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Court Of Appeals, Fourth Circuit**

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SKIPPER v. FRENCH

130 F.3d 603 (4th Cir. 1997)

United States Court Of Appeals, Fourth Circuit

FACTS

On August 25, 1990, Sherman Elwood Skipper fatally shot Ailene Pittman and Nelson Fipps, Jr., Pittman's eighteen year old grandson, in front of Pittman's home.¹ Skipper and a companion, Mark Smith, had been drinking beer for a lengthy period of time prior to showing up at Pittman's home. Skipper and Pittman had been dating, and Skipper went to Pittman's with the intention of talking to her. After talking for approximately fifteen minutes in Pittman's front yard, Skipper returned to his truck. At this point, Pittman told Smith, who was in the driver's seat, not to bring Skipper to her house anymore.² As Smith was starting to pull away, Skipper reached behind the front seat of the truck, and pulled out a .223 semiautomatic rifle.³ The rifle was loaded with a particular kind of U.S. Army ammunition known for its "effective wounding potential."⁴ Skipper fired three shots at Pittman, killing her.

After a brief pause, Skipper turned the gun on Fipps and fired twice.⁵ According to the record, Skipper then asked Smith, "did I get them," and then the two men departed to discard the weapon.⁶ Skipper and Smith evaded the authorities for almost a week before Smith turned himself into the Columbus County Sheriff's Department. After Smith revealed Skipper's whereabouts, the police captured Skipper who was then indicted for first-degree murder.⁷

The procedural posture of Skipper's case is lengthy and complex, but a recitation of it is necessary to understanding the decision. Skipper did not put on any evidence at his jury trial in Bladen County Superior Court.⁸ After the court declined to give a defense-requested instruction on second-degree murder as a lesser-included offense, the jury had to choose between guilty and not guilty of first-degree murder only. The jury chose the former, finding Skipper guilty of the first-degree murders of Pittman and Fipps. During the sentencing phase, the State submitted the following: (1) Skipper's prior conviction of three felony assaults with a deadly weapon;⁹ and (2) a "course of conduct" factor given

the proximity of two or more violent acts in the commission of a crime.¹⁰ In response, the defense presented the following mitigating evidence: (1) Skipper had previously been institutionalized for a drinking problem; (2) he would go on drinking binges and remain intoxicated for long periods of time; and (3) he had been dropped on his head as a child.¹¹ The jury imposed death sentences for both murders.¹²

After giving notice of appeal to the North Carolina Supreme Court and having his stay of execution granted, Skipper filed an appeal which raised thirty-one state and federal claims. In affirming the convictions and death sentences, the North Carolina Supreme Court rejected all of the federal claims.¹³ On January 23, 1995, the United States Supreme Court denied certiorari. Almost four months later, under North Carolina's "motion for appropriate relief,"¹⁴ the court appointed counsel for Skipper in order to seek post-conviction relief. At this time, Skipper's stay of execution was extended to October 16, 1995. Two months later, in June of 1995, Skipper sought an ex parte hearing on a motion for funds to procure a mental-health expert who specialized in mental retardation.¹⁵ The court denied the defendant's motion and moved the execution date back to November 16, 1995.

In an effort to challenge the court's denial of a hearing on the petition for funds, defense counsel then filed a petition for writ of certiorari and writ of supersedeas in the

¹⁰*Skipper*, 130 F.3d at 605-06.

¹¹*Id.* at 606. Dr. Antonin E. Puente, a neuropsychology expert, testified that Skipper had a history of head injury, alcohol abuse, and antisocial behavior. According to Puente, Skipper was functionally illiterate, his IQ was 69 (equivalent of a six year old), and he suffered from impaired memory, mental retardation, and a moderate to severe brain syndrome. Moreover, Puente found that Skipper neither understood the wrongfulness of his actions nor possessed the capacity to follow the law. *Id.* at 606.

¹²*Id.* at 606.

¹³*Skipper*, 130 F.3d at 606.

¹⁴N.C. Gen. stat. § 15A-1401-1420 (1997). Under North Carolina law, a motion for appropriate relief provides a single, unified procedure for raising, at the trial level, errors which are asserted to have been made during the trial. By definition, a motion for appropriate relief is a post-verdict motion (or post-sentencing motion where there is no verdict) made to correct errors occurring prior to, during, and after a criminal trial. *State v. Handy*, 391 S.E.2d 159 (1990). A motion for appropriate relief can be compared to an "assignment of errors" in Virginia law, though the former is addressed at the trial level, and the latter is dealt with at the appellate level.

¹⁵*Skipper*, 130 F.3d at 606.

¹⁶*Id.* at 606.

¹*Skipper v. French*, 130 F.3d 603, 605 (4th Cir. 1997).

²*Skipper*, 130 F.3d at 605.

³*Id.* at 605.

⁴*Id.* at 605.

⁵*Id.* at 605. According to the record, before firing the weapon at Fipps, Skipper stated, "you too."

⁶*Skipper*, 130 F.3d at 605.

⁷*Id.* at 605.

⁸*Id.* at 605.

⁹These convictions included the defendant's stabbing of his then wife, nearly severing her thumb, and the defendant's shooting of his brother in the back with a .22 caliber rifle. *Id.* at 605.

North Carolina Supreme Court.¹⁶ After this petition was denied, defense counsel spoke to the judge who had presided over the post-conviction proceedings, and requested a continuation of the stay of execution which was supposed to expire the next morning.¹⁷ After consulting with the Assistant Attorney General, who objected to extending the stay, the judge decided to deny the defense motion. He called Skipper's counsel to tell him, and counsel asked the judge whether he should file a motion for appropriate relief the next day.¹⁸ The judge told counsel that he was not deciding any other motion, but that defense counsel "was proceeding under the statute addressing Motions for Appropriate Relief without limitation as to time or some language to that effect."¹⁹

The next day, with no new execution date having been set, Skipper appealed the order and petitioned the state supreme court for reconsideration of its denial of certiorari. On November 20, 1995, still with no new established execution date, Skipper was given notice of a hearing to set a new execution date and an order to show cause why counsel should not be held in contempt given the failure to file a timely motion for appropriate relief.²⁰ Less than a month later, at the hearing on the execution date, the State surprised defense counsel by withdrawing the show-cause order and moving orally for the setting of a new execution date and an order prohibiting Skipper from raising any claims by use of the motion for appropriate relief in the state courts.²¹ The court, without any legal basis, granted the State's motion, issuing an order procedurally barring Skipper from using the motion for appropriate relief. In addition, the court set the execution date for February 10, 1996.

Skipper appealed the order and attached a motion for appropriate relief to his petition for certiorari, contending that the motion was incomplete because of the deficiency of requested mental-health experts.²² The attached motion raised seven federal constitutional claims in addition to those raised on direct appeal. The state supreme court granted the petition as a means of entering an order addressing the attached motion for appropriate relief. In its order, the court stated that it had reviewed all the issues raised in the motion and found no grounds sufficient to require an evidentiary hearing or afford relief.²³

Skipper then filed motions for a stay of execution and the appointment of federal habeas counsel in the United States District Court for the Eastern District of North Carolina.²⁴ The court granted both motions, and later, additionally granted motions for funds to retain a psychiatrist

and a second mental-health expert. On April 15, 1996, the defendant timely filed his petition for writ of habeas corpus, submitting both the seven federal claims raised in the attached motion for appropriate relief and twenty-one of the federal claims raised on direct appeal (but not in the motion for appropriate relief). The district court granted the State's motion for summary judgment, finding that all of the claims had been procedurally defaulted, and that no showing of cause and prejudice had been made. In making its findings, the district court did not differentiate in its review between the seven claims raised in the motion for appropriate relief and the twenty-one claims raised on direct appeal.²⁵ The district court determined that neither the state supreme court nor the state superior court considered the merits of Skipper's motion for appropriate relief because both relied on a state procedural bar.²⁶ Although the district court's order denied all of Skipper's claims as procedurally defaulted, its analysis did not consider any state court decision with regard to the twenty-one claims raised on direct appeal, instead only looking to the seven federal claims raised in the motion for appropriate relief. Skipper then appealed the district court's order to the United States Court of Appeals, Fourth Circuit, raising the issue of whether the district court properly ruled that all of the federal claims submitted in the defendant's federal habeas corpus petition had been procedurally defaulted in the course of state court proceedings.

HOLDING

The United States Court of Appeals, Fourth Circuit, in vacating the district court's judgment and remanding for first instance consideration of Skipper's claims on the merits, held that: (1) federal collateral review was not foreclosed as to the twenty-one claims that the defendant raised on direct appeal, but did not raise in his motion for appropriate relief in state court;²⁷ (2) the state supreme court's decision granting the defendant's petition for certiorari was a relevant decision to consider in determining whether federal courts were procedurally barred from reviewing federal claims that the defendant had raised in his motion for appropriate relief attached to the petition for certiorari;²⁸ and (3) the state supreme court's decision granting the defendant's petition for certiorari for the limited purpose of denying the relief requested in his appended motion for relief did not foreclose federal collateral review of the seven claims raised in the appended motion.²⁹

¹⁷*Id.* at 606. The record concerning the judge's actions is based on an affidavit submitted by the judge, Jack Hooks, Jr.

¹⁸*Id.* at 606.

¹⁹*Skipper*, 130 F.3d at 606 (quoting J.A. 93).

²⁰*Id.* at 606.

²¹*Id.* at 607.

²²*Id.* at 607.

²³*Skipper*, 130 F.3d at 607.

²⁴*Id.* at 607.

²⁵*Id.* at 608. The district court did not find relevant to its inquiry the decision of the state supreme court rejecting on defendant's direct appeal all of the twenty-one federal claims not later raised in the motion for appropriate relief to be relevant to its inquiry.

²⁶*Id.* at 608.

²⁷*Skipper*, 130 F.3d at 611.

²⁸*Id.* at 611.

²⁹*Id.* at 613.

ANALYSIS/APPLICATION IN VIRGINIA

I. Review of Procedural Default Doctrine

The doctrine of procedural default is rooted in the principle that federal courts will not consider on collateral review of state court criminal convictions, a federal claim which the state courts have dismissed on an "independent and adequate" state ground, including procedural default under state law.³⁰ Applying this principle can be problematic, especially if the basis for the state court decision is not clearly stated, or even worse, not even mentioned. The Skipper court offered the following principles as guidance in determining whether a procedural default has occurred.

First, when addressing the issue of procedural default, the relevant state court decision is "the last state court to be presented with the particular federal claim" in question.³¹ Second, if the state court decision was primarily based on or "interwoven with" federal law, then there is a presumption that the decision did not rest on an independent state law ground.³² Third, for a claim to be procedurally barred, the state court must have actually applied a procedural bar, and not just had the opportunity to do so.³³ Fourth, if a state court dismisses a claim on both the merits and an independent and adequate state law ground, then the claim is barred from federal habeas review.³⁴ Fifth, if a state court decision is completely grounded on an independent state procedural default ground, then that ground has to be "a constitutionally 'adequate' one," in that it must be a "firmly established and regularly followed state practice."³⁵

In applying these principles to its inquiry, the Skipper court emphasized the importance of distinguishing the two sets of claims at issue in this case.³⁶ With regard to the twenty-one direct appeal claims, the court found that the state supreme court was the last state court to which these claims were submitted, and that the state supreme court denied all of these claims on the merits.³⁷ Therefore, this first set of claims was not procedurally barred from federal

habeas review.

Similarly, the court found the seven federal claims in Skipper's motion for appropriate relief to be ripe for federal collateral review, in that, based on the language of the state supreme court decision and the procedural context of its entry, the decision was not based on an adequate and independent state law ground.³⁸ To determine the basis for this decision, the court asked whether "it fairly appear[ed] that [it] rested primarily on federal law or was interwoven with federal law, that is [whether we have] good reason to question whether there is an independent and adequate state ground for the decision."³⁹ In applying this standard, the court looked at the text of the state supreme court decision, the procedural posture of the decision and factually relevant precedent. The court found the procedural posture of the decision to be the determining factor. The state supreme court had two distinct issues before it: (1) Skipper's challenge to the superior court's procedural bar order; and (2) the federal claims asserted in the motion for appropriate relief.⁴⁰ To reject Skipper's procedural bar challenge, the state supreme court had only to deny the petition for certiorari which directly challenged that order.⁴¹ If the state supreme court rejected the petition, "that denial would also necessarily reject, as properly procedurally barred, the federal claims sought to be presented for decision on the merits."⁴² However, in actuality, the state supreme court granted the petition for certiorari which had challenged the procedural bar order. Consequently, the court of appeals reasoned that the state supreme court did in fact "consider" federal claims which it would not have reviewed if they were procedurally barred on the sole basis argued by the State.⁴³ The court of appeals' interpretation of the effect of the state supreme court's decision was, "that it rejected the only basis urged by the State for finding these federal claims procedurally barred and, in then "considering" the federal claims not

being the relevant decision. However, uncertain of this choice, the district court turned instead to the state superior court's order as potentially being the "last reasoned" decision. The district court concluded that both decisions had found the federal claims procedurally defaulted. The court of appeals disagreed with this conclusion, and conversely held that, "the relevant decision is that of the state supreme court, and that it rejected the federal claims on the merits, not on grounds of procedural default." *Id.* at 611.

³⁰*Id.* at 609.

³¹*Skipper*, 130 F3d at 609 (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991)).

³²*Id.* at 609 (quoting *Coleman v. Thompson*, 501 U.S. 722, 739 (1991)).

³³*Id.* at 609 (citing *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)).

³⁴*Id.* at 609 (citing *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989)).

³⁵*Skipper*, 130 F3d at 609 (quoting *James v. Kentucky*, 466 U.S. 341, 348-49 (1984)).

³⁶*Id.* at 609.

³⁷*Id.* at 611. The court determined that the district court did not regard this direct appeal decision of the state supreme court as the relevant decision concerning these particular federal claims. The district court had initially looked to the state supreme court's order denying the seven federal claims as being

³⁸*Skipper*, 130 F3d at 613.

³⁹*Id.* at 611 (quoting *Coleman v. Thompson*, 501 U.S. 722, 739 (1991)) (alterations in original).

⁴⁰*Id.* at 612.

⁴¹*Id.* at 612.

⁴²*Skipper*, 130 F3d at 612.

⁴³*Id.* at 612.

so procedurally defaulted, necessarily considered them on the merits.”⁴⁴

II. *Skipper's* Lessons beyond Procedural Default

Although the decision in *Skipper* mainly turns on procedural issues, capital defense counsel can glean some important practice points from it. First, defense counsel should submit findings for inclusion in the court order. The court's decision in *Skipper* and the court orders associated

⁴⁴*Id.* at 612. In interpreting the effect of this decision, the court of appeals factored in a certain long-standing practices of the state supreme court. The Supreme Court of North Carolina had a history of almost automatically denying petitions for certiorari where claims of procedural default were being upheld. The court of appeals found no reason why the decision here did not follow that pattern.

with it were evidence of how ambiguous court orders can lead to misunderstandings of what has and has not been considered by reviewing courts. Second, this decision is in some ways a “wake-up” call to district judges, saying that the procedural bar is not going to be accepted summarily each time it is used to foreclose a claim. The court of appeals fairly emphatically expressed dissatisfaction concerning the lower court's hasty dismissal of all claims under the guise of procedural default. Defense counsel can use the court of appeal's discontent with such result-oriented jurisprudence to argue that in order for a claim to be procedurally barred, there must be a clear showing that the claim was rejected on an “independent and adequate” state ground.

Summary and analysis by:
Mary K. Martin

WATKINS v. ANGELONE

133 F.3d 920 (4th Cir. 1998)

United States Court Of Appeal, Fourth Circuit

FACTS

On May 26, 1988, William McCauley was found dead on the floor of his Allied Services store in Danville, Virginia. Witness information lead to the arrest of Ronald Watkins shortly thereafter. Watkins was tried and convicted of capital murder on September 28, 1988 and sentenced to death that same day.¹ Watkins' post-sentencing motion entitled “Motion and Memorandum to Prohibit Imposition of the Death Penalty on Grounds of its Arbitrary and Discriminatory Application in Violation of the Eight and Fourteenth Amendments of the United States Constitution,”² was denied after a hearing.

On direct appeal to the Virginia Supreme Court, Watkins asserted racial discrimination in jury selection.³ Stating that

¹*Watkins v. Angelone*, 133 F.3d 920 (4th Cir. 1998). Watkins is an unpublished disposition. According to Fourth Circuit Local Rule 36(c), “citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Fourth Circuit.” The full opinion can be found at *Watkins v. Angelone*, No. 97-9, 1998 WL 2861 (4th Cir. Jan. 7, 1998). All subsequent citations to Watkins in this paper will use this electronic database citation.

²*Watkins*, 1998 WL 2861, at *2 (citing J.A. at 220).

³*Watkins*, 1998 WL 2861, at *3. The court of appeals stated that:

[o]n direct appeal Watkins argued that he was entitled to a jury matching the racial composition of the community. The Virginia Supreme Court rejected this argument, noting that Watkins made “no contention that the jury selection process was unlawful and makes no showing of any policy of, or effort toward, systematic exclusion” of blacks

Watkins had made no showing that the jury selection process had been unlawful, the Virginia Supreme Court rejected this argument,⁴ and the United States Supreme Court denied his petition for certiorari.⁵ Watkins' subsequent petition for state habeas corpus was denied; both the Virginia Supreme Court and the United States Supreme Court denied certiorari.⁶ Watkins petitioned the United States District Court for the Western District of Virginia for a writ of habeas corpus, alleging that racial discrimination occurred in the selection of his jury, that his trial counsel provided ineffective assistance, and that he was incorrectly denied his right to inform the sentencing jury that a life sentence would mean a minimum of twenty years in prison. The district court denied the writ, and Watkins appealed to the United States Court of Appeals for the Fourth Circuit.⁷

Watkins, 1998 WL 2861, at *2 (quoting *Watkins v. Commonwealth*, 385 S.E.2d 50, 53, 238 Va. 341, 346 (1989)). However, in the immediately preceding paragraph, the court of appeals itself summarized Watkins' post-sentencing motion as asserting that “the jury was racially biased due to unlawful exclusion of blacks from the jury pool.” *Watkins*, 1998 WL 2861, at *2 (emphasis added). Setting aside the issue of whether Watkins proved the systematic exclusion of blacks, in the court of appeal's own words Watkins did argue that such exclusion occurred. Despite this apparent contradiction, the court of appeals did not reject the finding of the Supreme Court of Virginia.

⁴*Watkins v. Commonwealth*, 385 S.E.2d 50, 53, 238 Va. 341, 346 (1989).

⁵*Watkins v. Virginia*, 494 U.S. 1074 (1990).

⁶*Watkins*, 1998 WL 2861, at *3.

⁷*Id.*