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United States v. Barnette 211 F.3d 803 (4th Cir. 2000)

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I. Facts

Aquilia Marcivicci Barnette ("Barnette") began dating Robin Williams ("Williams") in 1994. The couple moved in together in March 1995 in Roanoke, Virginia. In April 1996, Williams broke off the relationship and Barnette continually attempted to reconcile. On April 30, 1996, Barnette came to Williams's apartment, smashed the windows of her car, and threw a fire bomb into the apartment. Williams suffered second and third degree burns on her hands and arms. Williams then moved in with her mother, Bertha Williams ("Bertha").[1]

Barnette traveled to Charlotte, North Carolina, and purchased a semi-automatic shotgun. On June 21, 1996, Barnette took the sawed-off shotgun and walked to a nearby intersection. He stopped the automobile of Donald Allen ("Allen"). Barnette ordered Allen out of the car and into a ditch, where he shot Allen three times in the back. Barnette left Allen's body in the ditch. Barnette took Allen's wallet and car and drove to the home of Bertha Williams in Roanoke. Upon arriving, Barnette cut the telephone wire and fired the shotgun into the door. He then chased Williams across the street. A neighbor tried to phone the police, but Barnette pointed the gun at her and she retreated into her home. As Williams ran toward her mother's house, Barnette shot her twice. She died within arms length of her mother. He then returned to the stolen car and drove back to North Carolina. On June 25, 1996, Barnette turned himself in to police in Charlotte, North Carolina. Barnette was charged and convicted in the United States District Court for the Western District of North Carolina on eleven counts stemming from these activities. He was sentenced to death under the Federal Death Penalty Act.[2]

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1. United States v. Barnette, 211 F.3d 803, 808-09 (4th Cir. 2000).

2. *Id.* at 809-10; *see* 18 U.S.C. §§ 3592-97 (1994). Barnette was charged with and convicted of the following eleven counts: (1) violating the Violence Against Women Act, 18 U.S.C. § 2261(a)(1), (b); (2) using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1); (3) committing arson during a felony in violation of 18 U.S.C. § 844(h); (4) providing false information during the acquisition of a firearm in violation of 18 U.S.C. § 922(a)(6); (5) making a firearm in violation of 26 U.S.C. §§ 5861(f), 5871; (6) being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(e); (7) committing a carjacking that results in death in violation of 18 U.S.C. § 2119(3); (8) using and carrying a firearm during a carjacking that results in death in violation of 18 U.S.C. § 924(c), (i); (9) transporting a stolen motor vehicle across state lines in violation of 18 U.S.C.

Barnette appealed his death sentence and convictions to the United States Court of Appeals for the Fourth Circuit. He alleged that the trial court made the following errors: (1) excluded a potential juror for cause because the juror expressed uncertainty as to his feelings on the death penalty;[3] (2) allowed the Government to use a peremptory challenge on a black juror in violation of *Batson v. Kentucky*;[4] (3) failed to dismiss numerous counts for improper venue;[5] (4) found that he was qualified as an "intimate partner" under the Violence Against Women Act ("VAWA");[6] (5) refused to give a deadlock instruction to the jury;[7] and (6) refused to allow a defense expert to testify in surrebuttal about new evidence raised by the Government's expert witness on rebuttal at sentencing.[8]

II. Holding

The Fourth Circuit upheld Barnette's conviction in all respects, but vacated the death sentence.[9] The court granted a new sentencing hearing

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§ 2312; (10) violating the Violence Against Women Act in violation of 18 U.S.C. § 2261(a)(1), (b); and (11) using and carrying a firearm during the commission of a violent crime that results in death in violation of 18 U.S.C. § 924(c)(1), (i). *Barnette*, 211 F.3d at 810 n.1.

3. *Id.* at 811-12.

4. *Id.*; *see* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that it is unconstitutional to strike a juror based on race).

5. *Barnette*, 211 F.3d at 813.

6. *Id.* at 814; *see* 18 U.S.C. § 2261(a) (2000) (mandating that "a person who travels across a state line . . . with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who . . . intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner, shall be punished"); *see also* 18 U.S.C. § 2266(a) (2000) (defining spouse or intimate partner as a "spouse, a former spouse . . . and any person who co-habits or has cohabited with the abused as a spouse; and any other person similarly situated to a spouse who is protected by the domestic or family violence laws").

7. *Barnette*, 211 F.3d at 817.

8. *Id.* at 821.

9. *Id.* at 826. Because several of Barnette's claims were summarily dismissed by the court they will not be discussed in detail in this note. First, Barnette contended that the testimony relying on the Psychopathy Checklist Revised was inadmissible because it was not evaluated for reliability as required by *Daubert v. Merrell Dow Pharmaceuticals, Inc. Id.* at 815; *see* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592 (1993) (requiring trial judge to ensure that the evidence sought to be admitted is based on scientific knowledge, or is reliable, and to ensure that the evidence will assist the trier of fact or is relevant). The Government claimed that *Daubert* did not apply to the sentencing phase of the trial because that decision was based on the Federal Rules of Evidence which do not apply at the sentencing phase. *Barnette*, 211 F.3d at 815. Because the court determined that the evidence satisfied the *Daubert* standard for admissibility, it did not reach the question of whether *Daubert* applies to the sentencing phase. *Id.* at 815.

The Federal Death Penalty Act permits the use of victim impact evidence as a non-statutory aggravating factor. *Id.* at 817; *see* 18 U.S.C. § 3593(a)(2) (2000). Barnette claimed that the Government's use of victim impact evidence as an aggravator in this case was

unconstitutionally vague and that its presentation violated due process. *Barnette*, 211 F.3d at 817. The court found, after reviewing the record for bias and caprice, that the victim impact aggravating factor in this case had a common sense meaning because the jury was capable of understanding solely from the language of the factor that it was to consider the impact of the deaths on the families. *Id.* at 818. Thus, the court determined that the factor was not unconstitutionally vague. *Id.* Also, because Barnette was allowed to present 23 witnesses in his own mitigation, the victim impact statements did not amount to a violation of due process since Barnette had ample opportunity to counter the statements. *Id.*

Barnette next argued that the trial court erred in submitting to the jury the statutory aggravating factor that he created a grave risk to others during the murder. *Id.* at 819. He alleged that this instruction was unconstitutionally vague and the evidence presented did not support that factor. *Id.* The court found that the jury instruction was not overly broad and provided a common sense core of understanding. *Id.* The court also determined that because Barnette aimed his shotgun at a neighbor and shot Williams within arms reach of her mother, he placed both women at a grave risk of death. *Id.* at 820.

Barnette also claimed that he was denied his statutory and constitutional right to allocution. *Id.* The court followed *United States v. Hall*, which held that a defendant does not have a constitutional right to make an unsworn statement of remorse not subject to cross-examination before a jury. *Id.*; *see* United States v. Hall, 152 F.3d 381, 426 (5th Cir. 1998). Barnette further contended that the death sentence in his case violated 18 U.S.C. § 3595(c)(2)(A) because it was imposed under the influence of passion, prejudice, or arbitrariness. *Barnette*, 211 F.3d at 820; *see* 18 U.S.C. § 3595(c)(2)(A) (2000) (requiring that, should the court of appeals find that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, the court shall remand the case for reconsideration or imposition of a sentence other than death). Barnette pointed out several incidents during the proceedings to support his claim, such as one witness's testimony that the defendant was a "cold hearted motherfucker," the Prosecutor calling a defense expert a liar in his closing, and the Government's presentation of testimony that Barnette raped and sexually harassed other women. *Barnette*, 211 F.3d at 821. The court dismissed this claim with a finding that a death penalty case "will not be emotionless" and that the jury did not impose the death penalty under improper influence. *Id.*

Barnette argued that venue was improper. *Id.* at 813. He claimed that the Western District of Virginia was appropriate for resolution of counts one and ten because the crimes of violence and bodily injury occurred in Roanoke, Virginia. *Id.* The court dismissed this claim because 18 U.S.C. § 3237(a) states that "any offense. . . begun in one district and completed in another . . . may be . . . prosecuted in any district in which such offense was begun, continued or completed." *Id.*; *see* 18 U.S.C. § 3237(a) (2000). Thus, venue in the North Carolina district court was appropriate. Counts two and three were also appropriately tried in North Carolina because violations of VAWA may be tried in any of the locations involved in the interstate travel. *Barnette*, 211 F.3d at 813; *see* 18 U.S.C. § 3237(a) (2000). Count eleven, the capital charge, was also appropriately tried in North Carolina. *Barnette*, 211 F.3d at 814. 18 U.S.C. § 3235 requires the Government to try capital offenses in the county where the defendant committed the offense. *Id.*; *see* 18 U.S.C. § 3235 (2000) (providing that "trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience"). However, the offense in the instant case is using or carrying a firearm during or in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1). *Barnette*, 211 F.3d at 814. The court found that proper venue for this offense is where the underlying crime of violence occurred. *Id.* Therefore, the court determined that venue was proper in North Carolina because the underlying crime of violence involved traveling across state lines from Charlotte, North Carolina, to Roanoke, Virginia. *Id.*

Finally, Barnette claimed that the district court improperly allowed the Government

based on the trial court's erroneous exclusion of surrebuttal testimony at the sentencing hearing.[10] The court ruled that because the Government's witness raised a new issue on rebuttal, the Defense must have an opportunity to surrebut those findings.[11]

III. Analysis/Application in Virginia

A. Jury Selection

Barnette argued that the district court should not have excluded a potential juror for cause under *Witherspoon v. Illinois*[12] because the juror's views on the death penalty did not prevent or impair his ability to participate in the sentencing phase.[13] The juror stated that "if given two choices, I would weigh heavily on not wanting to go the death penalty unless it was very, very, very, very well warranted."[14] The juror also indicated that he would try to follow the law to the best of his ability and would consider the death penalty.[15]

The Fourth Circuit deferred to the trial court's determination based on its decision in *United States v. Tipton*[16] and found that the juror's views on capital punishment "would prevent or substantially impair the performance of his duties as a juror."[17] The court's conclusion suggests that the standards produced under *Witherspoon* and *Wainwright v. Witt*[18] have made it difficult to prevent the exclusion of a juror for cause who admits an aversion to the death penalty.[19] Here, the excluded juror admitted that despite his views,

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to use a peremptory challenge to exclude a black juror in violation of *Batson v. Kentucky*. *Id.* at 812; *see* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that it is unconstitutional to strike a juror based on race). The court dismissed the claim due to the Government's production of a patently neutral reason for the strike. *Barnette*, 211 F.3d at 812.

10. *Barnette*, 211 F.3d at 826.

11. *Id.* at 824.

12. 391 U.S. 510 (1968).

13. *Barnette*, 211 F.3d at 811; *see* Witherspoon v. Illinois, 391 U.S. 510, 521-22 (1968) (holding that a death sentence would be invalid if the jury was chosen by excluding for cause those venire persons who voiced general, conscientious, or religious objections to the death penalty).

14. *Barnette*, 211 F.3d at 812.

15. *Id.*

16. 90 F.3d 861 (4th Cir. 1996).

17. *Barnette*, 211 F.3d at 811; *see* United States v. Tipton, 90 F.3d 861, 880 (4th Cir. 1996) (holding that a reviewing court will defer to the discretion of the trial judge when jurors' answers in voir dire are ambiguous and arguably contradictory because the inquiry turns largely on the trial court's assessments of the demeanor and credibility of the juror).

18. 469 U.S. 412 (1985).

19. *Barnette*, 211 F.3d at 812; *see* Wainwright v. Witt, 469 U.S. 412, 425-26 (1985) (clarifying *Witherspoon*, noting that the juror did not have to make it "unmistakably clear that [he] would automatically vote against the imposition of capital punishment" to justify the trial judge excluding him).

he could still follow the law.[20] Nevertheless, the court struck the juror for cause.[21] This case is illustrative of the importance of rehabilitating jurors. Had defense counsel effectively clarified the juror's opinion on the death penalty, and eliminated ambiguity in the record, he might have avoided the strike for cause.

B. Application of the Violence Against Women Act

Five of Barnette's criminal counts, including the capital charge, involved violations of the Violence Against Women Act.[22] Barnette argued that VAWA should not apply to him because the evidence was insufficient to show that he was an "intimate partner" of Williams, as required by the statute.[23] The Act defines "intimate partner" as a person who "has co-habited with the abused as a spouse."[24] While Barnette contended that he did not fit the definition, the trial court left it to the jury to decide after instructing them on the definition provided by the statute.[25]

The jury heard evidence that Williams began renting the apartment when she and Barnette moved in together.[26] Witness testimony evidenced that the couple were "happy and in love" and that Barnette often used Williams's car and took her to work.[27] There was also testimony regarding fights in which Williams asked Barnette to leave the apartment because he was too possessive.[28]

The Fourth Circuit is the first United States Court of Appeals to interpret the meaning of "as a spouse" under VAWA.[29] The court determined that the intimate details described an "intimate relationship" which, although not husband and wife, was similar to a spousal relationship.[30] The court stressed that the definition of intimate partner uses the words "as a spouse."[31] The use of "as" suggests a relationship similar to a spousal partnership.[32] Defense attorneys should note that the Fourth Circuit's interpretation of VAWA would permit a person who has co-habitated with another for as little as one year to be prosecuted as a "spouse" under the Act.

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20. *Barnette*, 211 F.3d at 812.
21. *Id.* at 811-12.
22. *See* 18 U.S.C. § 2261 (2000).
23. *Barnette*, 211 F.3d at 814.
24. *Id.*; *see* 18 U.S.C. § 2266 (2000).
25. *Barnette*, 211 F.3d at 814.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 815.
31. *Id.*
32. *Id.*

C. *Jury Instruction*

The district court instructed the jury that if it could not agree on either a sentence of death or of life without parole, the court would sentence Barnette "as provided by law up to life without the possibility of release."[33] Barnette requested that the court instruct the jurors that in the event of deadlock, the court would "sentence the defendant to life without possibility of release."[34] The refusal of the this deadlock instruction was discussed by the United States Supreme Court in *Jones v. United States*.[35]

The Fourth Circuit did not, however, base its decision solely on *Jones*. The court pointed out that the district court's instruction was in compliance with sections 3593 and 3594 of Title 18 of the United States Code.[36] The court also noted that *Jones*, which came down after the district court's decision, made it clear that no instruction about the court's sentencing authority in the event of disagreement is required.[37] Further, the court held that any error the district court might have made was harmless under the procedural rules and harmless beyond a reasonable doubt if considered under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.[38]

D. *Surrebuttal*

Barnette argued that the district court erred at sentencing when it refused to allow the defense expert, Dr. Cunningham ("Cunningham"), to testify in surrebuttal after the Government's expert, Dr. Duncan ("Duncan"), testified to his diagnosis of Barnette as a psychopath.[39] During the sentencing phase, Barnette presented the testimony of three psychiatric experts as mitigation evidence.[40] Cunningham, a psychologist and risk assessment expert, testified about the risk of Barnette committing further

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33. *Id.* at 817.

34. *Id.*

35. Jones v. United States, 527 U.S. 373, 381 (1999) (determining that the proposed instruction has no bearing on the jury's role in the sentencing process; rather, it speaks to what happens in the event that the jury is unable to fulfill its role – when deliberations break down and the jury is unable to produce a unanimous sentence recommendation).

36. *Barnette*, 211 F.3d at 817; *see* 18 U.S.C. §§ 3593-3594 (2000).

37. *Barnette*, 211 F.3d at 817; *see Jones*, 527 U.S. at 381.

38. *Barnette*, 211 F.3d at 817.

39. *Id.* at 821.

40. *Id.* at 821-22. Dr. Sultan used the Diagnostic and Statistical Manual, Fourth Edition, to diagnose Barnette with depression and borderline personality disorder. *Id.* Dr. Halleck also provided a detailed diagnosis from the Diagnostic and Statistical Manual, Fourth Edition, finding that Barnette suffered from substance abuse, depression, bipolar disorder, intermittent explosive disorder, and borderline personality disorder. *Id.*

violent acts in prison.[41] He testified that Barnette's risk for future violence in prison was very low.[42]

Prior to the Government's rebuttal, Barnette moved to bar Duncan's potential testimony about the Psychopathy Checklist Revised and to allow Cunningham to remain in the courtroom during the rebuttal in order to prepare for surrebuttal.[43] The district court denied both motions.[44] Duncan then testified that based on the Psychopathy Checklist Revised, Barnette was a psychopath and posed a future danger in prison.[45] Until the Government called Duncan, there was no diagnosis of Barnette as a psychopath.[46]

At the close of Duncan's testimony, Barnette moved to recall Cunningham to testify in surrebuttal to Duncan's psychopath testimony.[47] The Defense then proffered the testimony that Cunningham would provide on surrebuttal.[48] The district court denied the motion and found that Barnette had cross-examined Duncan on the validity of the Psychopathy Checklist Revised and that Cunningham had nothing additional to contribute.[49]

The Fourth Circuit examined the record and found that Duncan's rebuttal raised new issues.[50] Prior to Duncan's testimony, no diagnosis of Barnette as a psychopath had entered the proceeding.[51] Further, the court noted that cross-examination is not as effective as the testimony of an expert

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41. *Id.* at 822.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 822-23.

46. *Id.* at 822.

47. *Id.*

48. *Id.* Without this proffer the appellate court could not know what Cunningham's testimony would have been and therefore could not have determined whether it was error for the trial court to exclude Cunningham's surrebuttal. Objections must be timely, raised on direct appeal, rely on all possible grounds, and rely on the same set of facts in order to be properly preserved for appeal in subsequent state and federal proceedings. *See generally* Matthew K. Mahoney, *Bridging the Procedural Default Chasm*, 12 CAP. DEF. J. 305 (2000) (suggesting method by which defense counsel can "make record" and avoid procedural default).

Cunningham's surrebuttal would have included the following: (1) the invalidity of the Psychopathy Checklist Revised as applied to African-Americans; (2) the inappropriate nature of the use of the test on Barnette; (3) Cunningham's own application of the Psychopathy Checklist Revised to Barnette, including a different score on the test that would not qualify Barnette as a psychopath; (4) Cunningham's opinion that Barnette was not a psychopath; and (5) his knowledge of other studies addressing the validity of the Psychopathy Checklist Revised's application to the black population, other than the one the Defense had already introduced. *Barnette*, 211 F.3d at 823-24.

49. *Barnette*, 211 F.3d at 823.

50. *Id.* at 824.

51. *Id.* at 822.

witness.[52] The court also found that Cunningham would have testified that there was no finding on his part that Barnette was a psychopath.[53]

The court then reviewed the error to determine if it was harmless.[54] In its review, the court looked to cases addressing the importance of psychological testimony.[55] *Ake v. Oklahoma*[56] noted that having two views on a mental health issue ensures that the defendant receives a fair adjudication and that the jury does not erroneously impose a punishment.[57] The court declared that Barnette was deprived of the evidence of the opposing views of his own doctors.[58] The court held that the denial of surrebuttal evidence was not harmless error and required a new sentencing hearing.[59]

E. Conclusion

The court emphasized the importance of psychological evidence in this case. First, the Defense was allowed to present "anti-future dangerousness" evidence during mitigation. Next, the Government was allowed to rebut with future dangerousness evidence. Finally, the Defense was allowed to surrebut, or counter new future dangerousness evidence based on psychological testimony the Government raised on rebuttal. Defense counsel should take note of the chronology of the proceeding in this case.

Christina S. Pignatelli

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52. *Id.* at 824.
53. *Id.*
54. *Id.*
55. *Id.*
56. 470 U.S. 68 (1985).
57. Ake v. Oklahoma, 470 U.S. 68, 83-84 (1985) (holding that because psychiatric evidence was so important, a defendant has a Constitutional right to a court appointed mental health expert if his mental state will be a significant factor at trial); *see Barnette*, 211 F.3d at 824.
58. *Barnette*, 211 F.3d at 824-25.
59. *Id.* at 825.

CASE NOTES:

Supreme Court of Virginia