Capital Defense Journal

Volume 11 | Issue 1 Article 17

Fall 9-1-1998

King v. Greene No. 97-28, 1998 WL 183909 (4th Cir. 1998)

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Recommended Citation

King v. Greene No. 97-28, 1998 WL 183909 (4th Cir. 1998), 11 Cap. DEF J. 117 (1998).
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King v. Greene
No. 97-28, 1998 WL 183909 (4th Cir. 1998)[1]

I. Facts

On October 1, 1990, Danny Lee King was released on parole from imprisonment for a prior offense.[2] A week later, he and Becky Hodges King, with whom he had entered into a bigamous marriage in January of 1989, stole a van from a used car lot in Chesterfield County.[3] They drove the van to the home of King's mother in Christiansburg, where Becky had been staying during King's imprisonment.[4] On October 11, King and Becky drove the van to Kings Chase, a residential area of Roanoke.[5] As they drove around, Becky wrote down the names and telephone numbers of three real estate agents whose signs were displayed on vacant houses.[6] Carolyn Horton Rogers was one of the agents whose name and telephone number Becky wrote down.[7]

Upon King's direction, Becky telephoned Ms. Rogers' office from a nearby shopping center and told the person who answered that "[she and her husband] wanted to see a house in Kings Chase."[8] When informed Ms. Rogers was not in, Becky tried Ms. Rogers at home.[9] Ms. Rogers left her home about 10:00 a.m. to keep the appointment.[10] King and Becky met Ms. Rogers at the vacant house in Kings Chase and introduced themselves as "Danny and Becky Keaton."[11] Ms. Rogers showed them through the house, and the three eventually reached the basement.[12] There, Becky asked King for a cigarette.[13] He said he did not have

1. This is an unpublished opinion which is referenced in the "Table of Decisions Without Reported Opinions" at 141 F.3d 1158 (4th Cir. 1998).

2. King v. Greene, No. 97-28 1998, WL 183909, at *2 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 4 (1998) (quoting King v. Commonwealth, 243 Va. 353, 416 S.E.2d 669, 670-671 (1992)).

3. *King*, 1998 WL 183909, at *2 (quoting King v. Commonwealth, 416 S.E.2d 669, 670-71 (1992)).

4. *Id.* (quoting *King*, 416 S.E.2d at 670-71).

5. *Id.* (quoting *King*, 416 S.E.2d at 670-71).

6. *Id.* (quoting *King*, 416 S.E.2d at 670-71).

7. *King*, 1998 WL 183909, at *2 (quoting King v. Commonwealth, 416 S.E.2d 669, 670-71 (1992)).

8. *Id.* (quoting *King*, 416 S.E.2d at 670-71).

9. *Id.* (quoting *King*, 416 S.E.2d at 670-71).

10. *Id.* (quoting *King*, 416 S.E.2d at 670-71).

11. *King*, 1998 WL 183909, at *2 (quoting King v. Commonwealth, 416 S.E.2d 669, 674-75 (1992)).

12. *Id.* (quoting *King*, 416 S.E.2d at 674-75).

13. *Id.* (quoting *King*, 416 S.E.2d at 674-75).

any and suggested she get one from their van.[14] Becky left and was gone "a few minutes."[15]

What happened after Becky left was disclosed by the testimony of Vincent Austin Lilley, an attorney appointed to represent Becky on her capital murder charge.[16] King apparently asked Ms. Rogers "some question . . . and at that point he took his fist and hit her [on] the left side of her face."[17] He continued striking her and then choked her and threw her against the basement wall.[18] When she started falling to the floor, he grabbed her by the throat, "squeezed very, very hard," and threw her to the floor.[19] Ms. Rogers was "semiconscious [and] moaning" and he grabbed her at the waist.[20] He then removed a knife from his boot and thrust it "in an upward fashion . . . into her chest and that was how he killed her."[21] King then directed Becky to drive Ms. Rogers' car to a nearby shopping mall and said he would be right behind her.[22] When King reached the mall, he "wiped down" Ms. Rogers' car to remove any fingerprints.[23] After leaving the mall in the van, King and Becky cashed checks forged on Ms. Rogers' account and pawned a ring stolen from her.[24] When Ms. Rogers did not return home or appear at her office, her son and two of her co-workers began looking for her.[25] After 5:00 p.m., one of the co-workers entered the vacant house Ms. Rogers had agreed to show and found her body in the basement furnace room.[26] Ms. Rogers' car was later found at the mall.[27]

Four days later, King and Becky were arrested in the stolen van in New Philadelphia, Ohio.[28] At the time of his arrest, King, of his own volition, told Ohio police officers: "[Becky] doesn't know anything about this. I'm the one you want."[29] This was to be the first of many instances of King's verbosity, and it

14. *Id.* (quoting *King*, 416 S.E.2d at 674-75).

15. *King*, 1998 WL 183909, at *2 (quoting King v. Commonwealth, 416 S.E.2d 669, 674-75 (1992)).

16. *Id.* (quoting *King*, 416 S.E.2d at 674-75).

17. *Id.* at *3 (quoting *King*, 416 S.E.2d at 674-75).

18. *Id.* (quoting *King*, 416 S.E.2d at 674-75).

19. *King*, 1998 WL 183909, at *3 (quoting King v. Commonwealth, 416 S.E.2d 669, 674-75 (1992)).

20. *Id.* (quoting *King*, 416 S.E.2d at 674-75).

21. *Id.* (quoting *King*, 416 S.E.2d at 674-75).

22. *Id.* (quoting *King*, 416 S.E.2d at 674-75).

23. *King*, 1998 WL 183909, at *3. (quoting King v. Commonwealth, 416 S.E.2d 669, 670-71 (1992)).

24. *Id.* (quoting *King*, 416 S.E.2d at 670-71).

25. *Id.* (quoting *King*, 416 S.E.2d at 670-71).

26. *Id.* (quoting *King*, 416 S.E.2d at 670-71).

27. *King*, 1998 WL 183909, at *2 (quoting King v. Commonwealth, 416 S.E.2d 669, 670-71 (1992)).

28. *Id.* (quoting *King*, 416 S.E.2d at 671).

29. *Id.* (quoting *King*, 416 S.E.2d at 671).

would lead to his execution. On November 2, 1990 King spoke with Vincent Austin Lilley, Becky's attorney, on the telephone.[30] After Lilley clearly told King that he did not represent him, King nevertheless went on to explain "[t]his thing with Becky is, insane . . . because [she] did not do what she's charged with."[31] When Lilley pointed out that Becky had cashed Ms. Rogers' checks and that the police had Becky "on file doing that," King said "she cashed checks because if she wouldn't have, [King] would have broken her damn neck, or she believed that."[32] King asked Lilley to visit him, saying that what he wanted to talk with Lilley about "[was] the fact that [King was] the one that should be charged with it."[33] Lilley agreed, and on November 6 went to the correctional center for that purpose.[34] There, after signing a waiver in which he stated he understood that Lilley represented Becky's interests and not King's, King told Lilley that he was a member of "a Hell's Angels . . . motorcycle gang" and that Ms. Rogers' killing was a contract killing which had been set up before he was released from the penitentiary.[35]

The plan was to have Becky call Ms. Rogers to arrange the meeting at the vacant house, but Becky was not to play any other role in the murder.[36] When Lilley asked King how he knew Becky "didn't kill Ms. Rogers,"[37] King "took a little piece of paper . . . and he wrote . . . in capital letters I D-I- D . . . and . . . he said, I did."[38] In a later meeting with Becky's attorneys King "just burst out, let's cut the b___ s ___, I stabbed Carolyn Rogers to death. Becky had nothing to do with it. Now, what do you want to know?"[39]

On June 14, 1991, a jury convicted King of capital murder, robbery, and two counts of forgery and uttering.[40] The jury recommended a term of life imprisonment plus 40 years for the noncapital offenses.[41] During the penalty phase of the capital proceeding, the jury found both future dangerousness and vileness statutory aggravating factors and recommended a sentence of death. The trial court adopted the jury's recommendation and imposed the death penalty for the murder conviction.[42] The Supreme Court of Virginia affirmed the convictions

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30. *Id.* (quoting *King*, 416 S.E.2d at 674).

31. *King*, 1998 WL 183909, at *2 (quoting King v. Commonwealth, 416 S.E.2d 669, 674 (1992)).

32. *Id.* (quoting *King*, 416 S.E.2d at 675).

33. *Id.* (quoting *King*, 416 S.E.2d at 675).

34. *Id.* (quoting *King*, 416 S.E.2d at 675).

35. *King*, 1998 WL 183909, at *2 (quoting King v. Commonwealth, 416 S.E.2d 669, 674-75 (1992)).

36. *Id.* at *3 (quoting *King*, 416 S.E.2d at 674-75).

37. *Id.* (quoting *King*, 416 S.E.2d at 675).

38. *Id.* (quoting *King*, 416 S.E.2d at 675).

39. *King*, 1998 WL 183909, at *3.

40. *Id.* at *1.

41. *Id.*

42. *Id.* (citing VA. CODE § 19.2-264.4(c)).

and the death sentence.[43] King filed an amended petition for state post-conviction relief with the Circuit Court for Roanoke County which was transferred to the Supreme Court of Virginia[44] and dismissed.[45]

Five days before King's scheduled execution date, the United States District Court for the Eastern District of Virginia stayed the execution pending King's application for federal habeas relief.[46] King's case was transferred to the Western District of Virginia and his application for a writ of habeas corpus was denied.[47] King then appealed to the United States Court of Appeals for the Fourth Circuit.[48]

II. Holding

The Fourth Circuit rejected King's claims and affirmed the district court's denial of relief.[49]

III. Analysis/Application in Virginia

A. Admissibility of King's Numerous Statements[50]

The court's rulings on confessions are seldom discussed at length in the *Journal* because the admissibility of a confession often turns on the facts peculiar to a given case. New general principles of law are not often announced. The same is true in *King*. A more complete discussion is included here for another reason. This case illustrates the importance of developing a relationship of confidence and trust between attorney and client, and the opportunity of achieving that with some clients. King's insistence on talking was undoubtedly a major factor in his conviction and sentence. Whether counsel could have persuaded him to shut up will never be known. Some general rules for developing a good relationship include: (1) visiting the client often, sometimes not even talking about the case; (2) keeping the client informed and involved in the preparation of the defense even if not all of his wishes will be followed; and (3) doing personal services for the incarcerated client, such as carrying messages to family members. It may well have been impossible to convince King that he should leave management of his defense to a professional instead of trying to run the show himself. Hopefully

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43. *King*, 1998 WL 183909 at *1 (citing King v. Commonwealth, 416 S.E.2d 669 (1992).

44. The case was transferred pursuant to state law. *See* VA.CODE § 8.01-654(c)(1).

45. *King*, 1998 WL 183909, at *1.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at *1.

50. King first claimed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub.L. No. 104-132, 110 Stat. 1214, was unconstitutional. King argued that the district court erred in applying it to his case, that the AEDPA was unconstitutional as applied, and that the district court misinterpreted it. The Fourth Circuit declined to review the decision because it found that King had failed to raise any arguments that would provide a basis for habeas relief even under pre-AEDPA standards. *King*, 1998 WL 183909, at *3-4. (citing Satcher v. Pruett, 126 F.3d 561, 567 n. 2 (4th Cir. 1997), *cert denied*, 118 S.Ct 595 (1997)).

other clients can be persuaded of the folly of King's course of action. They can only be persuaded, however, by counsel for whom they feel trust and confidence.

1. October Statements

King made his first statement to Detective James Lavinder on October 16, 1990.[51] Lavinder spoke with King, who was detained at the Carroll County jail, after he had traveled to Ohio with a warrant charging Becky with capital murder.[52] King was being held for violation of parole, and Lavinder advised King of his *Miranda v. Arizona*[53] rights before the two spoke.[54] King reiterated his denial of any involvement in Carolyn Rogers's death and their conversation ended when King told Lavinder, "I think I better not say anything else until I talk to an attorney."[55] King asserted that this constituted a request for counsel and that because the Commonwealth failed to honor this request, every subsequent statement he made to law enforcement officers was inadmissible.[56]

Two days after Lavinder and King's discussion, Detective Ken Kern spoke with King in the basement of the Carroll County jail.[57] After again advising King of his *Miranda* rights, Kern showed King items of clothing seized from the van.[58] Specifically, Kern singled out a shirt with a button missing; King stated that he "had never seen it before and it wasn't his."[59] King argued this statement should have been suppressed.[60] The Supreme Court of Virginia found both of these claims procedurally defaulted[61] and the Fourth Circuit affirmed on that ground.[62] In addition, the court of appeals found that these claims would have failed on the merits.[63]

2. November Statements

On November 1, 1990, Detectives Kern and Patrone went to the Powhatan Correctional Center to execute a court order to take King's fingerprints and hair and blood samples.[64] King was being held on parole violations (he had not yet been charged in connection with Rogers' murder).[65] After again being advised

51. *Id.* at *4.
52. *Id.*
53. 384 U.S. 436 (1966).
54. *King*, 1998 WL 183909, at *4.
55. *Id.*
56. *Id.*
57. *Id.* at 5.
58. *King*, 1998 WL 183909, at *5.
59. *Id.*
60. *Id.*
61. *Id.* (citing King v. Commonwealth, 416 S.E.2d at 671).
62. *King*, 1998 WL 183909, at *4 -5 (citing Coleman v. Thompson, 501 U.S. 722, 728 (1991)).
63. *Id.* at *5.
64. *Id.*
65. *Id.*

of his *Miranda* rights, King volunteered to make a statement if he was provided with an attorney, at a meeting with the police, a prosecutor, his attorney, Becky, and Becky's attorney.[66] The officers responded by telling King that because he was not charged with any crimes related to Rogers' murder they "could not" provide him an attorney; however, they also told him that he could retain an attorney on his own. King made several statements while the officers collected the samples.[67]

On November 9, the officers transported King to Roanoke County jail to take foot impressions and conduct a handwriting analysis.[68] Before doing so, Officer Patrone again informed King of his *Miranda* rights.[69] While the police took the samples, King told Kern, "[i]f you got questions, just ask me."[70] Kern asked King about the murder. King denied killing Rogers, but made several other incriminating statements.[71] King then reiterated his desire to make a statement before a prosecutor, Becky, Becky's lawyer, and counsel appointed for him.[72] The officers then contacted an Assistant Commonwealth Attorney, who met with King and told King that he was willing to listen.[73] King acknowledged that he might be "pulling the trigger" on himself by telling his story and then repeated his earlier account.[74]

King maintained that under *Edwards v. Arizona*[75] the statements he made on November 1 and 9 should not have been admitted at trial because he requested counsel on both occasions.[76] The Supreme Court of Virginia rejected these arguments.[77] In *Edwards*, the United States Supreme Court held that when an accused has invoked his *Miranda* right to have counsel present during custodial interrogation, all interrogation must cease until counsel is made available "unless the accused himself initiates further communications, exchanges, or conversations with the police."[78] In *Davis v. United States*[79] the court clarified that an Edwards right can only be invoked by an "unambiguous[ ] request for counsel."[80] The

66. *King*, 1998 WL 183909, at *5.

67. *Id.*

68. *Id.*

69. *Id.*

70. *King*, 1998 WL 183909, at *5.

71. Specifically, King: acknowledged being with Rogers and Becky in the house where the murder occurred; claimed that a man named "Dude" had Rogers on the floor when he left the house; and admitted he took Rogers' checks and jewelry. *Id.* at *6.

72. *Id.* at *6.

73. *Id.*

74. *King*, 1998 WL 183909, at *6.

75. 451 U.S. 477 (1981).

76. *King*, 1998 WL 183909, at *6 (citing Edwards v. Arizona 451 U.S. 477 (1981)).

77. *Id.* at *6 (citing King v. Commonwealth, 416 S.E.2d at 360-62).

78. *Id.* (citing *Edwards*, 451 U.S. at 484-85).

79. 512 U.S. 452 (1994).

80. Davis v. United States, 512 U.S. 452, 461 (1994).

Fourth Circuit rejected King's *Edwards* claim on the grounds that: (1) his requests were not "unambiguous requests for counsel"[81]; (2) the November conversations between King and the detectives were not interrogations for the purposes of *Miranda* or *Edwards*[82]; and (3) King waived his Fifth Amendment rights because he initiated the November 9 conversation by telling the police "[i]f you got questions, just ask me."[83]

King also argued that the officers misinformed him of his right to counsel on November 1 when they told him that they could not provide him with counsel before he was charged.[84] The court declined to provide relief on the grounds that: (1) his claim was procedurally barred because King never raised this claim at trial, on direct appeal, or in his state habeas petition[85]; and (2) that the information was accurate, if incomplete, given his waiver.[86]

Finally the court found that even if admission of King's October and November statements to the police constituted error, that error would be harmless.[87] First, the court noted that in his October and November 1 statements, King simply denied all involvement in the murder.[88] Second, the court pointed out that while King did link himself to the murder in his November 9 statements to the police, his statements to Becky's attorneys were still far more damaging to his case.

B. *Right to Conflict Free Counsel and to Proceed* Pro Se

King contended he was denied the right to conflict-free counsel and to proceed *pro se* in violation of the Sixth, Eighth, and Fourteenth Amendments. The court first noted that the claims were procedurally defaulted because King failed to raise either on direct appeal or in his state habeas petition. It then concluded that they also failed on the merits.[89]

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81. *King*, 1998 WL 183909, at *6 (citing Davis v.United States, 512 U.S. 452, 455 (1994)).

82. *Id.* (citing Rhode Island v. Innis, 446 U.S. 291 (1979)). The Court noted that in King's case, the detectives were executing court orders when they met with him, not attempting to elicit an incriminating response.

83. *Id.* (citing Solem v. Stumes, 465 U.S. 638, 640-41 (1984)). The court of appeals also noted that, in asking the police what was taking them so long "to drop warrants" on him on November 1, King may have initiated that conversation as well. *Id.*

84. *Id.* at *7.

85. *King*, 1998 WL 183909, at *7 (citing Gray v. Netherland, 518 U.S. 152 (1996))

86. *Id.*

87. *Id.* (citing Cooper v. Taylor, 103 F.3d 366, 370 (4th Cir.1996) (en banc)(holding that admission of a defendant's lengthy, detailed, and tape-recorded confession was harmless, even though that confession was recognized as determinative of the verdict by the trial judge and provided most of the basis of the prosecutor's closing argument because of additional evidence in the form of two short and poorly recollected prior confessions and certain circumstantial evidence)(quoting Brecht v. Abrahamson, 507 U.S. 619, 638, (1993))).

88. *Id.*

89. *King*, 1998 WL 183909, at *8. (citing *Gray*, 518 U.S. 160-61).

Under *Fields v. Murray*,[90] "[a] defendant who desires to invoke his right to self-representation, thereby waiving his right to counsel, must do so 'clearly and unequivocally.'"[91] The court found King failed to do so,[92] and that even if he had, he did not do so until the guilt phase of his trial and as such the decision of whether to permit him to discharge counsel and to proceed *pro se* was within the trial court's discretion.[93]

The court also rejected King's conflict with counsel claim. Because King conceded that counsel "had not presented the case in the manner that King wished, to the point of directing King to perjure himself on the stand," the Fourth Circuit concluded that King simply disagreed with his counsel's tactics.[94]

C. Ineffective Assistance of Counsel

King argued he was denied his constitutional right to effective assistance of counsel. Under the standard articulated by the United States Supreme Court in *Strickland v. Washington*[95] a petitioner must demonstrate that (a) the performance of his trial counsel failed to meet an objective standard of reasonableness;[96] and (b) this failure resulted in prejudice.[97]

1. Request for Counsel

King maintained that his trial counsel should have argued in his motion to suppress that he requested counsel on October 16, rather than exclusively asserting that King requested counsel on November 1.[98] The Fourth Circuit agreed with the district court's observation that his counsel's decision to focus on the November 1 request was objectively reasonable because the October statements did not damage his case.[99] In addition, the court found that even if counsel had erred, King could not demonstrate prejudice because (a) he did not confess to any of the murders in those statements; and (b) given that King initiated the November 9 conversation with the officers, the statements from that date, which were much more incriminating, would have been admissible

90. 49 F.3d 1024 (4th Cir. 1994) (en banc).

91. Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1994)(en banc) (quoting United States v. Reddeck, 22 F.3d 1504, 1510 (10th Cir.1994)).

92. *King*, 1998 WL 183909, at *9.

93. *Id.* (citing Bassette v. Thompson, 915 F.2d 932, 939-42 (4th Cir.1990) (finding criminal defendant has no constitutional right to represent himself on appeal) & United States v. Gillis, 773 F.2d 549, 560 (4th Cir.1985)(same)).

94. *Id.* at *9-10.

95. 466 U.S. 668 (1984).

96. *Id.* at 687.

97. *Id.*

98. *King*, 1998 WL 183909, at *10.

99. *Id.* at *11.

even if King's attorney had successfully argued that he had requested counsel on October 16.[100]

King next contended that his counsel erred in failing to argue that King enjoyed an attorney-client relationship with Becky's counsel, Lilley, such that his communications to Lilley were privileged. The Fourth Circuit found that King was aware of the relationship and had waived any rights he might have had.[101] In addition, the court concluded that King had a perfectly plausible reason for contacting Lilley, other than a hypothetical mistaken belief that Lilley would represent his interests, in seeking to protect his wife.[102] As such, the court rejected this claim.[103]

2. *Presentation of Evidence*

King next argued that his counsel's representation was ineffective during the penalty phase of the trial because counsel failed to develop mitigating evidence concerning abuse King suffered during childhood and King's good behavior in prison.[104] The court noted that King's counsel did present evidence of King's abusive childhood and of his good behavior in prison. In addition, as to the abuse, it found that whether or not counsel should have presented more exten-

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100. *Id.* at *10.

101. *Id.* According to the Fourth Circuit, Becky's counsel informed King on several occasions that they represented Becky, not King. In their first conversation, Lilley stated "I'm not your lawyer." On November 6, 1990, King executed a waiver indicating King knew Lilley was acting solely for Becky: "I understand that Vincent A. Lilley represents Becky Hodges King and that he will protect her interests, and not mine." King signed the waiver after Lilley went over it word for word with him. The two men then engaged in a conversation which lasted approximately two and one-half hours during which King confessed to the murder.

The day after that conversation, King called Lilley again. Becky's other counsel, Jack Gregory, also took part in this telephone conversation. Gregory first explained that he and Lilley represented Becky's interests only, and King acknowledged this. During the course of that conversation, King asked Gregory and Lilley how he should deal with the media, and Lilley replied, "I don't represent you. I represent Becky . . . And you've got to get your own lawyer to give you advice because I'm not on the same side of this thing with you." Gregory supported this statement by remarking to King, "[W]e're on opposite side of the fence," and encouraged King to get his own counsel. Later in the conversation, King told Becky's attorneys:

> I'm very well aware of y'alls major purpose in this thing. I am very well aware of the fact in more ways than one we are on opposite sides of the fence because of the fact that uh, y'alls main concern, if anything, would be to hang me if that would protect Becky.

King also telephoned Lilley and Gregory on December 3, 1990. He told them that he understood that they were acting solely as Becky's counsel, and they then arranged to meet on December 6. An investigator accompanied Lilley and Gregory when they met with King at Buckingham Correctional Center. At the outset of the meeting, King signed another waiver acknowledging that Lilley and Gregory did not represent his interests. *Id.*

102. *King*, 1998 WL 183909 at *11.

103. *Id.*

104. *Id.* at *12.

sive evidence of the abuse King suffered as a child, not presenting such further evidence did not prejudice King.[105] The court also concluded that there was no reasonable probability that the outcome at sentencing would have been different had such evidence been introduced.[106]

King made several arguments that he was denied his due process rights and effective assistance of counsel because evidence suggesting Becky was in fact the murderer and King was not present at the scene was not introduced at trial.[107] King contended that there was exculpatory evidence that would have supported his theory that this was a "contract murder."[108] Specifically, King claimed that his counsel failed to obtain a "package of materials" that exonerated him by indicating that Becky killed Mrs. Rogers in an effort to settle a drug debt.[109] The court of appeals found that the record provided no support for this argument and that the evidence contradicted King's assertions that Becky specifically wanted to kill Mrs. Rogers.[110] Furthermore the court found that the claim was procedurally defaulted.[111]

King also maintained that his counsel "failed to develop and present serological and forensic evidence showing that King was not in the presence of the victim when she was killed."[112] Specifically, King focused on the boots that left footprints in blood at the scene of the crime and marks on Mrs. Roger's head.[113] The court of appeals found that counsel's decision not to pursue further inquiries or to challenge this evidence at trial was a reasonable tactical decision, and clearly not one that was deficient.[114]

3. *Constitutionality of Aggravating Factors*

King also maintained that the aggravating factors considered in this case --vileness and future dangerousness-- were unconstitutionally vague and that his counsel's failure to challenge the constitutionality of these factors constituted

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105. *Id.* (citing Penry v. Lynaugh, 492 U.S. 302, 324(1989)(noting that such evidence of abuse may "indicate[ ] that there is a probability that he will be dangerous in the future") & Barnes v. Thompson, 58 F.3d 971, 980 (4th Cir.1994) (history of abuse may indicate future dangerousness)).

106. *King*, 1998 WL 183909, at *13 (citing *Strickland*, 466 U.S. at 691)).

107. *Id.* at *15.

108. *Id.*

109. *Id.*

110. *King*, 1998 WL 183909, at *15. The Commonwealth presented evidence that several real estate agencies received telephone calls from Becky seeking to have an agent show her a house. In addition, the Commonwealth introduced a legal pad, found in King's van, which listed the names of contact information of three real estate agents in the area. *Id.*

111. *Id.* (citing Gray v. Netherland, 518 U.S. 152, 160-61 (1996)).

112. *Id.* King argued that his counsel only had this expert review the Commonwealth's photographs of the evidence, and these photographs had been altered and did not possess a scale. Thus, King maintained that his counsel did not have the expert examine the actual evidence. *Id.*

113. *Id.*

114. *King*, 1998 WL 183909, at*15.

ineffective assistance of counsel.[115] The court rejected this argument, citing precedent.[116] Based on this precedent, the court found that counsel was not deficient in failing to raise such a challenge.[117]

Defense counsel should not be discouraged from challenging the constitutionality of both the vileness and future dangerousness aggravating factors. In *Godfrey v. Georgia*[118] the United States Supreme Court declared Georgia's vileness factor unconstitutional. That factor is identical to Virginia's. The court held:

> that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death.[119]

Although the Fourth Circuit dismissed the claim, defense counsel should, for several reasons, continue to argue that both the vileness and future dangerousness factors are unconstitutionally vague. First, doing so preserves the issue in a defendant's case in the event the United States Supreme Court rules on it. Second, it provides opportunity for lower courts to decide the issue based on the high court's, as opposed to the Fourth Circuit's, interpretation of the Constitution.

D. *Simmons Issue*

King contended that the trial court violated his rights under the Eighth and Fourteenth Amendments when it denied him the opportunity to rebut the state's evidence as to his future dangerousness by presenting evidence that if he received a life sentence he would not be eligible for parole for thirty years.[120] In *Simmons v. South Carolina*[121] the United States Supreme Court held that when his future dangerousness is at issue a capital defendant has a due process right under the Fourteenth Amendment to provide evidence indicating his ineligibility for parole. The Fourth Circuit denied the *Simmons* claim on this ground.[122]

First, the court observed that *Simmons* was a case in which the defendant was ineligible for parole as a matter of law, and subsequent cases have limited

115. *Id.* at *14.

116. *Id.* (citing Bennett v. Angelone, 92 F.3d 1336, 1345 (4th Cir.1990) & Giarratano v. Procunier, 891 F.2d 483, 489 (2d Cir.1989)).

117. *Id.*

118. 446 U.S. 420 (1980).

119. Godfrey v. United States, 446 U.S. 420, 428 (1980) (citations ommitted).

120. *King*, 1998 WL 183909, at *14.

121. 512 U.S. 154 (1994).

122. *King*, 1998 WL 183909, at *14.

Simmons to that realm.[123] Because King did not maintain that he was ineligible for parole as a matter of law, *Simmons* was inapplicable to him.[124] Second, *Simmons'* ruling in 1994 announced a "new rule" of procedural constitutional law.[125] As the court explained in *Teague v. Lane*,[126] a "new rule" is not to be applied retroactively on *habeas*.

With regard to King's assertion of an Eighth Amendment[127] (rather than Fourteenth Amendment) right, the district court correctly pointed out that the Fourth Circuit recently held that to extend the *Simmons* rule to the Eighth Amendment would be to create a "new rule."[128] Although this position was ultimately rejected by the Fourth Circuit, it is a sound claim and should continue to be asserted. Also, should the United States Supreme Court decide the issue at any time before end of the direct appeal process in a future case, *Teague v. Lane*[129] would not, of course, be a bar.

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123. *Id.* (citing Ingram v. Zant, 26 F.3d 1047, 1054 n. 5 (11th Cir. 1994).

124. *Id.*

125. *Id.* (citing O'Dell v. Netherland, 521 U.S. 151 (1997)(holding that *Simmons* rule was a new rule that could not be used to disturb habeas petitioner's death sentence).

126. 489 U.S. 288, 300-01 (1989).

127. The argument that regardless of whether future dangerousness is an issue at sentencing, the Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed was presented in Justices Souter and Steven's concurring opinions in *Simmons*.

128. *King*, 1998 WL 183909, at *14 (citing O'Dell v. Netherland, 95 F.3d 1214, 1238 n. 13 (4th Cir.), *aff'd*, 521 U.S. 151 (1997)).

129. 489 U.S. 288 (1989).