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892 F.2d 1193 (4th Cir. 1989)
United States Court of Appeals for the Fourth Circuit
Note: Direct page citations for the Fourth Circuit's opinion are to Westlaw, 1989 WL 149746.

FACTS

In 1984, Richard T. Boggs was a suspect in the murder of an elderly black woman named Treeby Shaw. Approximately three weeks after the murder, Boggs was arrested on unrelated charges. Initially he denied involvement in the murder, but after the police discovered evidence linking him to the crime, he waived his Miranda rights and confessed to the murder and robbery of Ms. Shaw.

Boggs was convicted of both robbery and capital murder. The jury sentenced him to life imprisonment for the robbery and found that the murder involved an "aggravated battery" as set out in Va. Code Ann. § 19.2-264.2 (1983 Repl. Vol.) and sentenced him to death. Boggs appealed to the Supreme Court of Virginia which affirmed both his conviction and sentence. *Boggs v. Commonwealth*, 229 Va. 501, 331 S.E.2d 407 (1985), *cert. denied*, 475 U.S. 1031 (1986).

On petition for a writ of habeas corpus, the United States District Court for the Eastern District of Virginia granted relief only with respect to the sentencing phase of Boggs' trial. Finding that the claim was properly preserved, the district court granted relief based on the fact that the judge refused defense counsel's request to redact racial comments present in Boggs' confession prior to allowing the prosecutor to read it to the jury. *Boggs v. Bair*, 695 F. Supp. 864, 869-70 (E.D. Va. 1988). The Court found that the prosecution's reading of the unredacted confession containing comments such as, "I want to kill the enemy on the other side, which is me, the white all over the world. I want to kill niggers," violated Boggs' Eighth and Fourteenth Amendment rights. *Id.* Further, the district court noted that although both Boggs and the victim were white, some members of the jury were black. *Id.* The District Court stated that "[T]he fact that the jury had a moral judgment to make about the culpability of Boggs' act does not mean they had a right to consider other elements of his character that have no bearing on this particular act of murder." *Id.* at 870; *see*, summary of *South Carolina v. Gathers*, 2 *Capital Defense Digest* 5 (Nov. 1989) (noting that "for purposes of imposing the death penalty . . . the defendant's punishment must be tailored to his personal responsibility and moral guilt." *South Carolina v. Gathers*, 109 S. Ct. 2207, 2210 (1989).

Both Boggs and the State appealed. In an opinion by Judge Widener, the United States Court of Appeals for the Fourth Circuit affirmed Boggs' conviction and reversed the district court's grant of relief with respect to the sentencing phase, thereby affirming the sentence of death.

HOLDING

Boggs asserted numerous grounds for relief, but the holdings of the Fourth Circuit which merit discussion in this summary because of potential significance to practitioners are the following: (1) that the proper factors to review in determining whether an aggravated battery has occurred sufficient to fulfill the vileness predicate of the capital sentencing statute (Va. Code Ann. § 19.2-264.2) may include "the number OR nature of the batteries inflicted upon the victim." *Boggs v. Bair*, Westlaw at 19 (4th Cir. 1989) (emphasis added); (2) that a trial judge is not constitutionally required to attempt to rehabilitate potential jurors during voir dire prior to disqualifying them for cause. *Id.* at 29; and (3) that Boggs did not suffer prejudicial error when the prosecution read racist statements contained in his confession to the jury during the closing arguments of the sentencing

ANALYSIS

(1) AGGRAVATED BATTERY

In *Boggs*, the court reviewed the defendant's claim that Virginia's capital sentencing statute, specifically the vileness predicate, was unconstitutional as applied to the circumstances of his case. Under Virginia's statutory scheme, a death sentence may be imposed if at the sentencing phase the jury finds that the defendant's conduct in committing the murder was "outrageously or wantonly vile. . .in that it involved torture, depravity of mind, or an aggravated battery to the victim." Va. Code Ann. § 19.2-264.2. The vileness predicate can be found if the murder involved any of these three varying factors. *Bunch v. Commonwealth*, 225 Va. 424, 442, 304 S.E.2d 271, 282 (1983). The United States Supreme Court has held that in order to avoid arbitrary imposition of the death penalty in administration of the vileness predicate, the jury must be instructed in such a way as to limit and guide its discretion. *Boggs*, at 17 (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)). Further, the United States Supreme Court has held that the language in the statute "[O]utrageously or wantonly vile, horrible and inhuman" will not itself suffice to limit the jury's discretion and that application of some "narrowing construction" is required. *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 1764-65, 64 L. Ed. 2d 398, 406-07 (1980); *see*, Falkner, *The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor*, 2 *Capital Defense Digest* 19 (Nov. 1989).

Prior to the holding in this case, the definition and narrowing construction available to guide the jury's discretion was to inform jurors that aggravated battery is that "[w]hich, qualitatively AND quantitatively, is more culpable than the minimum necessary to accomplish the act of murder." *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978) (emphasis added). In the instant case, Boggs argued that the trial court's instruction defining aggravated battery for purposes of imposing the death penalty lacked the necessary limitations. *Boggs*, at 17. The trial court instructed the jury that it "could impose a sentence of death if they found the murder `wantonly vile, horrible or inhuman' in that it involved an aggravated battery `beyond the minimum necessary to accomplish the act of murder.'" *Id.* at 18. The Fourth Circuit held that the difference in wording was not of constitutional magnitude, and agreed with the Supreme Court of Virginia that the proper test to determine an aggravated battery involved reviewing "[t]he number OR nature of the batteries inflicted upon the victim." *Id.* at 19 (emphasis added).

Consequently the Fourth Circuit, by affirming the trial court, may have effectively broadened the definition of aggravated battery by allowing the jury to classify a particular incident as aggravated, merely by finding that the "QUANTITY" of wounds or blows was excessive *without* also considering the "QUALITY" (nature) of the attack. The issue is whether quantity alone indicates a level of moral culpability greater than that found in the commission of the offense itself. A finding of greater moral culpability is necessary before a jury can impose the death sentence. *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991, 49 L. Ed. 2d 944, 961-62 (1976). The United States Supreme Court has held that the only factors which may be considered are those which permit a jury rationally to separate defendants based on their own personal moral culpability. *Booth v. Maryland*, 482 U.S. 496, 502-04, 107 S. Ct. 2529, 2532-33, 96 L. Ed. 2d 440, 448-9 (1987); *see also, South Carolina v. Gathers*, 109 S. Ct. 2207 (1989). For example, in *Gathers* the Court held

draw inferences about positive characteristics of the victim from items he had in his possession at the time of his death. *Gathers*, at 2211.

Previous Virginia cases have indicated that quantity alone may be insufficient to establish a particular battery as "aggravated." *Barnes v. Commonwealth*, 234 Va. 130, 360 S.E.2d 196 (1987) (noting that when multiple gun shots are the cause of death, proper classification as an aggravated battery would require that the victim survived the first shot, and that an *appreciable time* passed between the first and final shot causing death). The fact that the nature of the attack must be considered is also evidenced by a holding that the vileness factor was met when the "[w]ound was inflicted in a savage and methodical manner." *Stout v. Commonwealth*, 237 Va. 126, 376 S.E.2d 288 (1989) (single and deep slash in the victim's throat caused a slow painful death). The evidence in *Boggs* may not be seen as the best for presenting the distinction between the *culpability* of a defendant and the *method employed* in the murder. Boggs not only inflicted many blows to the victim, but also switched weapons during the attack. In fact, his principal argument that the attack was not both quantitatively *AND* qualitatively sufficient to establish aggravated battery centered on his contention that he was simply unsuccessful in trying to find the quickest way of killing the victim. *Boggs*, at 19.

Practitioners should continue to object to both the Virginia model jury instructions, which contain no narrowing construction of the statutory terms, and to either the *Smith* or *Boggs* narrowing construction of aggravated battery.

(2) VOIR DIRE

Boggs also claimed that the trial court erred when the judge failed *personally* to question and attempt to rehabilitate potential jurors who indicated that they would under no circumstances vote for the death sentence. *Id.* at 28. In holding that the trial court did not err and dismissing Boggs' claim as being without merit, the Fourth Circuit stated that not only was it proper to exclude jurors who could not follow judicial instructions due to their own moral views, but also that a judge has no constitutional duty to rehabilitate apparently disqualified veniremen. *Id.* It should be noted that although the trial judge did not attempt to rehabilitate through personal questioning those jurors indicating an aversion to the death penalty, he did, as is all too common, question and rehabilitate one juror who originally indicated that she felt death was ordinarily the proper punishment for murder. *Boggs*, 695 F. Supp. at 874.

It is clear from this holding that defense counsel must assume responsibility for further questioning of jurors with reservations about the death penalty. Practitioners should elicit agreement that the juror could follow the instructions of the court and *consider* the death penalty. If possible, this agreement should be elicited, repeated, reinforced and emphasized on the record. Further, any defense objection to the disqualification of a potential juror for cause should be placed on the record. Also, objections to refusal to excuse an unqualified pro-death juror should be renewed at the time the jury is impaneled. *See*, summary of *Hoke v. Commonwealth*, 2 *Capital Defense Digest* 18 (Nov. 1989).

(3) PREJUDICIAL STATEMENTS IN STATE'S CLOSING ARGUMENTS

In reversing the district court's holding, the Fourth Circuit held that the Judge's decision NOT to require redaction of racial statements contained in Boggs' confession before allowing the prosecutor to read the confession to the jury was proper, and did not prejudice the defendant during either the guilt or sentencing phases of his trial. *Id.* at 36. The rationale of the district court was that although the error was harmless during the guilt phase due to the overwhelming evidence against the defendant, the racial comments were improper and highly prejudicial during the sentencing phase. *Boggs*, 695 F. Supp. at 870.

The district court stated that "Boggs' racial views have no bearing on the culpability of this particular act." *Id.* However, the Fourth Circuit dismissed this claim, observing that the comments amounted to only a few lines from a multi-page closing argument and that the Commonwealth's Attorney "defused the racial character of Boggs' language" by explaining that the comments indicated a threat to persons of any race. *Boggs*, at 35.

It should be noted that although Boggs ultimately lost this claim on the merits, the district court explicitly, and the Fourth Circuit implicitly, found over the Commonwealth's objection that the claim was properly made and preserved on federal grounds and was not procedurally defaulted. *Boggs*, 695 F. Supp. at 869. Virginia practitioners should note that, especially during the sentencing phase, ANY evidence not relevant to defendant's individual moral culpability should be objected to on federal grounds and preserved on the record. This includes such evidence that is included in the defendant's confession or the closing arguments of the Commonwealth.

SUMMARY BY:
Thomas J. Marlowe

COLEMAN v. THOMPSON
____ F.2d ____ (4th Cir. 1990)
United States Court of Appeals for the Fourth Circuit

Note: Direct page citations for the Fourth Circuit's opinion are to Westlaw, 1990 WL 6403.

FACTS

Roger Keith Coleman was arrested and charged with the rape and capital murder of Wanda Faye Thompson McCoy. After being convicted on both charges and sentenced to death, Coleman appealed to the Supreme Court of Virginia. Upon review, the Court affirmed both his conviction and sentence. *Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983), *cert. denied*, 465 U.S. 1109 (1984).

Coleman applied for a writ of habeas corpus in the state Circuit Court, which denied the writ after an evidentiary hearing. After 31 days, Coleman filed an appeal of the order denying the writ with the Supreme Court of Virginia. He also filed a motion with the state habeas court to "correct" the date of its final judgment. The state habeas court denied the motion to change the date of final judgment, and on the state's motion, the Supreme Court of Virginia dismissed Coleman's appeal as untimely. Again, the Supreme Court denied certiorari. *Coleman v. Bass*, 484 U.S. 918 (1987).

Asserting 11 claims of error, Coleman applied for a writ of habeas corpus in the United States District Court. Without conducting an evidentiary hearing, the district court denied habeas relief and dismissed seven of the claims as procedurally barred. Coleman then initiated this appeal to the United States Court of Appeals for the Fourth Circuit.