No. 18-7670

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS ALEXANDER PORTER, PETITIONER
v.

DAVID ZOOK

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Supreme Court of Virginia unreasonably applied this Court's clearly established Due Process Clause jurisprudence in rejecting petitioner's request for state funding to obtain an expert to testify about the security constraints available in Virginia prisons and the general incidence of prison violence.

2. Whether the Supreme Court of Virginia made unreasonable factual findings as to two of petitioner's claims, such that the court of appeals erred in deferring to those findings under 28 U.S.C. § 2254(d) without an evidentiary hearing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–29a) is reported at 898 F.3d 408. An earlier decision of the court of appeals is reported at 803 F.3d 694. The memorandum opinions of the district court granting summary judgment (C.A. App. 2804–80; Pet. App. 34a–45a) are unreported but are available at 2014 WL 4182677 and 2016 WL 1688765.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2018. A petition for rehearing was denied on August 31, 2018 (Pet. App. 31a). On November 28, 2018, the Chief Justice extended the time to file a petition for a writ of certiorari to and including January 28, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. In 2005, petitioner and Reginald Copeland travelled to the apartment of one of Copeland's female acquaintances in Norfolk, Virginia, to purchase marijuana. Inside, the two men found Copeland's friend, her two daughters, and four other female family members. When the women said they did not have any marijuana to sell, petitioner became upset, pulled out a semi-automatic pistol, and began threatening the group. At some point during this encounter, Copeland left the apartment and petitioner locked the door, trapping the women inside and Copeland out in the hallway. Pet. App. 66a.

Unable to return to the apartment, Copeland exited the building and reported the incident to three uniformed police officers a few blocks away. Pet. App. 66a. Officer Stanley Reaves drove to the building to investigate and saw petitioner walking away from the building. *Id.* Reaves grabbed petitioner by the arm and instructed him to remove his hands from his pockets. *Id.* In response, petitioner drew his pistol and fired, striking Reaves in the head. *Id.* After Reaves had fallen, petitioner fired twice more from about 6 inches away, aiming for and hitting the back and side of Reaves's head. C.A. App. 1043–44. Petitioner took Reaves's service revolver and fled the scene; Officer Reaves died from his injuries. Pet. App. 66a. A multi-month manhunt eventually resulted in petitioner's arrest in the New York area. C.A. App. 1054.

2. Petitioner was charged with capital murder, use of a firearm in the commission of the murder, and grand larceny of a firearm.

a. At trial, petitioner did not deny his involvement in the crime or the fact that he had specifically aimed for Officer Reaves's head. Pet. App. 69–70a. Instead, petitioner testified that Officer Reaves (who was wearing his service uniform) had approached petitioner with his service weapon drawn and petitioner had feared for his life. Pet. App. 69a. Because the state trial court concluded that even "accepting [petitioner's] version of everything," C.A. App. 1141, his actions would not have been reasonable (particularly given the second and third shots), the court denied petitioner's request for a self-defense instruction, C.A. App. 1140. The jury later found petitioner guilty on all counts.

b. In Virginia, capital punishment involves a two-part sentencing determination. Va. Code § 19.2-264.4(C)–(D). First, the jury must decide whether the prosecution has established at least one of two statutory aggravating factors: (1) a "probability based upon evidence of the prior history of the defendant or of the circumstances [of the offense] that [the defendant] would commit criminal acts of violence that would constitute a continuing serious threat to society" (the future-dangerousness factor); and/or (2) that the defendant's "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" (the vileness factor). *Id.* If the jury finds that the prosecution has not proven either aggravating factor, it must impose a sentence of life imprisonment. *Id.* If the jury finds one or both aggravators, the jury has discretion to impose a sentence of death or life imprisonment. *Id.*

To assist with this sentencing phase, petitioner sought state funding to hire three experts: a clinical psychologist; a neuropsychologist; and a "prison risk assessment" expert. C.A. App. 19, 63–64, 66–178. Petitioner described the last expert, Dr. Mark Cunningham, as someone who could provide information "about such critical considerations as the defendant's future classification if sentenced to life imprisonment; the limitations on his freedom within the prison system; the Virginia Department of Corrections's internal safety and security measures; and the actual rates of serious violence in Virginia's prisons." C.A. App. 69.

The state trial court granted petitioner's motion for government funding to hire the first two experts but denied the motion as to Dr. Cunningham. The court found that testimony about whether "prisons generally are violent places" and whether prisons "generally [are] the kind of places where you can expect people to be allowed to act up" was irrelevant both to the two statutory aggravating factors and in rebuttal to the prosecution's specific evidence of petitioner's prior bad acts. C.A. App. 188–89, 207.

The sentencing jury determined that the prosecution had established the "future dangerousness" aggravating factor and sentenced petitioner to death for the capital murder of Officer Reaves and to a term of 22 years' imprisonment for the remaining offenses. Pet. App. 8a.

c. Under state law, any judgment imposing "[a] sentence of death" is automatically reviewed by Virginia's highest court. Va. Code § 17.1-313(A). The Supreme Court of Virginia affirmed petitioner's conviction and sentence, including

the decision not to appoint Dr. Cunningham as a government-funded expert witness for the defense. Pet. App. 65a, 83a–90a. This Court denied certiorari. 556 U.S. 1189 (No. 08-8732).

3. Petitioner sought state habeas relief in the Virginia Supreme Court. C.A. App. 1646-1711. By that time, petitioner had learned about two incidents involving Officer Reaves's prior service with the City of Baltimore: a 1994 incident where Officer Reaves allegedly pushed a person off his bicycle and slashed the tires; and a second incident in 2001 where Officer Reaves pursued a suspect on a dirt bike with his patrol car, resulting in the suspect's loss of control and death. C.A. App. 1661–63. Petitioner argued, among other things, that the prosecution had withheld this allegedly material, exculpatory evidence from the defense, C.A. App. 1663–65, and that defense counsel had provided ineffective assistance in failing to investigate Officer Reaves's professional background, C.A. App. 1701–02. The Virginia Supreme Court denied the petition. Pet. App. 46a–57a.

4. Petitioner next sought habeas relief in federal district court. C.A. App. 1–2. The district court dismissed the petition, holding that, *inter alia*, petitioner had not shown error with respect to the failure to appoint Dr. Cunningham or the claims related to Officer Reaves's prior background. C.A. App. 2821–24, 2836–38. The court of appeals dismissed petitioner's appeal, holding that there was no appealable final judgment because the district court had not resolved petitioner's claim "that a juror [ ] was 'actually biased,' in violation of [petitioner's] right to trial by an impartial jury." *Porter v. Zook*, 803 F.3d 694, 695 (4th Cir. 2015).

On remand, the district court "directed the parties to submit further briefing that set forth all of the facts, law, and argument with respect to the actual bias claim." Pet. App. 34a. The district court ultimately denied relief, concluding "that under either the deferential standard set forth in 28 U.S.C. § 2254(d)(1)-(2), or a *de novo* standard of review, the actual bias claim lacks merit and may be dismissed without an evidentiary hearing." Pet. App. 35a.

5. The court of appeals "affirm[ed] in part, vacate[d] in part, and remand[ed] with instructions that the district court allow discovery and hold an evidentiary hearing on" what it viewed as petitioner's "two separate juror bias claims." Pet. App. 6a.

The court of appeals affirmed the district court's dismissal of the two categories of claims that petitioner presses here—specifically, the claims about the state trial court's refusal to appoint Dr. Cunningham (the prison-risk-assessment expert) and various claims about Officer Reaves's prior background. Pet. App. 18a–22a. As to the former, the court of appeals explained that this Court "has never addressed a capital defendant's right to a state-funded nonpsychiatric expert," *id.* at 18a, and that "the state court did not unreasonably find that [petitioner] did not make a particularized and individualized proffer for his expert testimony, and it did not violate clearly established federal law in rejecting [petitioner's] request for a risk assessment expert," *id.* at 19a.

As for the claims about Officer Reaves, the court of appeals concluded that "it was not an unreasonable application of the facts [to find] that [defense] counsel was

not on notice of Reaves's employment history" and "[o]n the law, it was not unreasonable to conclude that [petitioner] did not show deficient performance" in failing to request such materials, particularly because, due to the state trial court's ruling, "[c]ounsel was precluded from arguing that [petitioner] acted in self-defense." Pet. App. 20a. The court of appeals further determined that petitioner's failure-to-disclose-exculpatory-evidence claim failed because petitioner "has not shown that this 'favorable evidence' of Reaves's background as a police officer in Baltimore was ever *possessed* by Norfolk police or the state." *Id.* at 22a.

The court of appeals concluded, however, that the district court had erred in dismissing petitioner's juror-bias claims without a hearing. Pet. App. 9a–18a. It thus "vacat[ed] and remand[ed] so that [petitioner], once and for all, may be able to investigate his bias claims." *Id.* at 18a. Judge Shedd dissented solely with respect to the remand. *Id.* at 23a–29a. He would have "affirm[ed] the district court's dismissal of [petitioner's] 28 U.S.C. § 2254 petition in full." Pet. App. 23a. The two remanded claims remain pending at the district court.

ARGUMENT

Petitioner contends (Pet. 14–39) that all of the lower courts erred in rejecting his constitutional claims about his proposed prison-risk-assessment expert and Officer Reaves's past actions.

Those claims do not warrant this Court's review. The interlocutory posture of this case and petitioner's ability to renew his current claims through a petition for certiorari from the final judgment means that this Court's review would be premature. Petitioner does not even assert that the court of appeals's unanimous

rejection of his claims conflicts with the decisions of another court of appeals or state court of last resort. The claims that petitioner now urges have shifted from those that he presented to the state trial court and the state habeas court, and the nature of Virginia's capital sentencing regime would complicate any efforts to reach the broader issues that petitioner seeks to press. Finally, the court of appeals's decision is both correct and intensely factbound. The petition for a writ of certiorari should be denied.

1. This Court's review is unwarranted at this time because of the case's current procedural posture.

The decision from which petitioner seeks review did not dispose of all of his claims. Instead, the court of appeals remanded for an evidentiary hearing on petitioner's "two separate juror bias claims." Pet. App. 6a. The case is thus in an interlocutory posture, a fact that by itself "furnishe[s] sufficient ground for the denial of" certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Virginia Military Institute* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari) (noting that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction"). If the district court or the court of appeals ultimately grants relief on petitioner's juror-bias claims, petitioner would obtain the same relief (vacatur of his conviction and sentence) that he seeks in this proceeding. And if the lower courts ultimately reject petitioner's juror-bias claims, petitioner will have another opportunity to raise all of the arguments that he seeks to press

here now. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that the Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). This Court's "long-established rule against piecemeal appeals," *Andrews* v. *United States*, 373 U.S. 334, 340 (1963), thus counsels against review at this point.

2. The petition for a writ of certiorari also should be denied because it does not even assert, much less demonstrate, a conflict among the federal courts of appeals or state courts of last resort. Instead, petitioner argues that the decision below is "inconsistent" and "in conflict with" two decisions of the *same* court of appeals that issued the decision below. Pet. 3–6, 23 n.5. Any such conflict, however, would be a matter for the Fourth Circuit—either at the panel stage or en banc—rather than this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

3. Petitioner's first question presented (which involves the state trial court's denial of his request for a prison-risk-assessment expert) suffers from two significant problems that would make it an unsuitable vehicle for addressing the nuanced constitutional issue the petition asks this Court to review.

a. To begin, the record does not support the broad inquiry that petitioner now proposes with respect to Dr. Cunningham.

i. Petitioner argues (Pet. 15–17) that the state trial court's refusal to appoint Dr. Cunningham violated his Eighth Amendment right to present

mitigating evidence. Not only did petitioner fail to make that argument to the state trial court—he expressly disavowed it. See, *e.g.,* C.A. App. 78 n.4 ("Defendant seeks to introduce testimony regarding the quality and structure of the incarceration to which he will be subjected if not executed – *not as mitigating evidence, but rather to rebut the Commonwealth's allegation of future dangerousness*." (emphasis added)); accord C.A. App. 194 (stating that Dr. Cunningham's testimony was necessary "to rebut the issue of future dangerousness").[1] Given this express decision not to pursue a mitigation theory before the Virginia trial court, petitioner should not be permitted to make such a claim on habeas review.

ii. This case likewise presents no occasion for deciding whether a state court may reject a request for an individualized predictive risk assessment. As petitioner's motion seeking the appointment of Dr. Cunningham shows, petitioner did not ask for an individualized expert assessment of *his* risk of committing future violence in prison. Rather, petitioner asked for an expert who could discuss the security restraints available in Virginia prisons and the general incidence of prison violence.[2] In addition, by the time petitioner's motion to appoint Dr. Cunningham

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[1] Even in discussing *Skipper* v. *South Carolina*, 476 U.S. 1 (1985), petitioner made clear that he sought to rely on this Court's Due Process holding—not its Eighth Amendment holding. CA. App. 75 ("A majority of the [*Skipper*] Court concluded that the exclusion of such evidence violated the Eighth Amendment because it was relevant as mitigation. However, *Skipper*'s primary significance for the present motion derives from the fact that all nine members of the *Skipper* Court separately agreed, as an independent ground for reversal, that the prosecution's affirmative claim that the defendant would probably misbehave in prison triggered a constitutional right of rebuttal [under the Due Process Clause.]").

[2] See C.A. App. 68 (arguing that the jury needed information regarding "security and the actual prevalence of serious violence" in the prison setting to make a proper assessment); C.A. App. 69 (emphasizing need for expert who can discuss the "defendant's future classification if sentenced to life imprisonment; the limitations on his freedom within the prison system; the Virginia Department of Corrections internal safety and security measures; and the actual rates of serious violence in

was argued, the trial court had already appointed both a licensed clinical psychologist and a neuropsychologist to assist in petitioner's defense. Pet. App. 83a. As the trial court ultimately concluded, these experts substantially lessened petitioner's need for a third, more generalized expert to discuss the security measures available in Virginia prisons. And the court below simply concluded that "the state court did not unreasonably find that [petitioner]" made no such "particularized and individualized proffer" in his own case. Pet. App. 19a.

b. To be sure, petitioner has properly preserved a case-specific due process claim about the state trial court's decision not to appoint Dr. Cunningham. But that freestanding claim provides no basis for this Court's review because it cannot be separated from Virginia's interpretation of its "future dangerousness" aggravating factor.

As noted above, Virginia requires its juries to find at least one of two aggravating factors before imposing a capital sentence. Va. Code § 19.2-264.4(C)–(D). Time and again, Virginia's highest court has interpreted the statutory "future dangerousness" factor as addressing the risk of violence to society "in general," rather than to the society that the defendant will actually encounter in the future. See *e.g.*, *Lovitt* v. *Commonwealth*, 537 S.E.2d 866, 879 (Va. 2000). In other words, Virginia's future dangerousness factor asks the jury to assess the defendant's *proclivity* for violence, not his actual *capacity* to commit such violence given the nature of his post-conviction environment. *Burns* v. *Commonwealth*, 541 S.E.2d

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Virginia's prisons."); C.A. App. 74 ("[F]ailure to appoint an expert qualified to testify to prison security and rates of prison violence would be [to] deny Defendant his due process rights[.]").

872, 893 (Va. 2001) ("[T]he relevant inquiry is not whether [the defendant] *could* commit criminal acts of violence in the future but whether he *would*." (emphasis in original)). For this reason, Virginia courts have repeatedly excluded evidence of the sort petitioner sought to present through Dr. Cunningham as irrelevant to the statutory inquiry.

This understanding of Virginia law presents at least two complications for petitioner's current argument. First, to the extent petitioner sought to use Dr. Cunningham's testimony to rebut the prosecution's evidence regarding the statutory future dangerousness factor, such evidence was irrelevant as a matter of state law. As the Virginia Supreme Court has held, testimony about the security constraints that a defendant will encounter in prison is not relevant to the question of whether petitioner "would" commit future acts of violence if given the opportunity. *Burns*, 541 S.E.2d at 893. Because federal courts have no power to correct a state court's interpretation of state law, the Virginia Supreme Court represents the end of that road.[3] See *Estelle* v. *McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state court determinations on matters of state-law questions.").

Second, to the extent petitioner sought to use this evidence solely to sway the jury's ultimate sentencing decision, there was a clear risk of confusion. Because the evidence offered by Dr. Cunningham obviously related to petitioner's actual

[3] Petitioner has not directly challenged the constitutionality of Virginia's statutory aggravating factors. In any event, the Federal Constitution does not forbid—let alone clearly forbid—reliance on a defendant's general proclivity for future violence, rather than his actual capacity for future violence as an aggravating factor at sentencing.

capacity for future dangerousness, there was a risk that the jury would misapprehend the nature of the statutory "future dangerousness" inquiry. The complicating role of Virginia law thus counsels against using this case to decide the due process question.

4. Finally, the petition for a writ of certiorari should be denied because petitioner's current claims are intensely factbound and both courts below were correct in unanimously rejecting them. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

a. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal habeas court may grant relief on a claim previously adjudicated on the merits in state court in only two circumstances. The first is where "the adjudication of the claim . . . 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." 28 U.S.C. § 2254(d)(1). The second is where "the adjudication of the claim . . . 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." § 2254(d)(2).

To constitute an "unreasonable application" of this Court's decisions, "the ruling must be objectively unreasonable, not merely wrong." *Virginia* v. *LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (per curiam) (internal quotation marks omitted). Indeed, in this context, "even clear error will not suffice." *Id.* Rather, "a litigant

must show that the state court's ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* (alterations and internal quotation marks omitted).

When a federal habeas court evaluates the legality of a state conviction, AEDPA dictates that any "determination of a factual issue made by [the] State court shall be presumed to be correct" and "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence" to the contrary. 28 U.S.C. § 2254(e)(1). Where an absence of record evidence is not attributable to the petitioner, the district court has discretion to grant an evidentiary hearing as part of its habeas review. In considering such requests,[4] the court must take account of whether the hearing would enable petitioner "to prove the petition's factual allegations," and whether, if true, those allegations "would entitle the applicant" to habeas relief. *Schriro* v. *Landrigan*, 550 U.S. 465, 474 (2007). Such decisions are typically left to the "sound discretion" of the district court and will be overturned on appeal only for an abuse of that discretion. *Id.* at 473.

b. As the court below correctly (and unanimously) concluded, the state trial court "did not violate clearly established federal law in rejecting [petitioner's] request for the risk assessment expert." Pet. App. 19a. This Court "has never addressed a capital defendant's right to a state-funded nonpsychiatric expert," Pet.

[4] AEDPA dictates a more stringent procedure for expanding the record where the petitioner has failed to develop the state court record through a lack of diligence or other fault. See 28 U.S.C. § 2254(e)(2); *Williams* v. *Taylor*, 529 U.S. 420 (2000).

App. 18a. (quoting *Morva* v. *Zook*, 821 F.3d 517, 524 (4th Cir. 2016)), and the "two key cases upon which [petitioner] relies . . . are inapposite" because they involve the right to present certain arguments or make the jury aware of certain facts rather than a "right to a state-funded nonpsychiatric expert," *id.* (discussing *Skipper* v. *South Carolina*, 476 U.S. 1 (1986), and *Simmons* v. *South Carolina*, 512 U.S. 154 (1994)). And even the decisions where this Court *has* concluded that the Federal Constitution creates an entitlement to state-provided assistance to individual defendants, the Court has emphasized that the Due Process Clause does not require the state to "purchase for the indigent defendant all the assistance that his wealthier counterpart might buy." *Ake* v. *Oklahoma*, 470 U.S. 68, 77 (1985).[5] That is not the stuff of which a violation of clearly established federal law is made.[6]

c. The court of appeals was also correct in unanimously rejecting petitioner's various claims involving Officer Reaves.

Petitioner's assertion that the state habeas court erred in finding that petitioner's trial counsel was not aware of any incidents in Officer Reaves's

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[5] As noted previously, petitioner received not one, but two mental health experts to assist in his defense. C.A. App. 192–93.

[6] For the reasons previously explained, no Eighth Amendment issues are properly before this Court. But even if they were, such claims would likewise provide no basis for further review. This Court has interpreted the Eighth Amendment as requiring States to give juries the opportunity "to consider and give effect to mitigating evidence" about the defendant's "character or record or the circumstances of the offense." *Oregon* v. *Guzek*, 546 U.S. 517, 526 (2006); accord *Skipper*, 476 U.S. at 6 (holding that defendant has a right to inform the jury of "any aspect of [his] character or record" or "any circumstances of the offense," including his good behavior during trial). But petitioner did not seek to introduce evidence about *his* character, *his* actual behavior in prison, or the circumstances of *his* offense, and this Court has never interpreted the Eighth Amendment as mandating introduction of any and all potentially mitigating evidence. To the contrary, this Court has emphasized that the Eighth Amendment "does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted." *Oregon*, 546 U.S. at 526 (holding that a state may exclude evidence meant to cast doubt on defendant's guilt at the sentencing phase).

background stumbles right out of the gate. As petitioner commendably quotes—but then fails to further discuss—the state habeas court understood petitioner as having "*acknowledge[d]* that counsel was not on notice of Reaves's alleged prior employment history." Pet. 32 (emphasis added); accord Pet. App. 56a. A court can hardly be faulted for taking a party at its word about what is and is not in dispute. See *Greenlaw* v. *United States*, 554 U.S. 237, 243–44 (2008). What is more, petitioner offers no evidence that counsel *was* aware that Officer Reaves had such incidents in his background, see 28 U.S.C. § 2254(e)(1) (stating that, in habeas, the burden of proof lies with the petitioner), and the state court's contrary conclusion is supported by the testimony of petitioner's trial counsel that his investigation at the time "did not reveal any information about Reaves's personnel files." C.A. App. 2837.

Petitioner next argues (Pet. 32–33) that the Supreme Court of Virginia erred in finding that Officer Reaves's service records did not suggest that he had a history of misusing his service weapon. But the state court did not make the categorical finding that petitioner suggests. Instead, the court noted its skepticism that petitioner could show that the records in question—"which do not reference . . . any instances of Officer Reaves inappropriately displaying or using his service weapon" — "would have been relevant in bolstering petitioner's testimony that Officer Reaves forcefully approached petitioner with his gun drawn" in this case. Pet. App. 56a.

Petitioner briefly contends (Pet. 34) that the court of appeals erred in finding that the state trial court prevented petitioner from arguing self-defense. Here too petitioner falls far short of a clear and convincing rebuttal. The trial court clearly

rejected petitioner's request for a self-defense instruction, reasoning that it did not believe petitioner could establish this defense. C.A. App. 1140.

Petitioner also falls short in his efforts to challenge the state habeas court's finding that the prosecution did not conceal exculpatory evidence because it never had the evidence in its possession. Pet. 35–39. As the court of appeals correctly explained, the burden of showing possession lies with petitioner and petitioner "has not shown that this 'favorable evidence' of Reaves's background was ever *possessed* by Norfolk police or the state." Pet. App. 22a. Even if petitioner can posit some other meaning to some of the underlying factual matters, the state court's finding is "at least minimally consistent with the facts and circumstances of the case," *Wright* v. *Angelone*, 151 F.3d 151, 157 (4th Cir. 1998), and is therefore controlling under AEDPA.

d. Petitioner's one-paragraph discussion (Pet. 39) fails to demonstrate that the district court abused its considerable discretion in rejecting his request for an evidentiary hearing on either issue involving Officer Reaves. As to the ineffective assistance claim, petitioner cannot show that the district court abused its discretion because he has provided no indication that an in-person hearing would provide any additional context in support of his allegations, nor that these facts would suffice, even if true, to overcome the reality that evidence of Officer Reaves's prior conduct would not have been admissible—even if discovered—because petitioner was not permitted to argue self defense.[7] See *Jordan* v. *Commonwealth*, 252 S.E.2d 323, 325

[7] Petitioner has not challenged the trial court's self-defense ruling here.

(Va. 1979) (character evidence of victim inadmissible in Virginia absent evidence of self-defense). Likewise, as to the claim that prosecutors withheld evidence, petitioner has not shown what would come of an evidentiary hearing given that the Commonwealth has already indicated that it never had the records in question.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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