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COLEMAN v. THOMPSON F.2d _ (4th Cir. 1990)

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.

HOLDING

In this appeal, Coleman asserted that the District Court erred (1) by holding that his claims were procedurally barred, (2) by holding that his claims were meritless without first conducting an evidentiary hearing, and (3) by holding that the death penalty was constitutionally imposed.

Affirming the District Court's holding, the Fourth Circuit relying on *Wainwright v. Sykes*, 433 U.S. 72 (1977), stated "[a] state habeas petitioner who fails to meet the requirements of state procedural law, and who has his petition dismissed on that basis by the last state court to review it, loses federal review of the federal claims raised in the state petition in the absence of cause and prejudice or a fundamental miscarriage of justice." *Coleman v. Thompson*, Westlaw at 4 (1990). The Fourth Circuit also affirmed the district court's holding that it was unnecessary to conduct an evidentiary hearing on issues **NOT** raised on direct appeal from the decision of the state habeas court since, Coleman's notice of appeal of the denial of the writ was untimely. Further, the Fourth Circuit held that not only were Coleman's constitutional claims barred from review, but that his sentence was lawfully imposed. *Id.* at 12.

ANALYSIS

(1) PROCEDURAL BAR

The Supreme Court of Virginia and the Federal District Court based their holdings on Virginia Supreme Court Rule 5:9(a). *Id.* at 3. Rule 5:9(a) states in part:

> No appeal shall be allowed unless, within 30 days after entry of final judgment or other appealable order or decree, counsel for the appellant files with the clerk of the trial court a notice of appeal.

Coleman asserted three alternative grounds on which the Fourth Circuit could reverse the holding of the District Court that his claims were procedurally barred. *First* he asserted that Rule 5:9(a) is ambiguous, and that the Supreme Court of Virginia's dismissal of his appeal for the denial of the writ was "based on [a] novel reading" of the Rule. *Id.* at 2. In reviewing this claim, the Fourth Circuit stated that the state habeas court entered its denial on September 4, 1986. *Id.* at 4. Coleman filed his notice appeal on October 7, 1986 which, according to the time allotted by Virginia Code § 1-13.3, was one day late. *Id.*

The Fourth Circuit acknowledged that "Procedural default can be invoked by the state only when 'the state court's opinion contains a plain statement that [its] decision rests upon adequate and independent state grounds.'" *Id.* at 5 (quoting *Harris v. Reed*, 109 S. Ct. 1038, 1042 (1989). However, the Fourth Circuit analyzed the Supreme Court of Virginia's order and found that the court considered the proper factors, and that it was a sufficiently plain statement that the sole ground for the Commonwealth's motion to dismiss was Coleman's failure to comply with Rule 5:9. The Fourth Circuit also affirmed the district court's decision that Coleman's failure to adhere to Rule 5:9 was an adequate and independent state ground to apply the procedural bar. *Id.* at 4.

The Fourth Circuit also held that, contrary to Coleman's contention, Rule 5:9 is not ambiguous, and the court's reading of the rule was not unique. *Id.* at 6. Coleman claimed that the rule was vague in that it was unclear whether the date entered referred to the date of issuance, or the date upon which the order was recorded. The Fourth Circuit summarily dealt with this claim by noting that the date of issuance was noted immediately above the Judge's signature, and by stating that "[T]he final order...was entered on the date the judge signed the order and that the time for appeal started running from that date." *Id.* at 7 (citing *Peyton v. Ellyson*, 207 Va. 423, 430-431 (1966)).

Coleman's *second* asserted ground for reversal of the District Court was based on his reliance on *Fay v. Noia* that the rule of procedural default is **not** applicable when a petitioner's late filing did not represent a deliberate attempt to bypass the courts. *Id.* at 7 (citing *Fay v. Noia*, 372 U.S. 391 (1963)). The Fourth Circuit held that "[F]ederal consideration of the defaulted claims should be determined by the cause and prejudice standards of *Wainwright v. Sykes*." *Id.* (citing *Murray v. Carrier*, 477 U.S. 478, 485-492 (1986)). That is, was there cause for Coleman's non-compliance with 5:9 and if so, would a different outcome have been likely. The court observed that a deliberate bypass issue would have been presented only if Coleman had **not** attempted to appeal the denial of state habeas.

Coleman's *third* assertion was that his counsel's error in failing to file a timely notice of appeal from the state habeas court's denial of the writ constituted ineffective assistance of counsel. *Id.* at 8. The Fourth Circuit, citing *Murray v. Giarratano*, stated that a "state prisoner seeking a writ of habeas corpus does not have a constitutional right to counsel." *Id.* (citing *Murray v. Giarratano*, 109 S. Ct. 2765 (1989)); *see also*, 2 *Capital Defense Digest* 8 (Nov. 1989). The Court then held that since Coleman had no constitutional right to counsel, he could not show cause that he had been denied effective assistance of counsel. *Id.* at 9. Further, the Court stated that since the evidence of Coleman's guilt was "beyond a reasonable doubt," he could not avoid the procedural bar by claiming a fundamental miscarriage of justice. *Id.*

(2) DENIAL OF EVIDENTIARY HEARING

The second issue raised by Coleman was whether the District Court should have held an evidentiary hearing prior to dismissing his claims. Coleman asserted that one of the jurors was predisposed to find him guilty, and that the state court did not resolve factual disputes regarding his claim of ineffective assistance of counsel. *Id.* at 10. The Fourth Circuit noted that neither of these issues was raised on direct appeal from the state habeas court and consequently, were procedurally barred due to the untimely notice of appeal and are ineligible for further review in a federal court. *Id.* Further, the Court stated that since further review was barred, the District Court was not required to conduct an evidentiary hearing on those issues. *Id.*

Although the District Court decided that an evidentiary hearing was not required, it nevertheless reviewed Coleman's additional claims and found them to be without merit. *Id.* at 11. Further, the Fourth Circuit noted that Coleman did **not** raise these issues on direct appeal from the state habeas court. *Id.* at 11. Based on Coleman's failure to adhere to Rule 5:9, the court found the claims procedurally barred from review. *Id.*

(3) CONSTITUTIONAL CLAIM

Coleman's final issue on appeal was that the death penalty was not constitutionally imposed. *Id.* at 12. He asserted that not only did the record fail to support the finding that the jury unanimously found the existence of an aggravating factor, but also that the trial court did not provide the jury with a constitutionally adequate limiting construction for Virginia's vileness predicate of the capital sentencing statute, § 19.2-264.2. *Id.* The Fourth Circuit noted that Coleman failed to object to the jury instruction at trial and that he also failed to raise the issue on direct appeal from the state habeas court. Therefore the Fourth Circuit found that the District Court did not err, and that Coleman's claims were procedurally barred from federal review. *Id.*

The Fourth Circuit also addressed the constitutionality of Coleman's sentence. The Court stated that a jury trial is **not** constitutionally required for imposition of the death penalty, and that the determination of its appropriateness may be made by an appellate court. *Id.* at 13 (citing *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986)).

In *Cabana*, however, the issue was whether, on substantive Eighth Amendment grounds, defendant was a mere accomplice who did not kill, or intend death and was therefore in a constitutionally protected class of defendants as defined by *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982). The main issue in *Cabana* was at what point in the criminal process an *Enmund* finding must be made. *Cabana*, at 382. The United States Supreme Court determined that such a finding did not require a jury and that an appellate court could constitutionally determine whether the death penalty was permissible under *Enmund*. *Id.* at 385, 386.

The Fourth Circuit's reliance on *Cabana* is curious. The Fourth Circuit read *Cabana* as authority for an appellate court to determine in place of the jury the proper application of the vileness aggravating factor and then to impose the death penalty. *Coleman*, at 13. However, the United States Supreme Court has held that an appellate court *may not* simply review the circumstances of the crime and decide on its own that they are sufficient to make out this aggravating factor. *Maynard v. Cartwright*, 486 U.S. 356, 363, 108 S. Ct. 1853, 1857, 100 L. Ed. 2d 372, 377 (1988). Since *Maynard* dealt with the very issue raised by Coleman, it would appear to be the more appropriate authority.

As shown by this opinion, state and federal appellate courts require STRICT compliance with procedural rules. Virginia practitioners should note that, unlike *Coleman*, most appeals to the Supreme Court of Virginia involve several claims which the court may reject on the merits or find to be waived or defaulted. Habeas counsel should note that for a state to invoke the doctrine of procedural default, "'[T]he state court's opinion [MUST] contain a plain statement that its decision rests upon adequate and independent state grounds.'" *Coleman*, at 5 (quoting *Harris v. Reed*, 109 S. Ct. 1038, 1042 (1989) (quoting *Michigan v. Long*, 463 U.S. 1032, 1042 (1983)). Also, counsel should note that any discrepancies or ambiguities regarding this point should be resolved in favor of permitting federal jurisdiction and review. *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S. Ct. 3469, 3476, 77 L. Ed. 2d 1201, 1214 (1983).

SUMMARY BY:
Thomas J. Marlowe

SPENCER v. COMMONWEALTH
[SPENCER III]

____ Va. ____, 385 S.E.2d 850 (1989)
Supreme Court of Virginia

FACTS

This is Timothy Wilson Spencer's third capital murder trial and appeal. *Spencer I* and *Spencer II* have been discussed in 2 *Capital Defense Digest* 13, (Nov. 1989).

Spencer was convicted of capital murder, i.e., willful, deliberate, and premeditated murder during the commission of or subsequent to rape, of Dr. Susan Hellams. Dr. Hellams' wrists had been tied behind her back with electrical tape. Death occurred by "ligature strangulation." Other injuries such as a fractured nose and marks indicating that she had been kicked with the edge of a shoe were found. *Spencer III*, 385 S.E.2d at 852. Spermatozoa were discovered on swabs taken from the victim's vagina, rectum, and perianal region, as well as from fluid found on the victim's skirt and slip. *Id.* Serological examination revealed that the seminal fluid was consistent with a type O secretor. Both Hellams and her husband were found to be non-secretors. *Id.* A sample of Spencer's blood revealed that he was a "type O secretor, PGM type 1, PGM subtype 1+, and peptidase A type 1." *Id.* However, 13% of the population have this particular combination of blood types. *Id.* As in *Spencer I* and *Spencer II*, DNA molecules from Spencer's blood sample were compared with DNA molecules from the seminal fluid, and were found to match. *Id.* at 853. No two individuals except for identical twins have the same DNA patterns. *Id.* at n.1.

HOLDING

At trial, Spencer challenged the constitutionality of the death penalty. The Virginia Supreme Court rejected this claim. *Id.* at 853. Spencer also contended that the death penalty statute was "vague" and does not specify which party carries the burden of proof of mitigation. The Virginia Supreme Court rejected this claim as not having been raised at trial. *Id.* at 854, n.3. Spencer also challenged the exclusion of venireperson Maureen Owens. The Virginia Supreme Court found no error in the exclusion of Owens. *Id.* at 854-5. The most significant holdings were those turning aside Spencer's challenges to the critical DNA evidence.

ANALYSIS

In this case, the "conventional" serological evidence showed only that the rapist-murderer was a "type-O secretor." Blood tests performed upon Spencer showed him to belong to this type. Since 13% of the population are type-O secretors, this evidence was insufficient to prove that Spencer had committed the rape. *Id.* at 852. In the absence of other forensic evidence, the DNA matching was necessary to show that Spencer had perpetrated the crime. The probability of error in the DNA matching process used to compare the DNA from Spencer's blood sample to the DNA in the seminal fluids recovered from the victim is alleged to have been one in 705,000,000. *Id.* at 853, n.2. Expert witnesses testified as to the accuracy and reliability of the test. "Dr. Roberts testified unequivocally that there was no disagreement in the scientific community about the reliability of DNA print testing." *Id.* at 854. DNA print testing was first at issue in Virginia as a forensic technique in *Spencer I* and *II*, where the Virginia Supreme Court held that "DNA testing is a reliable scientific technique." *Id.* at 855.

The Supreme Court of Virginia rejected Spencer's assignment of error complaining of the trial court's limitations on the cross-examination of Dr. Roberts. The Court noted that Spencer made no proffer of his questions or the answers the witness would have given. *Id.*

Significantly, the Court also noted that Spencer did not dispute that the DNA testing was properly conducted. As noted above, conventional analysis of the seminal fluid and Spencer's blood samples did no more than allow him to be considered as a suspect; it was the DNA matching that provided virtually conclusive evidence of his guilt. The defense presented no evidence in the guilt phase of the trial. *Id.* at 853. In other words, defense counsel made no significant challenge to the DNA matching test procedure in general