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TUGGLE v. NETHERLAND 79 F.3d 1386 (4th Cir. 1996) United States Court of Appeals, Fourth Circuit

the basis of three factors: Savino's previous criminal history; the nature of the crime; and, his history of substance abuse.[35] However, when the defense expert, Dr. Hovermale, was cross-examined by the Commonwealth, it was revealed that Dr. Centor's report contained statements made by the defendant. Instead of addressing this fourth factor, evidence that Dr. Centor was less than truthful about the source of his opinion, the court simply ignored it. Finally, the court held that even if Dr. Centor's testimony constituted error, it was harmless, speculating that excluding Savino's statements would "probably have had little if any effect on Dr. Centor's assessment."[36]

Because the court's analysis of Savino's Fifth and Sixth Amendment rights regarding the use of the Commonwealth's mental health expert testimony concerning future dangerous is erroneous, defense counsel must preserve these issues. Unless and until the United States Supreme Court reverses, counsel must give serious consideration to this strategy: using a mental health expert but precluding him or her from testifying at trial, even if the defendant's sanity or competency is in question.[37]

Summary and Analysis by:
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35 *Savino*, 82 F.3d at 605.

36 *Id.* at 605-606.

37 *See* Case Summary of *Payne v. Netherland,* Capital Defense Journal, this issue (where a competency evaluation was used against a defendant before the enactment of Va Code Ann. § 19.2-264.3:1.) See also; Collica, *Alice in Wonderland Interpretations: Rethinking the Use of Mental Mitigation Experts*, Capital Defense Journal, this issue.

TUGGLE v. NETHERLAND

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FACTS

In 1984, Lem Tuggle was convicted of capital murder committed during or subsequent to a rape.[1] He was sentenced to death after the jury found the Commonwealth had proven both the future dangerousness and vileness aggravating factors. Tuggle's conviction and sentence were affirmed by the Supreme Court of Virginia on direct appeal.[2] The United States Supreme Court vacated Tuggle's sentence and remanded the case for reconsideration in light of *Ake v. Oklahoma*,[3] which had held that when the prosecution presents psychiatric evidence to prove future dangerousness, due process requires that an independent psychiatrist also be appointed to assist the defense.[4]

On remand, the Supreme Court of Virginia held that the trial court had indeed violated *Ake* by denying Tuggle an independent psychiatrist to rebut the prosecution's psychiatric evidence of future dangerousness during the sentencing phase.[5] However, the Supreme Court of Virginia reaffirmed Tuggle's death sentence. Relying on *Zant v. Stephens*,[6] the court reasoned that because the vileness factor was separately found by the jury in addition to future dangerousness, the vileness factor alone was sufficient to sustain the sentence.[7]

Tuggle subsequently filed and was denied a petition for writ of *certiorari*,[8] a petition for state *habeas* relief, and a third petition for *certiorari*.[9] Tuggle then petitioned for a writ of *habeas corpus* in United States District Court, and the district court granted relief on several grounds, including *Ake*. The Fourth Circuit Court of Appeals, however, reversed and remanded, agreeing with the Supreme Court of Virginia that Tuggle's death sentence was valid under *Zant*.[10] The United States Supreme Court, however, granted *certiorari* and vacated the judgment of the court of appeals.[11] The Supreme Court noted that while *Zant* had held that an invalid aggravating circumstance does not always invalidate a death sentence, the presence of an otherwise valid aggravator cannot excuse the unconstitutional admission or exclusion of evidence. Thus, while the Court was willing to assume that the *Ake* error had no influence upon the jury's finding of "vileness," the Court was not willing to assume that the *Ake* constitutional error had no effect on the jury's ultimate decision on whether to impose a life sentence or the death penalty. Accordingly, the Court remanded the case to the court of appeals for a determination of whether harmless error analysis was applicable.[12]

HOLDING

On remand, the Fourth Circuit held that the *Ake* error was "trial error," as opposed to structural error, and therefore was subject to harmless-error analysis.[13] The court of appeals further concluded that federal *habeas* courts must apply the *Brecht* standard of harmlessness, which requires a court to find that the error had a "substantial and injurious effect or influence in determining the jury's verdict" before it can grant relief.[14]

1 Va. Code Ann. § 18.2-31(5) (Supp. 1995).

2 *Tuggle v. Commonwealth*, 228 Va. 493, 323 S.E.2d 539 (1984) (*Tuggle I*).

3 470 U.S. 68 (1985).

4 *Id.* at 83.

5 *Tuggle v. Commonwealth*, 230 Va. 99, 334 S.E.2d 838 (1985) (*Tuggle II*).

6 462 U.S. 862 (1983).

7 *Tuggle*, 230 Va. at 108-11, 334 S.E.2d at 844-46.

8 *Tuggle v. Virginia*, 478 U.S. 1010 (1986).

9 *Tuggle v. Bair*, 503 U.S. 989 (1992).

10 *Tuggle v. Thompson*, 57 F.3d 1356, 1374 (4th Cir. 1995).

11 *Tuggle v. Netherland*, 116 S. Ct. 283 (1995).

12 *Id.* at 285.

13 *Tuggle v. Netherland*, 79 F.3d 1386, 1391 (4th Cir. 1996).

14 *Brecht v. Abramson*, 507 U.S. 619 (1993). In *Brecht*, the Supreme Court concluded that granting federal collateral relief upon a mere "reasonable possibility" that the error contributed to the verdict would be inconsistent with the historic purpose of *habeas corpus* to afford relief only to those who have been "grievously wronged" by society. *Id.* at 637.

Applying the *Brecht* standard to the *Ake* error in *Tuggle*, the court of appeals held that the improper admission of the prosecution expert's testimony and the trial court's denial to Tuggle of expert psychiatric assistance did not have a "substantial and injurious effect or influence on the jury's decision to sentence Tuggle to death," and was thus harmless error.[15] Having determined that the invalid aggravating circumstance ("future dangerousness") was harmless error, the court of appeals again turned to *Zant* to uphold the jury's imposition of the death sentence based upon its independent finding of "vileness."[16]

ANALYSIS/APPLICATION IN VIRGINIA

I. Applicability of Harmless Error Analysis

In *Tuggle*, the court of appeals characterized the *Ake* error as consisting of both the improper admission of evidence (testimony by the Commonwealth's expert, Dr. Centor) and the improper exclusion of evidence (the denial to Tuggle of a defense psychiatric expert). Thus, the court of appeals viewed *Tuggle* and *Ake* as evidence cases, and by so doing, was able to characterize the improper admission and exclusion of the evidence as simply trial error subject to harmless-error analysis. However, *Ake* is **not** simply an evidence case. Rather, the deprivation of a psychiatric expert to Tuggle is better analogized to a **deprivation of counsel**, which would constitute structural error, not "trial error." And, as the United States Supreme Court has held, structural error is not subject to harmless error analysis.[17]

In *Ake*, the Supreme Court spoke in terms of the "basic tools of an adequate defense" and the "raw materials integral to the building of an effective defense" in concluding that in certain instances a defense psychiatric expert is required by due process.[18] The Court emphasized that the accuracy of the jury's determination, a substantial interest common to both parties, is "dramatically enhanced" with the appointment of an expert.[19] Apart from the testimony that a psychiatric expert can provide, the Court observed that the expert can assist defense counsel in the cross-examination of the state's psychiatric evidence so that, in effect, the expert becomes a member of the defense team. In circumstances where the error can go to the crux of the jury's decision, *Ake* supports the proposition that the deprivation of a psychiatric expert to the defense rises to the level of deprivation of counsel; thus, *Ake* error is a structural error and should not be subject to harmless error analysis in the first place.

The Supreme Court has not yet addressed whether *Ake* error should be subject to harmless-error analysis. Although the court of appeals found that the *Ake* error in *Tuggle* was "trial error," other courts have held that *Ake* error is "structural error."[20] Thus, this issue is not definitively resolved and defense counsel should continue to argue that *Ake* error cannot be subjected to harmless error analysis.

II. The Proper Standard of Harmless Error

Having held that harmless error analysis was applicable, the court of appeals next had to decide what standard of harmlessness to apply. The court had two choices: the *Brecht* or the *Chapman*[21] standard. *Brecht* sets a relatively low threshold to find the error was harmless, as reversal will only be required if the error had a "substantial and injurious effect or influence in determining the jury's verdict."[22] Under *Chapman*, on the other hand, the error is assessed according to whether it was "harmless beyond a reasonable doubt;"[23] and constitutional error may not be declared harmless if a "reasonable probability" exists that the "error contributed to the verdict."[24] Thus, the *Chapman* standard is a much more difficult standard for the government to meet in proving error was harmless.

Under Supreme Court precedent, *Chapman* is the applicable harmless-error standard on direct appeal and *Brecht* is the usual standard on *habeas* review. In *Brecht*, the Supreme Court concluded that granting federal collateral relief upon a mere "reasonable possibility" that the error contributed to the verdict (the *Chapman* standard) would be inconsistent with the historic purpose of *habeas corpus* to afford relief only to those who have been "grievously wronged" by society.[25] The court of appeals in *Tuggle* thus held that because the case was on federal *habeas*, the appropriate harmless-error standard was the *Brecht* standard. The court's automatic reliance on *Brecht*, however, ignored the reasoning behind *Brecht* and the fact that *Tuggle* was not the typical case on federal *habeas*.

The Supreme Court has taken a number of different approaches to the re-litigation of issues on direct appeal and collateral attack depending in part on the constitutional issue. For instance, a defendant cannot relitigate a Fourth Amendment claim on federal *habeas* if he had a full and

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[15] *Tuggle*, 79 F.3d at 1396.

[16] Interestingly, the court of appeals used the circumstances of *Tuggle* in a different case, *Middleton v. Evatt*, 1996 WL 63038 (unpublished op. referenced at 77 F.3d 469) (4th Cir. 1996), to illustrate how difficult it can be to find that a valid aggravating circumstance supports the imposition of the death penalty where other evidence was unconstitutionally admitted. The court of appeals stated in *Middleton*, "The circumstances in this case are more like those in *Zant* than *Tuggle* because, even eliminating the rape aggravating factor, one must conclude that the death penalty rests on firm ground, namely, the armed robbery aggravating factor. First, we are not confronted with a situation, as in *Tuggle*, where the jury had before it inadmissible evidence. . . . Second, Middleton, unlike Tuggle, was not precluded from adducing relevant mitigating evidence." *Id.* at *6.

Middleton raises its own worries that the court of appeals still has not gotten the message of *Tuggle II* in that it never asks the critical question that the Supreme Court says it must ask: would the evidence supporting the invalid aggravating circumstance have been properly admissible in the first place? *See* case summary of *Tuggle II*, Capital Defense Journal, Vol. 8, No. 1, p. 1 (1995). But *Middleton* is also troubling in that it suggests that the Fourth Circuit Court of Appeals recognizes that Tuggle had a strong claim and yet proceeded in *Tuggle III* to characterize it as harmless.

[17] *See Arizona v. Fulminante*, 449 U.S. 279, 309 (1991) (holding that "structural defects in the constitution of the trial mechanism . . . defy analysis by harmless-error standards").

[18] *Ake*, 470 U.S. at 77.

[19] *Id.* at 83.

[20] *See Rey v. State*, 897 S.W.2d 333 (Tex.Cr.App. 1995). In *Rey*, the Texas Court of Criminal Appeals held that because the denial of the defendant's motion to appoint a pathologist deprived the defendant of a "basic tool essential to developing and presenting his defensive theory," the error was not subject to harmless error review and ordered a new trial for the defendant. *Id.* at 345.

[21] *Chapman v. California*, 386 U.S. 18 (1967).

[22] *Brecht*, 507 U.S. at 637 (*quoting Kottkeakos v. United States*, 328 U.S. 750, 776 (1946)).

[23] *Chapman*, 386 U.S. at 24.

[24] *Brecht*, 507 U.S. at 637 (*citing Chapman*, 386 U.S. at 24).

[25] *Id.*

fair hearing in state court,[26] while the defendant can raise *Miranda* and ineffective assistance claims on federal *habeas* even if such issues were already fully and fairly litigated.[27] In the context of these approaches, *Brecht* can be seen as a compromise decision. In effect, while *Brecht* still allows a state prisoner to re-litigate certain issues on federal *habeas*, it assumes that because harmless error has already been fully and fairly litigated in state court, the court can impose a much more difficult standard for the prisoner to meet in order to receive federal relief. Thus, the *Brecht* standard is highly deferential to the state courts because the Court views the state courts as the most appropriate forum for harmless error to be fully litigated:

> State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. For these reasons, it scarcely seems logical to require federal *habeas* courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review.[28]

But while the *Brecht* standard may make sense where the state court has already found harmless error under *Chapman*, its reasoning had no application in Tuggle's case: in *Tuggle*, there never was a full and fair hearing in the state courts during which the error was analyzed according to the *Chapman* standard. Likewise, while the Supreme Court has allowed state appellate courts to salvage a death sentence under *Zant's* harmless-error analysis, it has always required the state appellate court to first re-weigh the remaining valid aggravating factors with the mitigating factors.[29] Because the Supreme Court of Virginia relied on *Zant* to salvage the death sentence without re-weighing the sentence and never applied *Chapman*,[30] *Brecht's* core rationale—deferring to the state's finding of harmless error under *Chapman* except where clearly erroneous—simply has no place; there was no state decision to which to defer. Consequently, the court of appeals should have used the *Chapman* standard, not the *Brecht* standard, to decide whether the *Ake* error was harmless.[31]

As a result, the court's decision to apply the *Brecht* standard in assessing the *Ake* error in *Tuggle* was an arbitrary one. If the Supreme Court of Virginia had correctly concluded on direct appeal that *Ake* error had occurred, it would have been required to apply *Chapman*. The court's application of *Brecht* thus perversely rewards the state court for getting the law wrong and erroneously affirming the death sentence when, in fact, it should have found error and been bound by *Chapman*. The decision of the court of appeals, therefore, was fundamentally unfair to Tuggle, as he never received the benefit of *Chapman's* lower standard for harmless-error analysis.

Summary and analysis by:
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[26] *See Stone v. Powell*, 428 U.S. 465 (1976) (holding that when a State has given a full and fair chance to litigate Fourth Amendment claim, federal habeas relief is not available to state prisoner alleging that his conviction rests on evidence obtained through an unconstitutional search or seizure).

[27] *See Withrow v. Williams*, 507 U.S. 680 (1993) (holding that *Stone's* restriction on exercise of federal *habeas* jurisdiction does not extend to state prisoner's claim that his conviction rests on statements obtained in violation of safeguards mandated by *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (declining to extend *Stone* to bar *habeas* review of certain claims of ineffective assistance of counsel under Sixth Amendment); *Jackson v. Virginia*, 443 U.S. 307 (1979) (denying request to apply *Stone* to bar *habeas* consideration of Fourteenth Amendment due process claim of insufficient evidence to support state conviction); and *Rose v. Mitchell*, 443 U.S. 545 (1979) (refusing to extend *Stone* to foreclose *habeas* review of equal protection claim of racial discrimination in selecting state grand-jury foreman).

[28] *Brecht*, 507 U.S. at 636 (citations omitted).

[29] *See Clemons v. Mississippi*, 494 U.S. 738 (1990) (holding that United States Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on invalid or improperly applied aggravating circumstance, so long as the appellate court either reweighs aggravating or mitigating evidence or conducts harmless error review, and remanding to the state appellate court to make such a determination). *See also Stringer v. Black*, 503 U.S. 222 (1992) (holding that use of vague or imprecise aggravating factor in weighing process invalidates sentence and at very least requires constitutional harmless error analysis or reweighing in state judicial system); *Sochor v. Florida*, 504 U.S. 527 (1992) (emphasizing that in considering a death sentence where sentencer has unconstitutionally applied an invalid aggravating circumstance, reviewing state court must either independently re-weigh the factors or apply harmless error analysis to constitutional flaw); *Richmond v. Lewis*, 113 S.Ct. 528 (1992) (concluding that at a minimum, where death sentence has been infected by vague or otherwise constitutionally invalid factor, state appellate court or some other state sentencer must actually perform new sentencing calculus if new sentence is to stand).

[30] Because the Supreme Court of Virginia has never held that under state law it has the power to independently re-weigh aggravating and mitigating factors, its only option may have been to apply *Chapman*.

[31] The court of appeals presumably could have remanded *Tuggle* to the state courts for a proper determination of whether the *Ake* error was harmless according to *Chapman*. In applying the *Brecht* standard to *Tuggle*, the court of appeals cited its own precedent in *Correll v. Thompson*, 63 F.3d 1279 (4th Cir. 1995) and *Smith v. Dixon*, 14 F.3d 956 (4th Cir. 1994) to support the proposition that *Brecht*, and not *Chapman*, should apply on *habeas* review. Like *Tuggle*, the state appellate court in *Smith* did not conduct a *Chapman* harmless-error analysis, and the court of appeals conducted a *Brecht* harmless-error analysis. However, in *Correll*, there was a hearing conducted in the state court on the issue at hand, and the court of appeals then applied a *Brecht* harmless-error analysis. Similarly, in *Middleton v. Evatt*, 1996 WL 63038 (4th Cir. 1995), the court of appeals applied a *Brecht* harmless error analysis only after the Supreme Court of South Carolina had re-weighed the issues. Thus, the court of appeals seems mistakenly poised to apply the *Brecht* standard to any issue on *habeas* review, regardless of whether the state court has applied harmless error.