No. 04- ____

IN THE

Supreme Court of the United States

LARRY BILL ELLIOTT,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Under many death penalty statutes, an individual may be sentenced to death only if an "aggravating circumstance" enumerated by statute is present. More than two decades ago, this Court held in *Godfrey v. Georgia*, 446 U.S. 420 (1980), that one such aggravator — that the defendant's conduct was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" — was unconstitutionally vague when applied without a narrowing construction. In the decision below, the Virginia Supreme Court affirmed a capital sentence based upon an identically worded vileness aggravator that was applied without a narrowing construction. As a consequence, the question presented here is:

> Whether the "vileness" aggravator used to sentence petitioner to death in this case was unconstitutionally vague.

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Larry Bill Elliott respectfully petitions for a writ of certiorari to review the judgment of the Virginia Supreme Court in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia (App. 1a-40a) is reported at 593 S.E.2d 270 (Va. 2004). The trial court's order denying petitioner's motion to declare Virginia's vileness aggravator unconstitutional (App. 41a-44a) is unreported. The jury's verdict (App. 45a) is unreported, and the trial court's sentencing orders (App. 46a-53a) are unreported as well.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on March 5, 2004, and petitioner's timely motion for rehearing was denied on June 17, 2004. App. 54a. On August 19, 2004, this Court entered an order extending the time for petitioner to file a petition for a writ of certiorari until October 15, 2004. The Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Virginia's capital sentencing statute provides in pertinent part:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that *his conduct in committing the*

> *offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim*; and (2) recommend that the penalty of death be imposed.

Va. Code Ann. § 19.2-264.2 (emphasis added). Other constitutional and statutory provisions involved in this case are reprinted at App. 55a-60a.

STATEMENT

When a jury is asked to decide whether to impose the death penalty, the Eighth Amendment requires that its discretion "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). In particular, the jury must be given clear and objective standards to apply, and those standards must genuinely narrow the class of individuals subject to capital punishment by drawing a principled distinction between those who are subject to such punishment and those who are not. *See, e.g.*, *Arave v. Creech*, 507 U.S. 463, 470-74 (1993); *Gregg*, 428 U.S. at 189 (opinion of Stewart, Powell, and Stevens, JJ.).

To comply with these requirements, many states require that statutorily enumerated "aggravating circumstances" be found before the death penalty may be imposed. In *Godfrey v. Georgia,* 446 U.S. 420 (1980), the Court held that one such aggravator — that the defendant's conduct was "outrageously and wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim" (Ga. Code § 27-2534.1(b)(7) (1978)) — was unconstitutional when applied without a narrowing construction because it was too vague to provide a jury with the guidance demanded by the Constitution.

Although this Court has repeatedly reaffirmed and extended the *Godfrey* decision over the last two decades, the Virginia courts have persistently refused to follow it. Virginia has a vileness aggravator that is worded exactly the same as Georgia's. Nevertheless, Virginia has refused to adopt a construction of that aggravator that clarifies and narrows its application. Accordingly, the decision below upheld petitioner's sentence even though the jury was given an instruction on the vileness aggravator that essentially quoted the statutory language found unconstitutionally vague in *Godfrey*. Because this decision violates the holding in *Godfrey*, and because it is now amply clear that the Virginia courts will not follow *Godfrey* unless forced to do so by this Court, this case warrants review.

1. Background. Petitioner Larry Bill Elliott served with distinction in the Army for thirty years, the first twenty on active duty and the final ten as a civilian employee. JA 2639-47.[1] His area of expertise was technical counter-surveillance, and at the end of his career he acted as program director of the service's technical surveillance countermeasures program and then as director of its technical counterintelligence school. JA 348.16, 2639-41. Petitioner's devotion to his duties and the long hours spent on his job took its toll on his personal life. As a consequence, he grew apart from his wife, JA 348.12, and by the summer of 1999 — as he approached fifty years of age — he was lonely and looking for female companionship. JA 1522. What he found was Rebecca Gragg.

Ms. Gragg is a much younger woman who has worked as both a stripper and a private escort. App. 7a. In the late 1990s, she branched out into the Internet, operating a web

[1] "JA" refers to the appendix filed by petitioner in the Virginia Supreme Court.

site that allowed users paying a fee to view pictures of her undressed and performing various acts. JA 1517-18. In addition, in the summer of 1999, she ran an advertisement on the Internet seeking a "sugar daddy." App. 7a.

Petitioner answered the advertisement and arranged a dinner with Gragg. When they met, Gragg recognized that she had "struck a gold mine." JA 1878. She told petitioner that she was not interested in a romantic or sexual relationship; instead, she wanted him to support her financially so that she could stop working as a stripper and set up a business making costumes for strippers. App. 7a.

Petitioner agreed, and over the course of the next eighteen months, he spent over $450,000 on Gragg. JA 1527, 1558-61, 2008. He brought her a car, gave her a cell phone, and let her use his credit card. JA 1525-27. He paid for her housing, including a house that she shared for a while with her second husband. JA 1525, 1611. He even paid for her children's food, clothing, sports equipment, and private school tuition. JA 1525-26.

The Custody Dispute — Petitioner was also dragged into a bitter custody dispute between Gragg and Robert Finch. Gragg and Finch had a stormy and sometimes violent relationship, fueled by Finch's alleged mistreatment of their two children. JA 1519-21. At one point, Gragg told a police officer that, if she continued living with Finch, she was going to kill either him or herself. JA 544. After they split up, Finch reportedly broke into the house where Gragg was living with another man, who drew a gun on Finch. JA 547-58. And Finch reported that Gragg had him beaten in February 1999, after he received some visitation rights to their children. JA 2631-34.

Petitioner became involved in the custody dispute in the spring of 2000, when Gragg sought to obtain evidence that Finch was again using illicit drugs to help in her custody battle. At first, using petitioner's money, Gragg hired a

private investigator to gather evidence that Finch was using illicit drugs. JA 1542. When the investigator failed to turn up anything, petitioner gave it a try himself, frequently surveilling the townhouse where Finch was living with his girlfriend, Dana Thrall. *Id.* He, too, turned up nothing.

In the summer of 2000, Gragg lost temporary custody of their two children to Finch. JA 1398-99. A hearing on permanent custody was scheduled for January 5, 2001. JA 1123. Because Finch had settled into a stable relationship with Thrall and developed a small business, JA 1157, 1162, he had a good chance of obtaining permanent custody of his children at the custody hearing. JA 1124.

The Murders — The hearing never took place because Robert Finch and Dana Thrall were murdered on January 2, 2001. When police arrived at the victims' townhouse early that morning, they found Finch lying dead at the foot of the staircase with three gunshot wounds. App. 3a. Thrall was found lying in a pool of blood in the kitchen, also with multiple gunshots wounds and a blunt force trauma to her head as well. App. 4a. She died the next day. *Id.*

The Investigation — Shortly after the murders, the police interviewed both Gragg and petitioner. App. 5a-9a. Because Gragg was driving back from Florida at the time of the murders, the police quickly focused their investigation upon petitioner, who admitted being in the vicinity of the victims' townhouse on the morning of the murders. *Id.* In light of the blood splattered on the walls and ceiling of the kitchen where Thrall was found, JA 1267, 2630, the police expected to find petitioner's fingerprints, blood, or hair at the townhouse, and blood from the victims in petitioner's truck. Indeed, in applying for a search warrant, the police represented that "during incidents of this nature there is always a transference of fluids, fibers and/or materials." JA 2630. They were, however, unable to find any evidence inside the townhouse suggesting petitioner's presence there.

App. 4a-5a. Moreover, even though they literally took petitioner's truck apart, the police found no blood from Finch or Thrall there. App. 9a.

The police did find a bit of petitioner's blood outside the townhouse on the fence in the back yard. App. 5a. However, there was no blood in the back yard itself or on the back door; none of the neighbors had heard the dog in the yard bark; and the door to the back yard was found locked on the morning of the murder, JA 1214, 1230, 1265-65, all of which suggests that the assailant did not leave through the back yard. In addition, a neighbor saw the storm door at the front of the house, which had been closed just moments before the murders, swinging back and forth shortly afterwards, indicating that the assailant left through the front door, which the police found open. JA 1226, 1231, 1256. Nevertheless, the police arrested petitioner on May 9, 2001, and charged him with the murders of Finch and Thrall. App. 9a.

Gragg's Polygraph Examinations — The following day, the police conducted a polygraph examination of Gragg. The police had previously given Gragg an examination in January. Although the results of that examination were inconclusive, the police suspected that she was not being forthcoming. App. 9a. The polygraph examination on May 10, 2001 was more definite. It showed that Gragg was lying when she denied having planned to have Finch killed. JA 673-74. The police confronted her with this result and told her that this was her final chance to cooperate. JA 2232-34. Gragg then changed her story.

In previous interviews, in addition to saying that she did not believe that petitioner had committed the murders, Gragg had told the police that a telephone call she received around 3:30 a.m. on the morning of the murders was from Finch. JA 1629-30, 2549. After being confronted with the results of her polygraph examination, Gragg told the police that the

telephone call was actually from petitioner and that their conversation had set him off in a jealous rage. According to Gragg, she had been sleeping in her car when she received the call on her cellphone. JA 2301-02. When she lost the signal, thinking that the call was from Finch, Gragg asked "Rob, can you hear me?" JA 2303. This mistake, Gragg told the police, enraged petitioner, who yelled that he was "tired of this s***" and that "he was going to take care of it." JA 2304.

Gragg also told the police that later that morning, after the murders, she received a telephone call in which petitioner told her that he was "trying to get rid of the stuff" and to "clean up this mess." JA 2308. Petitioner also supposedly said that she had nothing to worry about, that "[i]t wasn't going to come down" on her, and that her "problem was taken care of." JA 2309. Three months later, petitioner was indicted for the murders of Finch and Thrall. JA 1-4.

2. The Challenge to the Vileness Aggravator. On January 15, 2002, petitioner filed a pretrial motion challenging the constitutionality of Virginia's death penalty statute. JA 68-131. Among other things, he argued that the vileness aggravator employed by the Commonwealth "on its face and as applied in Virginia violates the federal constitution." JA 75. He further argued that this issue was "controlled by *Godfrey v. Georgia*, 446 U.S. 420 (1980), and the cases that follow *Godfrey*." *Id.* The trial court denied the motion without comment. App. 44a.

3. The First Trial. Petitioner's first trial began in July 2002. During that trial, the Commonwealth relied heavily on the testimony of Rebecca Gragg. JA 408-650. In particular, Gragg testified about her conversation with petitioner on the morning of the murders, informing the jury that the telephone call shortly before the murders set petitioner off in a jealous rage, JA 464-66, and that in telephone calls after the murder petitioner implicitly admitted to the murders by

telling her that her problem was taken care of, that he "had blood all over him," and that "the police were swarming all over the place." JA 470.

The Commonwealth also presented evidence that petitioner was seen less than one-half hour before the murders a short distance away from the victims' townhouse, that petitioner's blood was found on the fence in the back yard of the townhouse, and that petitioner had been inquiring into obtaining a silencer a week before the murders. App. 2a, 5a, 13a. The Commonwealth did not, however, attempt to explain how petitioner's blood could have gotten on the fence in the back yard when there was no other blood from petitioner at the crime scene, the back door was locked, the dog in the back yard had not barked, and the assailant appeared to have exited from the front door. *See supra* pp. 5-6. It also failed to present any physical evidence showing that petitioner was actually inside the townhouse. Nevertheless, the jury found petitioner guilty. App. 11a.

During the penalty phase, the Commonwealth sought the death penalty for the murder of Dana Thrall. Under Virginia law, an individual may be sentenced to death only if the jury finds at least one of two aggravating circumstances, vileness or future dangerousness, and then recommends imposing the death penalty. *See* Va. Code Ann. § 19.2-264.2; *Smith v. Commonwealth*, 248 S.E.2d 135, 150 (Va. 1978). The Commonwealth argued that both these circumstances were present. The jury agreed that the murder was vile, but it did not find that petitioner posed a serious threat of future violence. JA 685-86. It also recommended that petitioner be sentenced to death. *Id.* However, before this sentence was entered, the trial court learned that a juror had engaged in misconduct and declared a mistrial. App. 11a.

4. The Second Trial. At the second trial, the Commonwealth presented essentially the same evidence as in the first trial, with Gragg once again acting as its star

witness. JA 1575-82. To impeach Gragg's testimony, petitioner sought to inform the jury that Gragg did not disclose the most incriminating part of her testimony — the telephone calls on the morning of the murders — until she was confronted on May 10, 2001 with her failed polygraph examination. JA 209-11, 671-80. Although petitioner intended to use the polygraph evidence only for the limited purpose of showing Gragg's powerful motive to fabricate her story about the telephone calls, the trial court refused to allow any reference to the failed polygraph. JA 680-81.

Petitioner's ability to attack Gragg's credibility was hampered by other rulings as well. First, when a prosecution witness mentioned that Gragg had been questioned by a "polygrapher," the trial court did not permit petitioner to inform the jury that Gragg had failed that polygraph examination, thereby creating the risk that the jury would infer incorrectly that Gragg had taken and passed a polygraph examination. JA 1499-1503, 1509. Second, the trial court refused to require the Commonwealth to remedy false testimony from Rebecca Gragg that bolstered her credibility. At trial Gragg embellished her story about the telephone calls on the morning of the murders. For example, while earlier she had told the police she enraged petitioner by saying "Rob, can you hear me," *see supra* p. 7, at trial she testified that she had said "I love you, Rob." JA 1577-78. Similarly, at the first trial she added new details about the telephone calls after the murders, including that petitioner said he was covered in blood. *See supra* p. 8. When petitioner asked why she had not told the police these important facts, Gragg claimed that she had done so in a cigarette break during her May 10, 2001 interview and then memorialized that conversation in writing. JA 1663-71. Although the detective who allegedly took the statement denied its existence, JA 1675, the trial court did not require the Commonwealth to inform the jury of its witness's false

testimony. JA 1676-77. Once again the jury found petitioner guilty. JA 307-10.

In the penalty phase, the Commonwealth again sought the death penalty. Because of the verdict at the first trial, the Commonwealth was precluded from arguing future dangerousness and was therefore forced to rely solely on the vileness aggravator. JA 683-92. Accordingly, the Commonwealth argued that the murder of Dana Thrall was vile because it involved aggravated battery based upon her gunshot wounds and the blunt force trauma to her head. App. 63a-64a. Describing petitioner as a "cold calculated" killer, App. 65a, the Commonwealth also argued that petitioner had acted with a "depraved mind." App. 63a.

The trial court instructed the jury on the vileness aggravator by reading Virginia's model instruction on the aggravator, which largely quotes the language of the statute. In particular, the court told the jury that to find petitioner eligible for the death penalty, it had to find that the murder of Dana Thrall 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. 61a. The jury found that the murder was vile and recommended the death penalty. App. 45a. Because of the way the verdict form was drafted, the jury did not indicate whether this finding was based on depravity of mind or aggravated battery. *Id.* (finding that the murder of Thrall involved "torture; and/or depravity of mind; and/or aggravated battery"). Pursuant to this verdict, the trial court sentenced petitioner to death on May 22, 2003. App. 52a.

5. The Decision Below. Petitioner appealed to the Virginia Supreme Court, which consolidated its automatic review of his capital sentence with the rest of his appeal. App. 1a.

Although, as petitioner demonstrated, in most jurisdictions polygraph evidence is admissible for collateral purposes such as showing motive,[2] the court held that petitioner's polygraph evidence was properly excluded. App. 20a-21a. The court also rejected petitioner's argument that the Commonwealth had an obligation to remedy the false testimony of Rebecca Gragg on the ground that it was not properly raised, App. 28a-31a, and it found no error in the trial court's refusal to permit petitioner to rebut the false impression that Gragg passed a polygraph examination, that may have been created by the improper mention of the polygrapher. App. 21a-25a; *see also* App. 31a-34a (rejecting other challenges to petitioner's convictions).

Petitioner also challenged the capital sentence imposed upon him. *See* Def. Va. Sup. Ct. Br. at 36-50. He argued, among other things, that the vileness aggravator applied in this case was unconstitutionally vague under *Godfrey*. *See id.* at 36-39. The court summarily rejected this argument, noting that challenges to the vagueness of the vileness aggravator have been "previously rejected by this Court on numerous occasions." App. 37a n.10. The court also found that, even though petitioner had raised his vileness challenge in a pretrial motion and the trial court had ruled upon it, the challenge had not been properly preserved. App. 36a. The Commonwealth had suggested in a footnote that the challenge was waived because petitioner had not renewed it after the mistrial. Comm. Va. Sup. Ct. Br. at 39 n.11. Although the Commonwealth failed to cite any authority in support of this suggestion, the Virginia Supreme Court "concur[red] in the view expressed by the Commonwealth." App. 36a.

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[2] *See, e.g.,* Charles Alan Wright & Kenneth W. Graham, *Federal Practice & Procedure* § 5169 (2003).

Petitioner sought rehearing on his vagueness challenge to the aggravator. He argued that the requirement of renewing pretrial motions after a mistrial adopted by the decision below was unprecedented and that this novel procedural requirement conflicted with the Virginia statute governing the preservation of errors. *See* Va. Code Ann. § 8.01-384(A) ("No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal."). The petition was denied without comment. App. 54a.

REASONS FOR GRANTING THE WRIT

The decision below violates the Court's decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980), and conflicts with the decisions that other states with vileness aggravators have reached in light of *Godfrey*. The question whether Virginia's vileness aggravator violates *Godfrey* warrants the Court's attention because that aggravator has been used to sentence dozens of individuals to death and because it is now clear that the Virginia courts will not comply with the *Godfrey* decision until this Court intervenes.

It makes no difference that the decision below found petitioner's vagueness argument waived. This argument was clearly and reasonably raised in a pretrial motion upon which the trial court passed. The requirement that pretrial motions be renewed after the mistrial applied by the decision below is both novel and unreasonable, and it is well settled that federal review of constitutional claims cannot be precluded by such a requirement. In addition, this case is a good vehicle for considering the constitutionality of the Virginia's vileness aggravator, because it squarely presents that issue, and that issue is unlikely to be better presented in the future. Accordingly, it is now time for the Court to enforce its *Godfrey* decision in Virginia.

I. THE DECISION BELOW VIOLATES THE HOLDING OF THIS COURT IN *GODFREY*

As commentators have recognized,[3] the vileness aggravator employed in Virginia violates this Court's decision in *Godfrey*. In this case, as in others for more than two decades, the Virginia courts have imposed the death penalty based on a vileness aggravator that is identical to the one considered in *Godfrey*, without the narrowing construction that *Godfrey* held was required by the Constitution.

The defendant in *Godfrey* committed a gruesome double murder in which he shot both his estranged wife and his mother-in-law at close range with a shotgun. *See* 446 U.S. at 424-25 (plurality op.); *see also id*. at 449 (White, J., dissenting) (describing the murder scene). The prosecution sought the death penalty based upon the vileness aggravator in Georgia's capital punishment statute. Under that provision, an individual is eligible for the death penalty if he committed a murder that was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Id*. at 422 (plurality op.) (quoting Ga. Code § 27-2534.1(b)(7) (1978)). The prosecution argued that the depravity prong of the aggravator was satisfied, and the trial court instructed the

[3] *See* Melissa A. Ray, *'Meaningful Guidance': Reforming Virginia's Model Jury Instructions on Vileness and Future Dangerousness,* 13 Cap. Def. J. 85, 89 (2000); Douglas R. Banghart, *A Quarter Century of Death: A Symposium on Capital Punishment in Virginia Since Furman v. Georgia – Part IV: Vileness: Issues and Analysis*, 12 Cap. Def. J. 77, 78-79 (1999); Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N. C. L. Rev. 941, 965, 987-89 (1986); Comment, *Godfrey v. Georgia: Possible Effects on Virginia's Death Penalty Law*, 15 U. Rich. L. Rev. 951, 960-66 (1981).

jury on the aggravator by quoting the language of the statute. *See id*. at 426. The jury then found the defendant's offense "outrageously or wantonly vile, horrible, and inhuman" and sentenced him to death. *Id*. On appeal, the Georgia Supreme Court affirmed. *See id*. at 426-27.

Although this Court had previously rejected a facial challenge to Georgia's vileness aggravator on the assumption that it could be applied constitutionally, *see Gregg v. Georgia*, 428 U.S. 153 (1976), it found that the aggravator was unconstitutionally vague as applied in *Godfrey*. First, the Court noted, the jury's verdict that the offense was "outrageously or wantonly vile, horrible, or inhuman" was unacceptably vague because "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Godfrey*, 446 U.S. at 428-29 (plurality op.). Second, examining the facts of the case, it found that the Georgia Supreme Court had failed to apply a narrowing construction that cured this vagueness problem. *See id*. at 432-33; *see also id*. at 434 (Marshall, J., concurring in the judgment). This Court therefore concluded that the vileness aggravator was unconstitutionally vague as applied. *See id.* at 433 (plurality op.); *id.* (Marshall, J., concurring in the judgment).

In the nearly twenty-five years since this ruling, the *Godfrey* decision has been repeatedly reaffirmed and extended by this Court. In *Maynard v. Cartwright*, 486 U.S. 356 (1988), the Court struck down as unconstitutionally vague an Oklahoma statute that made the "especially heinous, atrocious, or cruel" nature of a murder an aggravating circumstance. Okla. Stat. tit. 21, § 701.12 (1981). It held that that "*Godfrey* controls this case" because "the language of the Oklahoma aggravating circumstance at issue . . . gave no more guidance than the 'outrageously or wantonly vile, horrible, or inhuman language' that the jury returned in *Godfrey*." *Maynard*, 486 U.S. at 363-64. Following *Godfrey*, subsequent decisions of this Court have

struck down an Arizona "especially heinous, cruel or depraved" aggravator, *Richmond v. Lewis*, 506 U.S. 40, 46-47 (1992), and a Florida "especially wicked, evil, atrocious, or cruel" aggravator, *Espinosa v. Florida*, 505 U.S. 1079, 1080-82 (1992) (per curiam). *See also Shell v. Mississippi*, 498 U.S. 1 (1990) (per curiam) (striking down the narrowing construction for a Mississippi "especially heinous, atrocious, and cruel" aggravator).

The decision below violates *Godfrey*. As the Virginia Supreme Court has recognized, *see Bunch v. Commonwealth*, 304 S.E.2d 271, 283 (Va. 1983), Virginia defines vileness in exactly the same terms as the Georgia statute considered in *Godfrey*. *Compare* Va. Code Ann. § 19.2-264.2 *with* Ga. Code § 27-2534.1(b)(7) (1978) (App. 59a). In addition, the jury instruction given below was virtually identical to the instruction in *Godfrey*: as in that case, the instruction here quoted the statute, adding only that the aggravated battery had to involve more than the "minimum necessary to accomplish the act of murder." App. 61a. Finally, as in *Godfrey*, the prosecutor urged the jury to find vileness based upon the unconstitutionally vague condition that the murder involved depravity of mind. App. 63a.

It makes no difference that the Commonwealth also argued that petitioner's conduct satisfied the "aggravated battery" prong of the vileness aggravator. Whether or not that prong is sufficiently definite and clear to satisfy the Eighth Amendment, the verdict below was tainted by the vagueness of the depravity prong because the jury returned a general verdict that may have been based upon that prong alone. *See Shell*, 498 U.S. at 3-4 (Marshall, J., concurring) (finding death penalty invalid where two of the three prongs of an aggravator were constitutionally infirm); *see also Zant v. Stephens*, 462 U.S. 862, 881 (1983) (noting that a capital sentence must be vacated "if the jury was instructed that it could rely on any of two or more independent grounds, and

one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground").

In addition, the "aggravated battery" prong is itself unconstitutionally vague. The term "aggravated battery" is unconstitutionally vague on its face because, as the Virginia Supreme Court itself has recognized, "any act of murder arguably involves . . . an 'aggravated battery to the victim.'" *Smith v. Commonwealth*, 248 S.E.2d 135, 149 (Va. 1978); *accord Gregg*, 428 U.S. at 201 (op. of Stewart, Powell, and Stevens, JJ.). Moreover, the jury instruction below neither clarified nor narrowed the aggravated battery prong. Rather than requiring some egregious mutilation or injury as the term *aggravated* battery suggests, the jury instruction interpreted the term to cover any battery "beyond the minimum necessary to accomplish the act of murder." App. 61a. The instruction also offered no guidance on how to determine the "minimum necessary" for a murder, much less any principled way of "distinguishing the few cases in which the [death] penalty is imposed from the many in which it is not." *Godfrey*, 446 U.S. at 427 (plurality op.) (quotation omitted). In short, far from narrowing and clarifying the meaning of the aggravated battery prong in a principled fashion as the Eighth Amendment demands, the jury instruction in this case broadened it and made it even more ambiguous and confusing. Thus, even if the jury had relied on the battery prong of the vileness aggravator, the decision below would still violate *Godfrey*.[4]

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[4] The Commonwealth has argued elsewhere that its vileness aggravator is irrelevant for constitutional purposes because, unlike Georgia, Virginia's death-penalty statute has a restrictive definition of capital murder that narrows the class of individuals eligible for capital punishment. This argument is without merit. The Eighth Amendment requires *both* that the class of persons eligible for the death penalty be narrowed *and* that the jury's discretion be channeled through clear and definite standards. *See*

II. THE NARROWING CONSTRUCTIONS ADOPTED BY OTHER STATES WITH VILENESS AGGRAVATORS CONFIRM THAT THE DECISION BELOW VIOLATES *GODFREY*

Virginia is not the only state to use a vileness aggravator. Four other states — Delaware, Georgia, New Jersey, and South Dakota — have vileness aggravators that are either identical or nearly identical to Virginia's. *See* App. 57a-60a. One of these states, Delaware, does not appear to have ever applied the depravity or battery prongs of its vileness aggravator. The other three states have adopted narrowing constructions of these prongs to avoid unconstitutionality, thereby confirming that Virginia is violating *Godfrey* by applying its vileness aggravator without a similar narrowing construction.

For example, New Jersey uses a vileness aggravator that is virtually identical to Virginia's. New Jersey's aggravator applies to any murder that was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim." N.J. Stat. Ann. § 2C:11-3c(4)(c); *see also State v. Ramseur*, 524 A.2d 188, 229 n.33 (N.J. 1987) (noting "aggravated assault" has the same meaning as "aggravated battery"). Citing *Godfrey*, the New Jersey Supreme Court has recognized that this provision "will not pass constitutional muster unless a narrowing construction is supplied." *Ramseur*, 524 A.2d at 200-01. Accordingly, it has construed the depravity prong of the New Jersey vileness aggravator to cover only murders

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Tuilaepa v. California, 512 U.S. 967, 971-73 (1994); *see also Walton v. Arizona*, 497 U.S. 639, 665 n.* (1990) (Scalia, J., concurring in part and concurring in the judgment) (observing that, "no matter how narrowly the crime is defined," the aggravating factors must "be specified *whenever* the sentencer is given discretion" to impose the death penalty).

that were not the "product of greed, envy, revenge, or another of those emotions ordinarily associated with murder, and served no purpose for the defendant beyond his pleasure of killing." *Id.* at 231. In addition, it has construed the torture and battery prongs of the aggravator to apply only where "the defendant intended to cause, and did in fact cause, severe physical or psychological pain or suffering to the victim prior to the victim's death." *Id.*

The South Dakota Supreme Court has adopted a similar narrowing construction. Like New Jersey, South Dakota has a vileness aggravator that is virtually identical to Virginia's. *See* S.D. Codified Laws § 23A-27A-1 ("The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age."). Citing *Godfrey*, the South Dakota Supreme Court has recognized that the language of this provision, "by itself, is vague and overbroad." *State v. Rhines*, 548 N.W.2d 415, 448 (S.D. 1996); *accord State v. Moeller*, 548 N.W.2d 465, 491 (S.D. 1996). It has, however, approved a narrowing construction of the battery prong, which requires a "specific intention, design or purpose of maliciously inflicting unnecessary pain" and "infliction of serious physical abuse upon the victim by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof." *Moeller*, 548 N.W.2d at 490; *see also State v. Moeller*, 616 N.W.2d 424, 452 (S.D. 2000) (approving a narrowing construction of the depravity prong which required, among other things, that the defendant "relished or gained a sense of pleasure from the murder" or committed torture or aggravated battery "as a result of an utterly corrupt, perverted or immoral state of mind").

The Georgia Supreme Court has also adopted a narrowing construction for its vileness aggravator. Prior to *Godfrey*,

that court determined that the depravity prong of its aggravator "comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim." *Godfrey*, 446 U.S. at 431 (discussing *Harris v. State*, 230 S.E.2d 1, 10 (Ga. 1976), and *Blake v. State*, 236 S.E.2d 637 (Ga. 1977)). In addition, after *Godfrey*, the Georgia Supreme Court construed the battery prong to apply only where a battery is "a separate and distinct act from the act causing death," *Davis v. State*, 340 S.E.2d 862, 868 (Ga. 1986), and the defendant "maliciously causes bodily harm to another by depriving him of a member of his body, by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof." *West v. State*, 313 S.E.2d 67, 71 (Ga. 1984).

The Virginia Supreme Court has taken a very different approach. Far from adopting a narrowing construction, it has held that its vileness aggravator is clear and definite on its face. *See, e.g., Smith*, 248 S.E.2d at 149. Indeed, it has refused to adopt a controlling definition of the aggravator or to require that the terms of the aggravator be explained to the jury. *See, e.g.,* App. 34a n.9; *Clark v. Commonwealth*, 257 S.E.2d 784, 790 (Va. 1979). Its interpretation of the aggravator is also far broader and vaguer than the interpretation of the courts in other states. *See Smith*, 245 S.E.2d at 149 (defining depravity to mean "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation"); *id.* (defining aggravated battery to mean a battery "which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder"). Thus, Virginia's application of its vileness aggravator directly conflicts with the decisions of other states with vileness aggravators, which have recognized that such aggravators cannot be applied constitutionally without a narrowing construction.

III. VIRGINIA'S VIOLATION OF *GODFREY* IS IMPORTANT AND RECURRING, AND IT WILL NOT END WITHOUT THIS COURT'S INTERVENTION

This case raises an important and recurring issue. Since the reinstatement of capital punishment in 1976, Virginia has executed more than 90 individuals, the second most of any state. *See* Deborah Fins, *Death Row U.S.A.,* Spring 2004, at 11, *available at* http://www.deathpenaltyinfo.org/DRUSA-20040401.pdf. Because vileness is one of only two aggravating circumstances used in Virginia to guide jury discretion in capital sentencing, *see Smith*, 248 S.E.2d at 472, many of these individuals have been sentenced to death based in whole or in part upon the vileness aggravator. As a consequence, it is of undeniable importance whether Virginia's use of that aggravator violates this Court's holding in *Godfrey* and is therefore unconstitutionally vague.

In addition, the Virginia Supreme Court is unlikely to comply with *Godfrey* unless this Court faces it to do so. In 1978, the Virginia Supreme Court upheld the Commonwealth's vileness aggravator against a facial challenge on the ground that the terms of the aggravator were not "so vague as to vest the sentencing authority with standardless sentencing power." *Smith,* 248 S.E.2d at 148. Although two years later *Godfrey* held just the opposite, the Virginia Supreme Court has repeatedly refused to change its interpretation of the vileness aggravator. Shortly after *Godfrey* was decided, the Virginia Supreme Court brushed the decision aside as limited to "its own peculiar facts" and refused to alter its interpretation of the vileness aggravator. *Briley v. Commonwealth*, 273 S.E.2d 57, 67 (Va. 1980); *see also Turner v. Commonwealth*, 273 S.E.2d 36, 44 (Va. 1980) ("*Godfrey* rested on its unique facts."). Even when *Maynard* and subsequent cases made it clear that *Godfrey* announced a fundamental principle extending far beyond its peculiar facts, *see supra* pp. 14-15, the Virginia Supreme Court

refused to reconsider its position. Instead, for more than twenty years, the Virginia Supreme Court has summarily dismissed vagueness challenges to the Commonwealth's vileness aggravator based upon its prior opinions.[5] Thus, the Virginia courts clearly will not comply with *Godfrey* on their own.

Nor is the Fourth Circuit likely to bring Virginia into compliance. In sharp contrast to the approach other courts have taken to similar aggravators, *see supra* pp. 17-19; *see also, e.g., Cone v. Bell*, 359 F.3d 785, 794-97 (6th Cir. 2004); *Deutscher v. Angelone*, 16 F.3d 981, 984 (9th Cir. 1994), the Fourth Circuit has upheld Virginia's vileness aggravator. At first, the Fourth Circuit simply followed the Virginia Supreme Court and distinguished *Godfrey* on its facts. *See Turner v. Bass*, 753 F.2d 342, 352-53 (4th Cir. 1985). Later it upheld the aggravator on the patently inadequate ground that "a juror of ordinary sensibility would not find that all murders involve depravity of mind or an

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[5] *See, e.g.*, *Wolfe v. Commonwealth*, 576 S.E.2d 471, 480 (Va.), *cert. denied*, 124 S. Ct. 566 (2003); *Morrisette v. Commonwealth*, 569 S.E.2d 47, 55 (Va. 2002), *cert. denied*, 124 S. Ct. 928 (2003); *Lenz v. Commonwealth*, 544 S.E.2d 299, 303 (Va. 2001); *Cherrix v. Commonwealth*, 513 S.E.2d 642, 647 (Va. 1999); *Beck v. Commonwealth*, 484 S.E.2d 898, 907 (Va. 1997); *Williams v. Commonwealth*, 450 S.E.2d 365, 371 (Va. 1994); *Breard v. Commonwealth*, 445 S.E.2d 670, 675 (Va. 1994); *Mickens v. Commonwealth*, 442 S.E.2d 678, 684 (Va.), *rev'd on other grounds*, 513 U.S. 922 (1994); *Stewart v. Commonwealth*, 427 S.E.2d 394, 399-400 (Va. 1993); *Satcher v. Commonwealth*, 421 S.E.2d 821, 826 (Va. 1992); *Mueller v. Commonwealth*, 422 S.E.2d 380, 393 (Va. 1992); *Turner v. Commonwealth*, 364 S.E.2d 483, 488 (Va. 1988); *Tuggle v. Commonwealth*, 323 S.E.2d 539, 552 (Va. 1984); *Jones v. Commonwealth*, 323 S.E.2d 554, 564 (Va. 1984); *LeVasseur v. Commonwealth*, 304 S.E.2d 644, 660 (Va. 1983); *Clanton v. Commonwealth*, 286 S.E.2d 172, 181 (Va. 1982).

aggravated battery." *Turner v. Williams*, 35 F.3d 872, 892 (4th Cir. 1994); *accord Jones v. Murray*, 976 F.2d 169, 174-75 (4th Cir. 1992). And in recent years, it has summarily refused to reconsider its prior rulings. *See, e.g.*, *Barnabei v. Angelone*, 214 F.3d 463, 472 (4th Cir. 2000); *Breard v. Pruett*, 134 F.3d 615, 621 (4th Cir. 1998). Thus, it is clear that Virginia will continue to violate *Godfrey* until this Court intervenes.

IV. THIS CASE IS A GOOD VEHICLE FOR CONSIDERING THE CONSTITUTIONALITY OF VIRGINIA'S VILENESS AGGRAVATOR

Although the decision below ruled that petitioner waived his vagueness challenge to Virginia's vileness aggravator by failing to renew his challenge after the mistrial, this Court is not prevented from considering that challenge because the procedural rule invoked by the decision below was both novel and unreasonable. In fact, this case is a good vehicle for considering the constitutionality of Virginia's vileness aggravator because it presents the issue in a clear and focused fashion.

1. Petitioner's vagueness challenge is properly before this Court because it was clearly and reasonably presented to the trial court. Months before trial, petitioner filed a motion raising this challenge, which the Commonwealth had the opportunity to oppose, and which the trial court ruled upon. JA 53-135. Virginia law does not require that such pretrial rulings be renewed at trial in order to be preserved for appeal. *See, e.g.*, Va. Code Ann. § 8.01-384(A) (2003); *Chawla v. Burgerbusters, Inc.*, 499 S.E.2d 829, 932-33 (1998); *King v. Commonwealth*, 570 S.E.2d 863, 866 (2002). Nevertheless, the decision below held petitioner was required to renew his challenge at the second trial because the first one ended in a mistrial. Because this renewal requirement is entirely novel and fails to serve any legitimate

state interest, it does not bar this Court from considering petitioner's vagueness claim.

Although in some circumstances a procedural default may constitute an independent and adequate state ground for rejecting a constitutional challenge, a state may not interfere with federal review of a constitutional question by interposing novel or unreasonable procedural rules. To the contrary, this Court has recognized that "only a firmly established and regularly followed state practice may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (quotation omitted). *See generally* Robert L. Stern *et al.*, *Supreme Court Practice* § 3.26(4), at 23 (8th ed. 2002). Accordingly, it is well-settled that novel procedural rules cannot bar federal review of constitutional claims that have been plainly and reasonably raised. *See, e.g.*, *Ford*, 498 U.S. at 423-25; *James v. Kentucky*, 466 U.S. 341, 348-49 (1984); *Wright v. Georgia*, 373 U.S. 284, 290-91 (1963); *NAACP v. Alabama*, 357 U.S. 449, 457 (1958). It is also well-settled that a state procedural rule cannot bar this Court from reviewing a constitutional challenge unless that rule serves a legitimate state interest. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 123-25 (1990); *Douglas v. Alabama*, 380 U.S. 415, 422-23 (1965); *Staub v. Baxley*, 355 U.S. 313, 319-20 (1958). As Justice Holmes observed, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

The procedural rule invoked by the decision below was clearly novel. The Commonwealth offered no precedent for requiring that pretrial motions be renewed after a mistrial. To the contrary, it simply observed in a footnote that petitioner "did not make any comparable pre-trial or trial challenges to the constitutionality of Virginia's system in his

second trial," without offering any argument or authority for why petitioner's vagueness arguments were therefore waived. Comm. Va. Sup. Ct. Br. at 39 n.11. Moreover, in finding a waiver, the Virginia Supreme Court failed to cite any Virginia decision, statute, or rule. Indeed, the only authorities it cited were two federal decisions, App. 37a, neither of which holds that motions fully decided before trial must be renewed after a mistrial. *See United States v. Palmer*, 122 F.3d 215, 221 (5th Cir. 1997) (finding waiver where the court informed the defendant "that her earlier-filed motions would not be carried to the second trial"); *United States v. Oakey*, 853 F.2d 551, 554 (7th Cir. 1988) (noting that trial court explicitly carried the pretrial motions over to the second trial).

Nor could petitioner have anticipated the Virginia Supreme Court's novel renewal requirement. There is no well-settled rule requiring renewal of pretrial motions after a mistrial. To the contrary, the general rule is that "the trial court's pretrial determinations and the objections and exceptions thereto survive the mistrial, and remain effective." 75 Am. Jur. 2d *Trial* § 109, at 322 (1991) (citing *New Hampshire v. Goding*, 513 A.2d 325, 238 (N.H. 1986)); *see also Illinois v. Henderson*, 344 N.E.2d 239, 252 (Ill. App. Ct. 1976) ("[I]t is only those proceedings which have caused the mistrial that are vitiated by the mistrial."). In addition, the Virginia Code provides that "[n]o party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal." Va. Code Ann. § 8.01-384(A) (2003). Because petitioner made his objection "known to the court" in his pretrial motion, it was reasonable for him to assume that his vagueness challenge would be preserved for review without renewing it at either his first or second trial. Under such circumstances, the novel requirement that pretrial motions be renewed after a mistrial is "inadequate to serve as an independent state ground" for

the decision below. *Ford*, 498 U.S. at 424; *accord NAACP*, 357 U.S. at 456-58.

The renewal requirement is also inadequate to bar review by this Court because it fails to serve any legitimate state interest. The mistrial did not alter petitioner's challenge to the vagueness of the vileness aggravator, which is legal in nature and therefore unaffected by the course of the proceedings at trial. Nor did the Virginia Supreme Court identify any legitimate interest served by its renewal requirement. There is therefore no reason to believe that renewing that challenge at the second trial would serve such an interest: as this Court has observed, "an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests." *Douglas*, 380 U.S. at 422. Thus, the renewal requirement is nothing more than an "arid ritual of meaningless form," which under this Court's decisions cannot bar federal consideration of the constitutional challenge plainly and clearly presented below. *Osborne*, 495 U.S. at 124.

2. This case is a good vehicle for considering whether Virginia's vileness aggravator is unconstitutionally vague under *Godfrey*. First, unlike many cases in which both vileness and future dangerousness were found, *see, e.g.*, *Powell v. Commonwealth*, 590 S.E.2d 537, 549 (Va. 2004), *cert. denied*, – S. Ct. –, 2004 WL 2069462 (U.S. Oct. 4, 2004) (No. 04-5312); *Morrisette v. Commonwealth*, 569 S.E.2d 47, 55 (Va. 2002); *Burns v. Commonwealth*, 541 S.E.2d 872, 896 (Va. 2001), in this case, petitioner's sentence was based upon the vileness aggravator alone. *See supra* p. 8. Second, because the jury in this case was given Virginia's model instruction on vileness, *compare* App. 61a *with Virginia Model Jury Instructions* 2-33 (2004) (Instruction Numbers P33.122 & P33.125), this case is

representative of how Virginia's vileness aggravator is applied.

Third, petitioner probably would not have been sentenced to death if a constitutionally sufficient narrowing construction had been applied. For example, if the trial court had applied New Jersey's construction of the depravity prong of the vileness aggravator and required a finding that Dana Thrall was murdered for the sheer pleasure of killing, *see supra* p. 18, the jury could not have found depravity because there was no evidence of such an intention. Similarly, if the trial court had adopted New Jersey's or South Dakota's narrowing construction of the aggravated battery prong and required an intent to inflict unnecessary pain and suffering, *see supra* p. 18, no reasonable jury could have found aggravated battery because there was no evidence of such intent either. Likewise, the battery prong could not have been satisfied under Georgia's construction of the battery prong, which requires an act separate and distinct from the conduct causing death, *see supra* p. 19, because there were no such acts here. Thus, the question whether the vileness aggravator applied here was unconstitutionally vague could not be more clearly presented.

3. It makes no difference that the decision below failed to address petitioner's vagueness challenge in detail. As noted above, *see supra* p. 21 & note 5, for the last twenty years, the Virginia Supreme Court has been summarily rejecting challenges to its vileness aggravator under *Godfrey*. Consequently, it is unlikely that the Virginia Supreme Court will offer any explanation for its refusal to follow *Godfrey*. Because it is also unlikely that any future case will pose the question presented here more clearly, the Court is unlikely to find a better vehicle for considering whether Virginia's vileness aggravator is unconstitutionally vague under *Godfrey*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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