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WATKINS v. ANGELONE 133 F.3d 920 (4th Cir. 1998) United States Court Of Appeal, Fourth Circuit

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 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

[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.

WATKINS v. ANGELONE

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

[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, 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.*

HOLDING

The United States Court of Appeals for the Fourth Circuit affirmed the district court's denial of the writ of habeas corpus, holding that (1) the jury selection procedure did not violate the Sixth Amendment;[8] (2) the jury selection procedure did not violate the Fourteenth Amendment;[9] (3)Watkins was not entitled to a new evidentiary hearing on juror discrimination;[10] (4) there was no showing of ineffective assistance of counsel;[11] and (5) Watkins was not entitled to inform the jury that if sentenced to life in prison, he would serve a mandatory minimum of twenty years.[12]

ANALYSIS/APPLICATION IN VIRGINIA

I. Racial Discrimination in Jury Selection

A. Watkins' Sixth Amendment Claim

Watkins argued that the venire from which his jurors were chosen was selected in a racially discriminatory manner. His brief to the Supreme Court of Virginia on direct appeal[13] stated that "reliance by the state on voter lists for the venire, in light of the evidence of lack of registration by minorities, created a prima facie case" for a violation of the Sixth Amendment's[14] fair cross-section requirement.

The court of appeals quoted *Duren v. Missouri*[15] as the standard for a Sixth Amendment challenge to the composition of a jury pool. In *Duren,* the United States Supreme Court stated that

> the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[16]

The court of appeals stated that "[o]nly the third element is at issue here,"[17] implying that the first two requirements of the *Duren* test were satisfied.

The court denied Watkins' argument, citing to two of its own decisions, *United States v. Cecil,*[18] and *United States v. Lewis,*[19] a case which relied on the logic of *Cecil.* In *Lewis,* the court summarized the holding of *Cecil* as follows:

> [w]e held that use of current voter registration lists as the source for a jury pool from which random selection of jurors is made presumptively provides a fair cross-section, even if minorities are underrepresented on those lists, as long as there is no affirmative discrimination in registration.[20]

The court in *Cecil* went on to say that "there is no violation of the jury cross-section requirement where there is merely underrepresentation of a cognizable class by reason of failure to register, when that right is fully open."[21]

An argument can be made, however, that the court of appeals misinterpreted both Watkins' claim and the third prong of *Duren.* In *Duren,* the United States Supreme Court found that the petitioner did meet the third prong of the test. The court stated that the petitioner successfully made a showing that the underrepresentation of women on the venire was "due to their systematic exclusion in the jury-selection process."[22] The *Duren* petitioner was able to make this showing because his evidence indicated "that the cause of the underrepresentation was systematic — that is, inherent in the particular jury-selection process utilized."[23] It is arguable that the jury selection process used in Watkins' case was the decision to use voter registration lists, not the generation of the voter registration lists themselves. Because there seems to be no genuine dispute as to the existence of racial disparity in the voter registration lists, the decision to use them to generate venires made the underrepresentation in the

[8] *Watkins,* 1998 WL 2861, at *4.

[9] *Id.* at *5.

[10] *Id.*

[11] *Watkins,* 1998 WL 2861, at *7-10.

[12] *Id.* at *11.

[13] *Watkins v. Commonwealth,* 385 S.E.2d 50, 238 Va. 341 (1989).

[14] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
U.S. Const. amend. VI.

[15] 439 U.S. 357 (1979).

[16] *Duren,* 439 U.S. at 364.

[17] *Watkins v. Angelone,* No. 97-9, 1998 WL 2861, at *4 (4th Cir. Jan. 7, 1998).

[18] 836 F.2d 1431 (4th Cir. 1986), *cert. denied,* 487 U.S. 1205 (1988).

[19] 10 F.3d 1086 (4th Cir. 1993).

[20] *Lewis,* 10 F.3d at 1090 (citing Cecil, 836 F.2d at 1448).

[21] *Cecil,* 836 F.2d at 1448.

[22] *Duren v. Missouri,* 439 U.S. 357, 366 (1979).

[23] *Id.*

venires "systematic — that is, inherent in the particular jury-selection process utilized."[24] When analyzed from this perspective, it appears that Watkins did meet the third prong of the *Duren* test. However, counsel should be aware that court of appeals still adheres to the holding of *Cecil.*

B. Watkins' Fourteenth Amendment Claim

The Court used a similar analysis of Watkins' claim that the underrepresentation of minorities in his venire violated the Equal Protection Clause of the Fourteenth Amendment.[25] The court quoted *United States v. Miller*[26] for the applicable standard: petitioner must establish that "(1) there is a cognizable group, (2) that is substantially underrepresented by reason of (3) a selection procedure that is not racially neutral, i.e., is the result of intentional discrimination."[27] As in the Sixth Amendment claim, the court of appeals stated that only the third prong was at issue in *Watkins.*

The court cited *United States v. Biaggi*[28] as a situation similar to *Watkins.* The *Biaggi* court held that petitioner "made no claim that Blacks or Hispanics have been hindered in registering to vote. They simply have chosen not to register in the same proportion as Whites."[29] Thus the *Watkins* court concluded that the same was true of Watkins' case: he "did not present any evidence to the Virginia state courts that the use of voter registration lists is 'susceptible of abuse or is not racially neutral.'"[30] The court of appeals' logic here is flawed in an exactly analogous fashion to its analysis of Watkins' Sixth Amendment jury race discrimination claim. If it can be shown that the voter registration lists racially discriminate by whatever mechanism, then the decision to use the lists for the generation of venires constitutes "a selection procedure that is not racially neutral."[31]

C. Watkins' New Evidence

Watkins sought to introduce at the federal court level new evidence of a statistical nature. Watkins asserted the evidence would show systematic discrimination in the selection of the venire and establish a prima facie case for a violation of both the Sixth and Fourteenth Amendments. However, because Watkins did not introduce this evidence before the Virginia state courts, the court of appeals, citing *Correll v. Thompson,*[32] held that:

> [w]hen the state has given a petitioner a full and fair hearing on a claim and he has failed to develop the material facts supporting it, he is not entitled to develop further facts in a federal habeas evidentiary hearing unless he demonstrates either cause for the failure and prejudice resulting therefrom or a fundamental miscarriage of justice.[33]

The court of appeals found that Watkins received two hearings on the matter, and so concluded that he in fact did receive a full and fair hearing in the Virginia state courts.[34]

Citing *Murray v. Carrier,*[35] the court stated that in order to show cause and prejudice, the petitioner must be able to demonstrate "some objective factor external to the defense [that] impeded counsel's efforts" to present the evidence in the state courts.[36] In addressing Watkins' claim that a trial court denial of a continuance to gather more data was such

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[24]Interestingly, the court of appeals in *Cecil* apparently invoked an "it's their own fault" argument as to the underrepresentation of minorities in voter registration lists and venires. The court stated that the discrimination that *Duren* was concerned with was not "any underrepresentation created simply because some members of a class itself had by sloth failed to register." *Cecil,* 836 F.2d at 1448. This assertion misses the point in two ways. It might have some logical force if the above-mentioned members had failed to register for a (mythical) venire list, thus justifying the exclusion, but there is no such list. Why should a failure to register to vote have any relationship to the ability to sit on a jury? Second, the Sixth Amendment simply does not mandate that a defendant is entitled to a trial by a fair cross-section of his peers so long as a certain portion of those similarly situated to defendant have registered to vote.

[25]All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

[26]116 F.3d 641 (2d Cir. 1997). Miller ultimately relied upon the test as set out in *Castenada v. Partida,* 430 U.S. 482, 494 (1977).

[27]*Miller,* 116 F.3d at 658.

[28]909 F.2d 662 (2d Cir. 1990).

[29]*Biaggi,* 909 F.2d at 677.

[30]*Watkins v. Angelone,* No. 97-9, 1998 WL 2861, at *5 (4th Cir. Jan. 7, 1998) (quoting *Castenada v. Partida,* 430 U.S. 482, 494 (1977)).

[31]*Miller,* 116 F.3d at 658.

[32]63 F.3d 1279 (4th Cir. 1995).

[33]*Correll,* 63 F.3d at 1288 (citing *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 8-12 (1992)).

[34]*Watkins,* 1998 WL 2861, at *5. Watkins received a post-sentencing hearing regarding the exclusion of blacks from the jury pool. However, evidence of such activity, by its nature, requires a lengthy time period to collect, and the hearing was held within too short a time for a meaningful gathering of evidence to occur. Predictably, Watkins' motion was unsuccessful at the hearing. Watkins then moved for a continuance for sufficient time to develop proper evidence of exclusion of blacks from the jury pool. After a hearing was conducted on the matter — this is the second hearing to which the court of appeals refers — the motion for continuance was denied. Letter from William S. Geimer, Professor of Law, Washington and Lee University School of Law, to Craig Lane, Associate Editor, Virginia Capital Case Clearinghouse, (Feb. 25, 1998) (on file with the Virginia Capital Case Clearinghouse).

[35]477 U.S. 478, 488 (1986).

[36]*Watkins,* 1998 WL 2861, at *5 (quoting *Murray,* 477 U.S. at 488).

an objective factor, the court of appeals gave yet another example of how procedural default is dangerous to defendants. Although the court conceded that "[t]his could constitute cause for a default,"[37] the court nevertheless went on to say that, because the trial court denial had not been cited as error before the Virginia Supreme Court on direct appeal, the claim was thus procedurally defaulted.[38]

With respect to the issue of a fundamental miscarriage of justice, the court quoted *Schlup v. Delo*[39] for the proposition that "the fundamental miscarriage of justice exception applies only if the petitioner claims actual innocence of either the offense itself or of an aggravating circumstance that was the basis of a capital sentence."[40] Watkins did not claim actual innocence, and thus the court of appeals found that Watkins was entitled to no exception from the rule against new introductions of evidence at the federal habeas level.[41]

From a defense perspective, the court's implication that a trial court's denial of a continuance to develop evidence may qualify as "cause" under *Correll* and *Keeney* is important. Trial counsel must be extremely vigilant in making motions on the record, in objecting on the record if denied, and in raising the issue at each level of appeal. As Ronald Watkins' case unfortunately shows, failure to consistently raise the issue in subsequent appeals can lead to procedural default.

II. Ineffective Assistance of Counsel

Watkins made four assertions of ineffective assistance of counsel. First, Watkins argued that it was ineffective assistance of counsel for his attorney to fail to strike Lennie Clark from the jury. During voir dire it was discovered that Ms. Clark was related to an individual who had been murdered. The court of appeals looked to *Strickland v. Washington*[42] for the standard on ineffective assistance of counsel. In paraphrasing *Strickland*, the court stated that a "petitioner must show that counsel's performance was deficient, that it fell below an objective standard of reasonableness, and that the grossly deficient performance actually prejudiced the petitioner."[43] The court further stated that "a challenged action is ineffective assistance only if it cannot be considered sound trial strategy under the wide range of reasonable professional conduct."[44] Under this standard, the court stated that Watkins' counsel's decision not to strike Ms. Clark was not ineffective assistance of counsel for two reasons. First, the attempt to strike would, according to the court, mostly likely have been futile because under Virginia law, "the mere fact that a juror is related to a victim in an unrelated case does not disqualify that juror."[45] Second, because the juror was black, the same race as Watkins, the court stated that defense counsel could reasonably have thought that the juror would have been more favorably disposed toward Watkins.[46]

Watkins' second claim of ineffective assistance of counsel concerned the testimony of Dr. Centor, a forensic psychologist who had interviewed Watkins and later testified in rebuttal that Watkins would represent a future danger. Quoting *Estelle v. Smith*[47] for the holding that "a defendant has a Fifth and Sixth Amendment right to be notified that a psychiatric evaluation by the state may be used against him at sentencing,"[48] Watkins asserted that it was ineffective assistance of counsel for his attorney not to object to Dr. Centor's testimony because such notice was lacking. In response, the court of appeals cited *Savino v. Murray*[49] for the proposition that when a defendant invokes Virginia Code section 19.2-264.3:1 to receive the services of a mental health expert,[50] the section "operate[s] to notify the defense that its decision to introduce psychiatric testimony constitutes a waiver of the defendant's right to remain silent during examination by the Commonwealth's

[37] *Id.*

[38] *Id.*

[39] 513 U.S. 298 (1995).

[40] *Watkins,* 1998 WL 2861, at *6 (citing *Schlup,* 513 U.S. at 321).

[41] *Id.*

[42] 466 U.S. 668 (1984).

[43] *Watkins,* 1998 WL 2861, at *7.

[44] *Id.*

[45] *Id.* See *Mackall v. Commonwealth,* 372 S.E.2d 759, 767, 236 Va. 240, 252 (1988) (mother of juror was recent rape victim).

[46] *Id.*

[47] 451 U.S. 454 (1981).

[48] *Watkins,* 1998 WL 2861 at *8.

[49] 82 F.3d 593 (4th Cir. 1996).

[50] Virginia Code section 19.2-264.3:1 states in pertinent part:

> A. Upon (I) motion of the attorney for a defendant charged with or convicted of capital murder and (ii) a finding by the court that the defendant is financially unable to pay for expert assistance, *the court shall appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition,* including (I) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense; (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired at the time of the offense; and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense.

Va. Code Ann. § 19.2-264.3:1(A) (Michie 1950 & Supp. 1996) (emphasis added).

mental health examiner."[51] Accordingly, the court of appeals stated that both "Watkins and his counsel had actual notice of Dr. Centor's examination through the court's order before the trial,"[52] rendering any objection to Dr. Centor's testimony by Watkins' counsel futile, and thereby placing the lack of objection outside the realm of ineffective assistance of counsel.[53]

Watkins' third assertion of ineffective assistance of counsel regarded the actions of his counsel during closing argument in the penalty phase. Although Watkins' counsel referred to Watkins as "a monster" and "vile" in front of the jury, the court of appeals found that these statements fell within the permissible "wide range of reasonable professional conduct."[54] Defense counsel had attempted to show that death was not an appropriate punishment for Watkins, because although "'the Ronald [Watkins] on the street is a monster,'"[55] "'the Ronald in the penitentiary ... [is] a Ronald that can live and is a Ronald that does not deserve to die.'"[56] The court of appeals' holding in Watkins demonstrates the extremely wide range of defense counsel action that the court is willing to label as effective assistance of counsel.

Watkins' last assertion of ineffective assistance of counsel regarded his counsel's failure to object to statements by the prosecutor during closing argument of the penalty phase, where the prosecutor stated that "Watkins did not show any remorse during trial . . . ."[57] Watkins alleged that the statement violated his Fifth Amendment[58] right against self incrimination by commenting on his decision not to testify at trial. However, the court of appeals held that the prosecutor "clearly keyed his remarks about Watkins' lack of remorse to his demeanor in the courtroom,"[59] and that the jury "would [not] naturally have taken these comments as highlighting Watkins' failure to take the stand."[60] It is permissible for the prosecutor to refer to defendant's demeanor as showing a lack of remorse, but it is a violation of the Fifth Amendment right against self incrimination for the prosecutor to refer to a defendant's lack of expression of remorse.

III. Informing the Jury of Minimum Mandatory Sentence

Watkins claimed it was error for the trial court to refuse to allow him to inform the jury that, if sentenced to life in prison, he would serve a mandatory minimum of 20 years before becoming eligible for parole. After quickly mentioning the rule of *Lockett v. Ohio*,[61] whereby the jury must consider "any aspect of a defendant's character or record or any of the characteristics of the offense that the defendant proffers as a basis for a sentence less than death,"[62] the court went on to look at whether *Simmons v. South Carolina*[63] applied in this case. In *Simmons*, the United States Supreme Court held that where the state seeks the death penalty based upon the future dangerousness[64] of the defendant, it is a violation of defen-

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[51] *Savino*, 82 F.3d at 604. Virginia Code Section 19.2-264.3:1 states in pertinent part:

> E. In any case in which a defendant charged with capital murder intends, in the event of conviction, to present testimony of an expert witness to support a claim in mitigation relating to the defendant's history, character or mental condition, he or his attorney shall give notice in writing to the attorney for the Commonwealth, at least twenty-one days before trial, of his intention to present such testimony. In the event that such notice is not given and the defendant tenders testimony by an expert witness at the sentencing phase of the trial, then the court may, in its discretion, upon objection of the Commonwealth, either allow the Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence.
>
> F. 1. If the attorney for the defendant gives notice pursuant to subsection E and the Commonwealth thereafter seeks an evaluation concerning the existence or absence of mitigating circumstances relating to the defendant's mental condition at the time of the offense, the court shall appoint one or more qualified experts to perform such an evaluation. The court shall order the defendant to submit to such an evaluation, and advise the defendant on the record in court that a refusal to cooperate with the Commonwealth's expert could result in exclusion of the defendant's expert evidence.

Va Code Ann. § 19.2-264.3:1(E) and (F) (Michie 1950 & Supp. 1996) (emphasis added).

[52] *Watkins*, 1998 WL 2861, at *8.

[53] *Id.*

[54] Watkins, 1998 WL 2861, at *7.

[55] *Id.* at *8 (quoting J.A. at 346).

[56] *Id.* at *8 (quoting J.A. at 347).

[57] *Watkins*, 1998 WL 2861, at *9.

[58] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S Const. amend. V.

[59] *Watkins*, 1998 WL 2861, at *10.

[60] *Id.*

[61] 438 U.S. 586 (1978) (plurality opinion).

[62] *Watkins*, 1998 WL 2861, at *10 (quoting *Lockett*, 438 U.S. at 604).

[63] 512 U.S. 154 (1994).

[64] In Virginia, the future dangerousness aggravator is found in Virginia Code Section 19.2- 264.4(C), which states in pertinent part:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society ....

Va. Code.Ann. § 19.2-264.4(C) (Michie 1950 & Supp. 1996).

dant's Fourteenth Amendment Due Process[65] rights for the trial court to keep from the jury knowledge of defendant's parole ineligibility. Watkins sought to extend the *Simmons* holding to his own situation, where a life sentence carried the possibility of parole after twenty years.[66] The court of appeals did not reach the substance of Watkins' assertion, however, because in *O'Dell v. Netherland*,[67] the United States Supreme Court held that Simmons was a new rule under *Teague v. Lane*.[68] Therefore, subject to narrow exceptions which did not apply to Watkins' case, *Simmons* could not be retroactively applied. The court of appeals observed that Watkins' conviction became final in 1989, five years before *Simmons*, and thus that *Simmons* did not apply to Watkins' case.[69] The United States Supreme Court has made it clear that the *Simmons* rule was a new rule with respect to the legal landscape of 1988 (and presumably prior to that), and therefore, that all convictions which became final prior to 1989 are not subject to *Simmons*. Although not explicitly stated in *O'Dell*, it is unlikely that the Court would find the *Simmons* rule to be an "old" rule at any time before the decision of *Simmons* itself, in 1994.

Summary and analysis by:
Craig B. Lane

[65] *See* note 25, *supra*.

[66] For a discussion of jury misconceptions regarding the meaning of a life sentence, see Jenio, *"Life"=Life: Correcting Juror Misconceptions*, Cap. Def. J., Vol. 10, No. 1, p. 40. (1997).

[67] 117 S.Ct. 1969 (1997). See Case Summary of *O'Dell*, Cap. Def. J., Vol. 10, No. 1, p. 4 (1997).

[68] 489 U.S. 288 (1989).

[69] *Watkins v. Angelone*, No. 97-9, 1998 WL 2861, at *11 (4th Cir. Jan. 7, 1998) (citing O'Dell, 117 S.Ct at 1973).

A MODEST PROPOSAL: REQUIRING PROOF BEYOND A REASONABLE DOUBT FOR UNADJUDICATED ACTS OFFERED TO PROVE FUTURE DANGEROUSNESS

BY: TOMMY BARRETT

I. Introduction

At the sentencing phase of a capital murder trial, the Virginia statutory scheme requires the Commonwealth to prove beyond a reasonable doubt at least one of two statutory aggravating factors.[1] In proving the future dangerousness aggravator, the Virginia statute permits the Commonwealth to introduce, and the jury or court to consider, evidence of "the history and background of the defendant."[2] This language has been interpreted to include evidence of "unadjudicated acts," i.e. criminal acts allegedly committed by the defendant for which the defendant was never tried or possibly even charged.[3] Unadjudicated acts, to be admissible, need only demonstrate a probability that the defendant would commit future criminal acts of violence that would constitute a future danger to society.

Unlike previous journal articles that have discussed the use of unadjudicated acts in capital sentencing,[4] this one focuses solely on the Due Process requirement of heightened reliability in capital sentencing. The Supreme Court has recognized two principles, individualized sentencing and heightened reliability, as constitutionally necessary for any capital sentencing scheme. The Virginia capital sentencing scheme embraces the principle of individualized sentencing by permitting the jury or court to consider all relevant evidence, including unadjudicated acts of violence allegedly committed by the defendant. The Virginia scheme has, however, neglected the constitutional requirement of heightened reliability. Neither the Virginia capital sentencing statute nor the Supreme Court of Virginia requires the sentencer to find that the defendant in fact committed the unadjudicated acts of violence by any standard of proof. The

[1] Va. Code Ann. § 19.2-264.2 (Michie 1995). This section permits the death penalty to be imposed if Commonwealth proves that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society"- what is commonly referred to as "future dangerousness" aggravator. Alternatively, the death penalty may be imposed if the Commonwealth proves that the defendant's conduct in committing the instant offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim"-what is commonly referred to as the "vileness" aggravator. Virginia Code Section 19.2-264.4(C) requires the Commonwealth to prove either or both aggravators beyond a reasonable doubt.

[2] Va. Code Ann. § 19.2-264.4(B) (Michie 1995). See also Va. Code Ann. § 19.2- 264.4(C), stating that a finding of future dangerousness may be based on "evidence of the prior history of the defendant."

[3] *Peterson v. Commonwealth*, 225 Va. 289, 298, 302 S.E.2d 520, 526 (1983).

[4] *See* Fenn, *Anything Someone Else Says Can and Will be Used Against You in a Court of Law: The Use of Unadjudicated Acts in Capital Sentencing*, Cap. Def. Dig., Vol. 5, No. 2, p. 31 (1993) (considering generally the use of unadjudicated acts in capital sentencing and suggesting trial strategies to minimize their effect); McIndoe, *Is A Standard of Proof Required for the Evaluation of Unadjudicated Acts in Capital Sentencing?*, Cap. Def. J., Vol. 9, No. 2, p. 52 (1997) (arguing that a recent Supreme Court case implicitly requires a capital jury to find by a preponderance of the evidence that the defendant committed the unadjudicated acts before relying upon such evidence in assessing future dangerousness).