Spring 1997

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Recommended Citation

Kristen Brown, A Case for Harmless Error Review for AKE Errors, 87 J. Crim. L. & Criminology 786 (1996-1997)

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A CASE FOR HARMLESS ERROR REVIEW OF *AKE* ERRORS

Tuggle v. Netherland, 116 S. Ct. 283 (1995) (per curiam)

I. INTRODUCTION

In *Tuggle v. Netherland*,¹ the Supreme Court ruled that the state of Virginia's use of a psychiatric expert's testimony at trial to prove part of its case against Tuggle, an indigent capital defendant, was an *Ake* error² because the trial judge denied funds for Tuggle to hire a rebuttal expert.³ The Court then remanded the case to the Fourth Circuit Court of Appeals to determine whether that error was harmless.⁴ The Fourth Circuit held that it was harmless⁵ and the Supreme Court agreed on appeal.⁶

Tuggle's case illustrates precisely why harmless review of an *Ake* error is appropriate. Tuggle's sentencing jury heard both properly and improperly admitted evidence.⁷ Considering that evidence within the parameters of Virginia's statutory scheme, the jury found two aggravating circumstances: vileness of the crime and future dangerousness of the defendant.⁸ The improperly admitted evidence

¹ *Tuggle v. Netherland*, 116 S. Ct. 283 (1995) (per curiam) [hereinafter *Tuggle V.*].

² *Id.* at 285 (construing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). In *Ake*, decided a few months after the Virginia Supreme Court affirmed Tuggle's death sentence, the Supreme Court held that such denial is an unconstitutional violation of an indigent defendant's right to the "basic tools" of an adequate defense. *Ake*, 470 U.S. at 74. In fact, the *Ake* decision cited 42 states that require the state government to provide such expert assistance to indigents, particularly in capital cases. *Id.* at 78-79 n.4.

The violation is based on the United States Constitution's Sixth Amendment right to a fair trial. The Sixth Amendment reads in full:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

³ *Tuggle V.*, 116 S. Ct. at 285.

⁴ *Id.* at 285-86.

⁵ *Tuggle v. Netherland*, 79 F.3d 1386, 1396 (4th Cir. 1996) [hereinafter *Tuggle VI.*].

⁶ *Tuggle v. Netherland*, 117 S. Ct. 237 (1996) [hereinafter *Tuggle VII.*].

⁷ *Tuggle VI.*, 79 F.3d at 1391-92.

⁸ *Tuggle v. Commonwealth*, 334 S.E.2d 838, 844 (Va. 1985) [hereinafter *Tuggle II.*].

about Tuggle's future dangerousness⁹ was unrelated to the jury's decision that the murder was vile.¹⁰ Since a Virginia capital sentence can stand even if supported by only one aggravating circumstance, the improper evidence was indeed harmless because it invalidated only the "future dangerousness" aggravator.¹¹

As this case illustrates, there are times where an appellate court should perform harmless error analysis of *Ake* errors. Rather than automatically going through a complete resentencing, the reviewing court should decide whether the error infected the jury's deliberation so thoroughly that it caused an unconstitutional defect in the trial.

The saga of Lem Tuggle came to a close on December 12, 1996. Twelve years after his conviction for the rape and murder of Jessie Geneva Havens, Tuggle was executed by the state of Virginia.¹²

II. BACKGROUND

A. AGGRAVATING CIRCUMSTANCES IN CAPITAL CASES SINCE *FURMAN V. GEORGIA*

When the United States Supreme Court invalidated the Georgia and Texas capital punishment statutes in 1972,¹³ it in effect abolished capital punishment as it then existed in the United States.¹⁴ The *Furman* Court held, in a one paragraph per curiam opinion, that the challenged state laws constituted cruel and unusual punishment¹⁵ as prohibited by the Eighth Amendment to the United States Constitution.¹⁶ The essence of the concurring opinions¹⁷ was that the lan-

⁹ *Tuggle VI*, 79 F.3d at 1392.

¹⁰ See VA. CODE ANN. § 19.2-264.4 (Michie 1950).

¹¹ *Id.* The Virginia Code reads:

The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt [that the defendant is] a continuing serious threat to society, or 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. *Id.*

¹² *Recaptured Murderer Executed in Virginia*, N.Y. TIMES, Dec. 16, 1996, at B11.

¹³ *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

¹⁴ Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 362 (1995). *Furman* in effect invalidated the capital statutes of 39 states, the District of Columbia and the federal government. *Id.* at 357.

¹⁵ *Furman*, 408 U.S. at 239-40.

¹⁶ The Eighth Amendment reads in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

¹⁷ Justices Douglas, Brennan, Stewart, White and Marshall concurred in the opinion. Chief Justice Burger and Justices Blackmun, Powell and Rehnquist filed dissenting opinions.

guage of the statutes was overly broad.¹⁸ In particular, the Court pointed to the statutes' potential for allowing (1) too many or too few capital sentences and (2) capital sentences out of proportion with the crime.¹⁹

1. *Overinclusion and Underinclusion*

The justices objected to the statutes' failure to limit or channel the sentencer's discretion.²⁰ Because the statutory parameters for imposing the death penalty were vague,²¹ sentencing bodies exercised a great deal of discretion in their decision-making and invoked the punishment inconsistently.²² The result was two common problems with capital sentences: overinclusion and underinclusion.²³ Overinclusion occurs when nearly any killing can qualify for capital punishment.²⁴ Underinclusion is the imposition of the death penalty inconsistently from one trial to the next, resulting in less harsh penalties for equally heinous crimes.²⁵ When the Court upheld some revised capital statutes four years later, it reiterated that overinclusion and underinclusion create arbitrary and capricious results that violate the fundamental notions of fairness protected by the Eighth Amendment.²⁶

2. *Proportionality*

The Court also banned death sentences unless the defendant was a major participant in a dangerous felony and exhibited a reckless indifference to human life; that is, the punishment had to be proportional to the crime.²⁷ At one point, the Court construed the proportionality doctrine so narrowly that only those who had killed, attempted to kill or intended to kill another human were eligible for the death penalty.²⁸ However, between 1977 and 1994, states exe-

¹⁸ The invalidated Georgia statute, for example, gave the factfinder discretion to sentence a defendant to death, life imprisonment, or a term of one to twenty years upon conviction for forcible rape. See GA. CODE ANN. § 26-1302 (Supp. 1971).

¹⁹ *Furman*, 408 U.S. at 308-10 (Stewart, J., concurring).

²⁰ *Id.* (Stewart, J., concurring).

²¹ See, e.g., *Baugus v. State*, 141 So. 2d 264, 266 (Fla.), cert. denied, 371 U.S. 879 (1962) (stating that the decision to impose death as a punishment for murder was to be "determined purely by the dictates of the consciences of the individual jurors").

²² *Furman*, 408 U.S. at 308 n.8 (Stewart, J., concurring).

²³ *Id.* at 291 (Brennan, J., concurring); *id.* at 309 (Stewart, J., concurring); *id.* at 311 (White, J., concurring).

²⁴ *Coker v. Georgia*, 435 U.S. 584, 592-97 (1977) (plurality opinion).

²⁵ *Furman*, 408 U.S. at 311 (White, J., concurring).

²⁶ *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion).

²⁷ See *Tison v. Arizona*, 481 U.S. 137, 158 (1987); see also *Steiker & Steiker*, *supra* note 14, at 376-77.

²⁸ See *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

cuted ten non-triggermen who were convicted of felony murder.²⁹ The Supreme Court allows felony murder to qualify as a capital crime whether the accomplice kills intentionally or accidentally.³⁰

3. *The States' Response to Furman*

States reacted to *Furman* by revising their statutes to address the problems of underinclusion, overinclusion, and proportionality. The new capital statutes listed aggravating circumstances that, if present, designated certain killings as capital crimes.³¹ Because the statutes required the presence of aggravating circumstances before the death penalty could be considered, they limited the discretion of juries and judges and thus solved the inclusion problems.³² The statutory parameters also solved the proportionality discrepancies by setting objective standards for prosecutors to determine whether to seek the death penalty.³³ The legislative purpose, in accord with *Furman*, was to single out a subclass of killers who, because of the brutality of their crimes, society deemed deserving of death.³⁴

In 1976, the Supreme Court upheld the first of these new statutes in *Gregg v. Georgia*,³⁵ thereby reinstating the death penalty as an acceptable sentence. The Georgia statute under which Gregg was convicted provided the sentencer with clear and objective standards that the Court believed would place reasonable limitations on the sentencer's discretion.³⁶ Justices Marshall and Brennan, however, held fast to the view that death is per se cruel and unusual punishment.³⁷

4. *Development of the Aggravating Circumstances Doctrine*

Since *Gregg*, the Court has addressed the aggravating circumstances doctrine several times. Two of these decisions, *Zant v. Stephens*³⁸ and *Godfrey v. Georgia*,³⁹ illustrate the Court's present jurisprudence regarding this issue. *Stephens* concerned a Georgia de-

²⁹ Steiker & Steiker, *supra* note 14, at 377 n.100 (citing NAACP Legal Defense & Educ. Fund, Inc. 1994 DEATH ROW USA REPORTER CURRENT SERVICE) (Summer 1994).

³⁰ Steiker & Steiker, *supra* note 14, at 377 (citing *Enmund*, 458 U.S. at 789-92).

³¹ See MICHAEL MELTSNER, CRUEL & UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 306-09 (1973).

³² *Furman v. Georgia*, 408 U.S. 238, 311 (1972) (White, J., concurring).

³³ *Id.*

³⁴ Steiker & Steiker, *supra* note 14, at 377-81.

³⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976).

³⁶ *Id.* at 198.

³⁷ See *Furman*, 408 U.S. at 305 (Brennan, J., concurring); *id.* at 358-59 (Marshall, J., concurring); *Gregg v. Georgia*, 428 U.S. 277, 228-29 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

³⁸ 462 U.S. 862 (1983).

³⁹ 446 U.S. 420 (1980).

fendant found guilty of beating, robbing, kidnapping and murdering a man who interrupted Stephens and an accomplice as they were committing a burglary.⁴⁰ The jury found three statutory aggravators: prior conviction of a capital felony; a substantial history of serious assaultive convictions; and commission of the offense while an escapee from jail.⁴¹ Stephens appealed, arguing first that Georgia's "nonweighing"⁴² scheme did not comport with *Furman* because it allowed too much discretion to the sentencer.⁴³ The Court disagreed, holding that the nonweighing statutory scheme added some measure of objectivity to the sentencer's decision-making process, which is all that *Furman* required.⁴⁴

Second, Stephens argued that his sentence could not stand because after the jury imposed death, an appellate court deemed one of the aggravating circumstances that supported the sentence was unconstitutional.⁴⁵ Specifically, while Stephens' case was on appeal, the Georgia Supreme Court decided that "prior convictions for assault" did not adequately narrow a sentencer's evaluation of a murder.⁴⁶

Nevertheless, the Court allowed Stephens' sentence to stand.⁴⁷ Though the jury instructions included a direction to consider the invalid circumstance in determining Stephens' sentence, the jury relied on two other valid aggravating circumstances which were sufficient by themselves to support the death sentence.⁴⁸

A second Georgia case illustrates that even when the aggravator passes constitutional muster, the court and the jury can misapply it. In *Godfrey v. Georgia*, the defendant shot and killed his estranged wife and mother-in-law.⁴⁹ Both women died instantly from shotgun blasts.⁵⁰ During the trial, the prosecutor stated three times that these murders involved no allegation of torture or aggravated battery.⁵¹ The jury, however, returned death sentences for both killings based

⁴⁰ *Stephens*, 462 U.S. at 864-65.

⁴¹ *Id.* at 864. See GA. CODE ANN. § 27-2534.1(b) (1978).

⁴² States are characterized as having a "weighing" scheme if the capital statute directs the sentencer to (1) consider any aggravating circumstance(s) present in a case as having more significance than any others; (2) place more weight to the presence of multiple aggravating circumstances rather than a single aggravator; or (3) balance the aggravating circumstances against the mitigating circumstances pursuant to any special standard. *Stephens*, 462 U.S. at 873-74.

⁴³ *Id.* at 874.

⁴⁴ *Id.* at 879-80.

⁴⁵ *Id.* at 880-84.

⁴⁶ *Arnold v. State*, 224 S.E.2d 386, 391-92 (Ga. 1976).

⁴⁷ *Stephens*, 462 U.S. at 890-91.

⁴⁸ *Id.* at 866-67.

⁴⁹ 446 U.S. 420, 424-25 (1980).

⁵⁰ *Id.* at 425.

⁵¹ *Id.* at 426.

on its finding that they were "outrageously or wantonly vile, horrible and inhuman."⁵² Both the trial judge and the Georgia Supreme Court affirmed the sentence.⁵³

The Supreme Court reversed.⁵⁴ The Georgia statute, which the Supreme Court had upheld against a constitutional challenge of vagueness just four years earlier,⁵⁵ allowed a death sentence if the offense included the aggravating circumstance of being "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."⁵⁶ In the earlier case, the Supreme Court ruled that this statutory aggravating circumstance met the narrowing requirement of *Furman*⁵⁷ as long as the Georgia Supreme Court did not rely on overly broad constructions of the language when applying it.⁵⁸

In *Godfrey*, however, the Supreme Court found that the Georgia Supreme Court had not "imply[d] any inherent restraint on the arbitrary and capricious infliction of the death sentence" when it affirmed that the offense was only "outrageously or wantonly vile, horrible or inhuman."⁵⁹ Because the sentencing instructions given by the trial judge did not sufficiently channel the jury's efforts, "the jury's interpretation of [the vileness aggravator defined in the statute could] only be the subject of sheer speculation."⁶⁰ The Court found that "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court."⁶¹

B. THE AKE ERROR

When a trial court denies an indigent defendant access to or funds for certain expert assistance in a capital case, that court violates the defendant's constitutional right to a fair trial as guaranteed by the

⁵² *Id.*

⁵³ *Id.* at 426-27.

⁵⁴ *Id.* at 433.

⁵⁵ *Gregg v. Georgia*, 428 U.S. 153, 202 (1976).

⁵⁶ GA. CODE ANN. § 27-2534.1(b)(7) (1978).

⁵⁷ *Furman* required that each state narrow its capital punishment law in a manner that avoided the arbitrary and capricious infliction of the death penalty by providing "a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." *Gregg*, 428 U.S. at 188-89 (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)).

⁵⁸ *Id.* at 202.

⁵⁹ *Godfrey*, 446 U.S. at 428-29. The jury expressly declined to find that Godfrey's murder of his wife and mother-in-law involved torture or aggravated battery. *Id.* at 426.

⁶⁰ *Id.* at 429.

⁶¹ *Id.*

Fifth, Sixth and Fourteenth Amendments to the United States Constitution.⁶² A key part of the State's duty to provide a fair trial for indigent defendants includes payment or arrangement for certain "basic tools" that have become integral parts of every capital trial.⁶³ In *Ake v. Oklahoma*,⁶⁴ the Court faced the question of whether an independent psychiatrist is one of those basic tools when the defendant's sanity might be an issue at trial.⁶⁵ Glen Burton Ake, arrested for murdering a couple, attempting to rape their 12-year-old daughter and wounding both the daughter and the couple's son,⁶⁶—behaved so bizarrely at arraignment that the trial judge, *sua sponte*, ordered that he be examined by a psychiatrist.⁶⁷ The psychiatrist diagnosed Ake as "a probable paranoid schizophrenic," unable, at that time, to stand trial.⁶⁸

Ake was committed to a state hospital where the chief forensic psychiatrist (CFP) confirmed Ake's incompetency.⁶⁹ Six weeks later, the CFP informed the court that drug therapy had resulted in Ake's becoming competent.⁷⁰ At no point during his stay in the state hospital did anyone evaluate Ake's mental condition at the time of the offense.⁷¹ When Ake's attorney requested state assistance in obtaining such an evaluation—crucial information since Ake's sanity was his only defense at trial—the court refused.⁷² At trial, the court instructed the jury to presume Ake to be sane unless he presented adequate evidence to raise a reasonable doubt on the issue.⁷³ Without a psychiatric expert, Ake could not meet that burden. The jury found Ake guilty on all counts.⁷⁴

Similarly, at sentencing Ake could not rebut the state psychiatrist's opinions that he was a future danger.⁷⁵ The jury called for

⁶² The Court has held that a trial is fundamentally unfair if it does not afford the defendant due process of law. *See, e.g.,* *Dillingham v. United States*, 423 U.S. 64 (1975) (per curiam) (trial must be speedy); *Powell v. Alabama*, 287 U.S. 45 (1932) (defendant must have access to effective counsel).

⁶³ The Court has stated that there is a difference between providing access to the courthouse steps and providing the meaningful basic tools for a defendant to launch a proper defense. *See* *Britt v. North Carolina*, 404 U.S. 226, 227 (1971).

⁶⁴ 470 U.S. 68 (1985).

⁶⁵ *Id.* at 70.

⁶⁶ *Id.* at 88 (Rehnquist, J., dissenting).

⁶⁷ *Id.* at 71.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 71-72.

⁷¹ *Id.* at 72.

⁷² *Id.*

⁷³ *Id.* at 72-73.

⁷⁴ *Id.* at 73.

⁷⁵ *Id.*

death sentences for each of the two murders.⁷⁶

The Supreme Court reversed Ake's sentences, holding that a psychiatrist is a basic tool of a defense.⁷⁷ Therefore, states have a constitutional responsibility to provide an independent psychiatrist (or funds for hiring one) to indigent defendants whose sanity will be an issue at trial.⁷⁸ In a special pretrial proceeding, a judge must decide whether the defendant can legitimately raise an insanity defense at trial.⁷⁹

The Court imposed this special pretrial procedure on the states after balancing the private and governmental interests at stake.⁸⁰ First, the Court held that the private interest in getting an accurate decision was "almost uniquely compelling" in a capital case.⁸¹ Conversely, the Court found that the government's fiscal interest was minimal.⁸² Forty other states and the federal government already had statutes requiring this type of expert assistance for indigent defendants, and those jurisdictions had not found the costs unbearable.⁸³ Further, the state should gladly pursue any effort that aids in the search for truth in criminal prosecutions since the state's goal is to punish the true offender.⁸⁴ Finally, the Court underscored its analysis by pointing out that denying something as simple as psychiatric assistance created an unacceptable risk in a capital trial.⁸⁵ If sanity is an issue, the defendant is entitled to have an expert explain his condition to the factfinder at both the guilt and sentencing phases of trial.⁸⁶

Ake v. Oklahoma has been the source of considerable controversy and confusion. For example, some commentators have criticized the Court for requiring a pre-trial proceeding where the judge decides

⁷⁶ *Id.*

⁷⁷ *Id.* at 69-70. Justice Rehnquist dissented. See *id.* at 87-92 (Rehnquist, J., dissenting). After setting out the rest of the details of Ake's crimes, Justice Rehnquist pointed out that the Oklahoma statute treats psychiatric testimony as a question of fact. *Id.* at 92 (Rehnquist, J., dissenting). Unless the expert commits perjury, the testimony about the facts of the defendant's mental condition should be the same no matter which side hires the psychiatrist. *Id.* (Rehnquist, J., dissenting).

⁷⁸ *Id.* at 74.

⁷⁹ *Id.* at 82-83.

⁸⁰ *Ake*, 470 U.S. at 77 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

⁸¹ *Id.* at 78.

⁸² *Id.*

⁸³ *Id.* at 78 & n.4.

⁸⁴ *Id.* at 79.

⁸⁵ *Id.* at 79-83.

⁸⁶ *Id.* at 83. There is some disagreement as to whether the *Mathews* formulation is properly applied to questions of deprivation of liberty without due process of law. Compare *Lassiter v. Department of Social Services*, 452 U.S. 18, 59-60 (1981) (Stevens, J., dissenting) (arguing that protecting liberty from deprivation by the state without due process is "priceless" and therefore the *Mathews* formulation should not be applied) with *Schall v. Martin*, 467 U.S. 253, 275-81 (1984) (applying *Mathews* to questions of deprivation of liberty).

the merits of the defendant's insanity plea before the defendant has even seen a psychiatrist.⁸⁷ Other legal analysts, however, have stated that *Ake* is merely a good start and that indigent defendants have a right to whatever expert assistance is necessary to rebut the prosecution's case.⁸⁸

C. THE STANDARDS FOR HARMLESS ERROR REVIEW

The harmless error doctrine allows a reviewing court to affirm a conviction in spite of a trivial, formal or merely academic error that occurred at trial.⁸⁹ Though sometimes constitutional errors are such that they can be subject to harmless error analysis,⁹⁰ most are not.⁹¹ *Brecht v. Abrahamson*⁹² identified two classes of constitutional errors—"trial" and "structural"—and established the bright line that separates them. In *Brecht*, the Court described trial and structural errors 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 to determine its effect 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.⁹³

Once a reviewing court decides that harmless error analysis is appropriate, its standard for performing the review depends on whether the case is before it on direct or collateral appeal. When the review is direct—for example, when a state supreme court reviews the decision of a lower state court—the reviewing court must be able to declare that the error was harmless *beyond a reasonable doubt*.⁹⁴ The court must

⁸⁷ See, e.g., Pamela Casey & Ingo Keilitz, *An Evaluation of Mental Health Expert Assistance Provided to Indigent Criminal Defendants: Organization, Administration, and Fiscal Management*, 34 N.Y.L. SCH. L. REV. 19 (1989); John M. West, Note, *Expert Services and the Indigent Defendant: The Constitutional Mandate of Ake v. Oklahoma*, 84 MICH. L. REV. 1326 (1986).

⁸⁸ See *infra* Part V.

⁸⁹ *State v. Michelli*, 301 So. 2d 577, 579 (La. 1974); *State v. Johnson*, 463 P.2d 205, 206 (Wa. 1969).

⁹⁰ *Rose v. Clark*, 478 U.S. 570, 577 (1986) (holding that harmless error analysis is inappropriate when the error thwarts a defendant's "opportunity to put on evidence and make [an] argument" to support his claim or otherwise affects "the composition of the record").

⁹¹ See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) (stating that violation of right to counsel cannot be harmless); *Rose*, 478 U.S. at 577-79 (holding that the deprivation of right to trial by jury cannot be harmless).

⁹² *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

⁹³ *Id.* at 620-30 (internal quotation marks and ellipses omitted).

⁹⁴ *Chapman v. California*, 386 U.S. 18, 23-24 (1967). Cf. *Kotteakos v. United States*, 328 U.S. 750, 764 (1946).

resolve any state or federal constitutional issues according to this standard.⁹⁵

There is a less onerous standard for collateral review of trial errors. Collateral review occurs when a federal court reviews a state court judgment to determine whether application of the state's law to this case violated any federal rights.⁹⁶ The reviewing court's standard is whether the trial error had a *substantial and injurious effect or influence on the verdict*.⁹⁷ The policy behind this lower standard for federal courts reflects the Supreme Court's concern "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."⁹⁸

III. FACTS AND PROCEDURAL HISTORY

A. STATEMENT OF FACTS

In 1971, Lem Davis Tuggle was sentenced to twenty years imprisonment at Virginia's Mecklenberg Correctional Facility for the second degree murder of a seventeen-year-old girl.⁹⁹ In early 1983, the state granted Tuggle parole for that crime.¹⁰⁰ Four months later, on May 28, 1983, Tuggle met Jessie Geneva Havens, a fifty-two year-old grandmother at an American Legion Hall dance.¹⁰¹ When the dance ended at 1:00 a.m., Tuggle offered to drive Havens home.¹⁰²

A short time later, a Virginia State Trooper pulled Tuggle over for weaving on the highway.¹⁰³ The trooper observed a "large, middle-aged, white female" sitting next to Tuggle.¹⁰⁴ After passing a sobriety check, Tuggle continued on his way.¹⁰⁵ By 6:00 p.m. on May 29, Havens' family notified the police that she was missing.¹⁰⁶

⁹⁵ *Tuggle VI*, 79 F.3d 1386, 1392-93 (4th Cir. 1996).

⁹⁶ *Brecht*, 507 U.S. at 638.

⁹⁷ *Id.*; *Satterwhite v. Texas*, 486 U.S. 249, 251-56 (1988). In *Satterwhite*, the *Ake* violation was not at issue. The Court analyzed whether a reviewing court can make an intelligent judgment about whether the erroneously admitted psychiatric testimony might have affected a capital sentencing jury or, if the scope of a violation "cannot be discerned from the record" so that "any inquiry into its effect on the outcome of the case would be purely speculative" and the error could not be harmless. *Satterwhite*, 486 U.S. at 256.

⁹⁸ *Tuggle VI*, 79 F.3d at 1392-93 (citing *Brecht*, 507 U.S. at 637).

⁹⁹ *Virginia Murder Case Remanded*, ROANOKE TIMES & WORLD NEWS, Oct. 31, 1995, at C1.

¹⁰⁰ *Tuggle I*, 323 S.E.2d 539, 544 (Va. 1984).

¹⁰¹ *Id.* at 543.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Four days later, State Trooper R.M. Freeman pulled Tuggle over because an armed robbery witness had described Tuggle's black pickup truck.¹⁰⁷ When Freeman asked Tuggle if he had been near a certain gas station,¹⁰⁸ Tuggle responded, "Yes, I robbed it, the money's in my pocket, the gun's in the truck."¹⁰⁹ Freeman seized a .25 caliber automatic weapon from the truck and then took Tuggle to the Pulaski County Sheriff's Office.¹¹⁰ During that ride, Tuggle stated that he was "connected with a missing person's report relating to Jessie Havens" and that he would talk to Smyth County authorities later.¹¹¹

When a Smyth County investigator arrived to question Tuggle later that morning, Tuggle stated that he did not know what had happened to Havens, but he knew where the investigator could find her body.¹¹² He specifically stated, "From past experience, I would like to talk to an attorney. I'll probably tell you the full story later."¹¹³

Later that morning, the investigator found Havens' body in the place Tuggle described.¹¹⁴ Havens' clothes were ripped and partially removed from her body.¹¹⁵ In addition to a fatal gunshot wound to her chest, Havens had a number of bruises and abrasions on her face, neck, arms and genitals.¹¹⁶ Ballistics tests identified the gun Trooper Freeman had seized from Tuggle's truck as the same gun that fired the bullet that killed Havens.¹¹⁷ There was also a bite mark on Havens' right breast that a forensic odontologist determined with medical certainty that Tuggle inflicted while Havens was still alive.¹¹⁸ Though there was no semen or sperm in Havens' vagina, there was evidence of penetration or manipulation.¹¹⁹ There was semen in her rectum.¹²⁰

Tuggle was charged with the willful, deliberate and premeditated murder of Jessie Geneva Havens during the commission of, or subse-

¹⁰⁷ *Id.* at 543.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 544.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 543-44.

¹¹⁸ *Id.* at 544. The reliability of bitemarks has been questioned by some experts. See, e.g., ANDRE A. MOENSSENS & FRED E. INBAU, SCIENTIFIC EVIDENCE IN CRIMINAL CASES 650-58 (2d ed. 1978).

¹¹⁹ *Tuggle I*, 323 S.E.2d at 544.

¹²⁰ *Id.*

quent to, rape.¹²¹ Tuggle and his counsel requested a psychiatric examination.¹²² They made this request because Tuggle had been frequently evaluated during his previous incarceration, including a 1971 evaluation for mental disorders.¹²³ The trial judge initially denied the request but later granted a subsequent motion for an examination based on the same grounds.¹²⁴

Prior to the exam, Tuggle signed a form indicating that he understood his rights, including the right to have his lawyer present during questioning, and that he was waiving these rights voluntarily.¹²⁵ Dr. Ryan, a forensic psychiatrist, and Dr. Centor, a clinical psychologist, performed the evaluation.¹²⁶ They reported that Tuggle was fit to stand trial and that he was sane at the time of the crime.¹²⁷ Though the doctors also reached a conclusion about Tuggle's future dangerousness, they withheld this opinion since the court had not asked for it.¹²⁸

When the doctors presented the results of this examination, Tuggle requested state funds for a subsequent exam by an independent psychiatrist of his counsel's choosing.¹²⁹ The trial court refused to provide funds for another expert or to allow Tuggle's state-appointed attorneys to pay for the analysis themselves.¹³⁰

B. PROCEDURAL HISTORY

At a bifurcated trial¹³¹ in early 1984, a jury found Tuggle guilty¹³² of Jessie Havens' murder and sentenced him to death.¹³³ Tuggle promptly appealed to the Virginia Supreme Court,¹³⁴ raising several

¹²¹ *Id.* at 543; VA. CODE ANN. § 18.2-31(e) (Michie 1996).

¹²² *Tuggle II*, 334 S.E.2d 838, 840 (Va. 1985).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Tuggle I*, 323 S.E.2d at 551-52.

¹²⁶ *Tuggle II*, 334 S.E.2d at 840.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Court Defines Death Penalty Factors*, UPI, Oct. 30, 1995, available in LEXIS, News Library, UPI File.

¹³⁰ *Tuggle v. Thompson*, 854 F. Supp. 1229, 1233 (W.D. Va. 1994) [hereinafter *Tuggle III*].

¹³¹ For capital cases, Virginia provides a two-stage trial. The factfinder first decides the defendant's guilt, then sets a sentence. See VA. CODE ANN. §§ 19.2-264.3, 19.2-264.4 (Michie 1995).

¹³² The state charged Tuggle with the willful, deliberate and premeditated murder of Ms. Havens during the commission of, or subsequent to, rape, pursuant to section 18.2-31(e) of the Virginia Code. See *Tuggle VI*, 79 F.3d 1386, 1394 (4th Cir. 1996).

¹³³ *Tuggle I*, 323 S.E.2d at 543.

¹³⁴ *Id.* Any defendant sentenced to death in Virginia receives an automatic appeal to the state supreme court. See VA. CODE ANN. § 17-110.1 (Michie 1996). As this automatic appeal was pending, Tuggle and five other death row inmates staged the largest death row

issues.¹³⁵ Despite finding errors in the original trial, the Virginia Supreme Court ruled that none of the errors warranted reversal and that the sentence could stand.¹³⁶ On May 13, 1985, the United States Supreme Court granted Tuggle's petition for certiorari.¹³⁷ The Court vacated the judgment and remanded the case to the Virginia Supreme Court for further consideration in light of *Ake v. Oklahoma*,¹³⁸ which the Court had decided shortly after the state court upheld Tuggle's sentence.¹³⁹

In September 1985, the Virginia Supreme Court again considered Tuggle's case.¹⁴⁰ Following a lengthy review of *Ake*, the court

escape in U.S. history when, posing as guards, they walked out of the Mecklenburg Correctional Center. Authorities recaptured all six within a month and all six have been executed. Laura LaFay, *High Court Sends Back Case Against Virginia Killer*, THE VIRGINIAN-PILOT (Norfolk), Oct. 31, 1995, at A1; *Virginia Murder Case Remanded*, ROANOKE TIMES & WORLD NEWS, Oct. 31, 1995, at C1.

¹³⁵ *Tuggle I*, 323 S.E.2d at 544-54. On appeal from the pre-trial and guilt trial phases, Tuggle claimed the following events and actions were improper:

- Denial of request for a second psychiatric evaluation;
- Denial of motion for change of venue;
- Denial of request to sequester the jury;
- Prejudicial voir dire errors;
- Prejudicial effect of the State Trooper's testimony regarding the separate charges of robbery;
- Prejudicial or incorrect jury instructions;
- Insufficient evidence to support the rape charge;
- Failure to disqualify an ill juror; and
- Conduct of the Commonwealth's attorney.

Id.

The claims raised concerning the penalty trial and sentence review were:

- Psychiatric exam performed outside counsel's presence;
- Prejudicial or improper jury instructions;
- Prejudicial factors allowed to influence the sentence; and
- Sentence excessive and disproportionate to sentences imposed on other defendants in similar cases.

Id. These claims were supported in part by the fact that the local papers published a number of articles prior to the trial that reported, among other things, that Tuggle's previous conviction for second-degree murder had included a rape charge and that Tuggle was an uncharged suspect in the rape of a 15-year-old girl. There were also instances of reporters and Sheriff's office employees contacting the jury panel about another criminal trial on which they served shortly before their acceptance onto Tuggle's panel. Finally, six members of the jury admitted to reading and remembering details from the newspaper accounts, and five of the jurors admitted that the Sheriff's Department or the media had contacted them to elicit an explanation of the reason for their lenient verdict in the other criminal case. *Tuggle III*, 854 F. Supp. at 1233-34.

¹³⁶ *Tuggle I*, 323 S.E.2d at 554.

¹³⁷ *Tuggle v. Virginia*, 471 U.S. 1096 (1985).

¹³⁸ *Ake v. Oklahoma*, 470 U.S. 68 (1985) (holding that the Constitution requires a state to provide indigent defendants with psychiatric assistance when sanity is a significant factor at trial).

¹³⁹ *Tuggle*, 471 U.S. at 1096.

¹⁴⁰ *Tuggle II*, 334 S.E.2d 838 (Va. 1985).

distinguished Ake's case from Tuggle's on the grounds that Tuggle's sanity at the time of the crime was not a significant factor in his trial, so there was no error in the guilty verdict.¹⁴¹ However, the court did hold the denial of a second psychiatric evaluation to be an *Ake* error in the penalty phase.¹⁴² The court deemed this error moot because it invalidated only the future dangerousness¹⁴³ element, not the vileness element.¹⁴⁴ Citing *Zant v. Stephens*,¹⁴⁵ the court reasoned that the death sentence could stand because an aggravating circumstance remained.¹⁴⁶ Two months later, the court denied Tuggle's petition for rehearing.¹⁴⁷

In June 1986, the United States Supreme Court denied Tuggle's second petition for certiorari.¹⁴⁸ Following this denial, Tuggle filed a petition for writ of habeas corpus in the Circuit Court of Smyth County, Virginia,¹⁴⁹ a petition for appeal in the Virginia Supreme Court,¹⁵⁰ and a third petition for writ of certiorari to the Supreme Court.¹⁵¹

In 1994, Tuggle filed his first appeal in federal court.¹⁵² In June 1994, the United States District Court for the Western District of Virginia granted Tuggle's petition for a writ of habeas corpus based on

¹⁴¹ *Id.* at 843.

¹⁴² *Id.* at 846. Apparently, this is the only reported instance where the Virginia Attorney General admitted constitutional error in a capital case. *Tuggle III*, 854 F. Supp. 1229, 1233, n.4 (W.D. Va. 1994).

¹⁴³ In Virginia, the death penalty shall not be imposed unless the State proves beyond a reasonable doubt: (1) future dangerousness (i.e., "that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society . . .") and/or (2) vileness (i.e., that the defendant's conduct in committing the offense was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.") VA. CODE ANN. § 19.2-264.4(C) (Michie 1995).

¹⁴⁴ *Tuggle II*, 334 S.E.2d at 846.

¹⁴⁵ *Zant v. Stephens*, 462 U.S. 862 (1983) (stating that when a jury reaches separate findings on statute-defined aggravating circumstances, any one of which could support a death sentence, subsequent invalidation of one of those circumstances does not invalidate the sentence).

¹⁴⁶ *Tuggle II*, 334 S.E.2d. at 845-46.

¹⁴⁷ *Tuggle III*, 854 F. Supp. at 1233.

¹⁴⁸ *Tuggle v. Virginia*, 478 U.S. 1010 (1986). Justice Brennan, joined by Justice Marshall, dissented, stating that the death penalty is a cruel and unusual punishment and is prohibited by the Eighth and Fourteenth Amendments to the Constitution. *Id.* (Brennan, J., and Marshall, J., dissenting).

¹⁴⁹ *Tuggle III*, 854 F. Supp. at 1233. This petition was dismissed without evidentiary hearing in March, 1991. *Id.*

¹⁵⁰ *Id.* This petition was dismissed without published order in November, 1991. *Id.*

¹⁵¹ See *Tuggle v. Bair*, 112 S. Ct. 1681 (1992) (denying petition for certiorari).

¹⁵² See *Tuggle III*, 854 F. Supp. at 1229.

ten constitutional errors.¹⁵³ The district court vacated Tuggle's conviction and sentence, ordered the state court to retry his case within six months, and, concurrently, granted the state's motion to stay the retrial and release pending its appeal to the Fourth Circuit.¹⁵⁴

The Fourth Circuit heard Tuggle's case in February 1995.¹⁵⁵ Reversing the district court, the Fourth Circuit remanded the case with instructions to dismiss the petition for writ of habeas corpus¹⁵⁶ and granted Tuggle a stay of execution pending his appeal to the Supreme Court.¹⁵⁷ In a per curiam opinion filed September 14, 1995, the Supreme Court said that the Fourth Circuit had wrongly interpreted the governing procedure of *Barefoot v. Estelle*¹⁵⁸ when it automatically granted a stay of execution to a capital defendant until that defendant could file a petition for certiorari to the Supreme Court.¹⁵⁹ Accordingly, the Court granted the Virginia's application to vacate the stay of execution.¹⁶⁰ However, despite the assignment of error to the Fourth Circuit's interpretation of *Barefoot*, on September 21, 1995, Chief Justice Rehnquist, writing for the Court, granted Tuggle's stay of execution pending disposition of his latest petition for writ of certiorari.¹⁶¹

On October 30, 1995, in a per curiam decision reached without hearing oral argument, the Supreme Court vacated Tuggle's sentence and remanded the case to the Fourth Circuit for further proceedings to determine whether the *Ake* error was harmless in the penalty phase of the trial.¹⁶²

On remand, the Fourth Circuit ruled that the *Ake* error was harmless.¹⁶³ The Supreme Court denied Tuggle's petition for certiorari to

¹⁵³ *Id.* at 1247-48. See *supra* note 135, for a summary of the general issues raised.

¹⁵⁴ *Tuggle v. Thompson*, 57 F.3d 1356, 1359 (4th Cir. 1995) [hereinafter *Tuggle IV*].

¹⁵⁵ *Id.* at 1356.

¹⁵⁶ *Id.* at 1374.

¹⁵⁷ *Netherland v. Tuggle*, 116 S. Ct. 4, 5 (1995).

¹⁵⁸ *Barefoot v. Estelle*, 463 U.S. 880 (1983). *Barefoot* requires that there must be "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari . . . ; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed" in order for the Supreme Court to grant a stay of execution. *Id.* at 895.

¹⁵⁹ *Tuggle*, 116 S. Ct. at 5.

¹⁶⁰ *Id.* Justice Stevens, joined by Justice Ginsberg, dissented, stating that despite the Fourth Circuit's failure to include a discussion of the three-part *Barefoot* inquiry in its opinion, there was no reason for the Court to assume that the analysis was not conducted. *Id.* at 5-6 (Stevens, J., dissenting). Justice Breyer concurred in part with this reasoning. *Id.* at 6 (opinion of Breyer, J.). Justice Souter, too, would deny the application. *Id.* at 6 (opinion of Souter, J.).

¹⁶¹ *Tuggle v. Netherland*, 116 S. Ct. 38 (1995).

¹⁶² *Tuggle V*, 116 S. Ct. 283, 285-86 (1995) (per curiam).

¹⁶³ *Tuggle VI*, 79 F.3d 1386, 1392 (4th Cir. 1996).

review this decision.¹⁶⁴ Tuggle was executed on December 12, 1996.¹⁶⁵

IV. SUMMARY OF THE OPINION

A. THE PER CURIAM OPINION

The per curiam opinion begins with a review of the rule from *Zant v. Stephens*¹⁶⁶ which states "that a death sentence supported by multiple aggravating circumstances need not always be set aside if one aggravator is found to be invalid."¹⁶⁷ First, the Court stated that this rule would not apply in weighing states.¹⁶⁸ Then, the Court noted that the Virginia Supreme Court and the Fourth Circuit both had interpreted *Zant* to mean that, in nonweighing states, as long as there is one valid aggravating factor, the death sentence will stand "regardless of the reasons for which another aggravating factor may have been found to be invalid."¹⁶⁹

Next, the Court reviewed the procedural history of Tuggle's case.¹⁷⁰ First, the Court noted that Virginia's capital punishment statute required Tuggle's sentencing jury to decide whether the prosecutor had proven the aggravating factors of future dangerousness or vileness.¹⁷¹ If neither were present, then the jury should impose life imprisonment.¹⁷² If one or both were present, then the jury had the discretion to sentence the defendant to death.¹⁷³ Next, the Court reviewed *Ake v. Oklahoma*,¹⁷⁴ a case decided just months after Tuggle lost his first appeal to the Virginia Supreme Court. The Court stated the *Ake* holding: when, in a death penalty sentencing, the prosecutor offers psychiatric testimony as to an indigent defendant's future dangerousness, due process guarantees the defendant's right to the assistance of a state-provided independent psychiatrist.¹⁷⁵ Rounding

¹⁶⁴ *Tuggle VII*, 117 S. Ct. 237 (1996).

¹⁶⁵ *Recaptured Murderer Executed in Virginia*, N.Y. TIMES, Dec. 16, 1996, at B11.

¹⁶⁶ *Zant v. Stephens*, 462 U.S. 862 (1983).

¹⁶⁷ *Tuggle V*, 116 S. Ct. at 284 (citing *Zant*, 462 U.S. at 886-88).

¹⁶⁸ *Id.* at 284. See *supra* note 42 for definition of weighing and nonweighing statutory schemes.

¹⁶⁹ *Tuggle V*, 116 S. Ct. at 284.

¹⁷⁰ *Id.* at 284-85.

¹⁷¹ *Id.* at 284 n.1.

¹⁷² *Id.*

¹⁷³ *Id.* Tuggle's jury found both factors present. *Id.* at 284.

¹⁷⁴ 470 U.S. 68 (1985). *Ake* was also the basis for the Supreme Court's first reversal and remand of Tuggle's case. *Tuggle v. Virginia*, 417 U.S. 1096, 1096 (1985).

¹⁷⁵ *Tuggle V*, 116 S. Ct. at 284. Tuggle did not receive such assistance and, on remand from the Supreme Court, the Virginia Supreme Court invalidated the future dangerousness aggravator. *Tuggle II*, 334 S.E.2d 838, 845-46 (Va. 1985). However, the Virginia court upheld the sentence, reasoning that, under *Zant*, the vileness factor was sufficient. See

out the factual and legal background for its analysis, the Court quoted the portion of the Fourth Circuit's opinion that applied *Zant* to Tuggle's case.¹⁷⁶

The Court disagreed with the circuit court's analysis of *Zant*.¹⁷⁷ According to the Court, *Zant* involved a statutory aggravating circumstance that was struck down as unconstitutional because it did not "provide an adequate basis for distinguishing a murder case in which the death penalty may be imposed from those cases in which such a penalty may not be imposed. *The underlying evidence [presented to support the factor was] nevertheless fully admissible at the sentencing phase.*"¹⁷⁸ Therefore, despite the elimination of an aggravating factor, the death sentence rested on firm ground.¹⁷⁹

The Court stated that Tuggle's *Ake* error did not rest on admissible evidence like the error in *Zant* did.¹⁸⁰ Furthermore, the Court disagreed with both the Virginia court's and the Fourth Circuit's assumption that the improper psychiatric evidence had no influence on the jury's ultimate decision.¹⁸¹ The Court surmised that Tuggle's inability to challenge the state's psychiatric evidence and mitigate its impact may have increased the persuasiveness of that evidence for the jury.¹⁸² Furthermore, the Court asserted that the lower courts had misinterpreted *Zant* to mean that the presence of any valid aggravator excuses constitutional error in the admission or exclusion of evidence.¹⁸³ Therefore, the lower courts should have looked to *Johnson v. Mississippi*¹⁸⁴ as precedent for Tuggle's case, rather than looking to *Zant*.¹⁸⁵ The Court did point out that *Zant* provided the basis for harmless error review of Tuggle's case.¹⁸⁶

In its conclusion, the Court addressed the fact that when the state court found the *Ake* error, it had not considered what remedy was appropriate for that error.¹⁸⁷ Acknowledging that it lacked jurisdiction to make an initial ruling as to the harmlessness of an issue,¹⁸⁸ the

supra notes 137-43 and accompanying text.

¹⁷⁶ *Tuggle V*, 116 S. Ct. at 285.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (quoting *Zant v. Stephens*, 462 U.S. 862, 885-86 (1983) (emphasis added)).

¹⁷⁹ *Id.* at 285.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ 486 U.S. 578 (1988) (stating that *Zant* will not support a death sentence when materially inaccurate evidence was allowed to play a part in the jury's decision).

¹⁸⁵ 116 S. Ct. at 285.

¹⁸⁶ See *supra* Part II.A.4 for a discussion of the *Zant* doctrine.

¹⁸⁷ 116 S. Ct. at 285.

¹⁸⁸ *Id.*

Court vacated the Fourth Circuit's judgment upholding the sentence and remanded the case to that court for further proceedings to determine whether the *Ake* error was harmless.¹⁸⁹

B. JUSTICE SCALIA'S CONCURRENCE

Justice Scalia concurred in *Tuggle V*, calling this a "simple case" of inadmissible evidence.¹⁹⁰ Citing *Satterwhite v. Texas*,¹⁹¹ Justice Scalia stated that the jury considered improper evidence, and, accordingly, the Virginia Supreme Court should have decided whether that "constitutional error contributed to the jury's decision to impose the sentence of death."¹⁹² Since the Virginia court did not consider this issue, Justice Scalia concluded that the Fourth Circuit improperly denied habeas.¹⁹³ Justice Scalia thus agreed to vacate and remand the case to the Fourth Circuit, but he would have instructed the Fourth Circuit to review the case under the *Brecht*¹⁹⁴ harmless error standard.¹⁹⁵

Justice Scalia asserted that *Tuggle's* case has persisted due to *Tuggle's* transformation of a simple question—"might the constitutional error have affected the decision of the capital sentencing jury?"—into a difficult question—"can a death sentence based in part on an 'invalid aggravating circumstance' still stand?"¹⁹⁶ Justice Scalia accused the Virginia Supreme Court of answering the second question, "the wrong question," because it assumed that a reference to *Zant* provided an easy basis for the decision.¹⁹⁷ Justice Scalia noted that the district court and Fourth Circuit subsequently had focused their inquiries on the result of the Virginia court's mistaken result.¹⁹⁸ Furthermore, Justice Scalia noted that even though the Supreme Court's current decision recognized the misplaced application of *Zant* to this case, it perpetuated "the 'invalid aggravating circumstance' camouflage that petitioner has added to a straightforward inadmissible-evidence

¹⁸⁹ *Id.* at 285-86.

¹⁹⁰ *Id.* at 286 (Scalia, J., concurring).

¹⁹¹ *Satterwhite v. Texas*, 486 U.S. 249, 259-60 (1988) (finding that upon application of harmless error analysis to the unconstitutional use of psychiatrist's testimony at a sentencing hearing, the error was not harmless beyond a reasonable doubt).

¹⁹² *Tuggle V*, 116 S. Ct. at 286 (Scalia, J., concurring).

¹⁹³ *Id.* (Scalia, J., concurring).

¹⁹⁴ *Brecht v. Abrahamson*, 507 U.S. 619 (1993). There is a discrepancy in citing both *Brecht* and *Satterwhite* here, since the cases call for conflicting standards of review when doing harmless error analysis. See *supra* Part II.C.

¹⁹⁵ *Tuggle V*, 116 S. Ct. at 286 (Scalia, J., concurring).

¹⁹⁶ *Id.* (Scalia, J., concurring).

¹⁹⁷ *Id.* (Scalia, J., concurring).

¹⁹⁸ *Id.* (Scalia, J., concurring).

case."¹⁹⁹

V. ANALYSIS

When the Supreme Court remanded Tuggle's case to the Fourth Circuit, it directed the lower court to decide whether the *Ake* error in Tuggle's sentencing proceeding was harmless.²⁰⁰ The Fourth Circuit correctly concluded that the un rebutted psychiatric testimony did not have a "substantial and injurious effect or influence on the verdict," so the verdict could stand.²⁰¹

The basis of the Fourth Circuit's analysis was straightforward. Tuggle's jury imposed a sentence after it found two aggravating circumstances: future dangerousness and heinousness. The jury heard that Jessie Havens made a terrible mistake when she accepted a ride from Tuggle.²⁰² Tuggle raped her. He sodomized her. He hit her. He bit her. While face to face with her, he put a gun to her chest and shot her. Then, he dumped her ravaged body over an embankment and drove off to rob a gas station at gunpoint.²⁰³ For the jury, these facts satisfied the requirements of the heinousness aggravator.²⁰⁴

But the jury also found the future dangerousness aggravator. Part of the testimony about this element came from a state psychiatrist who said that Tuggle posed a continuing threat to society.²⁰⁵ Because there was no expert rebuttal, due to the defendant's inability to hire an expert and the state's refusal to provide one, this was an *Ake* error.²⁰⁶ On his final appeal the defendant asked the Fourth Circuit and the Supreme Court to rule that an *Ake* error should never be subject to harmless error analysis because it is a structural error in the trial.²⁰⁷ Both courts rejected the argument.²⁰⁸

This Note argues that the facts and circumstances of Tuggle's case clearly show that an *Ake* error is not a structural error, but merely a trial error. The Fourth Circuit's harmless error analysis was appropriate and yielded the right result.

¹⁹⁹ *Id.* (Scalia, J., concurring).

²⁰⁰ *Tuggle V*, 116 S. Ct. at 285-86.

²⁰¹ *Tuggle VI*, 79 F.3d 1386, 1392 (4th Cir. 1996).

²⁰² *Tuggle I*, 323 S.E.2d 539, 543 (Va. 1984).

²⁰³ *Id.*

²⁰⁴ *Tuggle VI*, 79 F.3d at 1390.

²⁰⁵ *Id.* at 1391.

²⁰⁶ *Tuggle V*, 116 S. Ct. at 285.

²⁰⁷ See Appellant's Petition for Writ of Certiorari at 11-20, *Tuggle v. Netherland*, 117 S. Ct. 237 (1996) (No. 96-5364).

²⁰⁸ *Tuggle V*, 116 S. Ct. at 285; *Tuggle VI*, 79 F.3d at 1392.

A. THE CONTROVERSY SURROUNDING HARMLESS ERROR REVIEW FOR CAPITAL SENTENCING ERRORS

In his last appeal to the Fourth Circuit, Tuggle argued that *Ake* errors are structural and compel automatic reversal.²⁰⁹ This argument has its roots in three sources: the *Ake* opinion itself; the general belief that no constitutional error in a capital trial could be harmless; and the specific assertion that *Ake* errors are not harmless because of the identity of the expert involved.

In the *Ake* opinion, Justice Marshall concluded that the state has a constitutional duty to provide a psychiatrist to an indigent defendant under certain circumstances.²¹⁰ The policy behind this decision was twofold. First, Justice Marshall found that there was already a widespread acceptance for this rule.²¹¹ More than forty states and the federal law required that mentally ill indigent defendants receive psychiatric assistance for their trial.²¹² Marshall saw this majority rule as indicating both support for the requirement's status as fundamental to a fair trial and evidence that it was not an unworkable financial or procedural burden.²¹³

Second, Marshall looked at the pervasiveness of psychiatry in American law.²¹⁴ By the time *Ake* reached the Supreme Court in 1985, it was very common for psychiatrists to testify.²¹⁵ The Court noted that psychiatric issues are so complex that it becomes crucial for a defendant to put a psychiatrist on the stand and explain behaviors to the jury.²¹⁶ Accordingly, psychiatric testimony can become a "virtual necessity if an insanity plea is to have any chance of success."²¹⁷ This pervasiveness is exemplified by the willingness of any party who has access to a psychiatrist to use that expert.²¹⁸ Justice Marshall concluded that jury members could be so swayed by hearing a psychiatrist that only another equivalent professional would be able to shed doubt on what that expert said.²¹⁹ Without an expert of his own, a defendant is deprived of his constitutional right to a fair trial.²²⁰

²⁰⁹ Appellant's Petition for Writ of Certiorari at 11-20, *Tuggle*, (No. 96-5364).

²¹⁰ *Ake v. Oklahoma*, 470 U.S. 68, 86-87 (1985).

²¹¹ *Id.* at 78-79.

²¹² *Id.* at 78 & n.4.

²¹³ *Id.* at 78.

²¹⁴ *Id.* at 80.

²¹⁵ *Id.*

²¹⁶ *Id.* at 80-82 (quoting Martin R. Gardner, *The Myth of the Psychiatric Expert—Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy*, 2 L. & PSYCHOL. REV. 99, 113-14 (1976)).

²¹⁷ *Id.* at 81 (quoting Gardner, *supra* note 216, at 113-14).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 83-84.

Some commentators would take this analysis one step further because of the finality of capital punishment. These legal analysts propose that any constitutional error in capital sentencing proceedings requires reversal *per se*. Professor Linda E. Carter, for example, reached this conclusion by considering how the jury reaches its verdict.²²¹ When the jury reviews aggravating and mitigating circumstances to decide whether to impose death, the record cannot reflect what weight those factors carried or how the jurors' personal beliefs affected the equation.²²² Professor Carter thus characterizes the deliberation as a "value-laden" inquiry.²²³ However, she calls harmless error review a "fact-laden" process driven by a record which does not adequately account for the impact of jury values.²²⁴ Thus, Professor Carter concludes that sentencing decision errors meet the standard for *per se* reversal since they are "unquantifiable and indeterminate."²²⁵

One commentator applied this general analysis to the specific issue of the *Ake* error. Michael J. Lorenger argues that *Ake* errors should be *per se* reversible because of the policy justifications behind the rule in *Ake*.²²⁶ If jurors are, indeed, so swayed by psychiatric testimony, then there is a structural error in the trial.²²⁷ In particular,

²²¹ Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 GA. L. REV. 125 (1993). See also James C. Scoville, Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 740 (1987) (concluding that harmless error analysis is inappropriate for errors made in capital sentencing when the jury weighs aggravating and mitigating circumstances).

²²² Carter, *supra* note 221, at 127.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Sullivan v. Louisiana*, 508 U.S. 275, 275 (1993).

²²⁶ See Michael J. Lorenger, Note, *Ake v. Oklahoma and Harmless Error: The Case for a Per Se Rule of Reversal*, 81 VA. L. REV. 521 (1995). For the purposes of his analysis, Lorenger limited the *Ake* holding to the narrow facts of the case: denial of psychiatric expert assistance, in a capital trial, to a defendant who makes the initial showing that his sanity will be an issue at trial. Though some commentators have argued that there is also *Ake* error when a court denies other types of expert assistance in other types of trials, the courts have not yet extended the reach of this particular right. See, e.g., *Ex parte Grayson*, 479 So. 2d 76 (Ala. 1985) (holding that an indigent defendant does not have a right to a state-funded pathologist); *Plunkett v. State*, 719 P.2d 834 (Okla. Crim. App. 1986) (holding that there is no constitutional right to a bloodstain expert).

²²⁷ Lorenger, *supra* note 226, at 560-61. The Court has classified errors as *structural*, "where the entire conduct of the trial from beginning to end is obviously affected," and *trial*, when it can be "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 308-10 (1991). The applicable standard in *Fulminante*, "harmless beyond a reasonable doubt," see *id.*, was the *Chapman* standard. In *Tuggle's* case, a collateral habeas review, the proper standard is the *Brecht* standard of whether the error had "substantial and injurious effect or influence on the jury's verdict." See *Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993); *Tuggle V.*, 116 S. Ct. 283, 284 (1996),

Lorenger asserts that when a defendant does not rebut psychiatric testimony with an expert of his own, the jury could discern an acquiescence in the state's psychiatric conclusions.²²⁸

Although the case for extremely careful review of errors in capital trials is beyond argument, Tuggle's case proves that there is no need to treat those errors as structural; appellate courts do have the tools to review those errors and reach fair decisions.

Tuggle's sentencing proceeding clearly contained an *Ake* error. Prior to trial, the judge agreed that Tuggle's motion requesting a psychiatric evaluation had merit.²²⁹ Therefore, Tuggle met the threshold burden required by *Ake*, and he should have had his own psychiatrist on his defense team. The Supreme Court acknowledged this and directed the Fourth Circuit to assess this issue.²³⁰ There are two reasons why this was the proper procedural approach: first, *Ake* errors are trial errors and, second, the court had a full record for evaluating the impact of this particular *Ake* error.

First, there is a fundamental difference between *Ake* errors and errors already classified by the Supreme Court as structural. Structural errors impose a total disability on the defendant and thus are presumed to infect every aspect of the trial.²³¹ The right to counsel, for example, is guaranteed by the Constitution regardless of the case or the defendant.²³² This right attaches automatically with no special showing required of the defendant. Access to a psychiatrist, however, is not automatic. The *Ake* rule requires the defendant to meet an initial burden before that right attaches.²³³ Such a conditional right "[cannot] fairly be defined as basic to the structure of a constitutional trial."²³⁴ The *Ake* error in Tuggle's case is even more readily defined as a trial error, rather than a structural error, since it occurred only in the sentencing proceeding.²³⁵

Second, in this particular case, the evidence supports the Fourth Circuit's decision to uphold the sentence. By the time the Fourth Circuit performed its final review of Tuggle's case, the heinousness evidence was not at issue. Tuggle did not just kill Jessie Havens. He brutalized and probably terrorized her. It is irresponsible to suggest

²²⁸ Lorenger, *supra* note 226, at 546. See also *Ake*, 470 U.S. at 82-83.

²²⁹ *Tuggle II*, 334 S.E.2d 838, 840 (Va. 1985).

²³⁰ *Tuggle V*, 116 S. Ct. at 285.

²³¹ *Brecht*, 507 U.S. at 638.

²³² See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

²³³ *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

²³⁴ *Brewer v. Reynolds*, 51 F.3d 1519, 1529 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 936 (1996) (quoting *Starr v. Lockhart*, 23 F.3d 1280, 1281 (8th Cir. 1994) (alteration in original)).

²³⁵ *Tuggle V*, 116 S. Ct. at 285.

that the jury acted irrationally when it characterized this as horrible, inhuman torture, the product of a depraved mind, and/or an aggravated battery.²³⁶ Since there is no degree of heinousness in nonweighing states like Virginia, this aggravator's impact is neither lessened nor heightened in any way because of other aggravators or mitigators. But, as the Supreme Court stated, the error in Tuggle's case could not be dismissed solely because this factor was unimpeached.²³⁷ The appellate court had to assess whether the *Ake* error made the entire trial so unfair as to give rise to a constitutional right to a reversal.²³⁸

As the Fourth Circuit recognized, there were actually two components to the *Ake* error in this case. The first was the improper admission of Dr. Centor's testimony to support the future dangerous aggravator.²³⁹ To establish future dangerousness,

the state introduced: (1) evidence that Tuggle murdered Havens while on parole for murder; (2) evidence of Tuggle's criminal history, which in addition to another murder, included escape and armed robbery; and (3) the psychiatric testimony of Dr. Centor, a licensed clinical psychologist, who testified that Tuggle demonstrated a high probability of future dangerousness.²⁴⁰

Dr. Centor's testimony, which was improperly admitted evidence, was subject to harmless error analysis under both Fourth Circuit and Supreme Court precedent.²⁴¹ Both courts have held that a reviewing body can assess the impact that such testimony had on the verdict by considering factors such as the type of evidence and what emphasis the parties placed on it at trial, both in terms of time spent and relevance to their cases.²⁴² Here, the testimony was just one small part of the state's case against Tuggle. A reasonable jury could find future dangerousness even without Dr. Centor's statements.

The second and more difficult aspect of the *Ake* error was the court's denial of Tuggle's request for psychiatric assistance at the sentencing phase.²⁴³ When Tuggle's counsel learned that the evaluation

²³⁶ VA. CODE ANN. § 19.2-264.4 (Michie 1996).

²³⁷ *Tuggle V*, 116 S. Ct. at 285.

²³⁸ *Id.*

²³⁹ *Tuggle VI*, 79 F.3d at 1391. The improper admission of Dr. Centor's testimony was likely the portion of the error that Justice Scalia was considering when he called this a "straightforward inadmissible-evidence case." See *Tuggle V*, 116 S. Ct. 283, 285 (1995) (Scalia, J., concurring).

²⁴⁰ *Tuggle VI*, 79 F.3d at 1389 (citations omitted).

²⁴¹ *Correll v. Thompson*, 63 F.3d 1279, 1291-92 (4th Cir. 1995) (on collateral review, the court applied harmless error analysis to improperly admitted evidence). See also *Satterwhite v. Texas*, 486 U.S. 249 (1988). *Satterwhite* was the first case in which the Court applied harmless error analysis to a capital case.

²⁴² *Correll*, 63 F.3d at 1291-92; *Satterwhite*, 486 U.S. at 249.

²⁴³ *Tuggle VI*, 79 F.3d at 1380.

had included a conclusion about future dangerousness,²⁴⁴ he requested and was denied an additional assessment by a psychiatrist of his choosing.²⁴⁵ The Fourth Circuit stated that this denial was merely an improper exclusion of evidence, similar to a denial of the right to cross-examine a witness, so was no different than a harmless improper admission of evidence.²⁴⁶ Language in the *Ake* opinion lends support to this analysis. Justice Marshall wrote:

This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist . . . who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.²⁴⁷

The Fourth Circuit correctly held that Tuggle did not receive that assistance. However, restricting a defendant's right to formulate the game plan for his defense before he even enters the courtroom is not quite the same as restricting a defendant's right to cross-examine a witness. Nevertheless, the court's subsequent analysis supports the ultimate decision that, though unconstitutional, the *Ake* error here was harmless.

To determine whether this second part of the *Ake* error was harmless, the Fourth Circuit divided the sentencing evidence into six areas:

- (1) the strength of the remaining aggravating circumstance; (2) the evidence admitted (both properly and improperly) at the sentencing hearing to establish the invalid aggravating circumstance; (3) the evidence improperly excluded at the sentencing hearing; (4) the nature of any mitigating evidence; (5) the closing argument of the prosecutor; and (6) any indications that the jury was hesitant or entertained doubt in reaching its sentencing determination.²⁴⁸

The strength of the remaining aggravator has already been addressed, as has the inadmissible evidence for the future dangerousness aggravator. The *admissible* evidence for that aggravator included Tuggle's prior murder conviction, the fact that he murdered Havens while on parole after serving only eleven of the twenty year sentence for that earlier crime, his escape from prison, and the armed robbery he com-

²⁴⁴ Dr. Centor did not include his conclusions about Tuggle's future dangerousness in his report since the court had not asked for such an evaluation. Instead, his report focused solely on Tuggle's competence to stand trial and his sanity at the time of the crime. Respondent's Brief in Opposition to Petition for Writ of Certiorari at 6-7, *Tuggle v. Netherland*, 117 S. Ct. 237 (1996) (No. 96-5364).

²⁴⁵ *Tuggle III*, 854 F. Supp. 1229, 1233 (W.D. Va. 1994).

²⁴⁶ *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (holding that harmless error analysis was appropriate for a Confrontation Clause violation involving an improper restriction on the defendant's right to cross-examine a government witness for bias).

²⁴⁷ *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

²⁴⁸ *Tuggle VI*, 79 F.3d at 1393.

mitted shortly after murdering Havens.²⁴⁹ Finally, when the case went to the jury, it returned a verdict after only a little more than an hour of deliberation.²⁵⁰

The foregoing elements weigh against Tuggle. However, there were two factors in his favor. There was mitigating evidence—three witnesses testified, in essence, that Tuggle's parents did the best they could in raising him and that he was a "good-natured" person.²⁵¹ Also, the prosecutor improperly included in his closing argument a statement that the jury could consider Dr. Centor's testimony when deciding the "future dangerousness" aggravator.²⁵² Taken as a whole, this record does not establish that Dr. Centor's testimony had a "substantial and injurious effect or influence" on the jury's verdict.²⁵³ The testimony that Tuggle showed "a high probability of future dangerousness"²⁵⁴ is not reasonably related to the jury's unimpeachable finding that the crime was vile.²⁵⁵ Further, in balance with all the other properly admitted evidence that was before the jury, there is no compelling reason to believe that Dr. Centor's testimony held any special weight whatsoever. The error was harmless.

B. NO NEED FOR SUPREME COURT REVIEW OF THIS ISSUE

The Supreme Court rightly denied Tuggle's appeal of the Fourth Circuit's decision. There is at this time no split in the circuits such that the Court would take the case to provide some inter-jurisdictional unity.²⁵⁶ The only other circuit courts that have addressed whether an *Ake* error is subject to harmless error analysis are the Eighth and Tenth Circuits, and they agree that it is subject to such analysis.²⁵⁷

²⁴⁹ *Id.* at 1394.

²⁵⁰ *Id.* at 1395.

²⁵¹ *Id.* at 1394.

²⁵² *Id.*

²⁵³ *Id.* at 1395.

²⁵⁴ *Id.*

²⁵⁵ Tuggle's case does not raise the same issues as those in *Zant v. Stephens*, 462 U.S. 862 (1983). *Zant* presented the issue of whether a capital sentence could stand when the appellate court struck down one of the two aggravating circumstances found by the jury as unconstitutionally vague. *Id.* at 880-84. The Court held that *Stephens'* conviction and sentence could stand because, since Georgia was a non-weighting state, the remaining aggravator was statutorily adequate to uphold the verdict. *Id.* at 890-91. In Tuggle's case, however, the issue is not that an aggravator is found invalid on its face, but because of a trial error involving improperly admitted evidence. Therefore, even though Virginia's statutory scheme is nearly identical to Georgia's, *Zant v. Stephens* has no bearing on Tuggle's case. In its 1995 *Tuggle* V opinion, the Supreme Court clarified this issue and removed the *Stephens* analysis from the case on remand. See *Tuggle V*, 116 S. Ct. 283 (1995).

²⁵⁶ See Sur. Cr. R. 10 (allowing grant of certiorari "only for compelling reasons" including conflict between the circuit courts of appeal).

²⁵⁷ The Eighth Circuit held that an *Ake* error is subject to harmless error analysis under

VI. CONCLUSION

The public has little patience for lengthy appeal processes like Tuggle's.²⁵⁸ A Florida supreme court justice's comment that the high court spends fifty percent of its time on death cases is strong testimony about a system that provides retribution at an extremely high cost, both in real dollars and in lost opportunity for speedy resolution of other cases.²⁵⁹

As long as capital sentencing statutes persist, these costs will persist as the system attempts to avoid irreparable mistakes. Still, there are places where we must draw the line. Burdening an already overwhelmed court system with automatic resentencing for *Ake* errors goes too far. As the Tenth Circuit demonstrated in *Castro*,²⁶⁰ a reviewing court can find evidence in the record that points to the harm of this error. And, as the Fourth Circuit found, sometimes the *Ake* error is simply not harmful.

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the *Chapman* standard of "harmless beyond a reasonable doubt." *Starr v. Lockhart*, 23 F.3d 1280, 1291-92 (8th Cir. 1993), *cert. denied*, 115 S. Ct. 499 (1994). In *Castro v. Oklahoma*, 71 F.3d 1502 (10th Cir. 1995), the Tenth Circuit held that an *Ake* error was not harmless in *Castro's* sentencing proceeding and so reversed his capital sentence. The Tenth Circuit has developed a broad view of the *Ake* error as it affects the sentencing hearing: if the defendant meets the threshold determination that his sanity will be a significant mitigating factor, the state must provide access to an expert if presenting any evidence of future dangerousness, not just expert testimony about future dangerousness. *See, e.g.*, *Brewer v. Reynolds*, 51 F.3d 1519, 1529 (10th Cir. 1995); *Liles v. Saffle*, 945 F.2d 333, 340-41 (10th Cir. 1991).

²⁵⁸ *See generally* Daniel E. Lungren & Mark L. Krotoski, *Public Policy Lessons from the Robert Alton Harris Case*, 40 UCLA L. REV. 295 (1992) (discussing case of Harris, who was on death row for fourteen years for the double murder of teenage boys).

²⁵⁹ Marcia Coyle et al., *Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30.

²⁶⁰ 71 F.3d 1502 (10th Cir. 1995).