of his future dangerousness in connection with the standard prison life of inmates serving life without parole.⁹⁷ Because the court was unconvinced that the testimony was in fact individualized to the particular defendant,⁹⁸ no new arguments were advanced in dismissing defendant’s challenge to Virginia’s prison conditions precedent.⁹⁹

Two years later the court faced a similar challenge in *Porter v. Commonwealth*¹⁰⁰ where the defendant sought to convince the court that his expert’s report describing how prison conditions would reduce or eliminate his own potential for future dangerousness was sufficiently particularized to escape the holding in *Juniper*.¹⁰¹ Other than more robust challenges and information concerning generalized statistics of violence among inmates serving life in prison, the court found the evidence no different than the evidence in *Juniper* and similarly affirmed its exclusion at trial.¹⁰²

The most important prison conditions case decided after *Porter* was *Morva v. Commonwealth*.¹⁰³ Much like the defense in *Porter* sought to demonstrate enough individualization in its prison conditions evidence to be distinguishable from the rejected evidence in *Juniper*, William Morva sought to convince the court that his expert testimony (which coincidentally involved the exact same expert utilized

⁹² *Id.*

⁹³ *See supra* notes 65–66 and accompanying text.

⁹⁴ *Bell*, 563 S.E.2d at 713.

⁹⁵ *Id.* at 713–15.

⁹⁶ 626 S.E.2d 383 (Va. 2006), *cert. denied*, 549 U.S. 960 (2006).

⁹⁷ *See id.* at 403.

⁹⁸ *Id.* at 424.

⁹⁹ *See id.*

¹⁰⁰ 661 S.E.2d 415 (Va. 2008), *cert. denied*, 129 S. Ct. 1999 (2009).

¹⁰¹ *Id.* at 440.

¹⁰² *Id.* at 436–42. However, the extensiveness of the court’s treatment of each aspect of Porter’s claims was unmatched by any of its prior prison conditions decisions. This is probably due to the comprehensive nature of Porter’s challenges, which questioned every prison conditions holding starting from *Cherrix* and leading all the way up to *Juniper*.

¹⁰³ 683 S.E.2d 553 (Va. 2009), *cert. denied*, 131 S. Ct. 97 (2010).

by Thomas Porter¹⁰⁴) was sufficiently more individualized than that rejected in *Porter*.¹⁰⁵ Specifically, Morva's expert proposed to

interpret Morva's criminal history, capital murder conviction, and projected life sentence in light of group statistical data regarding similarly situated inmates . . . [and in] consideration [of] Morva's prior behavior while incarcerated, his security requirements during prior incarcerations, his age, and his level of educational attainment. He also . . . [would analyze how] preventative interventions and increased security measures could significantly reduce the likelihood that Morva would engage in violence in prison¹⁰⁶

In affirming the trial court's exclusion of this evidence, the opinion gave the following acknowledgment:

It is true that, in this case, unlike *Porter*, [the expert] proposed to provide testimony that concerns Morva's history and background, prior behavior while incarcerated, age and educational attainment, and such factors might bear on his adjustment to prison. However, other testimony [the expert] proposed to give, and to rely upon in giving a prison risk assessment for Morva, such as potential security interventions that "could be brought to bear" upon Morva, and the rates of assaults in the Virginia Department of Corrections, is, by [the future dangerousness] statute, not relevant to the determination the jury has to make concerning Morva's future dangerousness and therefore would not be admissible evidence.¹⁰⁷

In addition to repeating the black-letter holdings of all its prior cases rejecting prison conditions evidence, the court expounded on its rationale of inadmissibility by stating that "[i]ncreased security measures and conditions of prison life *that reduce the likelihood of future dangerousness* of all inmates is general information

¹⁰⁴ *Id.* at 563. Not surprisingly, the court's awareness of this coincidence seemed to decrease its willingness to view Morva's expert evidence as distinguishable from Porter's.

¹⁰⁵ *See id.* at 571–72 (Koontz, J., dissenting).

¹⁰⁶ *Id.* at 558. Focusing on individualized factors such as Morva's conviction, criminal history, age, and previous incarceration behavior was no doubt an attempt to invoke the explicitly approved categories of relevant future dangerousness evidence from *Lockett* and the Virginia Code. *See* VA. CODE ANN. § 19.2-264.4(B) (2010).

¹⁰⁷ *Morva*, 683 S.E.2d at 565.

that is irrelevant to the inquiry required by [the future dangerousness statute].”¹⁰⁸ Thus, *Morva* was the first Virginia case to affirm exclusion of partially admissible prison conditions evidence conceded to reduce the likelihood of a defendant’s future dangerousness simply because it was not entirely admissible under the *Lockett* standard of relevance enshrined in Virginia law.¹⁰⁹

The final case of significance decided four years after *Morva* was *Lawlor v. Commonwealth*.¹¹⁰ While there were other intervening cases between *Morva* and *Lawlor*, they did not present any arguments or rulings of consequence to the development of Virginia’s exclusionary stance on prison conditions evidence.¹¹¹ In *Lawlor*, defendant’s counsel sought to question prospective jurors during voir dire as to “whether they could consider a sentence of life imprisonment without parole in the absence of any evidence of prison security.”¹¹² The trial judge prohibited these questions, and the Virginia Supreme Court affirmed the trial court, stating that “[Virginia’s voir dire statute]¹¹³ 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.”¹¹⁴ When combining *Lawlor* with all of the other

¹⁰⁸ *Id.* (emphasis added). This statement is particularly important because it was the first time the court deemed prison conditions evidence inadmissible by providing something more than a conclusory assertion of irrelevance, generality, or application of the *Lockett* footnote (in other words, that relevant evidence cannot both reduce the likelihood of future dangerousness in a specific defendant’s projected setting of incarceration *and simultaneously reduce* that likelihood for all other similarly situated inmates as well).

¹⁰⁹ Normally when a court is posed with evidence which is partially admissible and partially inadmissible, the conventional solution is to redact or exclude the inadmissible portions and admit the rest. *See, e.g.,* *Randolph v. Commonwealth*, 482 S.E.2d 101, 107–08 (Va. Ct. App. 1997). The *Morva* court’s decision to permit the exclusion of the entire expert evidence was therefore excessively detrimental to *Morva*’s defense, especially because he was on trial for his life.

¹¹⁰ 738 S.E.2d 847 (Va. 2013).

¹¹¹ These cases were *Andrews v. Commonwealth*, 699 S.E.2d 237 (Va. 2010), *cert. denied*, 133 S. Ct. 2999 (2011) and *Prieto v. Commonwealth*, 721 S.E.2d 484 (Va. 2012), *cert. denied*, 133 S. Ct. 244 (2012). *Andrews* contained nothing new whatsoever; however, in *Prieto* the defendant unsuccessfully motioned for the jury to be transported to Red Onion State Prison so that it could see *Prieto*’s future prison conditions firsthand before deciding on his future dangerousness to “society as a whole.” *Prieto*, 721 S.E.2d at 501–02. The court was predictably unresponsive to this request. *Id.*

¹¹² *Lawlor*, 738 S.E.2d at 864.

¹¹³ VA. CODE ANN. § 8.01-358 (2010) (“The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror 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 . . .”).

¹¹⁴ *Lawlor*, 738 S.E.2d at 865. It is not clear why the court found it appropriate to interpret the word “relevant” in Section 8.01-358 the same way that it interprets that word in Footnote 12 or Rule 2:401 of the Virginia Rules of the Supreme Court (which defines the standard for

holdings from *Cherrix* and its progeny, the result is that every capital defendant in Virginia who is accused of being a future danger to society is virtually muzzled from attempting to make arguments or introduce evidence pertaining to prison conditions before the trial has even begun. This lasts all the way until the final appeal has been exhausted. In this respect, Virginia's steady evisceration of the right to rebut has debased that right into something of a constitutional dream catcher—providing capital defendants with little more than phantasmal protection from the velvet fist of Virginia's capital legal regime.¹¹⁵

III.

A. The Post-Lockett Cases and the Right to Rebut

In the years following *Lockett*, a number of U.S. Supreme Court cases were decided which seemed to expand the standard of relevance for rebutting capital aggravators beyond the hermetic categories of Footnote 12. One such case was *Tennard v. Dreke*,¹¹⁶ which reiterated language from many earlier post-*Lockett* cases¹¹⁷ in stating:

When we addressed directly the relevance standard applicable to mitigating evidence in [state] capital cases . . . we spoke in *the most expansive terms*. We established that the 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 . . . Thus, a State cannot

“relevant evidence” in all Virginia trials). Presumably, the context of voir dire questioning entails a more accommodating standard of relevance since it is geared toward ferreting out hidden biases that are subliminally buried beneath jurors' overt actions and opinions. This is markedly more difficult than sticking within semantic boundaries of black-letter standards of evidentiary relevance from statutes and cases.

¹¹⁵ Cf. *Morva v. Commonwealth*, 683 S.E.2d 553 (Va. 2009) (Koontz, J., dissenting) (“[I]n my view, *Morva* was left with little, if any, defense to the imposition of the death penalty in this case.”).

¹¹⁶ 542 U.S. 274 (2004).

¹¹⁷ These cases included: *Payne v. Tennessee*, 501 U.S. 808 (1991); *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Boyde v. California*, 494 U.S. 370 (1990); and *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

bar the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death Once this *low threshold for relevance* is met, the [Constitution] requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence We have held that a State cannot preclude the sentencer from considering any relevant mitigating evidence that the defendant proffers in support of a sentence less than death [*V*]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.¹¹⁸

With respect to future dangerousness evidence, the most significant of these cases was *Simmons v. South Carolina*.¹¹⁹ During the sentencing phase of Simmons's trial, the prosecution argued that he would be a future danger to society if allowed to remain alive.¹²⁰ In deliberating Simmons's punishment, the jurors asked the judge to clarify whether Simmons would be ineligible for parole if sentenced to life in prison (unaware that the judge had specifically prohibited an instruction requested by Simmons's counsel which would have confirmed that fact to the jury earlier in the sentencing phase).¹²¹ The judge refused to provide clarification, stating that the terms "life imprisonment and death sentence" were to be interpreted by their plain and ordinary meaning, and parole eligibility was not a proper issue for the jury to consider.¹²² After Simmons was sentenced to death, he unsuccessfully appealed his sentence to the South Carolina Supreme Court, alleging violations of the Eighth and Fourteenth Amendments, and then to the U.S. Supreme Court,¹²³ which decided the case in favor of Simmons by overturning his conviction.¹²⁴

¹¹⁸ *Tennard*, 542 U.S. at 284–85 (emphasis added) (citations omitted) (internal quotation marks omitted).

¹¹⁹ 512 U.S. 154 (1994) (plurality opinion).

¹²⁰ *Id.* at 157.

¹²¹ *Id.* at 156–60. The jury's confusion on this point was exacerbated by the fact that a state-wide public opinion survey which was admitted into evidence by the defense showed that only 7.1% of jury-eligible adults thought that defendants sentenced to life without parole would actually remain in prison for the rest of their lives. *Id.* at 159. This misperception was not limited to potential jurors in South Carolina, but extended to Virginia and other states. See William H. Hood, III, Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605, 1625 (1989) ("Other recent examinations of capital sentencing jurors' understanding of parole eligibility corroborate the findings contained in the National Legal Research Group's Virginia study. Three other surveys conducted outside Virginia suggest that many capital sentencing jurors harbor misconceptions about parole and that these misconceptions play a role in the jurors' penalty determination.").

¹²² *Simmons*, 512 U.S. at 160.

¹²³ *Id.* at 160–61.

¹²⁴ *Id.* at 171.

Much like the earlier death-penalty cases that *Lockett* sought to make clear, the holding of *Simmons* was not easily identifiable when the case was decided (other than the fact that it reversed and remanded Simmons's sentence) since there was not a majority opinion. Nevertheless, both sets of concurrences comprising the plurality acknowledged that when a capital defendant faces a claim that he will constitute a future danger to society, and the only alternative to a death sentence is a life sentence without parole, he has a due process right to inform the jury of this alternative so as to rebut any inaccurate implication otherwise.¹²⁵ This understanding of *Simmons* has since been reaffirmed by the Court in multiple cases which were both supportive¹²⁶ and critical¹²⁷ of the outcome.

B. The Post-Lockett Cases' Erosion of the Lockett Standard of Relevance

The holdings of the post-*Lockett* cases which expanded the standard of relevance away from the narrow Footnote 12 categories are crucial for assessing the constitutionality of Virginia's prison conditions jurisprudence. Though it is tempting to argue that there is an obvious constitutional tension between these cases and Virginia's prison conditions cases,¹²⁸ the Court's express holdings do not directly preserve a constitutional right to introduce evidence of prison conditions to counter a claim of future dangerousness in a capital trial. Rather, they preserve only a constitutional right to inform the sentencer of a defendant's parole ineligibility if sentenced to life in prison for a capital offense.¹²⁹ Had the former been accomplished, the Virginia Supreme Court could not have continued to develop its exclusionary stance on prison conditions evidence whilst the U.S. Supreme Court was simultaneously

¹²⁵ *Id.*

¹²⁶ *E.g.*, *Kelly v. South Carolina*, 534 U.S. 246, 248 (2002) ("Last Term, we reiterated the holding of *Simmons v. South Carolina*, that when 'a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel.'" (quoting *Shafer v. South Carolina*, 532 U.S. 36, 39 (2001))).

¹²⁷ *E.g.*, *O'Dell v. Netherland*, 521 U.S. 151, 153 (1997) ("[T]he rule set out in *Simmons v. South Carolina* requires that a capital defendant be permitted to inform his sentencing jury that he is parole ineligible if the prosecution argues that he presents a future danger . . .").

¹²⁸ See Jessica M. Tanner, "Continuing Threat" to Whom?: Risk Assessment in Virginia Capital Sentencing Hearings, 17 CAP. DEF. J. 381, 405–08 (2005) (arguing that the combined holdings of cases like *Crane v. Kentucky*, *Gardner v. Florida*, and *Simmons v. South Carolina* "implicate a fundamental constitutional concern . . . [a]s a matter of federal constitutional law" because "absent the right to provide [prison conditions] information [to jurors], the defendant's ability to present a complete defense and to rebut the prosecution's future dangerousness case is severely curtailed").

¹²⁹ *Id.* at 405–06.

announcing these post-*Lockett* cases.¹³⁰ This is underscored by the fact that the constitutional right to introduce prison conditions evidence to address claims of future dangerousness has never been the question presented in a Supreme Court case, and indeed the Court's denial of certiorari without explanation in all of Virginia's notable prison conditions cases¹³¹ arguably suggests that the Court did not agree that such a right should be *explicitly* recognized.

Nevertheless, there is a decisive takeaway *implicit* in the Court's post-*Lockett* rulings that directly conflicts with the *Lockett* standard of relevance. In *Shafer v. South Carolina*,¹³² for example, the Court reaffirmed *Simmons* by ruling that it was unconstitutional for the trial judge to deem irrelevant defendant's attempts to explain the proper meaning of life without parole to the jury when future dangerousness was at issue.¹³³ However, this ruling unquestionably applies to any capital defendant in any state who is subjected to that kind of ruling by any trial judge, and is therefore completely divorced from the exclusive categories of Footnote 12. To be clear, the fact that, under a particular state's criminal code, *all* defendants found guilty of capital offenses in that state will either be sentenced to death or life without parole *has absolutely nothing to do with* any individualized consideration of those defendants' prior record, character, or the circumstances of their offense(s).¹³⁴ Yet in all such cases, the Court has repeatedly declared that the defendant has a constitutional right to use the fact of parole ineligibility to defend against future dangerousness allegations.¹³⁵

Given that most of the expansive post-*Lockett* cases like *Simmons*—and even some expansive cases decided shortly before *Lockett* such as *Gardner v. Florida*¹³⁶—are plurality decisions without easily identifiable holdings, it is understandable why the force of their implications has been overlooked in comparison to the more cohesive opinion in *Lockett*.¹³⁷ Assuming some of the Justices in the post-*Lockett* pluralities

¹³⁰ See *supra* Part II.B (showing the dates of Virginia's prison conditions decisions, which progressed alongside the dates of the Court's post-*Lockett* cases in Part III.A).

¹³¹ See *supra* Part II.B (noting the denial of certiorari in all of Virginia's prison conditions cases).

¹³² 532 U.S. 36 (2001).

¹³³ *Id.* at 51.

¹³⁴ This incompatibility with the Footnote 12 categories of relevance has been recognized by others. See Petition for Writ of Certiorari at 15, *Morva v. Virginia*, 131 S. Ct. 97 (2010) (No. 09-10669) [hereinafter *Morva* Certiorari Petition] (“A defendant’s ineligibility for parole under state law is obviously neither part of ‘the defendant’s past criminal record, prior history [or] the circumstances surrounding the commission of the offense’” (citations omitted) (internal quotation marks omitted)).

¹³⁵ See *supra* note 126 and accompanying text.

¹³⁶ 430 U.S. 349 (1977) (plurality opinion) (holding that it was unconstitutional to sentence a capital defendant to death based on confidential future dangerousness evidence that the defendant was prevented from disputing or explaining).

¹³⁷ 438 U.S. 586 (1978). Even the *Lockett* opinion, however, suffers from some of the same forms of ambiguity that permeate the Court's pre- and post-*Lockett* decisions (for example, the majority opinion was divided into different parts which were sustained by a different

were aware of the logical implication of their decisions with respect to the *Lockett* standard of relevance, it may even have played to their advantage in building Court coalitions to weaken *Lockett* sub silentio rather than announce some kind of formal exception, limitation, or reversal.¹³⁸ But despite the potential motivations behind the deceptively narrow holdings of the post-*Lockett* cases, they unmistakably broaden the standard of relevance pertaining to the facts that capital defendants can present to rebut future dangerousness beyond the standard in *Lockett*, and thus beyond Virginia's statutory and case law founded thereon.¹³⁹ By transcending the limited categories of Footnote 12, the Court's post-*Lockett* cases signaled an important shift in future dangerousness doctrine: Even state rules of evidence which exclude future dangerousness rebuttal or mitigation evidence because it is unrelated to defendants' character, prior record, or offense circumstances can be "arbitrary" or "disproportionate to the purposes they are designed to serve," and thus constitutionally invalid.¹⁴⁰ In short, the Footnote 12 categories of relevance are no longer untouchable—they too will bruise and bleed if hit hard enough by flagrant injustices of state evidence law.

*C. The Relevance of Prison Conditions Evidence in Virginia
After the Erosion of Lockett*

Without the formerly unassailable blessing of *Lockett*, prison conditions evidence is no longer excluded per se by the Footnote 12 categories. But just because

composition of a majority of the Justices, multiple partial concurrences were filed, and justification for the holding shifted back-and-forth between the Eighth Amendment's proscription of cruel and unusual punishment and the Fourteenth Amendment's entitlement of due process). *See id.*

¹³⁸ An official acknowledgment of this kind of trajectory would probably have alienated certain moderate and conservative Justices concerned with creating yet another Court-imposed alteration to states' rules of evidence. This sentiment was rhetorically expressed in Justice Scalia's dissent in *Simmons*:

As I said at the outset, the [evidence] regime imposed by today's judgment is undoubtedly reasonable as a matter of policy, but I . . . fear we have read today the first page of a whole new chapter in the "death-is-different" jurisprudence which . . . [requires states to] adhere to distinctive rules, more demanding than what the Due Process Clause normally requires, for admitting evidence of other sorts—Federal Rules of Death Penalty Evidence, so to speak, which this Court will presumably craft (at great expense to the swiftness and predictability of justice) year by year.

Simmons v. South Carolina, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting).

¹³⁹ *Accord Morva Certiorari Petition*, *supra* note 134, at 15 ("Thus Virginia's unyielding determination to exclude from a capital defendant's case in rebuttal any evidence that is generally applicable to all capital defendants simply cannot be reconciled with the *Simmons* Court's recognition that a state's abolition of parole is a fact of . . . importance to any assessment of whether a given convicted murderer is likely to [pose a future danger to society] if allowed to live.").

¹⁴⁰ *See supra* note 30 and accompanying text.

these categories have lost their doctrinal invincibility does not mean they are so weak that they are *presumed* unconstitutional. Just as courts had to be convinced that evidentiary rules of relevance excluding life-without-parole instructions were unjustified in future dangerousness cases,¹⁴¹ so too will they need to be sold on the relevance of prison conditions evidence in such cases.

Setting aside the Court's consistent denials to hear Virginia prison conditions cases on appeal,¹⁴² this does not seem like a particularly difficult task. As noted in Part III.A, the minimal relevance standard applicable in state future dangerousness cases is "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."¹⁴³ *Simmons* itself constituted the Court's validation of the general improbability between the ability to harm society and residing in prison indefinitely.¹⁴⁴ This is so because there is no such thing as evidence which is neither relevant nor irrelevant under any American jurisdiction's rules of evidence,¹⁴⁵ and the *Simmons* Court certainly did not entitle capital defendants to inform juries of their alternative life-without-parole sentences because it *did not* affect the probability of future dangerousness. If anything, *Simmons*'s inferred assertion of the relevance between life imprisonment and future dangerousness is a compliment to the effectiveness of states' prison systems, not some sort of evidentiary attack on "states' rights." Ironically, Virginia's very own statutes betray its agreement with this assertion of relevance by legally requiring the Virginia Sentencing Commission to utilize "offender risk assessment instrument[s] for use in all felony cases, based on a study of Virginia felons, that will be predictive of the relative risk that a felon will become a threat to public safety [if released from prison]."¹⁴⁶ Notwithstanding

¹⁴¹ See *supra* Part II.B.

¹⁴² See *supra* Part II.B.

¹⁴³ See *supra* note 118. This standard of relevance is nearly verbatim of that set out in Rule 401 of the Federal Rules of Evidence as well as Rule 2:401 of the Virginia Rules of the Supreme Court. But the language of *Dretke* does not seem to hinge upon whether the state in question has a standard of relevance substantively identical to the Federal Rules of Evidence standard. Thus, Justice Scalia's derogatory description of the expansive post-*Lockett* cases as creating "Federal Rules of Death Penalty Evidence" is not entirely rhetorical exaggeration. See *supra* note 138.

¹⁴⁴ Accord Tanner, *supra* note 128, at 407 (observing that the *Simmons* Court approved "the jury's future dangerousness decision rest[ing] upon a distinction between the risk Simmons posed in society at large, and the much-reduced risk he posed in the restrictive prison setting").

¹⁴⁵ See, e.g., FED. R. EVID. 402 (dividing all evidence into "relevant evidence" and "irrelevant evidence"). Sometimes courts admit evidence that has "conditional relevance," meaning that its relevance is not immediately established because it is contingent upon some fact yet to be proved. See, e.g., FED. R. EVID. 104(b). But this is just a temporary form of irrelevance and does not disturb the relevant-irrelevant dichotomy.

¹⁴⁶ VA. CODE ANN. § 17.1-803(5) (2010).

indications of conceded relevance to be gleaned from judicial opinions and state statutes,¹⁴⁷ the obvious fact that being in prison makes a person less able (and therefore less likely) to harm society is readily accessible through common sense.¹⁴⁸

Once the relevance between life imprisonment and future dangerousness to society is identified, it is but one small step for capital defendants to successfully argue the relevance between prison conditions and future dangerousness—for syllogistically embedded in the acknowledgment that life imprisonment reduces inmate dangerousness is a predicate sub-acknowledgment about the effectiveness of the conditions of life imprisonment. As an illustration, imagine instead that the conditions of life imprisonment for the hypothetical client from Part I.A simply meant he would be housed in a state super-max prison until he is seventy-five years old, after which he would be assigned to half-way house arrest in some suburban neighborhood due to the need to use his cell for more dangerous inmates, coupled with his reduced likelihood to be a threat at that age (perhaps as part of a geriatric release program¹⁴⁹). Few would question that being informed of this information would alter the empirical probability calculus in the sentencer's mind such that your client's alleged future dangerousness is either more or less likely to be true than it was before being informed of this information. This is notwithstanding the fact that the information does not pertain to the person's character, criminal record, or circumstances in committing the offense.¹⁵⁰

¹⁴⁷ Recall the Virginia Supreme Court's concession that prison conditions evidence can reduce the likelihood of future dangerousness of inmates. *See supra* note 108 and accompanying text.

¹⁴⁸ *Accord* Solomon, *supra* note 34, at 71 (describing "evidence explaining the structure, procedures, and standards that make violent criminal behavior less likely in a prison setting" as well as noting that "[e]vidence of the safety and precautionary regimens of prison tends to negate the probability that the defendant will commit criminal acts of violence that constitute a continuing serious threat to that society").

¹⁴⁹ Well-informed readers may recognize that this is not currently allowed in Virginia because inmates convicted for Class 1 felonies under the Virginia Code, *see* VA. CODE ANN. § 53.1-40.01 (2010), (which include capital murder) are not eligible for geriatric release. But in a nation where two-thirds of the citizenry do not even know the name of one Justice on the U.S. Supreme Court, it would be the rare juror indeed who brings this knowledge with him to a capital trial. Juror misperceptions are a largely unchecked problem in our capital punishment system, as evinced in various parts of this paper.

¹⁵⁰ One can readily imagine additional things besides prison conditions evidence that do not fit the relevance categories of Footnote 12 or the Virginia Code, *see* VA. CODE ANN. § 19.2-264.4(C) (2010), but nevertheless affect the probability that an inmate will be a future danger to society. For example, consider a defendant who is being housed in a prison before or during the guilt phase of his trial and gets in a fight with another inmate or contracts an illness such that he permanently loses his eyesight or the use of some of his limbs. By the time his sentencing phase commences, perhaps even the Virginia Supreme Court would not dispute that he has a correspondingly lower probability of being a future danger to society than he had at the time he committed the charged offense(s).

Nor would it be difficult to demonstrate that Virginia's evidence law excluding prison conditions evidence¹⁵¹ violates the right to rebut by being disproportionate to the purpose it is designed to serve.¹⁵² The main purpose served by Virginia's standard of relevance is to confine jurors' consideration to facts that minimally matter to the case over facts that do not.¹⁵³ But the behavior of jurors in future dangerousness trials further evinces the unduly exclusionary nature of Virginia's approach toward prison conditions evidence. Today's jurors are arguably just as bad (if not worse) than the 92.9% of the jury-eligible population that was polled in South Carolina at the time *Simmons* was decided about the statement that life imprisonment truly did not carry a possibility for eventual parole.¹⁵⁴ Notwithstanding the fact that capital juries are now assured during the sentencing phase that "life means life," they continue to ask about the potential confinement conditions and protocols for capital defendants in ways that demonstrate their enduring skepticism that today's prisons will sufficiently prevent inmates from causing more harm to others inside or outside the prison.¹⁵⁵ This lack of faith in state penal systems only seems likely to grow with the corresponding increased depth of sensational reporting of prison conditions by the media,¹⁵⁶ and is comparatively easy for prosecutors to take advantage of with defendants who are legally powerless to respond.

¹⁵¹ The Virginia Supreme Court's specific relevance rule mentioned *supra* in note 114 doesn't exclude prison conditions evidence, as the standard is easy to satisfy. Instead, the Virginia Supreme Court's rules of evidence were "adopted to implement established principles under the common law [of Virginia] and not to change . . . [c]ommon law case authority, whether decided before or after the effective date of the Rules of Evidence [July 1, 2012]." VA. SUP. CT. R. 2:102. All of Virginia's prison conditions cases catalogued in Part II.B constitute Virginia common law.

¹⁵² This is one of the disjunctive grounds of unconstitutionality in the general test for the constitutionality of evidence rules that conflict with the right to rebut. *See supra* Part II.A. The other ground is that the practice infringes on a weighty interest of the accused, which is obviously satisfied in any capital trial where the practice affects the sentence imposed.

¹⁵³ *See, e.g.*, CHARLES E. FRIEND & KENT SINCLAIR, *THE LAW OF EVIDENCE IN VIRGINIA* 345–46 (7th ed. 2012) (stating that the rule in Virginia and elsewhere that irrelevant evidence is never admissible is a "principle based upon the obvious logic that time and effort should not be wasted upon evidence which is of no probative value in the case. At best, such matter is useless . . .").

¹⁵⁴ *See Simmons v. South Carolina*, 512 U.S. 154, 159 (1994) (plurality opinion). Seventy-five percent of those surveyed further stated that their judgment as to whether hypothetical capital defendants would remain in prison indefinitely if convicted would be an "extremely important" factor in choosing between a punishment of life imprisonment or death if called as jurors in a capital case. *Id.*

¹⁵⁵ *See, for example*, the Virginia case of Edward Bell mentioned *supra* in note 18: "At Bell's trial, during penalty phase deliberations, the jury inquired, '[u]nderstanding that imprisonment for life means no possibility of parole, is there any other way to be released from prison?'" *Bell v. True*, 413 F. Supp. 2d 657, 708–09 (W.D. Va. 2006).

¹⁵⁶ Expository examples abound from both local and national outlets. For the former category, *see, for example*, Mark Martin, *Gays and Lesbians Allowed Conjugal Visits in Prisons*,

Whatever could be said of capital jury sentencing in 1978 under the *Lockett* standard of relevance, it is clear that Virginia's choice to freeze that standard in time for nearly thirty-five years has become too heavy-handed of an approach. Unlike other, more-static aggravators like vileness, capital defendants must climb ever-steeper slopes of juror scrutiny and speculation in future dangerousness cases in order to stay alive. For the same reason that the *Simmons* Court saw fit to broaden the standard of relevance to include life-means-life instructions in 1991, the constitutional right to introduce prison conditions evidence in Virginia should be deemed both relevant and necessary.

IV.

A. The Reason Behind Virginia's Approach to Prison Conditions Evidence

Because the Virginia Supreme Court has never explicitly announced a coherent policy rationale as to why it has chosen to adopt such a hostile stance toward prison conditions evidence, we are left to speculate as to the real reason. To be sure, Virginia's stance is certainly not *required* by the language in Footnote 12.¹⁵⁷ Aside from a straightforward reading of the footnote's permissive language, the stances that other jurisdictions have taken on the matter demonstrate that Virginia has made a deliberate (and unique) choice to enforce an underinclusive standard of relevance since deciding *Cherrix* in 1999. Of the thirty-five American jurisdictions that provide for capital punishment,¹⁵⁸ four have made future dangerousness a statutory

S.F. CHRON. (June 1, 2007, 4:00 AM), <http://www.sfgate.com/news/article/Gays-and-lesbians-allowed-conjugal-visits-in-2590454.php>. Perhaps the best-known example of the latter category is MSNBC's *Lockup*, which is a prison documentary series that covers almost all aspects of prison conditions in supermax prisons around the country. *See generally Lockup on MSNBC*, NBC NEWS, <http://www.msnbc.msn.com/id/27118605/> (last visited Apr. 15, 2014). Hundreds of thousands of viewers watch this program every week, sometimes drawing more attention than popular programs like the *Rachel Maddow Show* and Wolf Blitzer's *Situation Room*. Mark Joyella, *On Friday Night, Highest-Rated Non-Fox Cable News Show (In Demo) . . . Was MSNBC's Lockup*, MEDIAITE (Apr. 15, 2011, 8:48 PM), <http://www.mediaite.com/tv/on-friday-night-highest-rated-non-fox-cable-news-show-in-demo-was-msnbcs-lockup/>. Episodes frequently focus on inmates serving life without parole sentences who do things like kill their cellmates or escape from prison. *See, e.g.*, Videotape Transcript: *Lockup—Inside Iowa State Penitentiary*, LIVEDASH (July 11, 2010, 2:00 AM), [http://livedash.ark.com/transcript/lockup-\(inside_iowa_state_penitentiary\)/5304/MSNBC/Sunday_July_11_2010/365708/](http://livedash.ark.com/transcript/lockup-(inside_iowa_state_penitentiary)/5304/MSNBC/Sunday_July_11_2010/365708/); Videotape Transcript: *Lockup: Raw—Criminal Minds*, LIVEDASH (July 17, 2010, 9:00 PM), [http://livedash.ark.com/transcript/lockup_raw-\(criminal_minds\)/5304/MSNBC/Saturday_July_17_2010/374603/](http://livedash.ark.com/transcript/lockup_raw-(criminal_minds)/5304/MSNBC/Saturday_July_17_2010/374603/).

¹⁵⁷ *See supra* note 52 and accompanying text.

¹⁵⁸ This includes thirty-three states as well as federal courts and U.S. military courts. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Apr. 15, 2014).

aggravator¹⁵⁹ and twelve have made it a permissible, non-statutory aggravator.¹⁶⁰ Of these future dangerousness jurisdictions, there is no indication that any of them exclude prison conditions evidence as categorically irrelevant.¹⁶¹

Some of the language in the Virginia Supreme Court's prison conditions cases suggests that the court is trying to enforce unspoken standards of morality, reliability, and fairness, rather than a standard of relevance. In *Burns*, for example, the court indicated that the future dangerousness inquiry should focus on whether a defendant *would* constitute a future danger to society, as opposed to whether he *could*.¹⁶² Thus, even if prison conditions render a defendant unable to be a future danger to society until the day he dies, the jury must further consider whether the defendant would nevertheless present a threat to society if he were hypothetically unrestrained by prison conditions. This hypothetical consideration would only be relevant in a state where there are either no prisons, or there is a possibility for the capital convict in question to be paroled. Because Virginia is not such a state, this inquiry transcends the realm of relevance, effectively requiring an assessment of capital defendants' character.¹⁶³ It is debatable whether conducting such a character assessment as part of a capital aggravator would be constitutional at all,¹⁶⁴ but clearly the Virginia Supreme Court should not be permitted to sneak it into state evidence law under the guise of a relevance standard.¹⁶⁵ If the court thinks that jurors should have the

¹⁵⁹ See Vartkessian, *supra* note 36, at 450 n.16.

¹⁶⁰ *Id.* at 450 n.17.

¹⁶¹ See, e.g., Tanner, *supra* note 128, at 391 n.82 (stating that “[o]ther capital jurisdictions have considered and permit the introduction of prison life evidence such as that currently excluded in Virginia” and listing cases from the federal system, Missouri, California, Georgia, and Louisiana as examples); see also, e.g., *Morva* Certiorari Petition, *supra* note 134, at 25–30 (stating that “Virginia’s stance on this issue of federal constitutional law is in direct conflict with the overwhelming weight of authority in those state and federal courts where future dangerousness is a prominent feature of the prosecution’s case for imposing the death penalty” and listing cases from the federal system, Texas, Oregon, Oklahoma, Illinois, and Tennessee as examples).

¹⁶² See *supra* note 78 and accompanying text.

¹⁶³ See *Morva* Certiorari Petition, *supra* note 134, at 12–13 (“*Morva* observed that by construing Virginia’s ‘continuing threat’ statutory aggravating factor as containing such an illogical and counter-factual limitation . . . the state court had effectively redefined the continuing threat factor as . . . whether he was merely a person of ‘dangerous character.’”) It is no coincidence that “character” is one of the categories of relevant evidence listed in Footnote 12 because character is relevant if it is assumed that the defendant will be able to act based upon the inclinations of his character in a given environment. But prison conditions evidence negates this assumption; even if a defendant’s violent or sadistic character would incline him to hurt others until the day he dies, he is prevented from carrying out such actions because he is contained in a secure environment where those actions are not possible.

¹⁶⁴ See *id.* at 30–34.

¹⁶⁵ This is not the only future dangerousness context where the Virginia Supreme Court has effectively required jurors to assess the moral character of capital defendants under the banner of relevance. See Justin D. Flamm, *Due Process on the “Uncharted Seas of Irrelevance”*: *Limiting the Presence of Victim Impact Evidence at Capital Sentencing After Payne*

discretion to essentially judge which kinds of defendants deserve to die based on objectionable character, it must wait until such discretion is conferred upon juries by the state legislature.

The court's reasons for rejecting the prison conditions evidence in *Morva* also seem foreign to any notion of relevance.¹⁶⁶ There, the court explained that because *Morva*'s prison conditions evidence reduced the likelihood of him being a future danger to society, but also reduced that likelihood for all inmates serving a life-without-parole sentence, his evidence was too general to be relevant.¹⁶⁷ Rationally speaking, this argument is invalid. Things that are generally relevant to groups of similarly situated individuals can also be (and frequently are) relevant to the particular individuals themselves. For example, if prisoners were routinely sent to locations where it would be impossible for them to return to society, such as prisons located deep under the ocean or on the moon, this would unquestionably nullify the probability of each prisoner's capacity for future dangerousness even though it also nullifies the probability of every prisoner's capacity for future dangerousness. But one need not resort to such fantastic scenarios in rejecting the court's argument, as *Simmons v. South Carolina* provides a perfect counter-example. Clearly, the fact that capital convicts are ineligible for parole reduces the probability of each and every capital convict's capacity to be a future danger to society at large, and it would be absurd to deem parole ineligibility "irrelevant" for this reason.¹⁶⁸ Instead, the *Morva* court seems to be concerned with the *reliability* of prison conditions evidence.¹⁶⁹ Reliability is a central concern of evidence law, and is the rationale behind many exclusionary rules of evidence.¹⁷⁰ But reliability is clearly a separate evidentiary standard of admissibility that must be met in addition to relevance, and the two

v. Tennessee, 56 WASH. & LEE L. REV. 295, 332 (1999) ("The Virginia Supreme Court chose to permit the admission of victim impact evidence not to portray the probability of any future acts of the defendant, but rather to demonstrate the individual's culpability for a past act—the particular murder at issue. Because the acknowledged purpose of victim impact evidence is to demonstrate an aspect of the defendant's moral guilt, and not to demonstrate the defendant's propensity for violence, victim impact evidence is not relevant to the future dangerousness aggravator.").

¹⁶⁶ See *supra* notes 103–08 and accompanying text.

¹⁶⁷ See *supra* note 108 and accompanying text.

¹⁶⁸ If the court truly has an inductive concern that data about groups does not directly establish anything about a particular individual, it should accept the group data as conditionally relevant subject to further proof that such data can be extrapolated to the capital defendant in the case sub judice. See *supra* note 145 (summarizing the concept of conditional relevance). It is hard to imagine this being a legitimate concern given the kinds of group data extrapolation that typifies multiple kinds of civil cases such as toxic tort and social syndrome cases. See MUELLER & KIRKPATRICK, *supra* note 28, at 660–66.

¹⁶⁹ See *Morva v. Commonwealth*, 683 S.E.2d 553, 562–63 (Va. 2009).

¹⁷⁰ Classic examples are the rules against hearsay and character evidence. See FED. R. EVID. 802; FED. R. EVID. 404.

should not be confused.¹⁷¹ Absent a rule which specifically provides for the general exclusion of certain kinds of evidence, courts must address reliability concerns through a case-by-case application of general rules of evidence designed for that purpose,¹⁷² rather than through judicially created categorical stances.

The only other way to make sense of the *Morva* court's reasoning is that it is trying to prevent capital defendants from profiting from the general effectiveness of state prisons during sentencing. From a fairness standpoint, it may seem counter-intuitive to allow capital defendants to avoid execution by pointing to the effectiveness of the very mechanisms that are designed to punish and restrain them for their crimes.¹⁷³ Though much of evidence law is grounded upon notions of fairness rather than relevance,¹⁷⁴ the court should not be allowed to incoherently mix the two in order to uphold capital convictions on appeal. As with reliability concerns, the court would need a specific rule of evidence to stand upon in order to categorically exclude prison conditions evidence on the basis of unfairness. For good reason, no such rule exists in Virginia or any other state.

B. Implementing a Solution

As evinced by the arguments advanced in Virginia's prison conditions cases,¹⁷⁵ capital defense advocates have launched thorough attacks on Virginia's exclusionary stance.¹⁷⁶ Undoubtedly, these will need to continue if progress is to be made, and

¹⁷¹ The rules against hearsay and character evidence are again good examples to use, as both operate to exclude evidence which is viewed as unreliable notwithstanding its relevance to issues at trial. *See* FED. R. EVID. 802; FED. R. EVID. 404.

¹⁷² These include, *inter alia*, rules having to do with the authenticity of documents or physical articles of evidence, and qualifications of witnesses who seek to testify as experts. *See* FED. R. EVID. 702; FED. R. EVID. 901.

¹⁷³ This would also explain the court's general use of the phrase "prison life evidence" as mentioned *supra* in note 58. By portraying prison conditions evidence as "what prison life would be like for [the defendant] if he received a life sentence," the court seems to manifest an unsympathetic attitude toward the fate of those who commit capital crimes, rather than a view about the relevance of incarceration conditions to capital defendants' future dangerousness. *See supra* note 58 and accompanying text.

¹⁷⁴ *See, e.g.*, MUELLER & KIRKPATRICK, *supra* note 28, at 452 (discussing the policy of excluding evidence of subsequent remedial measures because it is "unfair to introduce against a person, over his objection, evidence that he behaved responsibly after the fact" despite the fact that such behavior may be relevant to negligence, fault, and feasibility). Federal evidence law takes a similar stance toward evidence of settlement negotiations, plea bargains, and proof of payment of medical expenses. *See* FED. R. EVID. 408; FED. R. EVID. 409; FED. R. EVID. 410.

¹⁷⁵ *See supra* Part II.B.

¹⁷⁶ *See, e.g.*, Lara D. Gass, Note, *Virginia's Redefinition of the "Future Dangerousness" Aggravating Factor: Unprecedented, Unfounded, and Unconstitutional*, 70 WASH. & LEE L. REV. 1887, 1922–32 (2013).

there are signs that such arguments are beginning to succeed. Until *Porter*, there were no dissenting opinions pertaining to the Virginia Supreme Court's exclusion of prison conditions evidence. In *Porter*, however, Justice Koontz dissented from the majority's rejection of Porter's expert prison conditions evidence.¹⁷⁷ He began by asserting that "the defendant has a fundamental right to introduce appropriate evidence to rebut the Commonwealth's evidence" regarding the future dangerousness aggravator,¹⁷⁸ and proceeded to explain why Porter's "proffered [expert] testimony was relevant to the issue of Porter's future dangerousness because it was sufficiently specific to Porter based on Porter's individual characteristics . . . the particular facts of [his] history and background, and the circumstances of his offense."¹⁷⁹ Most importantly, Justice Koontz cautioned the majority about the broader constitutional and policy implications of maintaining its current trajectory:

I am compelled to warn that the various issues raised in this case may tend to exemplify certain aspects of the conduct of capital murder trials in this Commonwealth that slowly, but inexorably, will erode public confidence that the death penalty is being imposed in a fair and consistent manner. Surely, the citizens of Virginia expect . . . that [our] courts . . . will conduct death penalty trials with due regard for the constitutional and statutory safeguards that are meant to ensure that the maximum penalty will be imposed only in those instances where it is truly necessary to advance the cause of justice and secure the lives and welfare of the people. Moreover, it should be expected, and justice demands, that even in cases where a sentence of death may be appropriate, its imposition will occur through a strict and faithful adherence to due process of law. If the courts empowered to sit in judgment over those accused of typically heinous crimes fail to take the greatest care in assuring the fairness of [capital] proceedings . . . then it must inevitably follow in time that the death penalty statutes of this Commonwealth will no longer pass constitutional muster.¹⁸⁰

Justice Koontz was joined by Justice Keenan when he dissented again in *Morva*, the very next prison conditions case to follow *Porter*.¹⁸¹ Because *Morva*'s expert prison conditions evidence was even more individualized than *Porter*'s (albeit not

¹⁷⁷ *Porter v. Commonwealth*, 661 S.E.2d 415, 449–54 (Va. 2008) (Koontz, J., dissenting).

¹⁷⁸ *Id.* at 452.

¹⁷⁹ *Id.* at 454 (internal quotation marks omitted).

¹⁸⁰ *Id.*

¹⁸¹ See *Morva v. Commonwealth*, 683 S.E.2d 553, 568–74 (Va. 2009) (Koontz, J., dissenting).

enough to persuade the majority), Justice Koontz readily found that it “facially appear[ed]” to satisfy the court’s relevance standard from *Lockett*.¹⁸² He concluded that the absence of Morva’s prison conditions evidence left Morva “without the constitutionally required basic tools of an adequate defense that comport with a defendant’s due process rights.”¹⁸³ Finally, Justice Koontz criticized the majority’s general conception of prison conditions evidence, arguing that prison conditions evidence is not only “relevant,” but also “essential to achieving an individualized prediction” “when calculating the risk of future violent acts.”¹⁸⁴

In addition to the tenor of these dissenting opinions, the fact that they were filed consecutively in two of Virginia’s more-recent prison conditions cases is encouraging. The Virginia Supreme Court has never before been this receptive to reconsidering its exclusionary stance, and these dissents provide useful ammunition for advocates seeking to admit prison conditions evidence. Not only do they contain explicit acknowledgments of the incompatibility between Virginia’s exclusionary stance and due process doctrine based on right-to-rebut jurisprudence,¹⁸⁵ they also remind critics that accepting prison conditions evidence as relevant will not over-equip capital defendants to rebut the future dangerousness aggravator. The *Morva* dissent in particular noted that the prosecution did not challenge the scientific basis and methodology of Morva’s proffered expert testimony, nor the expert’s personal qualifications to conduct prison risk assessments analyses.¹⁸⁶ The dissenting justices also pointed out that even if Morva’s prison conditions evidence was deemed relevant, the jury would still be required to assess the persuasive weight of the evidence.¹⁸⁷ Along this same vein, *Simmons* itself noted that:

[T]he fact that a defendant is parole ineligible does not prevent the State from arguing that the defendant poses a future danger. The State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff.¹⁸⁸

All of these observations highlight the various conventions of the adversarial process that would still be available to prosecutors alleging future dangerousness despite the acceptance of prison conditions’ relevance in future dangerousness cases.¹⁸⁹

¹⁸² *Id.* at 572.

¹⁸³ *Id.* at 569 (internal quotation marks omitted).

¹⁸⁴ *Id.* at 572. This was precisely the same argument made seven years earlier in *Bell v. Commonwealth*. See *supra* notes 92–94 and accompanying text.

¹⁸⁵ See *Morva*, 683 S.E.2d at 568–74; *Porter v. Commonwealth*, 661 S.E.2d 415, 449–54 (Va. 2008) (Koontz, J., dissenting).

¹⁸⁶ *Morva*, 683 S.E.2d at 572.

¹⁸⁷ *Id.* at 569.

¹⁸⁸ *Simmons v. South Carolina*, 512 U.S. 154, 165 n.5 (1994) (plurality opinion).

¹⁸⁹ This is not to mention the fact that prosecutors need not prove the future dangerousness

As ironic as it may be that the Virginia Supreme Court could beat the U.S. Supreme Court to a solution, this route seems optimal for both parties. By waiting for Virginia to solve its own problem on its own terms, the Court avoids deviating from its preferred policy of nonintervention in state evidence law.¹⁹⁰ However, if Virginia does not continue to show meaningful signs of improvement, the Court should be prepared to bite the bullet and rectify the situation. The Court's hesitance to tread into the realm of state evidence law in capital cases is institutionally convenient, and perhaps even noble. Unfortunately, Virginia exemplifies that it can also be deadly. No matter the appeal of the cliché analogy that states should be left alone in order to develop into diverse policy laboratories,¹⁹¹ the unmistakable takeaway from the Court's modern capital jurisprudence is that states should be given very little leeway to toy with capital defendant's evidentiary protections. Otherwise, capital defendants' chances of surviving in our legal system become so arbitrary that they depend more on the name of the state where the crimes were committed than the nature of the crimes themselves.¹⁹² This is intolerable under our Constitution, and the Tenth Amendment should never be construed as granting states immunity from complying with due process.¹⁹³

CONCLUSION

Acknowledging the right of Virginians to introduce prison conditions evidence in rebuttal to allegations of future dangerousness will reaffirm our most important

aggravator at all if they can alternatively establish the vileness aggravator. *See supra* note 5 and accompanying text.

¹⁹⁰ As mentioned in multiple parts of this paper, this federalism concern is a major force in the development of the Court's capital jurisprudence, including future dangerousness precedent. *See supra* note 39 and accompanying text.

¹⁹¹ *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also Gilliard v. Mississippi*, 464 U.S. 867, 869 (1983) ("When Justice Brandeis originally analogized the states to laboratories in need of freedom to experiment, he was dissenting from a decision by the Court applying a now-discredited interpretation of the Due Process Clause to strike down an Oklahoma statute regulating the sale and distribution of ice. . . . Since then, however, the power of the States-as-laboratories metaphor has propelled Justice Brandeis' concept far beyond the sphere of social and economic regulation. Now we find the metaphor employed to justify this Court's abstention from reaching an important issue involving the rights of individual defendants under the Federal Constitution.").

¹⁹² This is already the case to some extent between the large number of jurisdictions that practice capital punishment and the smaller group that does not, but the analysis is more properly directed at the comparative differences only within the former group.

¹⁹³ *See United States v. Darby*, 312 U.S. 100, 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments . . .").

constitutional creed to equip all defendants—*especially* those accused of capital offenses—with a balanced opportunity to defend their lives, liberties, and property against any state seeking to curtail due process. Strangely enough, Virginia generally has a very undemanding standard of relevance. As one eminent Virginia evidentiary authority describes, “Virginia law is very liberal on defining the scope of relevant evidence,” and “the standard for finding relevance is exceedingly low If the proof is ‘some help’ in determining a fact, it meets th[e] relevancy standard.”¹⁹⁴ Thus, “every fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant.”¹⁹⁵ This is why, for example, Virginia courts regularly accept such tenuous arguments like one asserting that because marijuana is found in the same vehicle as someone, he is now more likely to be someone possessing a gun which he uses to defend himself in “the underground drug world.”¹⁹⁶

It is only when a Virginia defendant stands to lose his very existence to the accusation that he will be a future danger to society that more rigorous empirical metaphysics spring forth from the state’s common law to straightjacket his defense. He is permitted to address this accusation not by proving what he *could* do in the future, but what he *would* do in the future *if he could*, lest he present evidence that incidentally affects the probability of some other Virginia inmate’s future dangerousness. Meanwhile, the prosecution is allowed to resort to such unreliable and irrelevant evidence as unadjudicated acts of criminal conduct¹⁹⁷ and victim impact statements¹⁹⁸ to prove the defendant’s future dangerousness to society. Forced to engage in this despicable evidentiary dance on the only stage in America where it is conducted, the defendant embarks on a years-long appellate shuffle to his final destination, where he is told something along the lines of the following:

¹⁹⁴ FRIEND & SINCLAIR, *supra* note 153, at 342–43.

¹⁹⁵ *Thomas v. Commonwealth*, 607 S.E.2d 738, 743 (Va. Ct. App. 2005) (citing *Va. Elec. & Power Co. v. Dungee*, 520 S.E.2d 164, 179 (Va. 1999)).

¹⁹⁶ *Thomas*, 607 S.E.2d at 744–45.

¹⁹⁷ *See, e.g., Beaver v. Commonwealth*, 352 S.E.2d 342, 346–47 (Va. 1987). Ironically, unadjudicated acts of criminal conduct are not considered “relevant” for sentencing defendants for non-capital felonies. *Byrd v. Commonwealth*, 517 S.E.2d 243, 245 (Va. 1999) (“We can discern no relationship between the purposes of sentencing and the jury’s role in determining appropriate punishment in non-capital cases that would make evidence of *nolle prossed* charges relevant to the jury’s task.”). Selectively lowering the evidentiary standard of both relevance and reliability in favor of the prosecution during capital sentencing is blatantly incompatible with the fundamental design of the Court’s capital jurisprudence discussed in Part II.A (in other words, that the Constitution requires capital defendants to be afforded the greatest evidentiary protections in both the guilt and penalty phases of trials).

¹⁹⁸ *See VA. CODE ANN. § 19.2-264.4(A1)* (2010); *Beck v. Commonwealth*, 484 S.E.2d 899, 903–04 (Va. 1997), *cert. denied*, 522 U.S. 1018 (1997). For an argument that victim impact evidence is irrelevant to Virginia’s future dangerousness aggravator, see Flamm, *supra* note 165, at 323–24.

The fact that being an inmate in a single cell, locked down twenty-three hours a day, with individual or small group exercise, and shackled movement under escort would greatly reduce your opportunity for serious violence toward others, is not “a fact, however remote or insignificant, that *tends* to establish the probability or improbability of” your future dangerousness.¹⁹⁹

It is no longer difficult for the defendant to see why he was not the first or the last Virginia defendant to make this argument, nor why the large majority of death sentences comprising Virginia’s second-highest number of executions in the nation’s modern era of capital punishment involved the same future dangerousness façade.²⁰⁰ What remains difficult to determine is whether there is a possibly more unjust way to administer the law of evidence—to inflict death by irrelevance.

¹⁹⁹ This quotation was formed by combining language from *Morva v. Commonwealth*, 683 S.E.2d 553, 565 (Va. 2009), with Virginia’s otherwise accommodating standard of relevance as described in Charles Friend’s and Kent Sinclair’s *The Law of Evidence in Virginia*. FRIEND & SINCLAIR, *supra* note 153, at 342–43.

²⁰⁰ *Morva* Certiorari Petition, *supra* note 134, at 30; see also *Virginia Capital Litigation Data*, VIRGINIA CAP. CASE CLEARINGHOUSE, <http://vc3.org/resources/page.asp?pageid=561> (last visited Apr. 15, 2014) (click “Download Excel Spreadsheet” hyperlink) (showing that out of the 195 capital convictions in Virginia between 1978 and 2011, the future dangerousness aggravator was proven in 112 of those cases, amounting to 57.4%).