

No. 96-5364

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

LEM DAVIS TUGGLE, JR.,

Petitioner,

v.

J. D. NETHERLAND, WARDEN

Respondent.

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

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Petitioner, Lem Davis Tuggle, currently scheduled to be executed by the Commonwealth of Virginia on December 12, 1996, files the following Petition for Rehearing pursuant to Supreme Court Rule 44(2).

I. INTRODUCTION

Lem Tuggle was convicted of capital murder and sentenced to death by the Circuit Court of Smyth County, Virginia in 1984. Prior to trial, the Commonwealth arranged for a state psychologist to interview Tuggle so as to present evidence of his "future

dangerousness" during his capital sentencing. This investigation was conducted without prior notification of Tuggle's counsel.

When Tuggle's counsel learned of the covert examination, they asked the trial court to appoint a defense psychiatrist to assist Tuggle and offered to pay for that psychiatrist with their own money. The court refused the motion. During Tuggle's capital sentencing, the jury heard testimony from a state expert that Tuggle posed a future danger to society. Tuggle was unable to respond.

In October 1995, this Court unanimously found that the trial court's actions in denying Tuggle the assistance of a psychiatrist violated Ake v. Oklahoma, 470 U.S. 68 (1985). Ake held that the provision of psychiatric assistance to a defendant in a capital trial who is confronted with such evidence by the state is one of the "basic tools of an adequate defense." 470 U.S. at 77. With reference to Tuggle's case, this Court unanimously held that denying him 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.

In April 1996, the Fourth Circuit considered the harmless error issue and held that a violation of Ake v. Oklahoma can be harmless. The Fourth Circuit then examined the very trial record

that this Court had unanimously concluded was unconstitutional. Based purely on an examination of that one-sided record, the Fourth Circuit held that the Ake error in Tuggle's case was harmless. Tuggle v. Netherland, 79 F.3d 1386 (4th Cir. 1996). On October 7, 1996, this Court denied Tuggle's Petition for Writ of Certiorari from that judgment of the Fourth Circuit.

II. ARGUMENT

**The Petition for Rehearing Should Be Granted
Because Allowing the Lower Court Ruling to Stand
Would Signify a Complete Retreat from the Unanimous
Ruling in Tuggle's Favor that this Court Issued
Only One Year Ago.**

Even if a violation of Ake v. Oklahoma could be considered harmless, it is fundamentally unfair to allow the error to be excused based solely on a review of the one-sided trial record in this case. Such a ruling would represent a full retreat from this Court's unanimous ruling for Tuggle of only one year ago.

At trial, Tuggle diligently sought the expertise that he was entitled to under the Constitution. His attorneys even offered to pay for psychiatric assistance out of their own pockets, but such motion was denied by the trial court. Thus, Tuggle was unable to counter the state's evidence, unable to proffer evidence of his own on the psychiatric question, unable to fully develop his case in mitigation, and unable to respond to the prosecutor's closing argument that featured the unconstitutional testimony of the state witness.

In the twelve years since his trial, Tuggle has consistently asserted that his sentencing was unconstitutional and he has

repeatedly sought to demonstrate how his defense was affected thereby. In both his state and federal habeas corpus petitions, Tuggle cited facts relevant to the question of whether the assistance of a psychiatrist would have helped his case. In his state and federal habeas petitions, Tuggle sought expert assistance and an evidentiary hearing to be able to present facts showing the extent to which the Ake violation deprived him of his full ability to defend himself at trial. Just as the trial court refused to allow Tuggle the assistance he was entitled to, both the state and federal habeas courts denied his motions for evidentiary hearings. Thus, Tuggle has never been accorded any opportunity to present to any court the effect that the violation had on his sentencing.

In its ruling for Tuggle in 1995, this Court stayed an impending execution date and held that "the absence of [psychiatric assistance] may well have affected the jury's ultimate decision, based on all the evidence before it, to sentence the petitioner to death rather than life imprisonment." Tuggle v. Netherland, 116 S.Ct. 283, 285 (1995). By unanimously recognizing this fact, the Court ruled that it was unconstitutional to send Tuggle to his death until the effect of that "absent" evidence was understood. But, the Fourth Circuit made no effort to determine what that absent evidence would have shown. Instead, it merely relied on the same one-sided trial record that this Court condemned. The Court cannot accept that result without turning its back on its own ruling.

III. CONCLUSION

Lem Tuggle stands six weeks from execution. All courts have now recognized that his capital sentencing was unconstitutional and that the effect of that violation was to thwart his ability to fully present a sentencing defense. The Fourth Circuit's decision that the Ake error was harmless is a classic sandbag maneuver-- first, the trial court blocked Tuggle from putting on a defense and now the federal reviewing court holds that inadequate defense against him. This Court should not tolerate that deception. The Court properly analyzed this case one year ago and the Fourth Circuit's predetermined action on remand has done nothing to wipe away the injustice at the heart of Tuggle's death sentence.

Respectfully Submitted,

LEM DAVIS TUGGLE, JR.

By 

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CERTIFICATE OF SERVICE

I, Timothy M. Kaine, a member of the Bar of this Court, hereby certify, pursuant to Supreme Court Rule 44, that this Petition for Rehearing is presented in good faith and not for delay, and that its single argument is a substantial ground not previously presented. I also certify that, pursuant to Supreme Court Rule 29, I had a copy of the foregoing Petition for Rehearing hand-delivered to Donald R. Curry, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219 on this 15th day of November, 1996.

