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I. Facts

Aquila Barnette was convicted in federal court of three counts of capital murder, and the jury sentenced him to death for the carjacking and killing of Donald Lee Allen and the killing of Robin Williams.[1] The United States Court of Appeals for the Fourth Circuit affirmed the conviction but overturned the sentence of death and remanded the case to the district court for re-sentencing.[2] On remand, a new jury again recommended death on each of the three capital counts, and Barnette again appealed.[3]

II. Holding

The Fourth Circuit rejected each issue Barnette raised on appeal.[4] Instead, the court affirmed the death sentences imposed by the district court.[5] The Fourth Circuit determined that the indictment was not deficient because it alleged at least one aggravating factor, the Federal Death Penalty Act ("FDPA") is constitutional, the district court did not improperly apply the appropriate aggravating factor, and the use of allegedly inflammatory evidence did not infect the jury's capital sentencing decision.[6]

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1. United States v. Barnette, 390 F.3d 775, 783 (4th Cir. 2004). Capital counts seven, eight, and eleven were as follows:

> 7) commission of a carjacking that results in death, in violation of 18 U.S.C. § 2119(3); 8) using and carrying a firearm during and in relation to a crime of violence, namely a carjacking, in which death occurs, in violation of 18 U.S.C. §§ 924(c)(1) & (i)2(1); . . . 11) using and carrying a firearm during and in relation to a crime of violence, namely interstate domestic violence, in which death occurs, in violation of 18 U.S.C. §§ 924(c)(1) & (i)2(1).

Id. For a discussion of the facts surrounding the crime, see generally Christina S. Pignatelli, Case Note, 13 CAP. DEF. J. 191 (2000) (analyzing United States v. Barnette, 211 F.3d 803 (4th Cir. 2000)).

2. *Barnette*, 390 F.3d at 783 (citing United States v. Barnette, 211 F.3d 803, 808 (4th Cir. 2000)).

3. *Id.*

4. *Id.* at 779.

5. *Id.* Barnette raised ten issues on appeal. *Id.* at 783–84. Only four of these issues will be addressed in this case note.

6. *Id.* at 786, 790, 808, 810.

III. Analysis

A. Requirements of the Indictment

Citing *Ring v. Arizona*,[7] Barnette asserted that because the statutory aggravating factors were functional elements of the capital offense, they must be included in the indictment.[8] *Barnette* is one of several federal death penalty cases founded upon pre-*Ring* indictments that raise Fifth Amendment Indictment Clause issues.[9] Barnette argued that the prosecution's failure to allege in the indictment the statutory aggravating factors upon which the jury based the death sentences rendered those sentences invalid.[10] He specifically contended that counts seven and eight of the indictment did not allege the aggravating factor that he committed the offense "in the expectation of the receipt of something of pecuniary value."[11] Regarding count eleven, Barnette claimed that the indictment failed to state the aggravating factor that he killed Williams after substantial planning and premeditation.[12]

The court rejected Barnette's claims concerning the deficiency of counts seven and eight of the indictment.[13] Although these counts did not explicitly reference 18 U.S.C. § 3592(c)(8), the Fourth Circuit concluded that the language of counts seven and eight fulfilled *Ring*'s requirement that the statutory aggravating factor be included in the indictment.[14] Because Barnette used Allen's vehicle

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7. 536 U.S. 584 (2002).

8. *Barnette*, 390 F.3d at 784; *see* Ring v. Arizona, 536 U.S. 584, 589 (2002) (holding that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"); *see also* Jones v. United States, 526 U.S. 227, 243 n.6 (1999) (stating that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment"); United States v. Higgs, 353 F.3d 281, 299 (4th Cir. 2003) (concluding that the FDPA requires the indictment to include at least one aggravating factor). *But see* United States v. Wills, 346 F.3d 476, 501 (4th Cir. 2003) (finding that *Ring* does not require the "various aggravating factors . . . to be alleged in the indictment").

9. *See* United States v. Robinson, 367 F.3d 278, 283–84 (5th Cir. 2004) (examining the sufficiency of the indictment under *Ring*); United States v. Davis, 380 F.3d 821, 825–29 (5th Cir. 2004) (same); United States v. Allen, 357 F.3d 745, 748–51 (8th Cir. 2004) (same); *Higgs*, 353 F.3d at 295–304 (same); *see also* U.S. CONST. amend. V (stating that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury").

10. *Barnette*, 390 F.3d at 784.

11. *Id.* at 784–85 (citing 18 U.S.C. § 3592(c)(8) (2004)).

12. *Id.* at 785.

13. *Id.*

14. *See id.* (stating that count seven alleged that the accused, "with intent to cause death or serious bodily harm, did knowingly, willfully and unlawfully take by force, violence and intimidation, that is he shot to death and took from . . . Allen, a motor vehicle which had been shipped, transported and received in interstate . . . commerce, that is a . . . Honda Prelude"); 18 U.S.C. § 3592(c)(8) (stating the court will consider as an aggravating factor whether "[t]he defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value").

to drive to Roanoke rather than paying for transportation, the court reasoned that the stolen Honda Prelude satisfied the pecuniary gain requirement.[15] The court reached the same conclusion with respect to count eight, "inasmuch as Count 8 explicitly incorporate[d] Count 7."[16]

Although count eleven of the indictment did not specifically incorporate the phrase "substantial planning" from 18 U.S.C. § 3592(c)(9), the Fourth Circuit relied upon *Hagner v. United States*[17] to find that the "language must, as a fair construction, be read into the indictment."[18] Because Barnette used Allen's car to make the three-hour and nearly 200-mile drive from Charlotte to Roanoke and count ten alleged that he made this trip with the intent to injure Williams, the court concluded that the defendant "planned his crime and planned to take the three-hour journey to commit it."[19] Furthermore, because 18 U.S.C. § 3592 (c)(9)'s substantial planning "means . . . 'more than the minimum amount sufficient to commit the offense,' " the court found an increased degree of planning and premeditation.[20] Specifically, the Fourth Circuit noted that Barnette not only planned to murder the victim, but that he also planned and made the three-hour drive from Charlotte to Roanoke to commit the crime.[21] This added component of the crime fulfilled the statutory aggravating factor of substantial planning and premeditation.[22]

The court alternatively added that if the indictment did indeed fail to state the aggravating factors, the deficiency constituted harmless error.[23] The court first supported this conclusion by citing the factual background contained in the indictment from which the statutory aggravating factors could be inferred.[24] Moreover, the court noted that the Government had served the defendant with notice of its intent to seek the death penalty and that this notice included the statutory aggravating factors that the Government would seek to prove at sentencing.[25] Barnette made no claim of a lack of adequate notice, and the indictment could serve as a "defense of double jeopardy for any subsequent

15. *Barnette*, 390 F.3d at 785.

16. *Id.*

17. 285 U.S. 427 (1932).

18. *Barnette*, 390 F.3d at 785; *see* Hagner v. United States, 285 U.S. 427, 433 (1932) (holding that an indictment is not deficient if "the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment").

19. *Barnette*, 390 F.3d at 785–86.

20. *Id.* at 786 (quoting United States v. Jackson, 327 F.3d 273, 301 (4th Cir. 2003)) (internal quotations marks omitted).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Barnette*, 390 F.3d at 786.

prosecution of the conduct for which he was found guilty in this case."[26] The court stated that the defendant had no grounds to argue that the Government "ambushed his defense by attempting to prove previously unknown statutory aggravating factors at the sentencing hearing."[27]

B. Constitutionality of the Federal Death Penalty Act

Barnette asserted that *Ring* renders the FDPA unconstitutional.[28] *Ring* extended to capital cases the Supreme Court's holding in *Apprendi v. New Jersey*[29] that " 'any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' "[30] Barnette reasoned that the FDPA violates *Ring* by treating aggravating factors as sentencing factors that may be inserted into the case prior to trial by a United States Attorney rather than charged by a grand jury in an indictment.[31] Specifically, the FDPA states that "[i]f . . . the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified . . . the attorney shall" give the court and defendant notice of both the Government's intention to seek the death penalty and also the aggravating factors to be used in justifying the sentence.[32] Although the statutory factors must be proven beyond a reasonable doubt, they are not statutorily required to be included in the indictment.[33] Barnette asserted that because the FDPA does not require the factors to be included in the indictment, courts cannot comply with both the FDPA and *Ring*.[34]

Although the Fourth Circuit reviewed de novo the constitutionality of the FDPA, the court approached the statute with a presumption of validity and then rejected the defense's argument.[35] After reviewing the language and the legislative history of the FDPA, the Fourth Circuit determined that the statute neither restricts the grand jury from charging the aggravating factors in the indictment

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26. *Id.* (citing Russell v. United States, 369 U.S. 749, 763–64 (1962)).

27. *Id.*

28. *Id.* at 788; *see Ring*, 536 U.S. at 589 (holding that statutory aggravating factors necessary to impose the death penalty must be found by the jury).

29. 530 U.S. 466 (2000).

30. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (quoting *Jones*, 526 U.S. at 243 n.6).

31. *Barnette*, 390 F.3d at 788–89.

32. 18 U.S.C. § 3593(a) (2000).

33. *Barnette*, 390 F.3d at 789.

34. *Id.*

35. *Id.* at 788–90; *see* United States v. Bostic, 168 F.3d 718, 721 (4th Cir. 1999) (stating that appellate courts review de novo questions of law); INS v. Chadha, 462 U.S. 919, 944 (1983) (stating that review of a statute "begin[s] . . . with the presumption that the challenged statute is valid" and that "if a challenged action does not violate the Constitution, it must be sustained").

nor indicates such congressional intent.[36] Furthermore, the court stated that "*Ring*'s holding requires only that such aggravating factors, upon demand, be found by a jury instead of merely by a judge at sentencing."[37]

C. *Pecuniary Gain Statutory Aggravating Factor*

Barnette argued that the district court misapplied the aggravating factor of counts seven and eight, namely that he committed the offense in expectation of the receipt of anything of pecuniary value.[38] In particular, Barnette contended that § 3592(c)(8) does not apply to robbery-murders.[39] The Fourth Circuit reviewed this contention for plain error because the defendant did not raise the claim before the district court.[40]

The court distinguished Barnette's case from two cases from the United States Courts of Appeals for the Fifth and Tenth Circuits in which the courts ruled that § 3592(c)(8) did not apply to robbery-murders.[41] Contrary to the Fifth Circuit's conclusion in *United States v. Bernard*,[42] the court in *Barnette* found that "the evidence in the instant case was sufficient for the jury to conclude that Barnette killed Allen in the expectation of the receipt of something of pecuniary value, namely Allen's vehicle."[43] The court examined Barnette's testimony regarding the carjacking and murder to support its conclusion that "the motivation for Allen's murder was . . . Barnette's need for transportation to Roanoke."[44] Moreover, the court determined that, unlike *United States v. Chanthadara*,[45] "the district court . . . properly instructed the jury as to the pecuniary gain statutory aggravating factor."[46] The Fourth Circuit concluded that the jury was properly

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36. *Barnette*, 390 F.3d at 789.

37. *Id.*

38. *Id.* at 804; *see* 18 U.S.C. § 3592(c)(8) (2000) (defining the aggravating factor of "pecuniary gain" as "[t]he defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value").

39. *Barnette*, 390 F.3d at 804.

40. *Id.*

41. *Id.*; *see* United States v. Bernard, 299 F.3d 467, 483–84 (5th Cir. 2002) (finding that § 3592(c)(8) did not apply to the instant carjacking because the motivation for the murders of the passenger and driver were to prevent the victims from contacting the police, rather than for pecuniary gain); United States v. Chanthadara, 230 F.3d 1237, 1263 (10th Cir. 2000) (stating that courts must instruct jurors that the murder must have been committed for pecuniary gain, rather than merely occurring before the robbery).

42. 299 F.3d 467 (5th Cir. 2002).

43. *Barnette*, 390 F.3d at 807; *see Bernard*, 299 F.3d at 483–84 (finding that "no pecuniary gain was expected to flow directly from the homicide").

44. *Barnette*, 390 F.3d at 808.

45. 230 F.3d 1237 (10th Cir. 2000).

46. *Barnette*, 390 F.3d at 807; *see Chanthadara*, 230 F.3d at 1264 (explaining that the instruction on the aggravating factor must be clear enough to inform the jury that the murder must be

instructed and that the evidence supported the jury's § 3592(c)(8) finding that the defendant murdered Allen in the expectation of the receipt of something of pecuniary value.[47]

D. Imposition of the Death Sentence Under the Influence of Passion, Prejudice, or an Arbitrary Factor

Barnette contended that the Government's introduction of prior criminal convictions and unadjudicated allegations to prove the aggravating factor of future dangerousness improperly influenced the jury's decision to sentence him to death.[48] The Government introduced unadjudicated charges of rape, attempted kidnapping, and assault; testimony of a white woman accusing the defendant of unadjudicated sexual harassment; and convictions for cruelty to children, assault, felonious restraint, and breaking and entering.[49] Although the jury found that the Government did not prove future dangerousness beyond a reasonable doubt, the defendant claimed that the district court did not instruct the jury on how to receive and weigh such potentially prejudicial evidence.[50] Because statutory law requires the exclusion of evidence " 'if its probative value is outweighed by the danger of creating unfair prejudice,' " Barnette argued that the evidence introduced by the Government should not have been admitted at the sentencing hearing.[51]

The Fourth Circuit rejected Barnette's arguments.[52] Although the court first noted that the evidence was not powerful enough for the jury to find the defendant's future dangerousness beyond a reasonable doubt, the Fourth Circuit mentioned neither the racially charged sexual harassment testimony nor its potentially prejudicial impact on the jury.[53] The court next stated that the district court instructed the jury to treat separately each capital count and the evidence in support of the individual counts, and the Supreme Court has determined that " '[a] jury is presumed to follow its instructions.' "[54] Lastly, the Fourth Circuit focused on the fact that the aggravating factor of future dangerousness was not "held to be invalid;" rather, the jury found that it was not supported by the evidence.[55] The court reasoned that finding in favor of Barnette "would require

committed for pecuniary gain and not merely preceding the robbery).

47. *Barnette*, 390 F.3d at 807–08.

48. *Id.* at 809–10.

49. Brief for Appellant at 51–52, United States v. Barnette, 390 F.3d 775 (4th Cir. 2004) (No. 02-20) (on file with author).

50. *Id.* at 16.

51. *Id.* at 51–52 (quoting 18 U.S.C. § 3593(c) (2000)).

52. *Barnette*, 390 F.3d at 810.

53. *Id.*

54. *Id.* (quoting Weeks v. Angelone, 528 U.S. 225, 234 (2000)).

55. *Id.*

separate sentencing hearings and jury verdicts for each non-statutory aggravating factor that the government seeks to prove."[56] Instead, the FDPA calls for "only a single sentencing hearing at which the jury will consider evidence that is 'relevant to an aggravating factor for which notice has been provided.' "[57] Because the court determined that the government complied with § 3593(c), the Fourth Circuit found no error.[58]

IV. Application in Virginia

A. Requirements of the Indictment

Barnette creates another obstacle to overcome on appeal to the Fourth Circuit on the grounds that an indictment is deficient for failure to allege a statutory aggravating factor. In 2003 the Fourth Circuit held in *United States v. Higgs*[59] that only one statutory aggravator need be alleged in the indictment to comply with *Ring* and the Fifth Amendment Indictment Clause.[60] Moreover, the court in *Higgs* also determined that even if the indictment was deficient for failure to allege the statutory aggravator, the appellant will not be entitled to relief if the reviewing court concludes that the error was harmless.[61] *Barnette* now illustrates the fact that an indictment that does not specifically provide the statutory aggravating factor may still be found adequate if the reviewing court can tease the statutory aggravator out of the facts given in the indictment's allegations.[62] The Fourth Circuit's approach to the requirements of the indictment in *Barnette* demonstrates its willingness to infer a required statutory aggravating factor in a construction of an indictment's allegations.

Barnette further illustrates that even in the event that the statutory aggravators were inadequately alleged in the indictment, the Fourth Circuit will not hesitate to find the deficiency to be harmless error.[63] The court in *Barnette* determined that because the government provided the defendant with notice both of its intention to seek the death penalty and also of the statutory aggravating factors upon which it would rely at the sentencing hearing, any deficiency in the indictment constituted merely harmless error.[64] This same reasoning was

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56. *Id. But see* United States v. Stitt, 250 F.3d 878, 898 (4th Cir. 2001) (permitting the prosecution to submit for the jury's individual consideration forty-six non-statutory aggravating factors).

57. *Barnette*, 390 F.3d at 810 (quoting 18 U.S.C. § 3593(c) (2000)).

58. *Id.*

59. 353 F.3d 281 (4th Cir. 2003).

60. *Higgs*, 353 F.3d at 299–300.

61. *Id.* at 304.

62. *Barnette*, 390 F.3d at 785–86.

63. *Id.* at 786.

64. *Id.*

used by the Fourth Circuit in finding harmless error in *Higgs*, but such harmless-error analysis fails to take into account the screening function of the grand jury.[65] The recent decision in *Sattazahn v. Pennsylvania*,[66] however, suggests that the United States Supreme Court may not share the Fourth Circuit's understanding that a federal defendant is put on adequate notice to defend the charges.[67] Specifically, Justice Scalia noted that *Ring* aggravating factors are elements that essentially make "the underlying offense of 'murder' . . . a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.' "[68] The language of the *Sattazahn* opinion implies that murder carrying a life sentence is a distinct and separate crime from murder carrying a death sentence. Therefore, "by failing to allege the statutory aggravators in the indictment, the Government essentially charges the defendant with a lesser crime from the one for which the defendant will ultimately be prosecuted."[69] Although the Fourth Circuit has consistently determined the failure to allege the statutory aggravating factors in the indictment to be harmless error, *Sattazahn* suggests that challenging a defective indictment under harmless-error review may not always prove fruitless.

B. Pecuniary Gain Statutory Aggravating Factor

In response to Barnette's assertion that the pecuniary gain statutory aggravator does not apply to robberies, the Fourth Circuit distinguished the instant case from two rulings that supported the defendant's claim.[70] Contrary to Barnette's contention, the commission of a robbery, or carjacking, does not automatically remove the application of the pecuniary gain statutory aggravating factor. Rather, as the language of § 3592(c)(8) states, the aggravator only applies when "[t]he defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value."[71] If the perpetrator committed the murder for a purpose other than pecuniary gain or if the perpetrator completed the robbery and then committed the murder, § 3592(c)(8) is inapplicable.[72] Federal defense counsel faced with a pecuniary gain statutory

65. *Higgs*, 353 F.3d at 304–07; *see* K. Brent Tomer, *Ring Around the Grand Jury: Informing Grand Jurors of the Capital Consequences of Aggravating Facts*, 17 CAP. DEF. J. 61, 79–81 (2004) (discussing the benefits of a grand jury informed of the significance and effect of aggravating factors in a capital case).

66. 537 U.S. 101 (2003).

67. Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) (plurality opinion).

68. *Id.*

69. *Id.*

70. *Barnette*, 390 F.3d at 804–05.

71. 18 U.S.C. § 3592(c)(8) (2000).

72. *See Bernard*, 299 F.3d at 483–84 (finding that § 3592(c)(8) did not apply to the instant carjacking because the motivation for the murders of the passenger and driver was to prevent the victims from contacting the police rather than for pecuniary gain); *Chanthadara*, 230 F.3d at 1263

aggravating factor should examine the facts and present them in a light that will separate the robbery/carjacking as distinct from the murder. If the murder was committed during and to ensure the completion of the robbery/car-jacking, § 3592(c)(8) will be applicable as a statutory aggravator.

C. Imposition of the Death Sentence Under the Influence of Passion, Prejudice, or an Arbitrary Factor

Over the defense's objection, the court permitted the Government to introduce into evidence prior convictions and unadjudicated charges to prove future dangerousness.[73] The jury found that the Government failed to prove future dangerousness beyond a reasonable doubt.[74] However, the jurors' exposure to the highly prejudicial information may nevertheless have affected their decision to return a sentence of death.

Although the Fourth Circuit rejected the assertion that the Government's evidence in support of the future dangerousness aggravator should have been excluded as inflammatory, the court's opinion in *Barnette* omitted reference to the most prejudicial evidence offered by the Government. Barnette testified that he had been discharged from employment at a Camelot music store for making inappropriate comments to a female co-worker and light-heartedly slapping her on the buttocks.[75] Over the defense's objection, the court permitted the Government to present rebuttal testimony to counter Barnette's version of this incident.[76] The young white woman took the stand and testified in detail regarding alleged vulgar and sexual comments the defendant, a black man, directed toward her.[77] The district court overruled the defense's objection to the testimony as non-rebuttal and alternatively as prejudicial.[78]

Despite the Fourth Circuit's failure to recognize the racially inflammatory significance of a Southern white woman's testimony regarding a black man's sexual advances, capital defense counsel should always object to the introduction of such evidence. The FDPA provides that at capital sentencing proceedings, "information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice."[79] Although deference is given to the judgment of the trial judge when examining the admission of allegedly prejudicial evidence,

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(stating that courts must instruct jurors that the murder must have been committed for pecuniary gain rather than merely occurring before the robbery).

73. *Barnette*, 390 F.3d at 809–10.

74. *Id.* at 809.

75. Brief for Appellant at 51, *Barnette*, (No. 02-20).

76. *Id.*

77. *Id.* at 51–52.

78. *Id.* at 52.

79. 18 U.S.C. § 3593(c) (2000).

the prejudicial content of the testimony such as that provided by Barnette's former co-worker surely outweighed its probative value as rebuttal testimony.

V. Conclusion

In *Barnette*, the Fourth Circuit rejected each of the defendant's arguments, including the four discussed in this case note. The court concluded that a fair construction of the facts in the indictment is enough to find an indictment adequate despite its failure to allege the statutory aggravator.[80] Although the court's alternative reliance on harmless error further suggests that an appeal on the grounds of a deficient indictment will fall on deaf ears in the Fourth Circuit, the language of *Sattazahn* implies that such a claim may not be as readily dismissed by the Supreme Court.[81] *Barnette* also reaffirmed the constitutionality of the FDPA in light of *Ring*.[82] Third, the Fourth Circuit clarified that the pecuniary gain statutory aggravator is applicable in a robbery/carjacking case if the murder was committed in furtherance or to complete the robbery/carjacking.[83] Finally, *Barnette* appears to suggest a reluctance on the part of the Fourth Circuit to address squarely the ramifications of such racially charged evidence as a complaint of sexual harassment, despite the fact that a man's life potentially rested upon the district court's decision to admit such prejudicial evidence during the capital sentencing proceeding.

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80. *Barnette*, 390 F.3d at 786; *see Hagner*, 285 U.S. at 433 (holding that an indictment is not deficient if "the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment").

81. *Sattazahn*, 537 U.S. at 111.

82. *Barnette*, 390 F.3d at 790.

83. *Id.* at 806–08.