ORIGINAL

No. 96-5364

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

LEM DAVIS TUGGLE, JR.,

Petitioner,

v.

J. D. NETHERLAND, WARDEN,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE QUESTIONS PRESENTED

Prior to Petitioner's capital murder trial, a state psychologist interviewed him without notice to defense counsel to develop testimony on Virginia's "future dangerousness" aggravating circumstance. When Petitioner's trial attorneys learned of the interview, they moved for appointment of a defense psychiatrist, but their motion was denied even though they offered to pay for the expert themselves. At sentencing, the state expert testified that Petitioner met the "future danger" aggravating factor but he was unable to offer his own counter evidence to rebut that testimony or otherwise support his defense. The jury found the referenced aggravating factor and, reviewing all evidence before it, sentenced Petitioner to death.

This Court granted certiorari and unanimously found the Petitioner's sentencing unconstitutional under Ake v. Oklahoma, 470 U.S. 68 (1985), concluding that the refusal to allow Petitioner the assistance of a psychiatrist "prevented [him] from developing his own psychiatric evidence to rebut the Commonwealth's evidence and to enhance his defense in mitigation." Tuggle v. Netherland, 116 S.Ct. 283, 285 (1995). This Court remanded the matter to the United States Court of Appeals for the Fourth Circuit because there had been no determination of "whether harmless error analysis is applicable to this case." Id.

The Fourth Circuit considered the harmless error issue on an expedited basis and held, in an opinion issued 22 days after oral argument, that a violation of Ake v. Oklahoma can be harmless. Even though the admitted Ake violation deprived Petitioner of his

ability to prepare and present a sentencing defense, and even though Petitioner's requests for evidentiary hearings in state and federal habeas were denied, the Fourth Circuit reviewed the one-sided trial record and found that any error was harmless in his case. The case accordingly presents the following related questions:

1. Can a violation of Ake v. Oklahoma, 470 U.S. 68 (1985), which by its very nature deprives a defendant of the full ability to rebut the state's case and prepare his own capital sentencing defense, ever be excused as harmless?

2. Does Chapman v.California, 386 U.S. 18 (1967) require the Commonwealth to show that the Ake violation in this capital case was harmless beyond a reasonable doubt where no state court ever performed harmless error analysis?

3. When an Ake violation prohibited a petitioner from presenting his sentencing defense at trial, and when state and federal habeas courts denied him an opportunity to present the effect of that error through an evidentiary hearing, can an appellate court presume the violation harmless merely by reviewing the unconstitutional one-sided trial record?

The case also presents a fourth issue:

4. Was the sentencing jury's "vileness" aggravating circumstance valid, notwithstanding that the jury and appellate court acted without any sufficient limiting construction of the identical circumstance that this Court found facially unconstitutional in Godfrey v. Georgia, 446 U.S. 420 (1980)?

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Petitioner Lem Davis Tuggle, Jr. (Tuggle), a Virginia inmate under sentence of death, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit reversing a writ of habeas corpus granted him by the United States District Court for the Western District of Virginia.

OPINIONS BELOW

The Fourth Circuit opinion (the "Opinion") is reported as Tuggle v. Netherland, 79 F.3d 1386 (4th Cir. 1996) and appears in Appendix A to this Petition. A previous opinion of this Court is attached as Exhibit B. A previous opinion of the Fourth Circuit is

reported as Tuggle v. Thompson, 57 F.3d 1356 (4th Cir. 1995) and is attached as Appendix C to this Petition. The opinion of the District Court for the Western District of Virginia is reported as Tuggle v. Thompson, 854 F. Supp. 1229 (W.D.Va. 1994) and appears in Appendix D to this Petition.

JURISDICTION

The Opinion in this matter was filed on April 3, 1996. A timely Petition for Rehearing was filed on April 17, 1996. The Fourth Circuit's denial of the Petition for Rehearing was issued on April 30, 1996 and is set forth in Appendix E. The Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendments V, VI, VIII and XIV to the United States Constitution are set forth in Appendix F. All Virginia Code statutes cited are also set forth in Appedix F.

STATEMENT OF THE CASE

Lem Davis Tuggle, Jr. was convicted of the capital offense of murder during the commission of rape and sentenced to die by the Circuit Court of Smyth County, Virginia in 1984. This Court recognized, as early as 1985, that Tuggle was sentenced in violation of the United States Constitution. The Virginia Attorney General conceded at that time that Tuggle was entitled to be re-sentenced. But no re-sentencing has occurred because the Virginia

courts and the Fourth Circuit have adopted a shifting set of rationales to explain away the constitutional error which infected Tuggle's entire capital sentencing trial.

A) Tuggle's Trial

The offense for which Tuggle was convicted occurred on May 29, 1983. The victim died of a single gunshot wound to the chest. App. 123.[1] No semen was found in the victim's vagina, but the examiner performing the autopsy testified at the preliminary hearing that the condition of the body suggested "either manipulation or penetration" of the vagina. App. 20. When pressed whether the condition was just as likely caused by manipulation as by penetration, the examiner testified "without the finding of seminal fluid, spermatozoa in the vaginal vault, I would say it would be just as likely. There is no way to determine." Id.

Upon motion of Tuggle's counsel, the trial court ordered state mental health professionals to examine Tuggle, explicitly confining the order to an examination of (1) Tuggle's sanity at the time of the offense and (2) his competence to stand trial. App. 30. The Virginia statute governing such examinations established that nothing said during the course of such an evaluation could be used against Tuggle at trial "as evidence or as a basis for such

[1] Record citations refer to the Joint Appendix that the parties filed in the United States Court of Appeals for the Fourth Circuit. These references demonstrate that the federal issues pursued in this Petition were properly raised in the state trial court. Pursuant to Supreme Court Rule 14.1(g)(i), the specified record references are included as Appendix G to this Petition.

evidence" unless he elected to assert a defense based on diminished mental status. Va. Code § 19.2-169.1.

Tuggle was transferred to a state hospital where Doctor Arthur Centor interviewed him pursuant to the trial court's order and informed the court that, in his opinion, Tuggle was sane and could assist in his defense. App. 39-40. Centor also informed the court that he, of his own accord, had examined Tuggle to develop an opinion of the defendant's "future dangerousness." Centor did so even though the court order referring Tuggle for examination had not requested any such opinion, and defense counsel was not informed that such an evaluation would be made. App. 39-40, 191.

Upon learning about Dr. Centor's expanded examination of their client, Tuggle's counsel moved for evaluation by an independent psychiatrist to help them prepare a defense for Tuggle. App. 41-42. Trial counsel offered to pay for such an investigation from their own funds because the court had denied a previous request for such expert assistance. App. 28-29, 38. The trial court denied the motion. App. 57-62.

During the trial, the Commonwealth introduced expert testimony from its pathologist on the rape evidence. App. 120-44. The pathologist explained that there was no internal vaginal injury. App. 139, 143. The prosecution elicited testimony that the condition of the body suggested penetration by "something, a penis, a finger, an object, something." App. 124. But, on cross-examination, the medical examiner admitted that the body's condition was consistent with either "manipulation or penetration"

of the vagina. App. 143. Because the trial court had denied Tuggle's motion for an expert pathologist, the defense could put on no affirmative evidence challenging the rape charge. The jury convicted Tuggle of murder during the commission of rape. App. 245.

During the sentencing phase of Tuggle's trial, the prosecution called Dr. Arthur Centor to testify about Tuggle's future dangerousness. App. 185-87, 192-93, 199-205. Tuggle objected to the testimony on the ground that the trial court's commitment order had not authorized Centor to examine the defendant's future dangerousness, and defense counsel were given no notice that such an examination would take place. App. 188-191. The trial court overruled the objection and Centor testified that Tuggle showed "a high probability of future dangerousness." App. 202. Because defense counsel's repeated requests to retain an independent psychiatric expert, either at the state's or their own expense, had been denied, they could not offer evidence to counter the professional testimony of Dr. Centor.

In instructing the jury on the "vileness" aggravating circumstance, the trial court told the jury that it could impose the death penalty if it found that Tuggle's conduct in committing the crime "was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." App. 242. Tuggle's counsel sought specific instructions defining the terms "aggravated battery" and "depravity

of mind" but the trial court refused to allow any definition. App. 244.

In closing argument at the sentencing phase of the trial, the Smyth County prosecutor relied heavily on Dr. Centor's testimony that Tuggle would endanger others in the future. App. 229, 233-34. The jury recommended a sentence of death, finding both the "vileness" and "future dangerousness" aggravating circumstances provided by Virginia law. App. 245; Va. Code 19.2-264.4(C).

B) Tuggle's Direct Appeal

The Virginia Supreme Court affirmed Tuggle's conviction and sentence on appeal, relying on Dr. Centor's testimony as one of the grounds for the affirmance. Tuggle v. Commonwealth, 228 Va. 493, 517, 323 S.E.2d 539, 554 (1984)(Tuggle I). The court rejected Tuggle's claim that he was entitled to psychiatric assistance in his capital sentencing and found that he had waived his Sixth Amendment rights when he spoke with Dr. Centor at Central State Hospital. The Court also found that there was sufficient evidence to convict Tuggle of rape and that the "vileness" instruction delivered to his jury was not unconstitutionally vague.

This Court granted Tuggle's certiorari petition, vacated the judgment in his case and remanded the case to the Virginia Supreme Court in light of the decision in Ake v. Oklahoma, 470 U.S. 68 (1985). Tuggle v. Virginia, 471 U.S. 1096 (1985). On remand, the Virginia Attorney General conceded that Tuggle must be re-sentenced because of the Ake error. The Virginia Supreme Court refused to accept the concession. Although it acknowledged the Ake error and

struck down the "future danger" aggravating circumstance, it held that the jury's finding of "vileness" was sufficient by itself to affirm the death sentence under Virginia's "non-weighing" capital sentencing structure, citing Zant v. Stephens, 462 U.S. 862 (1983). Without evaluating the effect that the psychiatric testimony and argument might have had on the sentencing jury in its analysis of the "vileness" circumstance and in its discretionary decision to impose the death penalty, the Virginia Supreme Court re-affirmed the sentence. Tuggle v. Commonwealth, 230 Va. 99, 110-11, 334 S.E.2d 838, 845-46 (1985)(Tuggle II), cert denied, Tuggle v. Virginia, 478 U.S. 1010 (1986). In affirming the death sentence, the court did not perform the proportionality and arbitrariness review required by Virginia statute. Va. Code § 17-110.1(C).

C) Tuggle's Habeas Corpus Proceeding

Tuggle filed his petition for state habeas corpus relief in October 1986. The petition, which included his request for an evidentiary hearing on the issues raised, was denied in March 1991 and his appeal to the Virginia Supreme Court was unsuccessful.[2] In September 1992, Tuggle filed a federal habeas corpus petition in the United States District Court for the Western District of Virginia. On June 8, 1994, the district court granted his habeas petition on seven independent grounds, finding that the circumstances of Tuggle's trial demonstrated an "extreme willingness to sidestep petitioner's constitutional rights to

[2] Tuggle filed a petition for writ of certiorari in this Court after the completion of his state habeas proceedings, but the petition was denied. Tuggle v. Bair, 503 U.S. 989 (1992).

ensure a conviction." Tuggle v. Thompson, 854 F. Supp. 1229, 1239 (W.D.Va. 1994).

The district court found that Tuggle's trial was constitutionally improper for the following reasons: 1) the failure of the trial court to appoint Tuggle an independent psychiatric expert to assist in his sentencing defense violated Ake v. Oklahoma; 2) a combination of inaccurate pre-trial publicity, prosecutorial criticism of jurors, pre-trial contact of jurors by the media and Sheriff's Department, inadequate voir dire and refusal to allow Tuggle to challenge jurors for cause violated his right to trial by an impartial jury; 3) insufficient evidence to convict Tuggle of the rape element of his capital charge; 4) the testimony of Dr. Centor at Tuggle's sentencing was improper because it was based on discussions with Tuggle outside the presence of counsel without an effective waiver of his Fifth and Sixth Amendment rights; 5) the "vileness" instruction given to Tuggle's sentencing jury was unconstitutionally vague; 6) the trial court's restrictions on the efforts of Tuggle's counsel rendered them unable to provide effective representation of their client; and 7) the Virginia Supreme Court denied Tuggle "meaningful appellate review" when it considered his case on remand from the United States Supreme Court without following its own statutory procedures governing the review of death sentences. Because the court ruled for Tuggle as a matter of law, it did not grant his motion for an evidentiary hearing on the constitutional issues in his case. The Commonwealth never argued in the district court, or at any previous

stage, that any of the referenced constitutional errors were harmless.

On appeal, the Fourth Circuit reversed the district court on all seven grounds and ordered that Tuggle's habeas petition be dismissed. Tuggle v. Thompson, 57 F.3d 1356 (4th Cir. 1995). The Fourth Circuit did not dispute that Tuggle's sentencing was infected with constitutional error. Instead, it excused the Ake v. Oklahoma and Estelle v. Smith violations by invalidating the "future dangerousness" aggravating circumstance and holding that the jury's "vileness" finding was sufficient, in and of itself, to support the death sentence.

On October 30, 1995, this Court granted certiorari and unanimously vacated the judgment of the Fourth Circuit. This Court held that Tuggle's sentencing violated Ake v. Oklahoma and that the state's refusal to provide psychiatric assistance for Tuggle's capital sentencing "prevented [him] from developing his own psychiatric evidence to rebut the Commonwealth's evidence and to enhance his defense in mitigation." Tuggle v. Netherland, 116 S.Ct. 283, 285 (1995). This Court rejected the Fourth Circuit's holding that the mere presence of the "vileness" aggravating circumstance cured the constitutional error affecting the scope of Tuggle's sentencing defense. The case was again remanded to the Fourth Circuit because neither the state nor federal courts had ever addressed "whether harmless error analysis is applicable to this case." Id.

The Fourth Circuit considered the matter under an expedited schedule and ruled on April 3, 1996 that Tuggle's habeas petition should be remanded to the district court and dismissed. Tuggle v. Netherland, 79 F.3d 1386 (4th Cir. 1986). The ruling was composed of three separate holdings: (1) the court first examined the nature of the constitutional error and held that a violation of Ake v. Oklahoma at the sentencing phase of a capital trial is subject to harmless error analysis; (2) the court then determined that the appropriate harmless error standard is that announced in Brecht v. Abrahamson, 507 U.S. 619 (1993); and (3) applying the Brecht standard to the existing trial record, the court held that the Ake violation was harmless in Tuggle's case.[3]

REASONS FOR GRANTING THE WRIT

This Court has granted certiorari on two previous occasions in Tuggle's case. In each instance, the case was sent back to a lower court to consider and correct clear constitutional error. In each instance, the lower court has resisted the rulings of this Court by straining to uphold a death sentence obtained by unconstitutional means.

Certiorari should be granted to finally resolve this case. The Opinion below conflicts with rulings of this Court, including

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[3] The Opinion below failed to address two significant arguments raised by Tuggle in the remand proceeding: (1) that the Commonwealth could not satisfy its burden of showing the Ake error to be harmless due to its deliberate decision to not raise the harmless error defense in the habeas proceeding before the district court; and (2) that the federal court should not deem the error in Tuggle's state trial harmless because the Virginia Supreme Court does not excuse similar constitutional errors in capital sentencing under the harmless error doctrine.

the unanimous opinion issued in this very case in October 1995, and with rulings of other circuit courts of appeals.

1. The Fourth Circuit's Finding that a Violation of Ake v.Oklahoma Can Be Considered Harmless is Contrary to Decisions of this Court Holding That Harmless Error Analysis is Inapplicable When the Error Deprives a Defendant of the Full Ability to Present His Case.

The Fourth Circuit held that a violation of Ake v. Oklahoma, depriving a capital defendant of the ability to prepare and present a sentencing defense, is subject to harmless error analysis. Certiorari on this question should be granted because the Opinion below conflicts with previous opinions of this Court which hold that harmless error analysis cannot be used to excuse errors which effectively thwart a defendant's trial preparation. Sup. Ct. Rule 10(c).

In Ake v. Oklahoma, 470 U.S. 68 (1985), the Supreme Court held that the Fourteenth Amendment's due process guarantee requires a state to provide psychiatric assistance to an indigent capital defendant in preparation for sentencing if the state presents psychiatric evidence to prove future dangerousness.[4] The constitutional requirement derives from concern over the fundamental fairness of such proceedings:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is

[4] Ake also ruled that, under certain circumstances, the state is obligated to provide such assistance during the guilt/innocence phase of the trial. Id., 470 U.S. at 83. That aspect of Ake is not at issue in this case.

> fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense . . . .To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," and we have required that such tools be provided to those defendants who cannot afford to pay for them.

Id., 470 U.S. at 77 (citations omitted).

In analyzing whether psychiatric assistance was a "basic tool" of a defense in capital sentencing, the Court discussed the significance of its many cases requiring access to defense counsel as well as the critical role that psychiatric testimony plays on issues relating to mental status. It concluded as follows:

> Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.

Id., 470 U.S. at 84.

This Court has never suggested that an Ake violation can be harmless. Some constitutional errors are susceptible to harmless error analysis, Rose v. Clark, 478 U.S. 570, 577 (1986), but many cannot be found harmless, either because of their importance to the integrity of the trial mechanism or because assessing the impact of error on the trier of fact is too speculative. See, e.g., Sullivan v. Louisiana, 113 S. Ct. 2078 (1993)(violation of right to accurate reasonable doubt instruction cannot be harmless); Lozada v. Deeds, 498 U.S. 430, 432 (1991) (failure of counsel to file notice of

appeal presumed prejudicial); Arizona v. Fulminante, 499 U.S. 279, 309 (1991) (violation of right to counsel cannot be harmless); Amadeo v. Zant, 486 U.S. 214, 228 n.6 (1988) (racial discrimination in composition of master jury list cannot be harmless); Rose v. Clark, 478 U.S. 570, 577-78 (1986) (deprivation of right to trial by jury cannot be harmless); Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984) (deprivation of right to public trial cannot be harmless); Holloway v. Arkansas, 435 U.S. 475 (1978) (violation of right to conflict-free counsel cannot be harmless).

Recently, the Supreme Court has tried to harmonize its harmless error rulings by describing two classes of constitutional violations--"trial error" and "structural error." In Brecht v. Abrahamson, the Court described those two classifications as follows:

> Trial error "occur[s] during the presentation of the case to the jury," and is amenable to harmless-error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." At the other end of the spectrum of constitutional errors lie "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." The existence of such defects--deprivation of the right to counsel for example--requires automatic reversal of the conviction because they infect the entire trial process.

113 S. Ct. 1710, 1717 (1993) (citations and footnotes omitted).

An Ake violation is clearly a structural error compelling automatic reversal. See, Lorenger, Ake v. Oklahoma and Harmless Error: The Case for a Per Se Rule of Reversal, 81 Va. L. Rev 521 (1995). The trial court's refusal to allow Tuggle to have an Ake

expert for his sentencing proceeding was not a technical error occurring for an instant during the heat of trial which can be fully weighed from review of the trial record. Instead, like deprivation of right to counsel, it deprived Tuggle of "one of the basic tools of an adequate defense." The error thwarted Tuggle's preparation for his capital sentencing, limited his ability to cross-examine or otherwise challenge the state's critical testimony on one of the key elements of his case, eliminated an important source of mitigation testimony and muted Tuggle as the prosecutor argued his "future dangerousness" to the jury. The jury observed this one-sided testimony from the state's trained mental health expert and observed that Tuggle presented no response. Because the jury did not know that the trial court had deprived Tuggle of expert assistance, it likely may have concluded that the defense's silence on the "future dangerousness" point was a tacit admission.

This Court's recent remand in Tuggle's case demonstrates that the error here was structural in nature. The Court stated that the Ake error "prevented the petitioner from developing his own psychiatric evidence to rebut the Commonwealth's evidence and to enhance his defense in mitigation." Tuggle v. Netherland, 116 S. Ct. 283, 285 (1995).[5] This description of the Ake violation parallels the Court's description of other violations that require automatic reversal. See Rose v. Clark, 478 U.S. 570, 579

[5] The district court ruling explained that Tuggle's sentencing could not be analyzed and deemed cured precisely because the Ake violation thwarted Tuggle's "very ability to make a record on a critical point or even to rebut the evidence marshalled against him." Tuggle v. Thompson, 854 F. Supp. 1229, 1238 (W.D.Va. 1994).

(1986)(noting that harmless error analysis inappropriate if error thwarts a defendant's "opportunity to put on evidence and make argument" to support his claim or otherwise affects "the composition of the record"); Sullivan v. Louisiana, 113 S. Ct. 2078, 2084 (1993) (Rehnquist, C.J., concurring)(if an error "prevented the jury from considering certain evidence," it is likely structural in character). When an error skews the evidence presented to the jury and limits the defendant's ability to challenge that evidence and introduce his own testimony, reversal is automatic.

That Ake error in a capital sentencing cannot be harmless is given strong support by Satterwhite v. Texas, 486 U.S. 249 (1988). In Satterwhite, a petitioner complained that state psychiatric testimony was improperly introduced against him in his capital sentencing because that testimony was obtained following an interview outside of the presence of counsel. There was no assertion of an Ake violation, so no issue was raised concerning the defendant's inability to challenge the testimony or prepare his own sentencing evidence. Instead, the Court described the issue solely as whether "a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury." Id. at 250. Thus limited, the Court found that harmless error analysis was appropriate, although the unanimous court found that the testimony was not harmless in that case.

Justice O'Connor's opinion in Satterwhite carefully distinguished cases in which the error arose at trial from those where the error had the effect of keeping material out of the trial record. In the latter instance, where the "scope of a violation . . . cannot be discerned from the record, any inquiry into its effect on the outcome of the case would be purely speculative" and the error could not be excused as harmless. Id., 486 U.S. at 256 (emphasis added).

The Ake error in this case is exactly the type of error that Satterwhite declared to be incurable by harmless error analysis. As this Court found in October 1995, the error was not simply the erroneous admission of one bit of evidence. Instead, the error was the state's refusal to allow Tuggle the resources to present his own case to the jury "to rebut the Commonwealth's evidence and to enhance his defense in mitigation." Tuggle, 116 S. Ct. at 285. The error deprived him of the ability to make a record and any effort to conduct harmless error analysis from such record is speculative, and therefore, improper.

The Fourth Circuit's conclusion that an Ake error can be harmless rested on three rationales, none of which provide sufficient legal support for such a conclusion.

First, the Fourth Circuit re-defined the nature of an Ake violation from the expansive definition given by this Court just a few months ago. This Court explicitly found that the Ake violation in Tuggle's case deprived him both of the ability to counter the state's evidence of future dangerousness and the right to "enhance

his defense in mitigation." 116 S. Ct. at 285. The Opinion below, however, narrowed the definition of the Ake violation significantly, stating that it only deprived Tuggle of "expert psychiatric assistance at sentencing to rebut the state's testimony of future dangerousness." 79 F.3d at 1391. By eliminating the connection between the Ake issue and the critical concept of mitigation testimony at capital sentencing, the Fourth Circuit sought to downplay the significance of the error committed here.[6]

Second, the Fourth Circuit relied on the unrelated case of Delaware v. Van Ardsall, 475 U.S. 673 (1986) to suggest that the thwarting of Tuggle's sentencing defense could somehow be excused. In Van Ardsall, a defendant in a non-capital case was limited in his attempt to cross-examine a prosecution witness for bias, in that the prosecutor had dropped a criminal charge against the witness when he agreed to testify against the defendant. Defense counsel sought to use that fact to impeach the credibility of the witness, but the trial court refused. Significantly, the trial court did allow full exploration of the issue outside the presence of the jury, so a complete record was available for review by the appellate court.

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[6] District courts in the Fourth Circuit rarely grant writs of habeas corpus in capital cases. Nonetheless, the Fourth Circuit Court of Appeals has shown a predisposition to reverse such rare grants, especially in capital cases. Recently, in a matter of two days, the Fourth Circuit reversed three district court decisions granting habeas relief in capital cases. See Gray v. Thompson, 58 F.3d 59 (4th Cir. 6/28/95); Barnes v. Thompson, 58 F.3d 971 (4th Cir. 6/29/95); Tuggle v. Thompson, 57 F.3d 1356 (4th Cir. 6/29/95). A fourth reversal was issued not even two months later. See Correll v. Thompson, 63 F.3d 1279 (4th Cir. 8/24/95).

This Court found that the denial of cross-examination on the subject violated the Confrontation Clause of the Sixth Amendment. But, the Court went on to examine the trial record, including the record material concerning the foregone cross-examination, and concluded that the constitutional error could be reviewed for its harmlessness. In determining that harmless error analysis was appropriate, this Court held as follows:

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness, or material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

475 U.S. at 684 (emphasis added).

The error in Van Ardsall, denying the ability to fully cross-examine a single witness, is nowhere near as pervasive as the state's refusal to provide a capital defendant with "the basic tools of an adequate defense." More importantly, the presence of a full record concerning what a proper cross-examination would have shown gave the Van Ardsall Court the information it needed to assess the error's impact upon the jurors. In Tuggle's case, the Ake error deprived both the jury and subsequent reviewing courts of the facts necessary to conduct harmless error analysis. Because the scope of the error in this case "cannot be discerned from the record, any inquiry into its effect on the outcome of the case

would be purely speculative." Satterwhite v. Texas, 486 U.S. 249, 256 (1986).

Finally, the Fourth Circuit relied on rulings of the Tenth Circuit to support the notion that an Ake violation can be harmless. Castro v. Oklahoma, 71 F.3d 1502 (10th Cir. 1995); Brewer v. Reynolds, 51 F.3d 1519 (10th Cir 1995). These cases are markedly different from Tuggle's and can best be understood as cases in which there were no Ake violations. Still, they are instructive concerning the caution with which other courts of appeal approach the excusal of error in a capital sentencing.

In Castro, a capital defendant sought a psychiatric expert for sentencing assistance even though the State did not present any psychiatric testimony against him on the issue of future dangerousness. In Brewer, the state did not present any psychiatric evidence against the capital defendant and did not even proceed against him on the state's "future dangerousness" aggravator. Of course, Ake accords no express right to assistance at sentencing absent the state's presentation of "psychiatric evidence of the defendant's future dangerousness." 470 U.S. at 83. Still, the Tenth Circuit accepted an expansive Ake argument in these cases and held that psychiatric assistance at sentencing is required if a defendant merely makes some threshold showing of the potential helpfulness of the expert's services.

Having allowed this extension of the Ake right, the Tenth Circuit did suggest that harmless error analysis might be appropriate to condition its application. The use of the harmless-

error analysis to curb the expanded Ake right was explained as appropriate because "a right to which a defendant is not entitled absent some threshold showing [cannot] fairly be defined as basic to the structure of a constitutional trial." Brewer v. Reynolds, 51 F.3d 1519, 1529 (10th Cir. 1995). But, the Tenth Circuit has been extremely reluctant to find that a violation of this broadened Ake right can be harmless. Only in Brewer, where the state presented no psychiatric evidence and did not even attempt to demonstrate the petitioner's future dangerousness, was the court willing to say that any Ake error was harmless.

In this case, Tuggle makes no attempt to broaden the right announced in Ake. He did not have to make any "threshold showing" of his entitlement to assistance because his entitlement was automatic--the state put on secretly obtained psychiatric evidence against him and barred him even from hiring his own mental health expert to rebut that testimony. The issue of "future dangerousness" was one of the key elements of the state's sentencing case against Tuggle. The Commonwealth's refusal to provide him with the needed assistance requires that he be re-sentenced.

2. The Fourth Circuit's Ruling that Harmless Error Analysis in this Capital Case Should be Conducted Pursuant to the Standard Announced in Brecht v. Abrahamson, When There Had Been No Harmless Error Analysis Conducted by the State Courts, is Contrary to Decisions by this Court and the United States Court of Appeals for the Eighth Circuit.

The Fourth Circuit held that harmless error analysis in this capital case should be conducted under the elevated standard announced in Brecht v. Abrahamson, even though there had been no previous state court consideration of the harmless error question. Certiorari on this question should be granted because the Opinion below directly conflicts with a decision of the United States Court of Appeals for the Eighth Circuit and also conflicts with this Court's reasoning in Brecht. Sup. Ct. Rule 10(a),(c).

There are two general standards for applying harmless error analysis to a federal constitutional error. In Chapman v. California, 386 U.S. 18, 24 (1967), this Court held that constitutional error in a criminal trial cannot be excused unless the reviewing court deems it "harmless beyond a reasonable doubt." In Brecht v. Abrahamson, 507 U.S. 619, 622 (1993), this Court held that a constitutional error could not lead to habeas relief unless it had a "substantial and injurious effect or influence in determining the jury's verdict."

In Tuggle's case, the Fourth Circuit considered the two standards and, using a bright line rule, decided that the Brecht standard applied because this is a habeas case rather than a direct appeal. It adopted the Brecht standard even though there had been no harmless error analysis ever conducted by the state courts in

Tuggle's case and despite the fact that the Commonwealth had failed to meet its burden on the point by never raising the harmless error issue until its federal appeal.

The Fourth Circuit's rigid application of Brecht is in direct conflict with rulings of other courts that hold that the Chapman standard must apply in habeas cases where, as here, there has been no prior state court determination of harmlessness. See e.g. Orndorff v. Lockhart, 998 F.2d 1426, 1429-30 (8th Cir. 1993), cert. den'd, 114 S. Ct. 1631 (1994).

Orndorff was decided soon after Brecht. In a reasoned analysis, the Eighth Circuit recognized that the traditional method of reviewing harmless error had been the Chapman standard, but that the Supreme Court changed that when it decided Brecht. The Eighth Circuit noted that in drawing a distinction between the standard to be used for direct and collateral review, the Supreme Court in Brecht reasoned that "[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*," and that "it scarcely seems logical to require the federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review." Brecht, 507 U.S. at 636 (citations and footnotes omitted).

In reliance on this analysis, the Eighth Circuit in Orndorff held that the Brecht standard does not apply when harmless error analysis has not been performed by the state courts. The court

explained its ruling in terms of the comity concerns behind the Brecht decision:

> We believe the *Brecht* rule is based largely on the notion that because the state courts can properly apply the *Chapman* harmless error standard on direct review, the federal habeas courts need only review those decisions under the *Kotteakos* harmless error standard. In the case before us, however, the state courts did not have the opportunity to review the error at all, and the federal habeas court was the first court to review the constitutional error under the *Chapman* harmless error standard. As a result, we find that rule announced in *Brecht* does not apply and that the *Chapman* harmless error standard is the appropriate test in this case.

Orndorff, 998 F.2d at 1430 (8th Cir. 1993). See also Starr v. Lockhart, 23 F.3d 1280, 1292 (8th Cir. 1994); Fields v. Leapley, 30 F.3d 986, 990-91 (8th Cir. 1994).

The Orndorff analysis is particularly appropriate when considering harmless error questions in a capital case. Brecht is not a capital case, whereas both Orndorff and the case at bar are capital cases. This Court has long recognized that capital cases require heightened assurances of reliability and accuracy, given the "severity" and "finality" of the death penalty. Gardner v. Florida, 430 U.S. 349, 357-58 (1977). In Satterwhite v. Texas, this Court gave explicit caution concerning the application of harmless error analysis to capital cases:

> It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer.

486 U.S. 249, 250 (1986).[7] This caution strongly suggests that the more stringent Chapman standard is properly used in capital proceedings.[8]

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[7] The Virginia Supreme Court does not even apply harmless error analysis to constitutional errors occurring at the sentencing phase of capital trials. Mickens v. Commonwealth, 247 Va. 395, 442 S.E.2d 678 (1994).

[8] Satterwhite shows that this error could not be harmless under any standard. As indicated, a psychiatrist testified that the defendant presented a continuing threat to society for acts of violence. The testimony was ruled unlawful because it was obtained in violation of Estelle v. Smith, 451 U.S. 454 (1981). Then, the Supreme Court attempted to determine whether the testimony introduced was harmless. The state argued that it was harmless because of additional evidence supporting the future danger conclusion. The Supreme Court summarized that properly admissible evidence as follows:

> The evidence introduced at sentencing showed that, in addition to his conviction in this case, Satterwhite had four prior convictions of crimes ranging from aggravated assault to armed robbery. Eight police officers testified that Satterwhite's reputation for being a peaceful and law-abiding citizen was bad, and Satterwhite's mother's former husband testified that Satterwhite once shot him during an argument. The State also introduced the testimony of Bexar County psychologist Betty Lou Schroeder. Dr. Schroeder testified that she found Satterwhite to be a "cunning individual" and a "user of people," with an inability to feel empathy or guilt. She testified that in her opinion, Satterwhite would be a continuing threat to society through acts of criminal violence.

Satterwhite, 486 U.S. at 259 (footnotes omitted). Even with that plethora of proper evidence on "future dangerousness," however, the Supreme Court did not find the improper testimony harmless. Instead, the unanimous Court reversed the sentence, expressing concern that the offending testimony was relied upon by the prosecutor in closing argument. Id. at 260. This unanimous ruling demonstrates that the more serious violations in Tuggle's case could not be excused as harmless.

Other courts have followed the lead set by Orndorff. The Seventh Circuit's most recent opinion on this issue suggests that Brecht only applies "after a state court has already concluded that the error was harmless beyond a reasonable doubt." Enoch v. Gramley, 70 F.3d 1490, 1500 (7th Cir. 1995); but see Tyson v. Thigg, 50 F.3d 436, 446-47 (7th Cir. 1995). In addition, the United States District Court for the Middle District of Tennessee in the Sixth Circuit and the United States District Court for the Southern District of New York in the Second Circuit have both expressly adopted Orndorff's analysis, holding that Brecht only applies if the state courts conducted Chapman harmless error analysis. Rickman v. Dutton, 864 F. Supp. 686, 712 (M.D.Tn. 1994); Lyons v. Johnson, 912 F. Supp. 679, 688-89 (S.D.N.Y. 1996).[9]

The Tenth Circuit, like the Fourth Circuit, has held that the Brecht standard applies to all habeas cases, even those in which no state court has ever previously performed harmless error analysis.[10] Castro v. Oklahoma, 71 F.3d 1502, 1515-16 (10th Cir. 1995); Brewer v. Reynolds, 51 F.3d 1519, 1529 (10th Cir. 1995). This Court

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[9]The Ninth Circuit Court of Appeals very recently recognized this split in the circuit courts but held that "we do not need to decide this issue . . .," and therefore, it remains open. Hanna v. Riveland, 9th Cir. Record No. 95-35700 (June 25, 1996).

[10]The Eleventh Circuit Court of Appeals also adopts this analysis, but has not held that the Brecht applies to "all" habeas cases. See Horsley v. Alabama, 45 F.3d 1986, 1492 n.11 (11th Cir.) cert den'd, 116 S. Ct. 410 (1995)("We think the Supreme Court's rationale (advancing comity, federalism, finality, and the importance of the trial) for the Brecht rule reaches to almost all federal habeas cases, including this one.").

should grant certiorari here to resolve the growing conflict on this point among the circuit courts.[11]

3. The Fourth Circuit's Ruling that the Ake Error in Tuggle's Case was Harmless, Based Solely on its Review of the Unconstitutionally Skewed Trial Record, Is Contrary to Controlling Decisions of this Court.

As this Court found, the Ake violation in Tuggle's case deprived him of the opportunity to fully develop and present a sentencing defense. Nevertheless, the Fourth Circuit held that the error was harmless based purely on its review of that one-sided trial record. That ruling ignores the reality of the admitted Ake error as found by this Court only a few months ago, overlooks the burden that the Commonwealth bears in trying to escape the consequences of its own mistake and violates this Court's rulings concerning presentation of evidence in habeas proceedings. Sup Ct. Rule 10(c).

At trial, Tuggle diligently sought the appointment of expert assistance and his attorneys even offered to pay for that expertise

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[11] In Brecht, Justice Rehnquist expressly noted that "[o]ur holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." Brecht, 507 U.S. at 638, n.9. In this case, the district court granted habeas relief on seven separate grounds and reached the conclusion that the trial court demonstrated "an extreme willingness to side-step petitioner's constitutional rights to ensure a conviction." Tuggle v. Thompson, 854 F. Supp. 1229, 1239 (W.D.Va. 1994). The pattern of "egregious" error in Tuggle's case demonstrates an additional reason why the elevated Brecht standard should not apply here.

themselves. But, the trial court refused to allow him the "basic tools of an adequate defense" and forced him into a one-sided trial. Of course, he could not present his full sentencing defense under that circumstance.

In his state habeas petition, Tuggle asserted facts concerning his mental background and the disputed waiver of his rights in the uncounseled interview with Dr. Centor. As part of the habeas petition, he sought an evidentiary hearing. The state court dismissed Tuggle's habeas petition without any factual hearing. App. 282-293.

In his federal habeas petition, Tuggle again raised factual issues concerning his mental background and the uncounseled interview with Dr. Centor. App. 311-12, 320-21. He filed a Motion for an Evidentiary Hearing on these and other issues. App. 2. The motion did not mention harmless error because the Commonwealth had not raised that issue, but the request for a hearing was broadly worded to fully cover the Ake and Estelle issues. Tuggle v. Thompson, Motion for Evidentiary Hearing and Supporting Memorandum (3/25/93). Tuggle even successfully moved for appointment of a mental health expert to assist in preparation of his habeas case. App. 3.

The Commonwealth never made any mention of harmless error defense either in the state court or in the federal habeas proceeding in the district court. This failure amounts to waiver by the state of its harmless error defense. In the same way that habeas petitioners waive claims that they do not make in district

court, those same waiver rules must be applied to the state so that it does not "withhold . . . a defense until after the 'main event'. . . is over." Granberry v. Greer, 481 U.S. 129, 132 (1987). See also, Williams v. Dixon, 961 F.2d 448, 458-59 (4th Cir. 1992)("finality, and its companion, waiver, must run along a two-way street. Finality certainly means that a petitioner cannot raise new claims on appeal not yet raised. It also must mean that the State cannot raise new defenses on appeal not raised below."). This Court has held that harmless error is akin to an affirmative defense and that the presence of constitutional error "casts on someone other than the person prejudiced by it a burden to show it was harmless." O'Neal v. McAninch, 115 S. Ct. 992, 995 (1995), citing Chapman v. California, 386 U.S. 18, 24 (1967). The Commonwealth failed to meet its burden here by bypassing any harmless error argument during the district court proceeding.

Because the Commonwealth failed to raise harmless error in the district court, that court ruled for Tuggle as a matter of law and did not grant his request for an evidentiary hearing. Thus, despite Tuggle's persistent and timely effort at every stage of this case, he never had the opportunity to prepare and present the sentencing defense that he was constitutionally entitled to have in his capital trial.[12]

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[12] At the very least, Tuggle would be entitled to an evidentiary hearing on the question of how the Ake error affected his defense and whether that error could be deemed harmless. Such entitlement is mandatory because those facts were not resolved in the prior state proceedings. Townsend v. Sain, 372 U.S. 293 (1960); Becton v. Barnett, 920 F.2d 1190 (4th Cir. 1990); 28 U.S.C 2254(d)(1).

In making its determination that the Ake error was harmless, the Fourth Circuit here confined its analysis purely to the trial record that this Court has already found unconstitutional. Tuggle v. Netherland, 79 F.3d at 1393-1396. For example, the Fourth Circuit considered "the evidence improperly excluded at the sentencing phase" and stated as follows:

> . . . we will assume, arguendo, that Tuggle would have produced expert psychiatric testimony to rebut Dr. Centor's conclusions on Tuggle's future dangerousness and that this evidence was improperly excluded.

79 F.3d at 1394. But, the court failed to recognize this Court's careful description of how the Ake error affected Tuggle's case by depriving him, not only of the ability to counter the Commonwealth's evidence, but also by eliminating his right to "enhance his defense in mitigation." Tuggle v. Netherland, 116 S.Ct. 283, 285 (1995).

Similarly, the Fourth Circuit's harmless error analysis belittles the Ake error by focusing on the limited nature of the mitigation testimony that Tuggle introduced at trial. 79 F.3rd at 1394. Nowhere does the Fourth Circuit show an understanding that Tuggle's mitigation case was hobbled by the admitted constitutional error. As Tuggle has pled in his habeas petitions, there was background material concerning his mental health history that would have been relevant to a properly-appointed expert. The fact that such material was not fully developed was not his fault--it was a direct by-product of the Ake error.

In short, the Fourth Circuit's analysis merely repeats the error that this Court has already condemned. It is law of the case that Tuggle's sentencing case was unconstitutionally thwarted by the state's refusal to appoint him expert assistance. The Fourth Circuit now holds those limitations against Tuggle and, in doing so, defies this Court's unanimous ruling.

4. The Fourth Circuit's Holding that Virginia Courts Properly Affirmed the Petitioner's Death Sentence Under the Sentencing Jury's "Vileness" Finding is in Conflict with Decisions of this Court.

Certiorari should be granted on this question because the Fourth Circuit's affirmance of Virginia's "vileness" aggravating circumstance is contrary to this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980) and subsequent cases. Sup. Ct. Rule 10(c).

The Virginia statutory "vileness" aggravating circumstance is indistinguishable from others that this Court has struck down, yet the Virginia Supreme Court has done nothing to sufficiently narrow its application. This claim is particularly important because it is now acknowledged that the "future dangerousness" aggravating circumstance in Tuggle's sentencing was invalid and his death sentence now rests solely on the "vileness" circumstance.

The Eighth and Fourteenth Amendments require statutory aggravating factors to meet two standards to justify a death sentence. First, "the aggravating circumstance may not be unconstitutionally vague" -- that is, it must have a "'common-sense

core of meaning . . . that criminal juries should be capable of understanding.'" Tuilaepa v. California, 114 S. Ct. 2630, 2635-36 (1994) (citing Godfrey v. Georgia, 446 U.S. 420, 428, (1980), and Arave v. Creech, 113 S. Ct. 1534, 1541 (1993), and quoting Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J., concurring)). Second, "the circumstance may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder." Tuilaepea v. California, 114 S.Ct. at 2635 (citing Arave, 113 S.Ct. at 1542). The Virginia statute fails to meet either prong of this test.

The Virginia statute provides that a person convicted of capital murder may be sentenced to death if his or her conduct is found to be "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code § 19.2-264.2 (Repl. Vol. 1995). In Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980), this Court held that a vileness aggravating factor identical to Virginia's was unconstitutionally vague and overbroad on its face.[13] The Virginia Supreme Court has recognized that the Virginia provision is identical to the Georgia provision at issue in Godfrey. Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978).

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[13]In other cases, this Court has held that vague, pejorative adjectives are not constitutionally sufficient, absent well-drawn limiting instructions. Sochor v. Florida, 504 U.S. 527 (1992)("heinousness" or "coldness"); Shell v. Mississippi, 498 U.S. 1 (1990) ("especially heinous, atrocious, or cruel"); Maynard v. Cartwright, 486 U.S. 356 (1988) (same).

A statutory aggravating circumstance that is too vague as stated can nevertheless be used if the jury is given a tightly drawn defining instruction, or if the state appellate court reviews the particular finding with a consistent and narrow appellate construction. See e.g., Walton v Arizona, 497 U.S. 639, 653 (1990)("when a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutional on its face."); Maynard v. Cartwright, 486 U.S. 356 (1988). Neither occurred here.

The Virginia Supreme Court, recognizing that "any act of murder arguably involves a 'depravity of the mind' and 'an aggravated battery to the victim," developed a limiting construction of its "vileness" aggravating circumstance that is often given to juries in capital cases. Smith v. Commonwealth, 219 Va. at 478. The construction provides the following definitions for the statutory terms "aggravated battery" and "depravity of mind:"

> . . . we construe the words "depravity of mind" as used here to mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. Contextually, we construe the words "aggravated battery" to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.

Id.[14] Here, Tuggle's counsel requested that the terms "aggravated battery" and "depravity of mind" be defined as set forth in Smith, but the trial court refused to give even that minimal instruction. Instead, it simply read the jury the vague statutory language, adding an additional clause as shown:

> 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 beyond the minimum necessary to accomplish the act of murder.

Tuggle v. Thompson, 57 F.3d at 1371 (emphasis added). Neither the terms "aggravated battery" nor "depravity of mind" were defined.

The trial court's reading of the statutory language, with the brief addition, did not cure the unconstitutionality of the "vileness" aggravating circumstance. In Godfrey, this Court recognized that instructing the jury with the essentially identical statutory language was insufficient because "a person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" Id. at 429. Similarly, in Maynard v. Cartwright, 486 U.S. 356 (1988), the Court held that a jury instruction repeating Oklahoma's "especially

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[14] This limiting construction was not given as an instruction to Tuggle's sentencing jury or utilized by the Virginia Supreme Court during appellate review. Even if it had been used, the construction would not solve the invalidity of the Virginia "vileness" aggravating circumstance. Rather than creating a specific and well-defined class of murders for which the death penalty is appropriate, these minimal definitions create a single hypothetical murder for which the death penalty may not be imposed and allow the death penalty in all other cases where the theoretical minimum is exceeded. See Shell v. Mississippi, 498 U.S. 1 (1990)(appellate limiting construction still too vague to cure vague aggravating circumstance).

heinous, atrocious, or cruel" statutory language violated the Eighth and Fourteenth Amendments because the term "especially heinous" provided no guidance to the jury and that "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" Id. at 364.

In Shell v. Mississippi, 498 U.S. 1 (1990), the Supreme Court found unconstitutional a limiting instruction that was far more specific and detailed than that given in Tuggle's case to qualify the phrase "aggravated battery." In Shell, the trial court gave a limiting instruction defining Mississippi's "especially heinous, atrocious, or cruel" aggravating factor which stated that "the word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." Id. at 2. (Marshall, J., concurring). The Supreme Court held that this instruction was "not constitutionally sufficient." Id. at 1. If the Shell limiting instruction was constitutionally infirm, then the Tuggle court's cryptic "beyond the minimum necessary to accomplish the act of murder" cannot be found to meet the standards of specificity imposed by the Eighth and Fourteen Amendments.

Just as the trial court failed to channel jury's discretion in applying the vague Virginia aggravating circumstance through a jury instruction, the Virginia Supreme Court failed to limit the

"vilenes" factor in its review on direct appeal.[15] In reviewing Tuggle's death sentence under the vileness predicate, the Virginia Supreme Court failed to even apply the minimal Smith definitions of the term's "depravity of mind" and "aggravated battery", noting that the Smith definitions "are not necessarily the best or the only definitions for these terms." Tuggle, 228 Va. at 516. Instead, the court merely stated that the crime for which Tuggle was convicted was "outrageously vile and involved depravity of the mind." Id. at 517. Without any explanation or detailed analysis, the court also summarily concluded that "the battery to the victim was aggravated and "more culpable than the minimum necessary to accomplish an act of murder." Id. If the statutory language is itself unconstitutional, the state appellate court can hardly create an appropriate narrowing construction merely by repeating that language.

Nonetheless, the Fourth Circuit upheld the validity of the "vileness" finding on the grounds that the trial court instruction

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[15]The Virginia Supreme Court has never reversed a case in which the imposition of the death penalty relied upon the "vileness" aggravator. See, e.g., Mueller v. Commonwealth, 244 Va. 386, 422 S.E.2d 380 (1992), cert. denied, 113 S.Ct. 1880 (1993); Stewart v. Commonwealth, 245 Va. 222, 427 S.E.2d 394, cert. denied, 114 S.Ct. 143 (1993); Davidson v. Commonwealth, 244 Va. 129, 419 S.E.2d 656, cert. denied, 113 S.Ct. 423 (1992); Thomas v. Commonwealth, 244 Va. 1, 419 S.E.2d 606, cert. denied, 113 S.Ct. 421 (1992); Hoke v. Commonwealth, 237 Va. 303, 377 S.E.2d 595, cert. denied, 491 U.S. 910 (1989); Turner v. Commonwealth, 234 Va. 543, 552 & n.2, 364 S.E.2d 483 (1988), cert. denied, 486 U.S. 1017 (1988); Boggs v. Commonwealth, 229 Va. 501, 331 S.E.2d 407 (1985), cert. denied, 475 U.S. 1031 (1986); and Jones v. Commonwealth, 228 Va. 427, 323 S.E.2d 554 (1984), cert. denied, 472 U.S. 1012 (1985); Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d 815, cert. denied, 474 U.S. 865 (1985).

"paraphrased" the definition of "aggravated battery" set forth in Smith v. Commonwealth and that the Smith limitation was in accord with Godfrey. 57 F.3d at 1372. However, the Opinion failed to mention the Virginia Supreme Court's refusal to fully apply the Smith v. Commonwealth standard and omitted the fact that no definition of "depravity of mind" was given to the jury.

This Court has plainly declared that aggravating circumstances with language identical to Virginia's "vileness" circumstance are too vague to provide appropriate constitutional guidance in capital sentencing decisions. The failure of Virginia courts to provide a sufficiently narrow definition of the "vileness" factor in this case warrants a grant of certiorari.

CONCLUSION

This Court has twice granted certiorari in this case and remanded the matter to lower courts to correct clear constitutional error in Tuggle's capital sentencing. On both occasions, the lower courts have struggled to avoid the impact of this Court's rulings and cobbled together makeshift rationales to uphold a death sentence that cannot be justified. Certiorari should be granted here so that the acknowledged error can be thoroughly considered and finally resolved.

Respectfully Submitted,

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By _____
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