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Page v. Lee 337 F.3d 411 (4th Cir. 2003)

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I. Facts

Around 8:00 a.m on February 27, 1995, George Franklin Page ("Page") began firing rifle shots out of his apartment window. The first shot pierced Sandra McGill's fish tank in the apartment opposite Page's. When maintenance person Ellis Hollowell tried to investigate the hole left by the first bullet, Page fired a second shot that lodged in the apartment's exterior wall, slightly above the maintenance person's head. Around 9:00 a.m., Page fired a third bullet into a nearby cable van.[1]

Shortly thereafter, police arrived on the scene to inspect Sandra McGill's apartment. Page fired two shots, and as the officers radioed for help, Page fired once more. Officers John Pratt and Stephen Amos ("Amos") responded to the request for assistance. Amos exited the automobile and was standing by the hood when Page fired another shot through the back window of the patrol car and into Amos's chest. Amos died, and Page surrendered to the authorities on the condition that he first be allowed to visit Dan Pollock ("Pollock"), a clinical psychologist who had previously treated Page. Jason Crandell ("Crandell"), Page's psychiatrist, accompanied Page to Pollock's office.[2]

Before Page's trial, the North Carolina trial court denied his request for a forensic psychiatrist's aid in preparing his defense.[3] The jury found Page guilty of capital murder and recommended a death sentence; Page was sentenced to death.[4] On direct appeal, the Supreme Court of North Carolina concluded that the trial court correctly denied Page's motion to access a forensic psychiatrist.[5] Page applied unsuccessfully for a writ of habeas corpus in federal district court.[6] On appeal, Page argued he was improperly denied a forensic psychiatrist at trial.[7] Page also claimed the trial court erred by refusing him the opportunity to ascertain whether the venire members understood that if he were sentenced to life, he would be parole ineligible.[8]

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1. State v. Page, 488 S.E.2d 225, 228 (N.C. 1997).
2. *Id.* at 229.
3. *Id.* at 230.
4. *Id.* at 228.
5. *Id.* at 230.
6. Page v. Lee, 337 F.3d 411, 414 (4th Cir. 2003).
7. *Id.* at 413.
8. *Id.*

II. Holding

The United States Court of Appeals for the Fourth Circuit declined to issue a certificate of appealability ("COA") for Page's claim regarding his opportunity to question venire members.[9] Because Judge Gregory determined that a COA should issue on Page's claim that he was improperly denied access to a forensic psychiatrist, the Fourth Circuit heard that claim on the merits.[10] Nonetheless, the court ultimately found that the claim lacked merit and denied habeas relief.[11]

III. Analysis

A. Voir Dire

Page argued that the trial court's ruling, which denied his request to question potential jurors regarding their understanding of a sentence of "life without parole," was contrary to the United States Supreme Court's decisions in *Kelly v South Carolina*[12] and *Simmons v South Carolina*.[13] Because the district court declined to issue a COA, Page needed to obtain a COA from the Fourth Circuit before that court could hear the claim on its merits.[14] The Fourth Circuit declined to issue a COA "[a]s no judge on the panel believe[d] that petitioner ha[d] made a substantial showing of the denial of a constitutional right as to his *Simmons* claim."[15]

B. Forensic Psychiatrist

In *Ake v Oklahoma*[16] the United States Supreme Court held that:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent

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9. *Id.*

10. *Id.* at 414.

11. *Id.* at 420.

12. 534 U.S. 246 (2002).

13. *Page*, 337 F.3d at 413; *see* Kelly v. South Carolina, 534 U.S. 246, 248 (2002) (holding that due process requires that a defendant be allowed to inform the jury that he or she will be ineligible for parole when future dangerousness is at issue and the only sentencing options are death and life without the possibility of parole); Simmons v. South Carolina, 512 U.S. 154, 156 (1994) (same).

14. *Page*, 337 F.3d at 413; *see* 28 U.S.C § 2253(c)(1) (2000) (requiring "a circuit justice or judge" to issue a COA before a petitioner may appeal the result of a federal habeas proceeding in which the underlying detention arose from a state proceeding; part of AEDPA).

15. *Page*, 337 F.3d at 413; *see* 28 U.S.C. § 2253(c)(2) (stating that "[a] certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right"; part of AEDPA); 4TH CIR. R. 22(a)(3) (stating that requests to issue or expand a COA will be granted if one judge of a three-judge panel finds the applicant has made the requisite showing under 28 U.S.C. § 2253(c)).

16. 470 U.S. 68 (1985).

> psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.[17]

The Supreme Court of North Carolina has interpreted *Ake* to entitle a defendant to psychiatric assistance when the defendant shows: "(1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it will materially assist him in the preparation of his case."[18] The Fourth Circuit found that North Carolina's interpretation of *Ake* was reasonable and noted its similarity to the test used by the Eleventh Circuit, which requires a defendant to show that an expert would aid in preparing an insanity defense and that the trial would be unfair without the expert's assistance.[19]

Page argued that *Ake* required the trial court to grant him access to a *forensic* mental health expert, in contrast to the non-forensic mental health experts he already had available.[20] The Fourth Circuit read *Ake* to require only the appointment of a competent psychiatrist.[21] The Fourth Circuit found that nothing in *Ake*, or the court's experience, implied that non-forensic psychiatrists were categorically not competent to aid in the preparation of an insanity defense.[22] Page failed to produce any evidence that indicated Drs. Crandell and Pollock, the

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17. Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (holding that if a defendant's sanity during the offense will be an issue at trial, the state must provide the defendant with access to a competent psychiatrist).

18. *Page*, 337 F.3d at 415 (quoting State v. Moore, 364 S.E.2d 648, 652 (N.C. 1988)).

19. *Id.* at 416 (quoting Moore v. Kemp, 809 F.2d 702, 712 (11th Cir. 1987)). Interestingly, the Eleventh Circuit's test, which requires a defendant to show that an expert would assist the defendant's preparation of an insanity defense *and* that the absence of an expert would result in an unfair trial, appears to be more stringent than the North Carolina test, which allows the petitioner to show one *or* the other. *See Moore*, 809 F.2d at 712 (requiring the defendant to make both showings); *Moore*, 364 S.E.2d at 652 (allowing the defendant to make either showing).

20. *Page*, 337 F.3d at 416.

21. *Id.* at 417; *see* Walton v. Angelone, 321 F.3d 442, 463–65 (4th Cir. 2003) (ruling that the defendant was not prejudiced by his counsel's failure to object to the appointment of a mental health expert who did not believe that mitigating circumstances should offer an excuse for a crime). The trial court in *Walton* appointed Dr. Stanton Samenow ("Dr. Samenow") to be the defendant's mental health expert, despite Dr. Samenow's unorthodox belief that mitigating circumstances are nonexistent and therefore should not be considered in sentencing. *Walton*, 321 F.3d at 464. In *Walton*, the defendant's counsel failed to object to this appointment, but the court in *Walton* determined that this failure to object was not ineffective assistance because the defendant did not show that if his counsel objected the court would have appointed a new mental health expert. *Id.* at 464–65. Perhaps the *Walton* court's finding that the trial court would not have been obliged to appoint a different psychiatrist is a sign that the minimum standard of competency for a mental health expert under *Ake* is quite low in the Fourth Circuit, especially in light of the truncated assistance to defense counsel Dr. Samenow's unorthodox beliefs would have allowed him to provide. For a complete discussion of *Walton*, see Terrence T. Egland, Case Note, 16 CAP. DEF. J. 245 (2003) (analyzing Walton v. Angelone 321 F.3d 442 (4th Cir. 2003)).

22. *Page*, 337 F.3d at 417.

mental health experts who treated Page before the shootings and during the trial, were not competent.[23] Consequently, the Fourth Circuit upheld the Supreme Court of North Carolina's decision.[24]

Page also argued that Drs. Crandell and Pollock did not satisfy *Ake* because they were unable to fulfill some of the necessary psychiatric functions envisioned by *Ake*, such as testifying, examining the defendant, evaluating the strength of an insanity defense, and aiding the defendant's attorney in preparing to confront the state's expert witnesses.[25] However, the court found that Page only argued that his mental health experts did not satisfy *Ake* because the prosecution could have potentially called them as fact witnesses.[26] The court decided that none of a competent psychiatrist's core *Ake* functions would be compromised if the expert were asked to testify for the prosecution as a fact witness "independent of his or her expert status."[27] Therefore, the Fourth Circuit found that the trial court had granted Page access to mental health experts capable of performing the functions contemplated in *Ake* and consequently denied habeas relief.[28]

IV. Application in Virginia

A. Seeking an Extra Expert

The holding in *Page* creates a daunting standard for defense counsel to overcome if they hope to convince the trial court to grant the defendant access to an additional mental health expert. However, given the Fourth Circuit's emphasis on *Ake*'s requirement that defendants have access to "competent" mental health experts, a defendant might obtain additional experts by showing that the already-consulted experts are not competent to fulfill one or more of the *Ake* functions.[29] The Fourth Circuit denied relief to Page in part because he failed to show any reason why the two experts he already had were not competent under *Ake*.[30] Additionally, Judge Gregory's concurrence noted that *Ake* required the state to grant defendants access to competent mental health experts,

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23. *Id.*

24. *Id.*; *see* 28 U.S.C. § 2254(d)(1) (2000) (limiting federal habeas review to determining whether the state court's conclusion was "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; part of AEDPA).

25. *Page*, 337 F.3d at 416, 418 n.4; *see Ake*, 470 U.S. at 82 (noting the high risk of an inaccurate result at trial of a sanity issue if the defense does not have a mental health expert to examine the defendant, testify, determine viability of a sanity defense, and aide defense counsel in preparing for cross-examination).

26. *Page*, 337 F.3d at 419.

27. *Id.* at 418 n.4.

28. *Id.* at 419–20.

29. *Id.* at 417.

30. *Id.* at 419–20, 420 n.5.

however many they might already have.[31] Therefore, practitioners might obtain access to additional mental health experts by showing that the experts already consulted are incapable of fulfilling a particular *Ake* function, whereas the sought-after expert would fulfill that function.

Although the Fourth Circuit did not state what type of evidence would suffice to make such a showing, the court indicated that affidavits from the already-consulted expert, counsel, or petitioner could support a request for additional psychiatric assistance.[32] Consequently, counsel seeking to obtain additional experts under *Ake* should prepare affidavits from the already-consulted experts which illustrate the need for additional experts. The affidavits should emphasize the manner in which the sought-after expert better fulfills an *Ake* function than the already-consulted expert.

Furthermore, the Fourth Circuit held only that an expert's efficacy was not undermined by testimony for the State as a "fact witness[]," "independent of his or her expert status."[33] Thus, the Fourth Circuit's holding that a mental health expert available to defendant satisfies *Ake* even though the expert will also testify for the prosecution applies only to experts whose testimony will be limited to a factual nature. It is likely that after *Page* the Fourth Circuit would find that an expert whose testimony for the State encompassed more than just facts does not satisfy *Ake*. Such a holding would certainly be consistent with *Ake* because an expert who testifies for both sides on non-factual issues could probably not adequately perform the basic *Ake* functions.[34]

B. Procedural Concerns

Practitioners should also be aware of footnote three in *Page*, in which the Fourth Circuit advanced an alternate basis to deny habeas relief.[35] Federal Rule of Civil Procedure 72(b) states that "[w]ithin 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations."[36] The Fourth Circuit reiterated the rule that a party that altogether neglects to object to a magistrate's recommendations waives appellate review.[37] Although the court

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31. *Id.* at 420–21 (Gregory, J., concurring).

32. *See Page*, 337 F.3d at 420 n.5 (describing affidavits from an expert, counsel or defendant as the "simplest form of evidence").

33. *Id.* at 418 n.4.

34. *See Ake*, 470 U.S. at 82 (explaining that a competent mental health expert should conduct a professional evaluation of the defendant, testify, advise counsel of the viability of an insanity defense, and help counsel prepare to cross-examine the state's mental health experts).

35. *Page*, 337 F.3d at 416 n.3.

36. FED. R. CIV. P. 72(b) (detailing the procedure for objecting to a magistrate's decision).

37. *Page*, 337 F.3d at 416 n.3 (citing United States v. Schronce, 727 F.2d 91, 93–94 (4th Cir. 1984)).

acknowledged that the circuit had not yet decided whether the failure to raise specific objections to a magistrate's recommendation also entails a forfeiture of appellate review, it cited approvingly cases from several other circuits which reached that result.[38] Page only entered a general objection to the Magistrate's decision, and the court found Page's failure to object to the magistrate's findings with adequate particularity provided the court with another basis on which to reject his claims.[39] Therefore, a practitioner faced with an unfavorable recommendation from a federal magistrate should object to the findings with as much specificity as possible or face waiving the right to appeal to the Fourth Circuit. The court has clearly stated that a general or vague objection will not suffice to preserve the appeal. Counsel should object with sufficient specificity to " 'focus the district court's attention on the factual and legal issues that are truly in dispute.' "[40]

Finally, *Page* provides some indication of how the Fourth Circuit will decide to issue COAs in the future. Prior to *Miller-El v Cockrell*,[41] the Fourth Circuit frequently decided a claim against a habeas petitioner on the merits and used that finding to justify denying a COA.[42] However, in *Miller-El*, the United States Supreme Court condemned such practice and insisted that courts of appeals first consider whether a COA should issue under 28 U.S.C. § 2253(c) before examining an appeal on the merits.[43] Chief Judge Wilkins observed of the Fourth Circuit's pre-*Miller-El* practice in *Reid v True*:[44] "[I]t is likely that we afforded full review in many appeals that should have been dismissed for failure to satisfy the

38. *Id.* (citing United States v. 2121 E. 30th St., 73 F.3d 1057, 1060 (10th Cir. 1996), Howard v. Sec'y of Health & Human Servs., 932 F.2d 505, 508–09 (6th Cir. 1991), Lockert v. Faulkner, 843 F.2d 1015, 1019 (7th Cir. 1988), and Goney v. Clark, 749 F.2d 5, 6–7 (3d Cir. 1984)).

39. *Id.*

40. *Id.* (quoting *2121 E. 30th St.*, 73 F.3d at 1060).

41. 537 U.S. 322 (2003).

42. Miller-El v. Cockrell, 537 U.S. 322, 336–37 (2003) (forbidding courts of appeals from deciding the merits of an appeal before deciding whether to grant an application for a COA); *see* Lyons v. Lee, 316 F.3d 528, 532–35 (4th Cir. 2003) (declining to issue a COA after examining the merits of the appeal); Jones v. Cooper, 311 F.3d 306, 309–16 (4th Cir. 2003) (same). For a complete discussion of the discrepancy between the Fourth Circuit's procedure in *Jones* and *Lyons* and the Supreme Court's refined procedure announced in *Miller-El*, see 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)). For a complete discussion of *Miller-El*, see Priya Nath, Case Note, 15 CAP. DEF. J. 407 (2003) (analyzing Miller-El v. Cockrell, 123 S. Ct. 1029 (2003)).

43. *Miller-El*, 537 U.S. 336–37; *see* 28 U.S.C. § 2253(c) (2000) (discussing when a COA may be issued).

44. Reid v. True, Nos. 02-27, 03-2, 2003 WL 22301063, at *1, *4 (4th Cir. Oct. 8, 2003).

threshold requirements of § 2253(c)."[45] In *Swisher v. True*[46] and *Rowsey v. Lee*,[47] decided shortly after *Miller-El*, the Fourth Circuit closely examined the respective petitioner's claims before declining to grant a COA on most of their claims.[48] In contrast, the Fourth Circuit in *Page* offered a terse one-line explanation for its refusal to issue a COA on Page's *Simmons* claim.[49] Therefore, it appears that *Swisher* and *Rowsey* were transition cases between the Fourth Circuit's expansive review of applications for COAs before *Miller-El* and the shorter review offered by the court in *Page*. It is likely that *Page* reflects the depth of explanation a petitioner should generally expect from the Fourth Circuit's decisions concerning COAs in the future.

V. Conclusion

Page primarily indicates the difficulties that a habeas petitioner will have in convincing the Fourth Circuit that the trial court erred by not granting the petitioner access to mental health experts beyond petitioner's first such expert. However, this holding is by no means absolute. If the petitioner produced some type of evidence at trial, possibly in the form of affidavits, indicating that the available mental health expert was somehow deficient, the Fourth Circuit may treat the claim more favorably. Similarly, if the prosecution intended to use the expert as a witness concerning matters beyond basic facts, the Fourth Circuit may be inclined to find error. Procedurally, the Fourth Circuit also warned counsel that if they hope to preserve the right to appeal, they must follow the letter of Rule 72(b) and *specifically* object to unfavorable recommendations from a federal magistrate.

Maxwell C. Smith

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45. *Reid*, 2003 WL 22301063, at *4; *see* 28 U.S.C. § 2253(c) (2000) (stating that "[a] certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right").

46. 325 F.3d 225 (4th Cir. 2003).

47. 327 F.3d 335 (4th Cir. 2003).

48. *See* Rowsey v. Lee, 327 F.3d 335, 345 (4th Cir. 2003) (granting a COA on one of the petitioner's claims, but denying relief on the merits thereof and declining to issue a COA on the rest of his claims); Swisher v. True, 325 F.3d 225, 227 (4th Cir. 2003) (declining to issue a COA on any of the petitioner's claims), *cert. denied*, 123 S. Ct. 2668 (2003). For a complete discussion of the Fourth Circuit's treatment of the COA claims in *Swisher* and *Rowsey*, see Maxwell C. Smith, Case Note, 16 CAP. DEF. J. 195 (2003) (analyzing Swisher v. True, 325 F.3d 225 (4th Cir. 2003) and Rowsey v. Lee, 327 F.3d 335 (4th Cir. 2003)). For a discussion of the Fourth Circuit's treatment of other COA claims in the post-*Miller-El* context, see Terrence T. Egland, 16 CAP. DEF. J. 309 (2003) (analyzing *In re* Fowlkes, 326 F.3d 542 (4th Cir. 2003) and *In re* Williams, 330 F.3d 277 (4th Cir. 2003)).

49. *Page*, 337 F.3d at 413.