No. 18- ____

IN THE
Supreme Court of the United States

THOMAS ALEXANDER PORTER,

Petitioner,

v.

DAVID ZOOK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a state rule that excludes as irrelevant evidence that a capital defendant is unlikely to pose a risk of future violence in prison is contrary to or an unreasonable application of this Court's precedent under the Eighth and Fourteenth Amendments.

2. Whether a state court decision to dismiss constitutional claims as a matter of law:

i.) based on evidence proffered by the party moving for dismissal; and
ii.) based on evidence in conflict with evidence presented by the nonmoving party; and
iii.) based on evidence without supporting bases in the record; and
iv.) made without presuming the allegations of the nonmoving party and all reasonable inferences made therefrom to be true; and
v.) made without allowing the petitioner any opportunity to develop and present factual support for allegations in the petition, including discovery and an evidentiary hearing;

is a decision based on an unreasonable determination of facts or not an adjudication on the merits for purposes of applying U.S.C. § 2254(d).

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PETITION FOR A WRIT OF CERTIORARI

Thomas Alexander Porter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The August 3, 2018, opinion of the United States Court of Appeals for the Fourth Circuit (App. 1–29) is published at *Porter v. Zook*, 898 F. 3d 408 (4th Cir. 2018). A petition for rehearing was denied on August 31, 2018. (App. 31). The federal district court's opinion (App. 34–45) is unreported but available at *Porter v. Zook*, 2016 U.S. Dist. LEXIS 55127 (E.D. Va. Apr. 25, 2016). The decision of the Supreme Court of Virginia on state post-conviction review (App. 46–57) is reported at *Porter v. Warden*, 283 Va. 326, 722 S.E.2d 534 (2012). The decision of the Supreme Court of Virginia (App. 58–104) on direct appeal from trial is reported at *Porter v. Commonwealth*, 276 Va. 203, 661 S.E.2d 415 (2008).

JURISDICTION

The court of appeals had jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 1291 and 2253. The court entered judgment on August 3, 2018, (App. 30), and denied rehearing on August 31, 2018, (App. 31). On September 6, 2018, the court stayed issuance of its mandate. (App. 32). On October 10, 2018, the court determined to issue its mandate. (App. 33).

On November 28, 2018, the Chief Justice extended the time for filing a petition for certiorari to January 28, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part as follows:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Code section 28 U.S.C. § 2254(d) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

PRELIMINARY STATEMENT

In little more than a year, the United States Court of Appeals for the Fourth Circuit has issued two decisions granting relief to petitioners sentenced to death in Virginia state courts via holdings that are in conflict with that same court's holdings denying relief to Porter on two important questions of federal law. The Fourth Circuit's inconsistent decision in Porter's case makes clear that it is necessary for this Court to exercise its supervisory power to establish uniform application of the fundamental federal rights at issue.

On November 27, 2018, the Fourth Circuit ordered that Mark Lawlor's death sentence be vacated based on alleged violations of federal constitutional guarantees of a capital defendant's right to present evidence in mitigation that had been denied as grounds for relief in Porter's case. *Lawlor v. Zook*, 909 F.3d 614 (4th Cir. 2018); (available at App. 105-120). The court of appeals rejected as contrary to clearly established federal law the Supreme Court of Virginia's restriction on jurors' consideration of mitigating evidence that the defendant would not pose a future danger in a prison setting. The state court had found that the trial court's limitation of mitigating evidence was appropriate, because the proffered expert risk

assessment evidence was not evidence "peculiar to the defendant's character, history, and background," and the proffered testimony "[wa]s not probative of Lawlor's disposition to make a well-behaved and peaceful adjustment to life in prison." *Lawlor v. Commonwealth*, 738 S.E.2d 847, 884–85 (Va. 2013) (internal quotations and citations omitted). The state court cited Porter's case as precedent for its decision in Lawlor's case. *Id.* at 884.

Based on this Court's decisions, including *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings v. Oklahoma,* 455 U.S. 104 (1982), and *Jurek v. Texas*, 428 U.S. 262 (1976), and "[c]onsidering the Supreme Court's expansive view of relevance of mitigating evidence," *Lawlor*, 909 F.3d at 632, the Fourth Circuit rejected the state court's reasoning that risk assessment evidence should be excluded because it "[m]erely extract[ed] a set of objective attributes about the defendant and insert[ed] them into a statistical model created by compiling comparable attributes from others, to attempt to predict the probability of the defendant's future behavior based on others' past behavior," *id.* at 624 (quoting *Lawlor*, 738 S.E.2d at 884). The court found the state court's exclusion based on such reasoning was "contrary to . . . clearly established Supreme Court law." *Id.* at 629. *See also id.* at 629–33. The full Court of Appeals declined to reconsider the panel's finding *en banc*.

Porter so far has been unable to access the benefit of the decision in *Lawlor*. In Porter's case, the Fourth Circuit found that the state court's decision to prevent Porter from developing and presenting the same individualized risk assessment

evidence at issue in *Lawlor* by refusing to appoint an expert needed to develop and present the evidence was *not* unreasonable and, as a result, approved of the exclusion of this evidence by Porter's capital sentencing jurors. *See Porter*, 661 S.E.2d at 441–42 (risk assessment expert would opine "in a scientific manner based on an individualized assessment of Mr. Porter, which includes prior behavior while he was incarcerated in the past, to include the 76 unadjudicated bad acts that the Commonwealth has noticed; appraisals of past security requirements while he was incarcerated; and his age; his level of education and comparative review of the statistical data regarding similarly-situated inmates.").

On November 16, 2017, the Fourth Circuit discussed in detail and applied the standards and procedures for addressing motions to dismiss constitutional claims as a matter of law in the context of § 2254 proceedings. *Juniper v. Zook*, 876 F.3d 551 (4th Cir. 2017). The court emphasized that such review must construe facts in the light most favorable to the petitioner, should not make credibility determinations based on the written record, and should resolve all credibility determinations in petitioner's favor. *Id.* at 567–69. The court vacated the district court's decision and remanded, because, "the district court abused its discretion in dismissing Petitioner's *Brady* claim without holding an evidentiary hearing because it failed to assess the plausibility of that claim through the proper legal lens." *Id.* at 556.

Less than nine months later, the Fourth Circuit upheld the dismissal as a matter of law of Porter's claims even though the district court and the state courts

violated each of the basic tenets emphasized in *Juniper*, and more. Porter's claims included well-supported allegations that counsel were ineffective for failing to investigate and present evidence of prior misconduct by police officer Stanley Reaves, including two separate incidents in which Reaves's unprofessional conduct resulted in civilian fatalities. Porter testified at his capital trial that Reaves's unprofessional behavior caused Porter to fear for his life and shoot in self-defense. Porter alleged that the Commonwealth violated *Brady v. Maryland, Kyles v. Whitley, and Napue v. Illinois,* by concealing exculpatory evidence in the possession of the Commonwealth regarding Reaves's personnel file and background investigation, and by presenting false evidence and statements claiming Reaves's exemplary behavior as a police officer. In a case in which the critical issue was whether Porter panicked and feared for his life as a result of Officer Reaves's unexpected and unprofessional behavior, the state court, the district court, and the Fourth Circuit refused to presume true Porter's well-pled allegations, denied him the opportunity to develop evidence supporting his allegations through discovery or to confront evidence proffered against him, and dismissed Porter's claims as a matter of law based on evidence proffered by the party moving for dismissal that the court presumed true—practices found in *Juniper* to be abuses of discretion and contrary to the mandatory procedures required when determining whether to dismiss claims alleging constitutional violations as a matter of law.

STATEMENT OF THE CASE

A. Prohibition on Jurors' Consideration of Mitigating Evidence

The only basis upon which Porter was eligible for a potential death sentence was the jurors' finding, "after consideration of his history and background, that there is a probability that he . . . would commit criminal acts of violence that would constitute a continuing serious threat to society." *Porter*, 661 S.E.2d at 424.[1] Aware that the Commonwealth would rely on this "future dangerousness" aggravator to persuade jurors to find Porter eligible for death and to select a death sentence, defense counsel moved pre-trial for the appointment of a nationally renowned forensic psychologist and researcher specializing in capital risk assessment, Mark D. Cunningham, Ph.D., to provide testimony on this issue. J.A.66–178.[2] The assessment would have provided a basis for expert opinion evidence:

> in a scientific manner based on an individualized assessment of Mr. Porter, which includes prior behavior while he was incarcerated in the

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[1] Virginia law provides that the death penalty may not be imposed unless the prosecution proves beyond a reasonable doubt either:

> 1. that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or
>
> 1. that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or
>
> 2. that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

Va. Code §§ 19.2-264.2, -264.4(C).

[2] "J.A." cites are to the Joint Appendix filed in the United States Court of Appeals, No. 16-18 (ECF No. 30).

> past, to include the 76 unadjudicated bad acts that the Commonwealth has noticed; appraisals of past security requirements while he was incarcerated; and his age; his level of education and comparative review of the statistical data regarding similarly-situated inmates.

Porter, 661 S.E.2d at 441–42. Porter proffered statements from Cunningham regarding an individualized risk assessment conducted in the case of another capital defendant, Ricky Gray, where jurors did not find the "future dangerousness" aggravating circumstance. There was no suggestion that the individualized quality of the assessment Cunningham intended to do for Porter would be different.

The Commonwealth objected to Cunningham's appointment on the ground that no risk assessment would be admissible under Virginia precedent unless it took into account *only* the defendant's own "history and experience," and avoided reference to the correctional setting in which he would live for the remainder of his life. Joint Appendix at 323–26, 939, *Porter v. Commonwealth*, Nos. 071928–29 (Va.) ("Direct Appeal J.A."). The trial judge accepted the Commonwealth's argument and denied Cunningham's appointment, holding that the testimony was not particularized and, "an expert in his field could take any general claims he might make with respect to the prison framework and apply it to an individual. That doesn't make it particular." *Porter*, 661 S.E.2d at 437. *See* J.A.206–07, 196–97.

Porter was prevented from presenting any expert risk assessment evidence. In the absence of this evidence, the prosecutor argued that jurors should find Porter eligible for a death sentence based on the "future dangerousness" aggravating

circumstance, and sentence him to death. Future dangerousness was the only aggravating circumstance jurors found, and they sentenced Porter to death.

B. Uninvestigated and Concealed Exculpatory Evidence of Officer Reaves's Misconduct

The central issue at trial was whether the evidence showed beyond a reasonable doubt that Porter shot Norfolk Police Officer Stanley Reaves "for the purpose of interfering with the performance of [Reaves's] official duties," Va. Code § 18.2-31(6), an element that impacted Porter's degree of guilt and the appropriate punishment. Defense counsel argued that the crime was committed in self-defense. *See, e.g.*, J.A.1145. They put Porter on the stand to testify that he shot Reaves because he feared for his life. J.A.976. The prosecution argued that Porter's account was "fictional," J.A.1236, and that Reaves was the "kind of police officer [who] would talk to somebody first," J.A.1466.

Defense counsel claimed that he had planned to investigate Reaves's history as a police officer, but simply never did. J.A.2258 ("[W]e initially outlined a plan to issue either a subpoena duces tecum or FOIA request for Officer Reaves' [sic] service record in Baltimore in an effort to investigate his background."). Although counsel abandoned their investigation into Reaves's conduct, they did not abandon their argument that Reaves's aggressive conduct caused Porter to panic and fear for his life. *See*, *e.g.*, J.A.1112–13 ("the series of actions" by Reaves "preceding the shooting . . . constitute the overt act necessary to establish" an apprehension of imminent harm); J.A.1132–37; J.A.1117–18 ("Our position certainly is that Officer

Reaves went beyond what his duties were when he essentially violated his protocol by jumping out in front of Mr. Porter and grabbing him and getting at such close distance to him and then pulling out his weapon."); J.A.1227 ("What you do know is you know from Mr. Porter he feared for his life. He said he was afraid that the officer was going to kill him."); J.A.1233 ("Mr. Porter thought that he was going to be killed that day. And that's why [he] pulled out his gun and shot him. He was not trying to prevent Officer Reaves from arresting him."); J.A.1229.

According to Porter, he left a second-floor apartment unaware that Reaves was outside or that he had any interest in Porter. Porter was surprised and confused when Reaves grabbed him without explanation. Porter attempted to withdraw from the confrontation by raising both hands in the air, but Reaves drew his weapon—again without explanation—causing Porter to believe Reaves was going to shoot him. Porter testified, "I thought [Reaves] was going to kill me because he looked angry at the time, so I was just worried for my safety." J.A.976. To prevent this, Porter drew his own gun and fired multiple shots. *See* J.A.1035–36 (Porter agreed he "remember[ed] the first shot," but did not remember "the interval between after firing the first shot and when [he] stopped shooting"). Then he took Reaves's gun from the sidewalk and fled. As the district court found, "the crucial inquiry . . . [was] not whether the officer was in fact engaged at the time he was killed in performing a law enforcement duty but, rather, whether [Porter] acted

with the purpose of interfering with what *he perceived* to be an officer's performance of a law enforcement duty." J.A.2833 (emphasis added).

During state post-conviction proceedings, Porter discovered that a reasonable investigation of Reaves's background and history of unprofessional conduct as a Baltimore police officer would have allowed trial counsel to rebut the prosecutor's representation that Porter's testimony was "fiction," J.A.1236, and that Reaves was an officer who would "talk to somebody first," JA.1466. There were two distinct sources of powerful evidence from Reaves's history as a police officer, and each supported Porter's account. The first was the public record related to two incidents in which misconduct on Reaves's part led to the death of persons either in his custody or sought by Reaves for questioning. The second source of information, unavailable to Porter, was Reaves's personnel record in the custody of the Commonwealth at the time of Reaves's death, including a background check of Reaves's behavior as a police officer prior to coming to Norfolk.

1. The Public Record on Reaves's History of Misconduct

Some information about each of the fatal incidents in which Reaves was involved as a police officer was available because the decedents' representatives filed lawsuits about Reaves's conduct and that of other officers. The first of these two incidents occurred in June, 1994, when Reaves stopped a bicyclist by blocking his path with Reaves's police cruiser. Reaves approached the bicyclist and, without "any conversation," pushed the person in the chest, knocking him to the ground.

J.A.2041–47. Then Reaves inexplicably slashed the person's bicycle tires. When a previously uninvolved bystander, George Hite, objected to Reaves's actions, he was arrested for disorderly conduct. J.A.2049–55. Witnesses reported that Hite was in the custody of Reaves and another officer with his hands cuffed behind his back, when the second officer pulled Hite to his feet then swept Hite's legs out from under him. This caused Hite to hit his head on the sidewalk, an injury that ultimately resulted in Hite's death. "In a subsequent civil lawsuit, Officer Reaves stated he believed his fellow officer had acted appropriately, although eyewitnesses contradicted Reaves's version of events." J.A.2437. A police internal affairs investigation charged Reaves with "malicious destruction." Reaves denied that he touched the person or the bicycle, but was found guilty and removed from the street. J.A.2011–12. A federal prosecutor investigating the incident found Reaves's account "troubling," J.A.2129, and his "lack of candor" "disquieting," J.A.2127.

A second fatal incident involving Reaves's unprofessional conduct occurred in 2001, when, in violation of department policy, Reaves chased a teen riding a dirt bike in his police cruiser. When Reaves's cruiser caught up to the dirt bike, the teen lost control, was thrown into a utility pole, and died of head injuries. J.A.2437.

2. Concealed Information Regarding Reaves's Misconduct

The suppressed personnel record evidence was distinct from evidence available to the public. In response to a request for Reaves's police personnel file, the City of Norfolk stated, "[t]his office has a small database responsive to your

request," but refused to release it. J.A.1771. Porter alleged that evidence related to the Baltimore fatalities and more would have been disclosed to the Norfolk Police Department (NPD) when it conducted the mandatory investigation into Reaves's background before hiring him. J.A.1778.[3] Although Porter diligently requested throughout state and federal habeas proceedings the discovery that would allow him to prove his factual allegations about the information in the Commonwealth's possession, *see, e.g.*, J.A.1709, 2136, 2142–44, 2374, 2386–88, 2515, 2610, all requests were denied, *see, e.g.*, J.A.2447; *Porter*, 772 S.E.2d at 550; J.A.2880.

In response to Porter's allegations, the Warden proffered an affidavit from prosecutor Philip G. Evans, II. J.A.2437–38. Evans claimed that "the Commonwealth had no specific information concerning . . . the nature of [Reaves's] service as a law enforcement officer" in Baltimore. J.A.2254. However, in another recent case addressing Evans's compliance with his *Brady* obligations, both the federal district court and the Fourth Circuit found that favorable evidence was

[3] The NPD Police Recruit Supplemental Questionnaire asks the applicant whether he "had any disciplinary action taken against [him] from any employment," and to provide details of any such action. J.A.1786. It also asks whether the applicant has previously applied for employment in the public safety field, and to provide references, including former employers, J.A.1788, and specify years of law enforcement experience, J.A.1790. Because he had been a police officer for 11 years in Baltimore, Reaves should have been eligible to enter the NPD as a certified officer transfer, a program that allows an officer certified in another jurisdiction to do a shortened period of training before becoming a full officer and earning substantially more than is earned during training. *See* NPD Recruitment, Certified Officer Program, http://www.norfolk.gov/police/recruitment.asp. The testimony at trial from NPD Chief Marquis was that Reaves was required to participate in the full six-month police academy required of a new officer and three months of additional training before he was sworn in as a police officer. J.A.410–11. The fact that Reaves was required to complete the entire training program and more, despite 11 years of experience as a police officer, provides support for Porter's argument that something in Reaves's background gave the NPD cause for hesitation in making Reaves a full officer.

concealed from the defendant despite multiple sworn statements from Evans averring otherwise. *See Juniper v. Pearson*, 2013 U.S. Dist. LEXIS 46406, *43–44 (E.D. Va. Mar. 29, 2013); *id.* ("events leading up to this point . . . show the Commonwealth's entrenched resistance to transparency in this criminal prosecution and subsequent post-conviction proceedings."); *Juniper v. Zook*, 876 F.3d at 566 (agreeing with the district court's "entrenched resistance" characterization, noting "that additional evidence in the record . . . pointed to suppression," and finding that Evans "seems to have fundamentally misunderstood his obligation under *Brady*").

ARGUMENT

I. Virginia's Exclusion of Individualized, Scientific Evidence that a Capital Defendant is Unlikely to Pose a Risk of Future Violence in Prison as Irrelevant and Inadmissible is Contrary to or an Unreasonable Application of this Court's Precedent Under the Eighth and Fourteenth Amendments.

The only aggravating circumstance jurors found that could make Porter eligible for a death sentence was the probability that he was a "continuing serious threat to society," as defined by state statute. *See supra* n.1. (aggravating factor referred to as "future danger" or "future dangerousness"). In support of this aggravating factor, the prosecution presented evidence of Porter's behavior while incarcerated in prison or in custody of jail personnel. The state court held that the only items of evidence that could be used to rebut the prosecution's evidence of future dangerousness were incidents from Porter's past behavior. *Porter*, 661 S.E.2d at 438–39. Testimony about a risk assessment individualized to Porter—an

individualized scientific assessment of the probability that Porter would commit serious criminal acts of violence that would constitute a continuing serious threat to society if sentenced to life imprisonment without parole—was rejected as per se irrelevant and inadmissible. *Id.*

A. Virginia's Exclusion of Scientific Risk Assessment Evidence from Consideration as Mitigating Evidence Violates the Eighth Amendment by Undermining the Fairness and Reliability of the Jurors' Ultimate Capital Sentencing Decisions.

For more than three decades, this Court has acknowledged the well-established rule that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. . . . [and] such evidence may not be excluded from the sentencer's consideration." *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (relying on *Eddings v. Oklahoma,* 455 U.S. 104 (1982)). The decisions in *Eddings* and *Skipper* followed from standards set by this Court requiring that sentencers in a capital case should be presented with "all possible relevant information," to better enable predications about a defendant's probable conduct in prison. *See, e.g.*, *Jurek v. Texas,* 428 U.S. 262, 276 (1976) ("It is, of course, not easy to predict future behavior. . . . What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."). The standard for mitigating evidence in capital cases is defined in "in the most expansive terms," *Tennard v. Dretke*, 542 U.S. 274, 284 (2004), and includes "a defendant's disposition to make a well-behaved and

peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Skipper*, 476 U.S. at 7.

Despite this precedent clearly establishing the relevance and admissibility of "evidence that the defendant would not pose a danger if spared (but incarcerated)," *Skipper*, 476 U.S. at 5, Virginia courts have barred as irrelevant and inadmissible defendants' presentations of expert risk assessment testimony in death penalty cases.[4] *See, e.g.*, *Porter*, 661 S.E.2d at 442; *Lawlor*, 738 S.E.2d at 882–85 (jurors assessing future dangerousness are not making a predictive judgment, so expert risk assessment testimony on prison violence is not relevant); *Morva v. Commonwealth*, 683 S.E.2d 553, 565–66 (Va. 2009); *Juniper v. Commonwealth*, 626 S.E.2d 383, 424 (Va. 2006); *Bell v. Commonwealth*, 563 S.E.2d 695, 714–15 (Va. 2002).

In *Lawlor v. Commonwealth*, the most recent Virginia case to address the relevance and admissibility of risk assessment evidence in capital sentencing proceedings, the state court cited *Porter v. Commonwealth* in justifying the exclusion of Lawlor's proffered risk assessment evidence as "mere 'statistical speculation.'" *Law-*

[4] While barring expert risk assessment evidence on behalf of the defendant, Virginia courts have approved of predictions of violence by prosecution witnesses who identified no empirical or research bases for their opinions, and made no effort to quantify the magnitude of risk beyond vague terms such as "substantial" or "high." *See, e.g.*, *Wright v. Commonwealth*, 427 S.E.2d 379, 391 (Va. 1993); *Savino v. Commonwealth*, 391 S.E.2d 276, 280 (Va. 1990); *Edmonds v. Commonwealth*, 329 S.E.2d 807, 813 (Va. 1985); *Giarratano v. Commonwealth*, 266 S.E.2d 94, 101 (1980).

Virginia courts also allow the admission of expert risk assessment evidence in other situations, including cases involving people alleged to be "sexually violent predators." *See, e.g.*, *Boyce v. Commonwealth*, 691 S.E.2d 782, 783–86 (Va. 2010) (allowing a "risk assessment" expert to testify on behalf of the Commonwealth that the defendant "had a high risk to re-offend" based in part on an "actuarial standard.").

lor, 738 S.E.2d at 884 (quoting *Porter*, 661 S.E.2d at 442). The state court also relied on *Porter* for the proposition that, "the mere fact that an attribute is shared by others from whom a statistical model has been compiled, and that the statistical model predicts certain behavior, is neither relevant to the defendant's character nor a foundation for expert opinion." *Id.* (quoting *Porter*, 661 S.E.2d at 442).

Based on a purported distinction between "characteristic" and "character," the state court in *Lawlor v. Commonwealth* ruled that "extracting a set of objective attributes about the defendant" and comparing these to extensive existing data "to predict the probability of the defendant's future behavior" is not probative of a capital defendant's "disposition to make a well-behaved and peaceful adjustment to life in prison," and could never be admitted as mitigating evidence. *Lawlor*, 738 S.E.2d at 884–85 (quoting *Skipper*, 476 U.S. at 7); *but see Lawlor v. Zook*, 909 F.3d at 632–33. As found by the court of appeals in *Lawlor v. Zook*, 909 F.3d at 629, the state court's exclusion of this kind of evidence from a capital sentencing determination that the defendant "would not pose a danger if spared" a death sentence cannot be squared with longstanding Eight Amendment guarantees. *See, e.g.*, *Eddings, Skipper*, *Jurek*, *Tennard*, *supra.*

B. Virginia's Exclusion of Scientific Risk Assessment Evidence from Consideration as Rebuttal Evidence to Prosecution Claims that a Capital Defendant Would be a Future Danger to Society if Not Executed Violates Due Process Guarantees.

"Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, . . . 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 requires that a capital defendant be permitted to present evidence that he would not pose a danger in prison." *Skipper*, 476 U.S. at 5 n.1 (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977)) (internal quotation marks omitted). *See also Simmons v. South Carolina*, 512 U.S. 154, 163–64 (1994) ("The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause."); *id.* at 161 ("The Due Process Clause does not allow the execution of a person on the basis of information which he had no opportunity to . . . explain."). *Cf. Jurek*, 428 U.S. at 275–76 (while it is "not easy to predict future behavior," "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.").

The Supreme Court of Virginia has persistently ignored this requirement, and effectively eliminated a Virginia capital defendant's right to rebut the prosecution's allegations of future dangerousness with individualized, scientifically verified risk assessment evidence regarding the low probability that he will pose a threat of violence if sentenced to life imprisonment. The state court's limitation endorses the evidence typically presented by the prosecution—the facts of the crime and the defendant's prior criminal history—while barring categories of evidence and scientific research findings tending to show that, even taking into account a violent crime and prior record, a given defendant's risk of serious future violence is actually low.

In *Porter*, the state court found that, under state law, Porter's risk assessment evidence was inadmissible because the evidence did not relate to the essential elements defining Virginia's aggravating circumstances that "focus the future dangerousness inquiry on the defendant's prior history, prior criminal record and/or the circumstances of the offense." *Porter*, 661 S.E.2d at 440. *See also*, *e.g.*, *Morva,* 683 S.E.2d at 565 ("The relevant evidence surrounding a determination of future dangerousness consists of the defendant's history and the circumstances of the defendant's offense."). In *Morva*—where the trial court denied admission of risk assessment evidence based on precedent set in *Porter*, *see Morva*, 683 S.E.2d at 559—the state supreme court explained that expert risk assessment evidence was inadmissible by virtue of its incorporation of general prison evidence into the expert's calculations about Morva's specific risk. *Id.* at 566 ("According to Dr. Cunningham, general

factors concerning prison procedure and security that are not individualized as to Morva's prior history, conviction record, or the circumstances of his offense are essential to Dr. Cunningham's expert opinion on prison risk assessment. Pursuant to our precedent, Dr. Cunningham's proposed testimony concerning prison life is inadmissible."); *see also id.* at 572 (Koontz, J., dissenting) (Virginia law established "a *per se* rule of inadmissibility" for "prison risk assessment evidence").

C. The State Court Unreasonably Applied Clearly Established Federal Law in Porter's Case.

The Supreme Court of Virginia affirmed the trial court's exclusion of Porter's expert risk assessment evidence based on a finding that only evidence of the defendant's character, prior record, or circumstances of the offense can be admitted as mitigating evidence at a capital sentencing determination, and that evidence of future behavior—such as adaptability to incarceration—may only be admitted to the extent that it relies solely upon the defendant's criminal record and prior history. *See, e.g.*, *Porter*, 661 S.E.2d at 441 ("[W[hen we used the term 'future adaptability' [to describe admissible mitigating evidence in prior cases], we meant that term *only* as future dangerousness can be derived from the context of a defendant's past acts, both as to his 'criminal record' and 'prior history' and including his past incarceration and the circumstances of the capital crime." (emphasis added)). *See also id.* at 439 ("we noted that the evidence in *Skipper* [*v. South Carolina*, 476 U.S. 1 (1986)] and *Williams* [*v. Taylor*, 529 U.S. 362 (2000)] was individualized specifically to

those defendants' prior acts while incarcerated *and were not statistical projections of future behavior*." (emphasis added)). Although the proposed expert risk assessment evidence would have taken into account evidence of Porter's character, prior record, and the circumstances of the offense, J.A.91 at ¶5, the state court found the evidence inadmissible because it *also* would have taken into account other information necessary to making a reliable and scientific assessment of risk. The state court went on to find that, because state court "precedent would render inadmissible the statistical speculation" that was part of the risk assessment evidence Porter sought to present, he could never show the "particularized need" required to be allowed to develop and present the evidence. *Porter*, 661 S.E.2d at 442. Indeed, the state court expressly found, assuming Porter had obtained an "individualized assessment," "[o]ur precedent is clear that [risk assessment evidence about the probability that Porter would be a future danger while incarcerated] is not relevant either in rebuttal or mitigation as to the future dangerousness factor." *Id.* at 441 n.15. In *Morva*, the court later explained that it had found that Porter could not make the showing required to obtain expert assistance to develop and present risk assessment evidence because this evidence was inadmissible. *Morva*, 683 S.E.2d at 563. Thus, the state court foreclosed any avenue by which expert risk assessment evidence could have been admitted at Porter's capital sentencing trial based on its fundamental ruling that the evidence itself was inadmissible and irrelevant to that proceeding.

In Porter's case, the Fourth Circuit held that the state court's decision to refuse to appoint a risk assessment expert because Porter's proffer was not "individualized" or "particularized" was reasonable, without addressing the broader and more fundamental underlying state court precedent that the evidence Porter sought to develop and present was inadmissible and irrelevant to a capital sentencing proceeding. *Porter v. Zook*, 898 F.3d 408, 433 (4th Cir. 2018). The court of appeals considered the state court's decision to be based on "Virginia law" that ostensibly recognizes "a federal right to non-psychiatric experts in Virginia state cases," *id.*, and not "clearly established federal law, as determined by the Supreme Court of the United States," 28 U.S.C. 2254(d)(1). The record clearly shows, however, that the trial court's decision to deny Porter an opportunity to present risk assessment evidence, and the state supreme court's justification for upholding that denial, relied upon the underlying and fundamental precept that risk assessment evidence was wholly inadmissible under Virginia law in capital sentencing proceedings. *See, e.g.*, *Porter*, 661 S.E.2d at 441 n.15 (assuming Porter made a particularized showing, "[o]ur precedent is clear that [risk assessment] evidence is not relevant either in rebuttal or mitigation as to the future dangerousness factor"); *Morva*, 683 S.E.2d at 563 (stating that Porter failed to make a particularized showing for appointment of a risk assessment expert because risk assessment evidence "was inadmissible") ; *Lawlor*, 738 S.E.2d at 884 (because risk assessment evidence applies a defendant's attributes to "a statistical model. . . . it is mere statistical speculation" and "neither

relevant to the defendant's character nor a foundation for expert opinion") (quoting *Porter*, 661 S.E.2d at 442).[5]

The state court's decision also was an unreasonable application of clearly established constitutional guarantees that "plainly require[]" that a capital defendant be allowed to present evidence to "deny or explain" the prosecution's evidence of future dangerousness. *Simmons,* 512 U.S. at 169 (citing *Gardner*, 430 U.S. at 362). *See also id.* at 165 n.5 ("[t]he Due Process Clause will not tolerate placing a capital defendant in a straitjacket by barring him from rebutting the prosecution's arguments"); *Skipper*, 476 U.S. at 5 n.1. There is no indication within this Court's precedent that its holdings intend to restrict the Due Process right to rebut the prosecution's case only to factual scenarios identical to those in the Supreme Court cases.

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[5] The Fourth Circuit panel in *Lawlor v. Zook* distinguished Porter's case by claiming that the state court rejected Porter's claim because Porter's proffer for the risk assessment "was not 'individualized' or 'particularized' to" Porter. *Lawlor*, 909 F.3d at 631 n.5 (quoting *Porter* panel's description of the Supreme Court of Virginia's decision in *Porter v. Commonwealth*). However, it is clear from the records of the two cases that is not a basis for distinguishing them. As in *Lawlor v. Commonwealth*, the state court in Porter's case "excluded specialized and relevant testimony of a qualified witness who would have explained that [the defendant] represents a very low risk for committing acts of violence while incarcerated, where the jury's only choices were life in prison without parole (LWOP) or death." *Lawlor*, 909 F.3d at 618 (internal quotations and citations omitted). As in *Lawlor v. Commonwealth*, Porter sought to present expert risk assessment evidence from a "clinical psychologist and expert in prison risk assessment and adaptation," who would use extensive evidence of Porter's "past behavior, as well as other statistical data and actuarial models, to analyze [Porter's] potential to adjust to life term in prison without serious violence." *Lawlor*, 909 F.3d at 619–20 (internal quotations omitted). And, most critically, as in *Lawlor v. Commonwealth*, expert risk assessment evidence was categorically rejected because the state court improperly held that testimony using statistical projections to examine a defendant's individual characteristics in the prison framework was irrelevant to, and inadmissible at, a capital sentencing proceeding. *Compare Porter*, 661 S.E.2d at 437, 442, *with Lawlor*, 738 S.E.2d at 632–33.

See, e.g., *id.* at 7 (rejecting a rule that would "have the effect of precluding the defendant from introducing otherwise admissible evidence for the explicit purpose of convincing the jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment."); *Simmons*, 512 U.S. at 165 ("petitioner was prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death").

In *Jurek v. Texas*, the Court approved the Texas statutory scheme requiring jurors to answer a question about future dangerousness because it was "essential . . . that the jury have before it all possible relevant information about the individual defendant." *Jurek*, 428 U.S. at 275–76. *See also id.* at 271 ("A jury must be allowed to consider on the basis of *all relevant evidence* not only why a death sentence should be imposed, but also why it should not be imposed." (emphasis added)). Relying on the foundation of *Jurek*, this Court later held, in dealing with the question of whether the *prosecution* could present expert psychiatric testimony related to the issue of future dangerousness, that *Jurek* made "no suggestion by the Court that the testimony of doctors would be inadmissible. To the contrary, the joint opinion announcing the judgment said that the jury should be presented with all of the relevant information." *Barefoot v. Estelle*, 463 U.S. 880, 897 (1983). The Court went on to hold that such testimony should be admitted even when the expert has not made a personal examination of the defendant, and was responding to hypothetical ques-

tions. *Barefoot*, 463 U.S. at 903 ("Expert testimony, whether in the form of an opinion based on hypothetical questions or otherwise, is commonly admitted as evidence where it might help the factfinder do its assigned job."). Ultimately, the Court concluded that finding this psychiatric testimony inadmissible, "would seriously undermine and in effect overrule *Jurek*." *Id.* at 906. The Court consistently endorsed a defendant's ability to present evidence opposing the prosecution's case against him. *See, e.g.*, *id.* at 898–99 ("jurors should not be barred from hearing the views of the State's psychiatrists along with opposing views of the defendant's doctors").

The state court decision in *Porter* was precedent for that court's decision in *Lawlor*. The state court's decision in *Lawlor* plainly was an unreasonable application of clearly established federal law regarding the federal constitutional right to present mitigating evidence at capital sentencing proceedings. *See Lawlor v. Zook*, 909 F.3d at 629–33. For the same reasons set out by the court of appeals in *Lawlor v. Zook*, the decision of the state court in Porter's case was an unreasonable application of Eighth Amendment guarantees as established in cases such as *Skipper*, *Eddings*, *Lockett*, and *Jurek*. For the reasons set out above, the state court decision also was an unreasonable application of Fourteenth Amendment guarantees established in cases such as *Gardner* and *Simmons*. This Court should hold as such, and remand with instructions to vacate Porter's death sentence.

D. The Exclusion of Expert Prison Risk Assessment Evidence was Prejudicial.

The prosecutor urged jurors to sentence Porter to death because they could "see from the record of this defendant has done [sic] that the chain of abuse of other people is unbroken. The decisions that he makes are undeterred and that he will continue to present a danger to society." Direct Appeal J.A.4142. Constitutional guarantees require that a capital defendant be able to present evidence that he would not be a continuing serious threat to society in support of a sentence less than death, and to respond to arguments like those made by the prosecution in Porter's case.[6] "[A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination," and "evidence of adjustability to life in prison unquestionably goes to a feature of the defendant's character that is highly relevant to a jury's sentencing determination." *Skipper*, 476 U.S. at 7 & n.2. A rule that:

> ha[s] the effect of precluding the defendant from introducing otherwise admissible evidence for the explicit purpose of convincing the jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment . . . would not pass muster under *Eddings*."

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[6] Jurors would have considered the expert risk assessment evidence in two distinct contexts. *See Tuggle v. Netherland*, 516 U.S. 10, 12 at n.1 (1995) (citing Va. Code §§ 19.2-264.4(C)–(D) (1995)). First, it would have been considered to determine whether jurors were unanimous that the evidence proved Porter's "future dangerousness" beyond a reasonable doubt, a finding required in order for Porter to be eligible for a capital sentence. Second, jurors would have considered the evidence when making their individualized sentencing selection decisions to determine whether to impose death or life imprisonment.

Id. at 7.

The state court's refusal to allow jurors to consider expert risk assessment evidence is all the more significant when "future dangerousness" plays the central role in jurors' death sentence eligibility and death sentence selection decisions, as it did in Porter's case. This is so because it is difficult for jurors to predict future behavior or the "probability" of a particular quality of behavior, which necessarily involves a degree of speculation. *See, e.g.*, *Jurek*, 428 U.S. at 274–75; *Buck v. Davis*, 137 S. Ct. 759, 776 (2017). The excluded expert risk assessment evidence, however, would have provided jurors "hard statistical evidence" to guide their speculation. *Cf. Buck*, 137 S. Ct. at 776–77 (finding prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), in a case where future dangerousness was a critical issue when defense counsel presented "hard statistical evidence" from an expert that the defendant's race was a factor to be considered when assessing his propensity for violence).

The excluded risk assessment evidence would have had a significant impact on jurors' determinations of the *weight* each would assign to the aggravating factor of future dangerousness in their highly discretionary sentencing decisions whether to impose death or life imprisonment. *See, e.g.*, *Porter*, 661 S.E.2d at 452–54 (Koontz, J., dissenting). The predictive evidence of Porter's risk of violence in prison also "could prove or disprove a fact the jury could deem to have mitigating value,

that is, whether [Porter] would 'pose a danger if spared but incarcerated.'" *Lawlor*, 909 F.3d 614 at 630 (quoting *Skipper*, 476 U.S. at 5).

In *Tuggle v. Netherland*, this Court recognized that an error preventing a capital defendant from developing his own psychiatric evidence allowing the Commonwealth's psychiatric evidence to go unchallenged "may have unfairly increased its persuasiveness in the eyes of the jury." 516 U.S. 10, 13 (1995) (per curiam). *Cf. Johnson v. Mississippi*, 486 U.S. 578 (1988) (holding that the Eighth Amendment was violated by a death sentence imposed by jurors allowed to consider materially inaccurate evidence). The Court found that "the absence of [improperly excluded] evidence may well have affected the jury's ultimate decision, based on all of the evidence before it, to sentence petitioner to death rather than life imprisonment." *Tuggle*, 516 U.S. at 14. In the same way, Virginia's refusal to allow Porter to present expert prison risk assessment evidence, and the resulting evidentiary imbalance in the evidence jurors were allowed to consider, casts doubt on the factual reliability, accuracy, and moral integrity of jurors' sentence selection decisions. *Cf. Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (decision to impose a death sentence reflects "a reasoned moral response to the defendant's background, character, and crime").

Because expert risk assessment evidence was inadmissible under Virginia law, Porter was denied the assistance of such an expert. This prevented Porter from presenting critical mitigating risk assessment evidence to jurors about the nature of his probable future behavior, and about whether a death sentence was the appro-

priate punishment for him. The state court's ruling "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record" of the defendant. *See Skipper*, 476 U.S. at 8.

Because the state court's decision impermissibly prohibited jurors from considering evidence that would have rebutted the state's case in support of a death sentence and supported Porter's case in favor of a life sentence, it was an unreasonable application of clearly established law. This Court should grant certiorari, vacate the lower court's decision, find the state court's dismissal of this claim to be an unreasonable application of clearly established federal law, and "remand with instructions to grant relief," *see Lawlor*, 909 F.3d at 618.

II. The State Court's Post-Conviction Decision Dismissing as a Matter of Law Porter's Well-Pled Allegations that his Convictions and Death Sentence were Obtained in Violation of His Constitutional Rights was Unreasonable and Entitled to *De Novo* Review under 28 U.S.C. § 2254(d).

The lower state and federal courts dismissed as a matter of law all of Porter's post-conviction allegations that his capital conviction and sentence were obtained in violation of the U. S. Constitution. He received no discovery, court-appointed expert or investigative assistance, or evidentiary hearing; neither the state nor the district court allowed argument on his petitions for a writ of habeas corpus or on any motion; and he was refused access to any process that would have given him the opportunity to compel testimony or produce evidence in support of his allegations, or to challenge evidence proffered against him.

Adding to the imbalance this absence of process created against petitioner, the state court dismissed Porter's claims as a matter of law based on allegations proffered by the Warden in support of his motion to dismiss, that the court presumed to be true. The court also resolved factual disputes in favor of the Warden, and made factual findings in favor of the Warden that were without bases in the record before the state court. This was contrary to clearly established federal law regarding how a motion to dismiss a petitioner's allegations of federal constitutional violations must be assessed. *See Townsend v. Sain*, 372 U.S. 293, 313 (1963); *Palmer v. Ashe*, 342 U.S. 134, 135–36 (1951) (where a state habeas petitioner was not afforded the opportunity to "prove his allegations," a federal court "must look to the [state habeas] petition and answers to determine whether the particular circumstances alleged are sufficient to entitle petitioner to a judicial hearing"); *id.* at 137 (a well-pled allegation of the violation of federal constitutional rights cannot be rejected "by a resort to surmise and speculation."). *See also Juniper*, 876 F.3d at 563 ("'a petitioner who has diligently pursued his habeas corpus claim in state court is entitled to an evidentiary hearing in federal court, on facts not previously developed in the state court proceedings, if the facts alleged would entitle him to relief, and if he satisfies one of the six factors enumerated by the Supreme Court in *Townsend*'") (quoting *Conaway v. Polk*, 453 F.3d 567, 582 (4th Cir. 2006)); *Juniper*, 876 F.3d at 564 (a habeas petitioner has alleged facts sufficient to obtain relief if, "construe[ing] facts in the light most favorable to the [petitioner],"

the claim is "plausible on its face."); *id.* at 567 (court also must "draw all reasonable inferences" from allegations in favor of petitioner); *see also Wolfe v. Johnson*, 565 F.3d 140, 165–69 (4th Cir. 2009).

In *Panetti v. Quarterman*, the Court stressed that *Ford v. Wainwright*, 477 U.S. 399 (1986), provided "clearly established law" setting "the minimum procedures a state must provide" in determining a death-sentenced inmate's competence to be executed. 551 U.S. 930, 949 (2007) (internal quotations omitted). The Court held that state court review of alleged federal constitutional violations must provide "basic requirements required by due process," including the ability to counter the State's evidence. *Id.* at 949–50 (internal quotations omitted) (citing *Ford*, 477 U.S. at 427); *see also Evitts v. Lucey*, 469 U.S. 387, 401 (1985) ("when a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act . . . in accord with the Due Process Clause."); *Smith v. Robbins*, 528 U.S. 259, 276–77 (2000) (state court appellate review must be "adequate and effective" and "reasonably ensure[]" that the "appeal will be resolved in a way that is related to the merits of that appeal."). Contrary to the holding in *Panetti*, the "factfinding procedures upon which the [state] court relied [to dismiss Porter's claims] were 'not adequate for reaching reasonably correct results' or, at a minimum, resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth.'" *See Panetti*, 551 U.S. at 954 (quoting *Ford*, 477 U.S. at 423 (Powell, J., concurring in part and concurring in judgment)).

A. The State Court Decision Dismissing as a Matter of Law Allegations of Ineffective Assistance of Counsel was Based on Unreasonable Determinations of Fact.

The state court dismissed Porter's claim that trial counsel failed to adequately investigate Reaves's prior conduct as a police officer by relying on unreasonable determinations of fact based on the state court record. The state court found that: i.) Porter "acknowledge[d] that counsel was not on notice of Reaves's alleged prior employment history"; and ii.) Reaves's personnel records "do not show any formal disciplinary proceedings and do not reference any instances of Officer Reaves inappropriately displaying or using his service weapon." *Porter*, 722 S.E.2d at 549. In light of this absence of evidence, the state court found that Porter failed to articulate how personnel records would bolster his testimony that Reaves forcefully confronted him with his gun drawn. *Id.*

Each finding is unreasonable based on the record before the state court. The second "finding" was especially egregious and confounding. Contrary to its finding, *the state court could not know what information is in Reaves's personnel records* because, despite Porter's diligent efforts, *the records never have been released*. The state court's reliance on trial counsel's purported lack of notice was similarly unreasonable. In fact, the Warden's proffer from trial counsel to the state court confirmed that counsel planned to investigate Reaves's past behavior as a police officer, but simply failed to do so. J.A.2255.

Trial counsel's initial plan to investigate Reaves's history as a police officer was reasonable and necessary in light of Porter's claim that he shot Reaves in response to Reaves's unanticipated and threatening actions. Under Virginia law, evidence of the victim's specific prior behavior is admissible in support of self-defense even if the defendant was not aware of the prior behavior. *See Randolph v. Commonwealth*, 56 S.E.2d 226, 230 (Va. 1949); *Barnes v. Commonwealth*, 197 S.E.2d 189, 190 (Va. 1973). Counsel's decision to accuse Reaves of unprofessional, aggressive conduct without performing even a cursory investigation of his prior conduct was objectively unreasonable. *See Strickland*, 466 U.S. at 691 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

Even if trial counsel were initially unaware of Reaves's previous behavior as a law enforcement officer, counsel's lack of actual notice of the substance of Reaves's employment history does not absolve them of the duty to make a diligent investigation. This is especially true in this case because the defense alleged Reaves behaved in a way that was contrary to the way he would be expected to behave when performing his official duties. *Strickland* does not require counsel to investigate only when put on actual notice of the fruit of the investigation; instead, counsel is required to make a "complete investigation," and only put "limitations on investigation" that are supported by "reasonable professional judgments" in the

particular circumstances of the case. *Strickland*, 466 U.S. at 691. Neither the state nor the federal district court resolved or addressed these matters.

The court of appeals affirmed the lower courts' dismissals of Porter's claim, not because he failed to alleged grounds for relief, but because he failed to "rebut[] . . . by clear and convincing evidence" the state court's determination of fact that trial counsel failed to learn about Reaves's history of misconduct as a Baltimore police officer. *Porter*, 898 F.3d at 435. But Porter was never provided an opportunity to develop and present such rebuttal evidence. The court of appeals also noted that trial counsel's failure to obtain Reaves's personnel record was not "particularly egregious" because counsel were not allowed to argue self-defense. *Id.* The state court record, however, squarely contradicts this finding and shows that, although the trial court did not allow a self-defense instruction, trial counsel argued self-defense repeatedly. *See, e.g.*, J.A.1112–13; 1117–18; 1132–37; 1227; 1229; 1233.

B. The State Court Decision Dismissing as a Matter of Law Allegations of Violations of *Brady v. Maryland*, *Kyles v. Whitley*, and *Napue v. Illinois*, was Based on Unreasonable Determinations of Fact.

Porter alleged both that information supporting his testimony about Reaves's behavior was concealed by the Norfolk Police Department which assisted in Porter's prosecution, *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), and that the Commonwealth made representations about Reaves's behavior despite having actual knowledge of concealed information conflicting with those representations, *Napue v. Illinois*, 360

U.S. 264 (1959). The evidence concealed from Porter "may have had an effect on," *Napue*, 360 U.S. at 271, and was "material" to, *Brady v. Maryland*, 373 U.S. 83, 87 (1964), jurors' guilt and sentencing decisions.

Evidence of Reaves's history of aggressive conduct as a police officer was relevant to whether prosecutors had proven beyond a reasonable doubt that Porter shot Reaves for the purpose of interfering with the performance of his official duties, an element required for a conviction of capital murder, Va. Code § 18.2-31(6). It would have supported Porter's requests for instructions on self-defense and lesser degrees of murder, and his arguments against death eligibility and in favor of a life sentence. In the absence of this evidence, the trial court presumed Reaves acted in accord with the performance of his official duties as a police officer, and refused to give an instruction on self-defense. J.A.1143.

Based on disclaimers proffered by the Warden—the party moving for dismissal as a matter of law—the state court found that no favorable evidence was concealed, and dismissed this claim as a matter of law. *Porter*, 722 S.E.2d at 541. The Warden's proffers came from the very same prosecutors accused of concealing the information, and were internally contradictory.[7] *But see Commonwealth of Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 119 (1956) (not sufficient

[7] Prosecutor Bryant averred that she had no personal knowledge of allegations of misconduct against Reaves while he was a Baltimore Police Officer, but all the information her office had was that Reaves approached people in a non-confrontational manner. J.A.2235. Prosecutor Evans claimed the office had no "specific information" about the nature of Reaves's service in Baltimore. J.A.2254.

basis for summary dismissal if respondent merely "files an answer denying some or all of the allegations."). The proffers were based on the prosecutors' personal knowledge, and did not claim to involve investigation to determine whether other agents of the Commonwealth had knowledge of Reaves's prior conduct. Notably, the affidavit proffered by the Warden from Norfolk Police Investigator Malbon did not deny knowledge of Reaves's prior misconduct as a police officer. At most, the Warden's proffer creates a genuine dispute of material fact, but it cannot "demonstrate" that no prosecution agent possessed the information described.

The state court also found that a letter from the City of Norfolk, "demonstrate[d] that the Commonwealth did not possess any information" about Reaves's behavior as a police officer. *Porter*, 722 S.E.2d at 541. The letter was a response to Porter's request for Reaves's police personnel file, including his application to the Norfolk Police Department and background check, and any records of alleged misconduct by Reaves. J.A.1771. Contrary to the state court's representation, the letter from the City of Norfolk conceded, "[t]his office *has a small database responsive to your request*," but refused to release the records because they were "exempt from disclosure." J.A.1771 (emphasis added). The undisclosed custodian denied having "a background check or misconduct records for Officer Reaves's tenure with the Baltimore Police Department," but did not deny that the unnamed "applicable department" had records relating to the mandatory background check that had been done as part of Reaves's application to the *Norfolk*

Police Department. In light of the background information required in the application to the NPD, *supra* n.4, these records would undoubtedly include information about Reaves's prior conduct as a police officer. Also, important for application of *Brady*, the letter gives no indication that the City did not possess information that *could lead* to the discovery of material information, such as identities of persons responsible for conducting the background check or signing off on Reaves's fitness for duty with the NPD. *See, e.g.*, *United States v. Sipe,* 388 F.3d 471, 485 (5th Cir. 2004); *United States v. Gil,* 297 F.3d 93, 104 (2d Cir. 2002) ("[I]nadmissible evidence may be material under *Brady*."); *Wright v. Hopper,* 169 F.3d 695, 703 (11th Cir.1999) ("Inadmissible evidence may be material if the evidence would have led to admissible evidence."); *Coleman v. Calderon,* 150 F.3d 1105, 1116 (9th Cir. 1998) ("To be material, evidence must be admissible or must lead to admissible evidence."); *United States v. Phillip,* 948 F.2d 241, 249 (6th Cir. 1991) ("Certainly, information withheld by the prosecution is not material unless the information consists of, or would lead directly to, evidence admissible at trial for either substantive or impeachment purposes.").

Porter diligently tried to obtain information about Reaves's conduct as a police officer, but sources refused to provide it voluntarily. The state post-conviction court refused to provide Porter any opportunity through discovery to review Reaves's personnel file from the NPD or the results of the background check done as part of the employment application process. It is undisputed that the contents of

Reaves's personnel file, including his background investigation, are *not* available to Porter without court assistance, and have never been reviewed by him or by any court in this matter. The state court's decision to dismiss the claim as a matter of law based on the purported availability *and content* of these records was based on an unreasonable determination of facts under § 2254(d)(2).

Ultimately, the court of appeals upheld the dismissal of Porter's *Brady* claim, not because he had failed to allege grounds for relief, but because he had "not shown that the 'favorable evidence' of Reaves's background was ever *possessed* by Norfolk police or the state." *Porter*, 898 F.3d at 438. Porter's failure to prove his claim is not a basis for dismissal of the claim as a matter of law. In *McNeal v. Culver*, the Court found that, although it was not possible to determine the truth of the allegations and circumstances alleged in the petition, "the allegations themselves made it incumbent on the [state] supreme court to grant petitioner a hearing and to determine what the true facts are." 365 U.S. 109, 117 (1961).

State court decisions, like those described above, that are the product of a court's refusal to provide adequate process when addressing a death-sentenced inmate's allegations of federal constitutional violations are not entitled to comity afforded decisions that provide fundamental elements of a fair adjudication of these alleged violations. Such decisions cannot invoke restrictions on a federal court's ability to consider the merits of the allegations and to remedy violations if identified. *See, e.g.*, *Winston v. Pearson*, 683 F.3d 489, 501 (4th Cir. 2012) (where a

habeas petitioner is "hindered from producing critical evidence to buttress his . . . claim . . . by the state court's unreasonable denial of discovery and an evidentiary hearing. . . . his claim had not been adjudicated on the merits in state court," and § 2254(d) does not apply); *id.* at 502 (a "state court's refusal to allow [a habeas petitioner] to develop the record, combined with the material nature of the evidence that would have been produced in state court were appropriate procedures followed, render[] its decision unbefitting of classification as an adjudication on the merits."). This kind of review has been found to lack "the type of adversarial process historically thought essential to the truth-finding function of a court." *Gray v. Pearson*, 2012 WL 1481506 *11 (E.D. Va. Apr. 27, 2012).

C. Porter is Entitled to *De Novo* Review of These Claims.

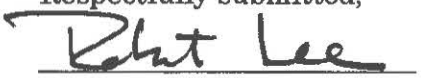
This Court should grant certiorari to hold unreasonable the state court's decisions outlined above, to identify the inadequate quality of the process and review provided in Porter's case in state court, and to establish parameters consistent with this Court's decisions in *Townsend* and *Panetti* and with broad practices in addressing motions to dismiss civil cases, for the process necessary to adjudicate and make reasonable decisions regarding post-conviction review of allegations of constitutional violations in criminal proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted, the lower court's decision should be vacated, Claim I should be remanded with instructions to grant

relief, and, alternatively, Claim II should be remanded with instructions to provide *de novo* review of the claims discussed therein, including discovery and an evidentiary hearing.

Respectfully submitted,



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