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Swisher v. True 325 F.3d 225 (4th Cir. 2003) Rowsey v. Lee 327 F.3d 335 (4th Cir. 2003)

Swisher v. True
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I. Facts

On February 5, 1997, Bobby Wayne Swisher ("Swisher") entered a florist shop in Augusta County, Virginia and told an employee of the store, Dawn McNees Snyder ("Snyder"), that he had a gun concealed in his coat pocket. Swisher then took Synder to a desolate field near the South River. Swisher forced Snyder to perform oral sex and remove her clothes. He then raped her and made her perform oral sex again. After she put her clothes back on, Swisher cut her face and throat with a butcher's knife. While Snyder was still alive, Swisher threw her into the river. When Snyder began to crawl up the bank, Swisher fled in fear. Her body was found on February 21, 1997. The next day, Swisher confessed the details of the murder to two of his friends. His friends, Clarence Henry Ridgeway, Jr. ("Ridgeway") and Shane Knous, became alarmed and notified the authorities. Subsequently, Swisher confessed to the crime. After a jury trial, the jury found Swisher guilty of capital murder, abduction, rape and forcible sodomy. The jury fixed the penalty at death, and the trial judge so sentenced him on February 18, 1998.[1]

The Supreme Court of Virginia denied Swisher's direct appeal, which was consolidated with the automatic review of his death sentence in the Supreme Court of Virginia.[2] Next, Swisher filed a petition for a writ of habeas corpus in the Supreme Court of Virginia but was again denied relief.[3] Swisher then sought habeas relief in the United States District Court for the Western District of Virginia.[4] Once more, Swisher was unsuccessful.[5] Finally, Swisher sought a certificate of appealability ("COA") from the United States Court of Appeals for the Fourth Circuit.[6] Swisher argued that the Commonwealth did not provide

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1. Swisher v. True, 325 F.3d 225, 226–28 (4th Cir. 2003), *cert. denied*, 123 S. Ct. 2668 (2003).

2. *Id.* at 228; Swisher v. Commonwealth, 506 S.E.2d 763, 773 (Va. 1998); *see* VA. CODE ANN. § 17.1-313(A) (Michie 2003) (stating that "[a] sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court").

3. *Swisher*, 325 F.3d at 228.

4. *Id.*; *see* U.S.C. § 2254 (2000) (allowing federal courts to entertain writs of habeas corpus by persons in custody pursuant to state court judgments).

5. *Swisher*, 325 F.3d at 228.

6. *Id.*

him with *Brady* material and knowingly elicited perjured testimony from a witness.[7] He also claimed his counsel's assistance was ineffective.[8]

Shortly thereafter, the Fourth Circuit received a request for a COA arising from a North Carolina case, *State v Rowsey*.[9] Around 1:00 a.m. on March 24, 1992, Raymond Dayle Rowsey ("Rowsey") and his half brother Raymond Lee Steele went to a local Circle K convenience store. After playing video games and examining a movie display, Rowsey approached the checkout counter and purchased two bags of M&M's. Rowsey next produced a gun from his coat, pointed it at the clerk and clicked the weapon without discharging it. Rowsey turned to his half brother with a smile and said he had scared the clerk with a water gun. Rowsey turned back to the clerk and shot him in the face with what was indeed a real gun. He then leaned over the counter and shot him again. After running around the counter, Rowsey fired at least two more shots and kicked the victim several times in the back of the head. The two fled the store with $54.00 in cash and several adult magazines. When Rowsey's half brother tried to spend a recorded two-dollar bill obtained from the store, he was apprehended and eventually confessed. The jury convicted Rowsey of first-degree murder and armed robbery and sentenced him to death.[10]

On direct appeal, the Supreme Court of North Carolina affirmed the conviction and the sentence.[11] After the United States Supreme Court denied certiorari, Rowsey filed a motion for appropriate relief ("MAR") in North Carolina state court, which was denied.[12] The Supreme Court of North Carolina denied certiorari.[13] Thereafter, Rowsey filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of North Carolina, which the district court dismissed upon a magistrate's recommendation.[14] The district court did not issue a COA.[15] Rowsey sought a COA from the United States Court of Appeals for the Fourth Circuit seeking, *inter alia*, review for judicial bias, ineffective assistance of counsel, and imposition of a death sentence without a unanimous jury verdict.[16]

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7. *Id.*
8. *Id.*
9. Rowsey v. Lee, 327 F.3d 335 (4th Cir. 2003); State v. Rowsey, 472 S.E.2d 903, 903 (N.C. 1996).
10. *Rowsey*, 327 F.3d at 337–39.
11. *Rowsey*, 472 S.E.2d at 919.
12. *Rowsey*, 327 F.3d at 339.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 339–41.

II. Holding

The United States Court of Appeals for the Fourth Circuit declined to issue a COA for any of Swisher's claims.[17] The Fourth Circuit did, however, issue a COA for Rowsey's claim that the trial judge's comments during the trial evinced a bias against Rowsey.[18] Nonetheless, the court upheld the district court's determination because Rowsey failed to demonstrate that the alleged bias deprived him of a fair trial.[19] The court declined to grant a COA for any of Rowsey's remaining claims.[20]

III. Analysis

A. Procedural Standards

Because the district court did not issue a COA, Swisher, like Rowsey, could appeal only if at least one judge on a three judge panel of the court of appeals granted him a COA.[21] A COA can issue "only if the applicant has made a substantial showing of the denial of a constitutional right."[22] In *Slack v McDaniel*,[23] the United States Supreme Court held that to meet this burden a habeas petitioner must "sho[w] that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to

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17. *Swisher*, 325 F.3d at 233.

18. *Rowsey*, 327 F.3d at 341.

19. *Id.* at 342.

20. *Id.* at 345. One of the remaining claims that the court refused to hear was an equal protection claim based on the alleged equal culpability of Rowsey's co-defendant. Rowsey argued that the trial court's application of North Carolina General Statutes section 15A-2000 denied him his equal protection rights. *Id.* at 342; *see also* N.C. GEN. STAT. § 15A-2000 (2001) (detailing procedure for separate penalty phase after judgment of guilt in capital trial). Despite equal culpability, Rowsey claimed that his co-defendant was offered a life plea and avoided a death sentence. *Rowsey*, 327 F.3d at 342. Because Rowsey produced no evidence to demonstrate a discriminatory intent on the part of the prosecution and the prosecution produced substantial evidence showing Rowsey's guilt, the court declined to issue a COA for that claim. *Id.* at 343. That claim will not be discussed further in this case note.

21. *Swisher*, 325 F.3d at 228; *Rowsey*, 327 F.3d at 339; *see* 28 U.S.C. § 2253(c)(1)(A) (2000) (stating that unless a circuit justice or judge issues a certificate of appealability, an applicant may not appeal "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court"; part of AEDPA); FED. R. APP. P. 22(b)(1) (stating that when "an applicant files a notice of appeal, the district judge who rendered the decision must either issue a certificate of appealability or state why a certificate should not issue"); 4TH CIR. R. 22(a)(3) (stating that a COA shall issue if any judge of a three judge panel finds that a petitioner has made the showing required by 28 U.S.C. § 2253(c)).

22. 28 U.S.C. § 2253(c)(2) (stating that for a certificate of appealability to issue, the applicant must make a "substantial showing of the denial of a constitutional right"; part of AEDPA).

23. 529 U.S. 473 (2000).

proceed further.' "[24] Likewise, when the district court rejects a petitioner's habeas petition on procedural grounds, without reaching the underlying constitutional claim, the court of appeals may only issue a COA upon a showing that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."[25] In *Miller-El v Cockrell*,[26] the United States Supreme Court insisted that appellate courts not "sidestep[]" the process for issuing a COA by denying an appeal on the merits and then using that denial as a justification for not issuing a COA.[27] The Court held that when appellate courts used such reasoning to deny a COA, they were essentially "deciding an appeal without jurisdiction."[28]

The Fourth Circuit heard arguments in both *Rousey* and *Swisher* before the Supreme Court announced its decision in *Miller-El*, but it issued both decisions after *Miller-El*.[29] In *Swisher*, the court noted that "[t]he current posture of this appeal, in which we are called on to determine whether to issue a COA as to issues which have been fully briefed and argued before the panel, is thus out of step with the procedural treatment that the Supreme Court has indicated is appropriate for COA applications under § 2253(c)."[30] Nonetheless, in both cases the court applied the standard found in § 2253(c) and *Slack* as directed by *Miller-El*.[31]

B. Ineffective Assistance of Counsel

1. Swisher

During the penalty phase of Swisher's trial, Ridgeway testified that he had heard Swisher say he felt he could "do it again."[32] Ridgeway had previously told

24. Slack v. McDaniel, 529 U.S. 473, 483–84 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)).

25. *Id.* at 484.

26. 537 U.S. 322 (2003).

27. Miller-El v. Cockrell, 537 U.S. 322, 336–37 (2003) (forbidding courts of appeals from deciding the merits of an appeal and using that decision to determine whether to grant an application for a COA).

28. *Id.* In his concurrence, Justice Scalia pointed to two such cases in the prior year alone, Kasi v. Angelone, 300 F.3d 487 (4th Cir. 2002) and Wheat v. Johnson, 238 F.3d 357 (5th Cir. 2001), in which the respective appellate courts decided an appeal without jurisdiction. *Id.* at 348–49 (Scalia, J., concurring); *see also* Lyons v. Lee, 316 F.3d 528, 530 (4th Cir. 2003) (declining to issue a COA after examining the merits of the appeal); Jones v. Cooper, 311 F.3d 306, 308 (4th Cir. 2003) (same); Janice L. Kopec, Case Note, 15 CAP. DEF. J. 467 (2003) (analyzing Jones v. Cooper, 311 F.3d 306 (4th Cir. 2003) and Lyons v. Lee 316 F.3d 528 (4th Cir. 2003)).

29. *Miller-El*, 537 U.S. at 322; *Rousey*, 327 F.3d at 335; *Swisher*, 325 F.3d at 225.

30. *Swisher*, 325 F.3d at 230.

31. *Id.*; *Rousey*, 327 F.3d at 340.

32. *Swisher*, 325 F.3d at 227.

the police he did not remember hearing such a statement from Swisher himself, but that Shane Knous remembered hearing Swisher say he felt like he could "do it again."[33] Swisher argued that his counsel rendered ineffective assistance by neglecting to cross-examine Ridgeway about the discrepancy between his testimony and his statement to the police.[34]

The district court applied *Strickland v Washington*[35] and denied Swisher habeas relief.[36] The district court determined that Swisher's counsel's performances were not objectively unreasonable and that the jury heard sufficient other evidence of both vileness and future dangerousness (physical evidence of the crime, Swisher's confession, discovery of a "shank" and razor blade in Swisher's cell, and Swisher's repeated threats to jailers) to support the ultimate sentence.[37] The Fourth Circuit found that, in light of the evidence presented to the jury outside of Ridgeway's testimony, reasonable jurists would not find the district court's ruling debatable and denied Swisher's application for a COA.[38]

2. Rowsey

Rowsey argued that his counsel provided ineffective assistance by failing to object to the judge's jury poll questioning of Eleanor Leath ("Leath") or to ask for clarification of her response.[39] After the jury foreman delivered the recommendation of a sentence of death, the judge polled the jury to determine if each member assented to the sentence.[40] Leath became emotional and was unable to respond to the judge's questions.[41] After being asked three times whether she agreed with the sentence, Leath voiced her assent on the fourth questioning.[42]

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33. *Id.* at 227–28.

34. *Id.* at 231.

35. 466 U.S. 668 (1984).

36. *Swisher*, 325 F.3d at 232; *see* Strickland v. Washington, 466 U.S. 668, 687–91 (1984) (holding that to support a finding of ineffective assistance of counsel, a petitioner must show the following: (1) counsel's performance fell below an objective standard of reasonableness and outside the wide range of professional competency; and (2) the performance prejudiced the defense in that if counsel had met the professional standards, the result of the proceeding would have been different).

37. *Swisher*, 325 F.3d at 232. Under Virginia statutory law, before a death sentence is imposed, the court or jury must either find a probability of future dangerousness or that defendant's conduct in the course of the crime was "outrageously or wantonly vile." VA. CODE ANN. § 19.2-264.2 (Michie 2000). In Swisher's case, the jury found that the Commonwealth proved both aggravating factors beyond a reasonable doubt. *Swisher*, 325 F.3d at 232 n.8.

38. *Swisher*, 325 F.3d at 232.

39. *Rowsey*, 327 F.3d at 343.

40. *Id.* at 344.

41. *Id.*

42. *Id.*

Four years later, Leath swore in an affidavit that she did not intend to assent to the sentence.[43]

The Fourth Circuit found, based on the transcript of the proceeding alone, that counsel's failure to object was not unreasonable.[44] The court noted that the trial judge went to great pains to ascertain Leath's intent and that her assent to the verdict was clear and unambiguous.[45] The court gave Leath's affidavit little weight and noted the dangers of basing a decision on a juror's recollections years after the fact, particularly when the juror's response to the poll on the day in question was uncontroverted.[46] Given these circumstances, the court decided that Rowsey's counsel did not act unreasonably by failing to object to the judge's questioning of Leath and declined to issue a COA on that claim.[47]

C. *Procedural Default and Perjured Testimony*

Swisher also argued that by eliciting false testimony from Ridgeway and failing to correct the impression it created, the Commonwealth violated his Fourteenth Amendment rights.[48] Because Swisher did not raise this claim at trial or on direct appeal, but in the state habeas proceedings, the Supreme Court of Virginia determined that the claim was procedurally defaulted.[49] Swisher failed to "show cause and prejudice to overcome his procedural default," and the district court therefore denied his claim.[50] Swisher argued that he had shown cause because by the very act of using the testimony, the Commonwealth purposely obscured its falsity.[51] Therefore, government officials' actions interfered with Swisher's ability to comply with state procedural rules.[52] The Fourth Circuit observed that the basis for Swisher's perjury claim was the disparity between Ridgeway's statement to the police and his testimony at trial, both of which were

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43. *Id.* at 343.

44. *Id.* at 344.

45. *Rowsey*, 327 F.3d at 344–45.

46. *Id.*

47. *Id.*

48. *Swisher*, 325 F.3d at 230 (citing Napue v. Illinois, 360 U.S. 264, 269 (1959) and Giglio v. United States, 405 U.S. 150, 153 (1972)); *see* U.S. CONST. amend. XIV (guaranteeing due process of law). In *Napue*, the Court stated that convictions obtained by soliciting false evidence, or failing to correct the erroneous impression it creates at trial, may not stand. *Napue*, 360 U.S. at 269. In *Giglio*, the Court noted "that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio*, 405 U.S. at 153 (citation omitted).

49. *Swisher*, 325 F.3d at 230.

50. *Id.*

51. *Id.*

52. *Id.* at 230–31 (citing McCleskey v. Zant, 499 U.S. 467, 494 (1991) (holding that officials' actions rendering compliance with state procedural rules impracticable will provide sufficient cause to excuse default)).

in Swisher's possession.[53] The court determined that reasonable jurists would agree that government interference had not impinged upon Swisher's ability to discover Ridgeway's alleged perjury because Swisher possessed Ridgeway's initial statement all along.[54]

Alternatively, Swisher argued that his counsel's failure to challenge the testimony constituted ineffective assistance of counsel that explained his procedural default.[55] While ineffective assistance of counsel may establish cause for procedural default because it is an independent constitutional claim, it is also subject to the requirement of exhaustion in state court.[56] Swisher failed to assert this ineffective assistance of counsel claim in a timely manner and did not explain this failure.[57] Therefore, the court held that reasonable jurists would not debate the district court's finding that Swisher's ineffective assistance of counsel excuse for his procedural default was itself procedurally defaulted.[58] Because no reasonable jurists could debate the insufficiency of either of Swisher's explanations for his procedural default, the Fourth Circuit declined to issue a COA.[59]

D. Brady *Violation*

Swisher asserted that the Commonwealth's failure to disclose that Ridgeway sought and received a reward in exchange for his testimony violated *Brady v Maryland*.[60] Although Swisher also procedurally defaulted this claim, the district court denied it on the merits pursuant to 28 U.S.C. § 2254(b)(2).[61] The district court concluded that in light of the strength of the evidence before the jury outside of Ridgeway's testimony, if Swisher's counsel had been able to impeach Ridgeway through the evidence requested, no juror would have likely voted for life.[62] The Fourth Circuit decided that no reasonable jurists could debate the results of the district court's determination.[63]

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53. *Id.*

54. *Id.*

55. *Swisher*, 325 F.3d at 231.

56. *Id.* at 231 (citing Edwards v. Carpenter, 529 U.S. 446, 451–52 (2000) and Murray v. Carrier, 477 U.S. 478, 488–89 (1986)).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 232; *see* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment").

61. *Swisher*, 325 F.3d at 232–33 (citing 28 U.S.C. § 2254(b)(2) (2000)).

62. *Id.* at 233 (citing *Jones*, 311 F.3d at 314 n.4 (finding that to establish a *Brady* claim, a defendant must show a reasonable probability that the results of the proceedings would have been different if the exculpatory material had been disclosed)).

63. *Id.*

E. Judicial Bias

Rowsey argued that the trial judge's partiality and bias against him violated his due process rights.[64] Rowsey alleged that nineteen statements from the trial judge reflected an unconstitutional bias.[65] Among the statements, the trial judge said that the victim "was gay and the defendant was probably a latent homosexual," if the jury sentenced the defendant to death the defendant should "be taken from the courthouse to the Circle K where the murder occurred, shot six times and stomped in the head," and if individual voir dire was granted the judge "would go back to Durham and wait three weeks and [counsel should] call him when they were through."[66] None of these statements were made in the presence of the jury.[67]

In *Liteky v. United States*,[68] the United States Supreme Court held that judicial bias amounted to a denial of due process only when an appellant showed that the bias made "fair judgment impossible."[69] " 'Opinions formed by the judge do not constitute a basis for a bias or partiality motion unless they displayed a deep-seated favoritism or antagonism. . . .' "[70] " '[E]xpressions of impatience, dissatisfaction, annoyance, and even anger,' do not constitute judicial bias.[71] The state MAR court found that the comments did not impact the fairness of the trial and the federal district court upheld that ruling.[72] Because the Fourth Circuit found that reasonable jurists could debate the district court's assessment of the effect of the trial judge's comments, the Fourth Circuit issued a COA.[73]

Upon issuing a COA, the Fourth Circuit was bound to examine the MAR court's ruling to determine whether it was "contrary to, or an unreasonable application of, clearly established Federal law."[74] Although this standard of review is higher than the initial COA inquiry, the clearly established federal law to be applied was still the *Liteky* standard.[75] The Court of Appeals determined that because the jury adjudicated Rowsey's guilt and fixed the penalty, to succeed on his claim, Rowsey needed to show that either the judge's alleged bias influ-

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64. *Rowsey*, 327 F.3d at 341.

65. *Id.*

66. *Id.*

67. *Id.* at 341–42.

68. 510 U.S. 540 (1994).

69. Liteky v. United States, 510 U.S. 540, 555 (1994) (holding that to establish judicial bias the appellant must show a deep seated favoritism or antagonism rendering fair judgment impossible).

70. *Rowsey*, 327 F.3d at 341 (quoting *Liteky*, 510 U.S. at 555) (alteration in original).

71. *Id.* (quoting *Liteky*, 510 U.S. at 555–56).

72. *Id.* at 342.

73. *Id.* at 341.

74. *Id.* (citing Williams v. Taylor, 529 U.S. 362, 367 (2000)).

75. *Id.* at 341–42.

enced the jury or that the judge made rulings against Rowsey that demonstrated a deep seated bias.[76] The Fourth Circuit agreed with the district court that some of the trial judge's comments "push[ed] private judicial commentary to its ethical limit."[77] However, the Fourth Circuit found that the judge made all of the alleged improper comments outside the presence of the jury and the judge ruled in favor of Rowsey several times.[78] Rowsey also claimed that the judge displayed his bias by overruling Rowsey's objection against introducing his prior record as mitigating evidence.[79] The Fourth Circuit agreed with the Supreme Court of North Carolina that the trial judge was required to admit the prior record because a reasonable juror could view the prior record as a mitigating circumstance because the record consisted of mostly property crimes, contained no felonies, and showed Rowsey did not have a serious criminal history.[80] Consequently, the Fourth Circuit upheld the district court's determination that the state MAR court's ruling was neither contrary to, nor an unreasonable application of, clearly established federal law.[81]

F. Imposition of a Death Sentence on a Nonunanimous Verdict

Finally, Rowsey argued that because juror Leath did not intend to assent to the verdict, the state violated its own process by sentencing Rowsey to death without first obtaining a unanimous jury verdict.[82] The Fourth Circuit agreed with the Supreme Court of North Carolina and the district court that the trial judge's questioning of Leath was proper and that she freely assented to the verdict.[83] Although Rowsey requested an evidentiary hearing on the matter, the only new evidence he produced to indicate that the verdict was not unanimous was Leath's affidavit.[84] The court found the claim "wholly without merit and decline[d] to issue a COA."[85]

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76. *Rowsey*, 327 F.3d at 342.

77. *Id.* at 341.

78. *Id.* at 341–42.

79. *Id.* at 342. Under North Carolina law, a judge must submit all evidence that might support a mitigating circumstance to the jury, even over a defendant's objection. *See* N.C. GEN. STAT. § 15A-2000(b) (requiring the judge to instruct the jury to consider mitigating evidence when determining the appropriateness of a capital sentence); State v. Ingle, 445 S.E.2d 880, 893–94 (N.C. 1994) (stating that if the defendant's prior criminal history is relatively insignificant, the judge must submit the record to the jury as mitigating evidence).

80. *Rowsey*, 327 F.3d at 342.

81. *Id.*

82. *Id.* at 345; *see* N.C. GEN. STAT. § 15A-2000(b) (2001) (requiring a death sentence to be supported by a unanimous jury verdict).

83. *Rowsey*, 327 F.3d at 345.

84. *Id.*

85. *Id.* Perhaps Rowsey based this claim on a violation of due process; the opinion does not clarify the basis for this claim.

IV. Application in Virginia

Swisher and *Rousey* provide the practitioner with some indication of how the Fourth Circuit will follow the procedural requirements established by the Supreme Court in *Miller-El*. First, throughout most of both cases the Fourth Circuit appeared to heed the Supreme Court's admonition against deciding an appeal on its merits and using the result to justify denying a COA. However, at the end of *Rousey*, the Fourth Circuit appeared to slide back into that disfavored practice by declining to issue a COA because the claims were "wholly without merit."[86] Apparently, the Fourth Circuit will not specify that reasonable jurists could find a decision debatable when the decision appealed leaves nothing to debate; after all, reasonable jurists would all agree that a claim wholly without merit was properly dismissed. This finding suggests that in some class of appeals the merits of the appeal will be so obvious that even a first examination of the application will reveal that the appeal is both without merit and beyond reasonable debate.

Rousey and *Swisher* also indicate, however, that the procedural standard the Supreme Court insisted on in *Miller-El* may impact the Fourth Circuit's decision to issue a COA in other appeals. The two cases illustrate that the standard for granting a COA will be daunting. Of the several issues appealed in those cases, the only one for which a COA was granted was Rowsey's judicial bias claim, based in part on comments that pushed "private judicial commentary to its ethical limit."[87] To the extent that the Fourth Circuit has fleshed out the procedural demands of *Miller-El* in these cases, it has done so in a demanding way.

The denial of an application for a COA by the district court places the practitioner in an awkward situation. *Miller-El* plainly requires a two-step process, first an application for a COA and, if granted, a briefing on the merits.[88] The two documents would have considerable overlap in factual and procedural material. Certainly, the more efficient method is to combine them in one document. Furthermore, the Fourth Circuit appears to follow the Supreme Court's directive that the "issuance of a COA must not be *pro forma* or a matter of course."[89] Because of the apparent difficulty applicants will likely have in obtaining a COA, an applicant should include as much material as possible in the application for a COA because, as these cases illustrate, the application for a COA may be the applicant's only chance to be heard at the appellate level.

Rousey sheds some light on how to proceed with a hesitant juror during a jury poll. The practitioner must choose between objecting to the way in which

86. *Id.*
87. *Id.* at 341.
88. *Miller-El*, 537 U.S. at 335–36.
89. *Id.* at 337.

the jury poll is conducted or remaining silent and hoping for postconviction relief. *Rousey* indicated that in all likelihood no postconviction relief will be forthcoming from the Fourth Circuit if the judge can extract an assent from a juror.[90] Given the result in *Humbert v Commonwealth*,[91] a Virginia appellate court might be more sympathetic to such a claim.[92] An important fact in *Humbert* was that a hesitant juror cried and said she "[could not] say it" before assenting to the verdict.[93] Absent extreme circumstances like those in *Humbert*, the appellate courts are unlikely to overturn a conviction. Therefore, the best strategy to pursue, if faced with a hesitant juror, is to ask the judge to repoll the jury. If the judge repolls the jury, and the juror refuses to assent, then the result is a nonunanimous death verdict upon which the judge must impose life.[94] If the juror manifests his or her assent to the verdict, then a practitioner has not lost anything after *Rousey* and *Humbert*.

Swisher reminds the practitioner that all ineffective assistance of counsel claims should be made as quickly as possible. The Fourth Circuit held in *Burket v Angelone*[95] that ineffective assistance of counsel for failing to raise a claim at trial or on direct appeal may provide cause to excuse the procedural default.[96] The Fourth Circuit in *Swisher* found that Swisher's claim of ineffective assistance of counsel to excuse his procedural default was itself procedurally defaulted because he did not raise it at his first opportunity.[97] Consequently, counsel hoping to use the rule announced in *Burket* must do so in the state habeas proceeding, or else the claim that ineffective assistance of counsel excuses a procedural default will be itself defaulted.[98]

Swisher also reminds the practitioner that ineffective assistance of counsel claims should be made with as much particularity as possible. Swisher's claim that his counsel ineffectively cross-examined Ridgeway was not broad enough to

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90. *Rousey*, 327 F.3d at 343–45.

91. 514 S.E.2d 804 (Va. Ct. App. 1999).

92. Humbert v. Commonwealth, 514 S.E.2d 804, 809–10 (Va. Ct. App. 1999) (holding that when a judge repeatedly prodded a jury to reach a verdict, jurors expressed belief that a unanimous verdict was impossible before the judge ordered them to further deliberate, and a juror became upset, cried, and said she "[could not] say it" before finally assenting to the verdict, the verdict was not unanimous).

93. *Id.*

94. VA. CODE ANN. § 19.2–264.4(E) (Michie Supp. 2003) (stating that if a jury cannot reach unanimity regarding the penalty, the judge must dismiss the jury and impose a life sentence).

95. 208 F.3d 172 (4th Cir. 2000).

96. Burket v. Angelone, 208 F.3d 172, 189 (4th Cir. 2000) (ruling that because defendant had a constitutional right to assistance of counsel at trial and on appeal, ineffective assistance of counsel may excuse a procedural default on another claim).

97. *Swisher*, 325 F.3d at 231.

98. *Burket*, 208 F.3d at 189 (finding ineffective assistance of counsel may excuse procedural default).

encompass his claim that his counsel's ineffectiveness for not claiming the State knowingly elicited perjured testimony excused his procedural default.[99] Therefore, counsel should plead each and every ineffective assistance of counsel claim as precisely as possible at the earliest possible stage of the proceedings.

V. Conclusion

For the first time, the Fourth Circuit seriously engaged the procedural step of the appeals process that requires an appellant to receive a COA before the court entertains the appeal on the merits. The standard that appears to emerge from that engagement is lofty. Moreover, obtaining a COA, of course, is no guarantee that the decision on the merits will be favorable.

VI. Epilogue

At 9:05 p.m. on July 22, 2003, Bobby Wayne Swisher was executed at the Greensville Correctional Center.[100] In his final statement he said, "I hope you all can find the same peace in Jesus Christ as I have."[101] The execution had been set for July 1, 2003, but Governor Mark Warner delayed the execution in order to give Swisher a final chance to appeal to the Supreme Court of Virginia for a new sentencing proceeding.[102] Swisher argued that the jury used a verdict form later found by the Supreme Court of Virginia to be defective.[103] The court denied his appeal on what Swisher's attorney described as procedural grounds.[104]

Maxwell C. Smith

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99. *Swisher*, 325 F.3d at 231–32.

100. Jamie C. Ruff, *Augusta Killer is Executed; Swisher Hoped for Resentencing*, RICH. TIMES-DISPATCH, July 23, 2003, at B1, 2003 WL 8029195.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*