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BARNABEI v. COMMONWEALTH 1996 WL 517733 (Va. 1996) Supreme Court of Virginia

E. Attorney General May Authorize Lethal Injections

At the time the jury imposed the death sentences, no federal statute provided authorization for the "specific means of executing such sentences."[83] Yet, the Attorney General of the United States had promulgated regulations that death sentences imposed under § 848(e) should be executed "by intravenous injection of a lethal substance or substances in a quantity sufficient to cause death."[84] The trial court stayed the execution on the grounds that the Attorney General's regulation was *ultra vires* because Congress possessed the exclusive power to prescribe the means by which federal death sentences should be carried out. The court rejected this argument, stating that Congress's power was not exclusive and that Congress had not preempted the issue, expressly or impliedly.[85] In addition, the court held that application of the regulation to the defendants did not violate the Ex Post Facto Clause because it was promulgated after the commission of the capital offenses at issue.[86]

Summary and Analysis by:
David T. McIndoe

83 *Id.* at 901-902.
84 *Id.* at 902 (citations omitted).
85 *Id.* at 902-903.
86 *Id.* at 903.

BARNABEI v. COMMONWEALTH

1996 WL 517733 (Va. 1996)
Supreme Court of Virginia

FACTS

Derek Rocco Barnabei was indicted for rape[1] and for capital murder in the commission of a rape.[2] At trial, the Commonwealth introduced items of circumstantial evidence and various forensic tests tending to show that on the night of the murder, (1) the victim was with the defendant in the defendant's room, (2) the defendant and the victim had sexual intercourse, and (3) the victim was killed in defendant's room before her body was found in the river.[3] The sole witness to offer any evidence from which the jury could infer that a rape occurred was the Commonwealth's medical examiner. Although Barnabei had moved pre-trial for the appointment of a forensic pathologist to assist the defense, the trial court denied Barnabei's motion.[4] The jury found the defendant guilty of both rape and capital murder.[5]

At the sentencing phase, Barnabei's ex-wife was one of two witnesses to testify for the Commonwealth about various threats and acts of violence that Barnabei had allegedly inflicted upon her. Barnabei objected to her testimony as to specific incidents, arguing that such testimony went beyond the scope of the notice given by the Commonwealth pursuant to Va. Code § 19.2-264.3:2.[6] The trial court overruled Barnabei's objection and his motion for a mistrial and admitted further testimony from his ex-wife.[7] At the close of the evidence, the jury sentenced Barnabei to death based upon both the "vileness" and "future dangerousness" predicates.[8]

Barnabei appealed his capital murder conviction and death sentence, challenging, among other things, the trial court's refusal to appoint a defense forensic expert and the admission of a portion of his ex-wife's testimony.[9]

HOLDING

The Supreme Court of Virginia rejected both of Barnabei's challenges. In upholding the trial court's refusal to appoint a defense forensic pathologist expert, the Supreme Court of Virginia held that Barnabei failed to make the necessary particularized showing that would have entitled him to such an expert. The court upheld the admission of the testimony of Barnabei's ex-wife, ruling that the notice given by the Commonwealth pursuant to § 19.2-264.3:2 was sufficient and that the trial court did not abuse its discretion in admitting the testimony.[10]

1 Va. Code Ann. § 18.2-61(A).
2 Va. Code Ann. § 18.2-31(5).
3 *Barnabei v. Commonwealth*, 1996 WL 517733, *1-*4 (Va. 1996).
4 *Id.* at *5.
5 *Id.* at *1.
6 § 19.2-264.3:2 provides that if the Commonwealth intends to introduce evidence of any unadjudicated acts allegedly attributable to the defendant, the Commonwealth must provide pre-trial notice to the defendant of such intention, including a description of the unadjudicated acts.
7 *Barnabei*, 1996 WL 517733 at *11.
8 *Id.* at *1.
9 *Id.* at *5.
10 The court rejected all of defendant's assignments of error. Some of the rulings provide little if any guidance because they apply broad, settled principles of law to facts that are specific to the case being reviewed. Issues that will not be addressed in this summary include:

(1) harmlessness of prosecution error in withholding exculpatory evidence; (2) removal of two jurors for cause by the Commonwealth; (3) denial of defendant's proposed jury instructions on mitigating factors and sentence alternatives; and (4) statutory review of imposition of death sentence.

The court also rejected Barnabei's claim that the trial court erred in refusing to instruct the jury that he would not be eligible for parole for at least 25 years. However, it is important to note that defense counsel preserved this type of claim pursuant to *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994). For treatment of the implications of *Simmons*, *see* Pohl and Turner, *If at First You Don't Succeed: The Real and Potential Impact of* Simmons v. South Carolina *in Virginia*, Capital Defense Digest, Vol. 7, No. 1, p. 28 (1994).

ANALYSIS/APPLICATION IN VIRGINIA

I. Default

On direct appeal, Barnabei assigned 53 errors, but failed to brief twenty-eight of these errors, and thus waived consideration of them.[11] In order to preserve every issue on appeal, it is necessary to object at trial, assign each issue as error, and brief each issue on appeal. Although the Rules of the Supreme Court of Virginia impose a 50 page limit on appellate briefs, defense counsel may move for relief from the 50 page limit in order to effectively brief every assignment of error.[12]

Barnabei also defaulted two issues because he failed to object at trial. On appeal, Barnabei argued that the jury instructions regarding "vileness" and "future dangerousness" were vague and incomplete, and that the verdict was not "meaningfully or rationally reviewable" because the verdict contained the terms "and/or."[13] However, Barnabei failed to object both when the instructions were given and when the verdict was returned by the jury or when the judgment was entered thereon. Thus, such issues were technically defaulted according to Rule 5:25.[14]

However, in rejecting Barnabei's contention that the jury instructions regarding the aggravating factors were unconstitutionally vague, the Supreme Court of Virginia stated: "We previously have rejected this contention. Adhering to our previous holdings, we again reject this contention."[15] By this language, the court, in effect, **ruled on the merits** of this issue. Fortunately, because the state court ruled on the merits of this claim, the issue is probably preserved for federal appeal.

Prior to his trial, Barnabei made a motion for a bill of particulars specifying evidence that the Commonwealth intended to use in support of the death penalty. This motion was denied. Barnabei objected to the denial, but failed to allege federal grounds for his objection. The Supreme Court of Virginia found that his claim on appeal of due process denial of notice and opportunity to defend against the Commonwealth's case for death was defaulted.[16] In ruling that Barnabei defaulted this issue, the Supreme Court of Virginia implicitly recognized the due process claim. The due process claim remains unresolved by federal courts. Consequently, it is important to object to the denial of a defendant's motion for a bill of particulars, and to couch such an objection in constitutional terms by stating that the refusal to order the bill of particulars will deny the defendant his constitutional due process right to notice and an opportunity to defend against those factors necessary to render him eligible for the death penalty.

Finally, the court held two of Barnabei's assignments of error to be defaulted without any explanation as to why or how the claims were defaulted. First, the court held defaulted Barnabei's claim that the trial court treated him unfairly and was biased in favor of the Commonwealth.[17] In so holding without any explanation, it is unclear what defense counsel must do to avoid default on such a claim. To be absolutely safe, defense counsel might consider moving to recuse the judge.

Second, the court held defaulted Barnabei's claim that the court had an *ex parte* communication with a witness for the Commonwealth.[18] Although such a claim appears to raise a disputed issue of fact, the court apparently resolved this issue without any fact-finding. It is unclear whether Barnabei made the *ex parte* communication claim part of the record by noting his objection at trial. Beyond objecting to rulings, it is of course advisable on a contested factual matter to insist upon an evidentiary hearing at which a record is made of exactly what is disputed and how the court resolves the dispute.

II. *Ake* Issues

A. Medical Examiner's Testimony as to "Force"

Prior to trial, Barnabei filed a motion *in limine* seeking to prohibit the medical examiner, who conducted the autopsy of the victim, from giving an opinion as to whether force was used to inflict any of the injuries to the vagina or anus of the victim. In support of his motion, Barnabei argued that such testimony would invade the province of the jury on the ultimate issue of whether a rape had occurred. At a hearing on the motion, the medical examiner stated that although the vaginal bruising could have been caused only by "forcible penetration of the vagina," there were other explanations for his findings, and that he used the term "force" only in a medical sense. In response to questions about a tear in the victim's anus, the medical examiner re-emphasized that he could only say "medically" that force had been used and that it was not for him to say "[w]hether a person would consent to force being used." The trial court denied the motion *in limine*.[19]

At trial, however, the medical examiner testified that the vaginal bruising was caused by a "**violent penetration** of that area."[20] Barnabei never objected to any of this testimony at trial. Consequently, his claim that the medical examiner's testimony differed from his pretrial testimony and that the medical examiner's testimony was beyond the scope of his expertise was held to be procedurally defaulted.[21]

In relying on its finding of procedural default, the Supreme Court of Virginia did **not** decide whether the trial court erred in the first place by denying Barnabei's motion *in limine* and allowing the medical examiner to testify with regard to "force." Such a determination was crucial to this case. Because Barnabei's capital murder conviction turned on whether a rape had occurred, the medical examiner's testimony about force went to an ultimate issue of fact. Without rape, Barnabei could not have been convicted of capital murder; thus, the jury needed to find rape as an element of the crime. Curiously, in the civil context, the Supreme Court of Virginia has held that an expert cannot testify about matters that invade the province of the jury as to an ultimate issue of fact.[22] There is no reason why such a principle should not also apply in the criminal context.

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[11] *Barnabei v. Commonwealth*, 1996 WL 517733 at *12, n. 1.

[12] Rule 5:26(a) provides, in relevant part: "**Except by permission of a justice of this Court,** neither the opening brief of appellant, nor the brief of appellee, nor a brief of amicus curiae shall exceed 50 typed or 36 printed pages.... Page limits under this Rule do not include appendices." (emphasis added)

[13] *Barnabei*, 1996 WL 517733 at *10.

[14] Rule 5:25 provides that "[e]rror will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice."

[15] *Barnabei*, 1996 WL 517733 at *11 (citations omitted).

[16] *Id.* at *6.

[17] *Id.* at *12, n. 9.

[18] *Id.*

[19] *Id.* at *4.

[20] *Id.* at *5 (emphasis added).

[21] *Id.*

[22] *See* Paul Fletcher, *Supreme Court continues limits on use of experts*, 11 Virginia Lawyer's Weekly 361, 390 (1996).

B. Denial of Forensic Expert to the Defense

In holding that Barnabei was not entitled to a forensic pathologist expert to assist in his defense and to rebut the medical examiner's testimony, the Supreme Court of Virginia stated that

> Barnabei failed to make the particularized showing that would have entitled him to the appointment of an expert forensic pathologist at the Commonwealth's expense. At most, Barnabei **hoped** or **suspected** that an expert might testify that the injuries to [the victim's] vagina and anal opening did not necessarily result from force. **A hope or suspicion that favorable evidence may be procured from an expert, however, is not sufficient to require appointment of an expert.**[23]

This requirement of a pre-appointment showing that favorable evidence will be procured contradicts the principles announced in *Ake v. Oklahoma*,[24] and is reinforced by the pre-*Ake* precedent of the United States Court of Appeals for the Fourth Circuit.

In *Ake*, the United States Supreme Court recognized the imbalance that exists between the resources available to a State and those of an indigent defendant and held accordingly that the Constitution requires the appointment and payment of a competent, independent psychiatrist to assist the defense.[25] The rationale of the Court's decision in *Ake* applies to all experts reasonably necessary for an effective defense. Thus, where the Commonwealth's case involves important expert testimony, the courts have required the provision of a defense expert in numerous specialties.[26]

However, as the Supreme Court of Virginia properly recognized, an indigent defendant's constitutional right to the appointment of an expert is not absolute. As the court held in *Husske v. Commonwealth*,[27] decided the same day as *Barnabei*, an indigent defendant seeking the appointment of an expert "must demonstrate that **the subject** which necessitates the assistance of the expert is likely to be a significant factor in his defense."[28] In order to satisfy this burden, the court held the defendant must demonstrate: (1) that the services of an expert would materially assist him in the preparation of his defense, and (2) that the denial of such services would result in a fundamentally unfair trial.[29]

Had the court properly applied its own test according to the principles of *Ake*, Barnabei would have been required to show only that the subject for which he requested the assistance of an expert—in this instance, the alleged rape—was likely to be a significant factor in his defense. He could have easily made this showing. In *Barnabei*, the autopsy findings were essential to the Commonwealth's case in establishing that a rape had occurred, as the medical examiner's testimony as to "force" was the only evidence presented by the Commonwealth from which the jury could infer that a rape had occurred.[30] That the medical examiner's testimony was crucial in establishing that a rape had occurred is borne out by the Supreme Court of Virginia's reliance on such testimony to conclude that the evidence was sufficient for the jury to find that a rape had occurred.[31] Thus, a defense expert was critical to the Barnabei's ability to challenge the Commonwealth's expert—both in the cross-examination of the medical examiner and in the presentation of independent testimony to rebut the Commonwealth's case.

Moreover, both *Ake* and Fourth Circuit precedent made it clear that the required showing did not include the catch-22 requirement of demonstrating **what** the expert would find before she is appointed. The Fourth Circuit Court of Appeals stated in *Williams v. Martin*,[32] "[a]n indigent prisoner who needs expert assistance because the subject matter is beyond the comprehension of laymen **should not be required to present proof of what an expert would say** when he is denied access to an expert."[33] Thus, the Supreme Court of Virginia ignored plain precedent. In arguing for the appointment for a defense expert, Barnabei was **not** required to show what the expert's opinion would have been, nor was he required to show that the expert's opinion would have been favorable to his case.

While *Ake* and its progeny do require a defendant to make a very particularized showing of need, such a showing relates to the centrality of the issue that will be contested at trial—**not** to what the expert would say. For example, defense counsel must allege in the *Ake* motion, and be prepared to support with evidence, the following: the type of expert desired; the type of assistance the expert will provide; the names, qualifications, and fees of suggested experts; the legal necessity of the expert's assistance; the legal entitlement to defense experts; and the inadequacy of available state experts.[34] However, the court cannot require defense counsel to also demonstrate that favorable evidence would be procured from the requested expert. So long as the defendant can demonstrate that the issue for which expert assistance is requested is critical and in dispute, the defendant has made the required showing under *Ake*. For even if the defense expert does not provide favorable evidence to the defense, the expert remains a "necessary tool" to the defense as contemplated by *Ake;* that is, the expert can lend his or her medical (or other) expertise to defense counsel in the cross-examination of the state's expert and in contesting prosecution evidence.

III. Vague Statutory Response Under 3:2

Prior to trial, Barnabei filed a motion pursuant to § 19.2-264.3:2[35] to require the Commonwealth to provide notice of any unadjudicated criminal conduct which it intended to present in the penalty phase. In response, the Commonwealth stated that it intended to present testimony

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[23] *Barnabei*, 1996 WL 517733 at *6 (emphasis added).

[24] 470 U.S. 68 (1985).

[25] 470 U.S. at 76-77.

[26] *See, e.g., Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987)(failure to appoint expert on hypnosis where prosecution used hypnotically refreshed testimony violated due process); *United States v. Bailey*, 886 F.Supp. 7(S.D.W.Va. 1995) (hair, fiber, and blood experts); *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980) (pathologist); *Bradford v. United States*, 413 F.2d 467, 474 (5th Cir. 1969) (handwriting and fingerprint experts).

[27] 1996 WL 517738 (Va. 1996).

[28] *Id.* at *6, quoting *Ake*, 470 U.S. at 82-83 (emphasis added).

[29] *Id.* at *6.

[30] It was undisputed that Barnabei and the victim had engaged in a consensual sexual relationship for a period of time. *Barnabei*, 1996 WL 517733 at *2.

[31] *Id.* at *8.

[32] 618 F.2d 1021 (4th Cir. 1980).

[33] 618 F.2d at 1026-27 (emphasis added).

[34] Monahan, *Obtaining Funds for Experts in Indigent Cases*, Champion, Vol. XIII, No. 7, p. 10 (August 1989).

[35] Va. Code §19.2-264.3:2 provides, in pertinent part, "Upon motion of the defendant, . . . if the attorney for the Commonwealth intends to introduce evidence during a sentencing proceeding . . . of a defendant's unadjudicated criminal conduct, the attorney for the Commonwealth shall give notice in writing to the attorney for the defendant of such intention. The notice shall include a description of the alleged unadjudicated criminal conduct and, to the extent such information is available, the time and place such conduct will be alleged to have occurred."

from Barnabei's ex-wife, Paula Barto. The notice alleged that, during the time Barnabei had been married to Barto, he had "engaged in a continuous course of threatening and assaultive conduct against [her], said conduct occurring on such a continuous and regular basis that [she could not] recall each and every specific date and occasion upon which such threatening and assaultive conduct occurred."[36]

However, during the penalty phase of the trial, Barto related one specific incident alleging that Barnabei had attempted to have anal intercourse with her, but she successfully had resisted the attempt. Barnabei objected and moved for a mistrial, asserting that the Commonwealth's notice had not adequately apprised him of the testimony. The trial court overruled the objection, and Barto further testified, over Barnabei's renewed objections, that Barnabei had forced her to have sexual intercourse with him on other particular occasions.[37] On appeal, Barnabei contended that the trial court erred in allowing Barto to testify about incidents that were not specifically alleged in the notice. The Supreme Court of Virginia disagreed. In so ruling, even the court could not bring itself to hold affirmatively that the notice given by the Commonwealth was "reasonable notice" that Barnabei would face testimony about specific incidents of forcible anal intercourse. Rather, it found that the allegations were "sufficient to allow the admission of her testimony."[38]

Defense counsel in Virginia should note that in so ruling, the Supreme Court of Virginia is inviting, if not requiring, a greater burden to be put on the trial judge. The court's holding in Barnabei requires defense counsel not only to move for early disclosure, but also to examine the response given by the Commonwealth and, when the response is as vague as it was in *Barnabei*, to make as many further motions as may be required to obtain clarification. Upon receipt of the Commonwealth's response, counsel may move *in limine* to limit the testimony to the scope of what was revealed in the response. If defense counsel does not file such further motions, and the defendant is later surprised in court, *Barnabei* makes clear that no relief will be granted on appeal. The responsibility for increased litigation and delay occasioned by litigating the questions of fair notice of unadjudicated acts rests with the Supreme Court of Virginia.

Summary and analysis by:
Lisa M. Jenio

36 *Barnabei*, 1996 WL 517733 at *10.
37 *Id.*
38 *Id.* at *11.

GOINS v. COMMONWEALTH

251 Va. 442, 470 S.E.2d 114 (1996)
Supreme Court of Virginia

FACTS

On the morning of October 14, 1994, Christopher Goins and a friend visited the home of Goins's 14 year-old ex-girlfriend, Tamika Jones, who was then seven months pregnant with Goins's child. During the course of the visit Goins apparently became upset over the pregnancy. Tamika testified that she was in her bedroom when she heard Goins participating in a conversation which was interrupted by gunfire. She heard multiple gunshots and screams, then Goins appeared in her bedroom and shot her nine times. He also shot Tamika's 21-month-old sister, Kenya.[1]

After Goins left, Tamika called 911 and identified Goins to the operator as the shooter. When police arrived, they found that all of the members of the Jones family had been shot. Both parents and three children were dead. Only Tamika and Kenya survived. The forensic evidence showed that all of the victims had been shot multiple times with a .45 caliber Glock pistol.[2]

Two subsequent searches of the home of Goins's girlfriend, Monique Littlejohn, yielded an unfired .45 cartridge which matched those used in the killings and the instruction manual for a Glock pistol lying near some men's clothing.[3]

A jury found Goins guilty of the capital murder of one of the children based on the killing of more than one person in the same act or transaction.[4] He was also found guilty of four counts of first degree murder and two of malicious wounding, as well as seven counts of the use of a firearm in commission of a felony.[5]

At the penalty phase of the trial, the Commonwealth presented the testimony of a police detective who stated that eight months prior to the shootings he had arrested Goins for possession of crack cocaine. Goins did not appear for trial and was wanted on that charge at the time of the shootings. The state also presented the testimony of the medical examiner, who stated that several of the children may have been shot after they were unconscious or dead.[6]

In mitigation, the defense presented testimony that Goins's mother was an abusive drug addict, and that drug addiction and crime were prevalent in the Goins family. The jury also heard testimony that "Goins was devastated when his grandmother died, because she was the only person who had shown him any love."[7] The jury fixed the punishment for the capital murder conviction at death, based upon their finding both of the aggravating factors, future dangerousness and vileness.[8]

HOLDING

The Supreme Court of Virginia, after reviewing the record and disposing of multiple claims,[9] found that the sentence was not imposed

1 *Goins v. Commonwealth*, 251 Va. 442, 447-8, 470 S.E.2d 114, 119 (1996).
2 *Id.* at 448, 470 S.E.2d at 119.
3 *Id.* at 449-50, 470 S.E.2d at 120.
4 Va. Code Ann. § 18.2-31(7).
5 *Goins*, 251 Va. at 447, 470 S.E.2d at 118.
6 *Id.* at 451, 470 S.E.2d at 121.
7 *Id.* at 452, 470 S.E.2d at 122.
8 *Id.* at 447, 470 S.E.2d at 119.
9 The court made specific rulings on certain issues which will not be dealt with here at length:

1) the admissibility of photographs and videotapes is in the discretion of the trial court, and the fact that they are gruesome