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4th Cir. R. 22(a)

I. Introduction

Pursuant to 28 U.S.C. § 2253(c)(1), an individual incarcerated as a result of a state court decision may not appeal a federal district court's denial of habeas relief unless a district or appellate court first issues a certificate of appealability ("COA") with respect to the claim the petitioner seeks to appeal.[1] A COA may issue only if the applicant makes "a substantial showing of the denial of a constitutional right."[2] Under applicable United States Supreme Court precedent, an applicant will make the requisite showing under § 2253(c) by demonstrating that "reasonable jurists could debate" the lower court's denial of habeas relief.[3] If the issuing court grants the COA, it must specify which issues are certified for appeal in the COA.[4]

In *Miller-El v Cockrell*,[5] the United States Supreme Court overturned the United States Court of Appeals for the Fifth Circuit's denial of a COA.[6] The Fifth Circuit denied the application for a COA because "the state court's adjudication neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court."[7] In so holding, the Fifth Circuit actually decided the petitioner's claim on the merits, without first deciding whether to grant a COA.[8] The Supreme Court reaffirmed that the decision to issue a COA must be a discrete and separate step from the ultimate decision on the merits of the claim.[9] The Court cautioned that "[w]hen a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justif[ies] its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an

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1. 28 U.S.C. § 2253(c)(1) (2000).

2. 28 U.S.C. § 2253(c)(2).

3. Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citing Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

4. 28 U.S.C. § 2253(c)(3).

5. 537 U.S. 322 (2003).

6. *See* Miller-El v. Cockrell, 537 U.S. 322, 348 (2003).

7. Miller-El v. Johnson, 261 F.3d 445, 452 (5th Cir. 2001).

8. *Miller-El*, 537 U.S. at 341–42; *see* 28 U.S.C. § 2254(d) (2000) (stating that a writ of habeas corpus shall not issue unless the appellant demonstrates that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts"; part of AEDPA).

9. *See Miller-El*, 537 U.S. at 342 (noting that the decision to issue a COA "is a separate proceeding, one distinct from the underlying merits").

appeal without jurisdiction."[10] In his concurrence, Justice Scalia noted that the United States Court of Appeals for the Fourth Circuit had previously failed to consider independently an application for a COA before deciding a habeas claim on its merits.[11]

The Fourth Circuit acknowledged that its procedure for deciding whether to issue a COA before *Miller-El* was not in compliance with § 2253(c) and that it frequently decided both whether to issue a COA and the merits of the case at the same time.[12] Therefore, the purpose of Fourth Circuit Rule 22(a) is to align the Fourth Circuit's procedure for issuing COAs with the requirements of *Miller-El* and § 2253(c).[13] The content of the new rule was initially adopted as Standing Order 03-01 on May 9, 2003, became Fourth Circuit Rule 22(a) on July 8 of that year, and was ultimately appended to, and discussed in, the Fourth Circuit's decision in *Reid v. True*.[14]

II. Discussion

Rule 22(a) addresses four different procedural circumstances in which the court may issue a COA.[15] In all events, a COA will issue if one member of the three-judge panel believes that the petitioner has made the requisite showing.[16] The first eventuality, governed by Rule 22(a)(1)(A), occurs when the district court has not granted the appellant a COA with respect to any of the issues initially raised in the habeas proceeding and the petitioner enters a request for a COA before the Fourth Circuit has filed a briefing order.[17] In that case, the court clerk

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10. *Id.* at 336–37.

11. *Id.* at 348–49 (Scalia, J., concurring) (citing Kasi v. Angelone, 300 F.3d 487 (4th Cir. 2002)). Scalia also noted that in one instance the Fourth Circuit heard an appeal without even issuing a COA. *Id.* at 349 n.* (Scalia, J., concurring); *see* Bates v. Lee, 308 F.3d 411, 417 (4th Cir. 2002) (stating that the district court declined to issue a COA and deciding the appeal on its merits without further reference to a COA). For a complete discussion of the discrepancy between the Fourth Circuit's previous COA procedure and the Supreme Court's refined procedure announced in *Miller-El*, *see generally* 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)).

12. *See* Reid v. True, 349 F.3d 788, 796–97 (4th Cir. 2003) (stating that the court previously "did not have a mechanism for separating the COA determination from the decision on the merits").

13. *Id.* at 797.

14. *Reid*, 349 F.3d at 795–98, 808–16.

15. *See generally* 4TH CIR. R. 22(a), *available at* http://www.ca4.uscourts.gov/pdf/rules.pdf (Dec. 1, 2003) (explaining how the Fourth Circuit will respond to requests for COAs in different procedural contexts).

16. *See* 4TH CIR. R. 22(a)(3) (stating that if at least one of the three judges on the panel finds that petitioner has shown sufficient cause, then a COA should issue); 28 U.S.C. § 2253(c)(1) (2000) (stating that "a circuit *justice or judge*" may issue a COA; part of AEDPA (emphasis added)).

17. *See* 4TH CIR. R. 22(a)(1)(A) (allowing an appellant to petition directly the Fourth Circuit for a COA); 4TH CIR. R. 22(a)(1)(A) note (stating that the circumstance described in the rule will

will refer the request to a three-judge panel.[18] If the panel grants the request, the clerk will enter a briefing order, which will indicate the issues the panel elected to hear.[19] The initial request for a COA should include a "statement of the reasons why a certificate should be issued."[20]

Similarly, if the district court has granted a COA with respect to some of the applicant's claims for habeas relief, but not others, and the applicant requests a COA before the court has entered a briefing order, then Rule 22(a)(2)(A) directs the clerk to submit the request to a three-judge panel.[21] The request must be accompanied by an explanation of why the COA issued by the district court should be expanded to include the other issues.[22] If a COA issues, the clerk will enter a briefing order particularizing the issues the court selected to hear.[23]

Rule 22(a)(1)(B) governs the third instance, in which the district court does not grant a COA for any issue and the appellant does not request a COA.[24] In such cases, the court will regard the notice of appeal as the request for a COA.[25] The clerk must then direct the appellant to enter a brief on the merits, but will neither allow the appellee to enter a brief nor allow the appellant to enter a reply brief.[26] However, should the COA issue, then the clerk will direct the appellee to enter a brief contesting the certified issues and allow the appellant to file a reply brief.[27] Additionally, the applicant may further discuss why the COA should issue by submitting another document, with the initial brief, plainly requesting a COA.[28] This process ensures that the applicant is not precluded from presenting other arguments as to why a COA should issue apart from those made in the brief on the merits.[29] Although the court will examine a full brief on the merits at this stage of the proceeding, the court will not decide the issue on

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occur in the rare instances in which the appellant files a request for a COA before the briefing order is entered).

18. 4TH CIR. R. 22(a)(1)(A).

19. *Id.*

20. *Id.* Because the court promptly enters briefing orders once the appeal is docketed, cases in which an appellant requests a COA before the clerk enters a briefing order will be relatively few in number. 4TH CIR. R. 22(a)(1)(A) note.

21. 4TH CIR. R. 22(a)(2)(A).

22. *Id.*

23. *Id.*

24. 4TH CIR. R. 22(a)(1)(B). In all likelihood, this third instance will be the scenario in most cases. 4TH CIR. R. 22(a)(1)(B) note.

25. 4TH CIR. R. 22(a)(1)(B); *see* FED. R. APP. P. 22(b)(2) (allowing a circuit judge to consider a notice of appeal as a COA).

26. 4TH CIR. R. 22(a)(1)(B).

27. *Id.*

28. 4TH CIR. R. 22(a)(1)(B) note.

29. *Id.*

the merits; it will only decide whether the applicant has made the requisite showing under § 2253(c).[30]

The last procedural situation covered by Rule 22(a) occurs when the district court has granted a COA for some issues, but the appellant has not requested a COA for additional issues at the time the clerk enters the briefing order.[31] In that event, Rule 22(a)(2)(B) instructs the appellant to brief all issues certified by the district court as well as any other issues the appellant would like certified.[32] However, the court will consider the additional issues briefed only if the party also files a list with the brief stating the parties' names, the case number, and the additional issues the appellant would like the court to certify.[33] The accompanying statement may present further arguments to expand the COA.[34] Once the appellant has submitted the brief containing additional issues, with the necessary statement identifying those issues, the clerk will suspend briefing while the three-judge panel considers whether to expand the COA.[35] If the panel grants the petitioner's request, the clerk will enter a Final Briefing Order specifying the issues that the court ultimately decides to hear on the merits.[36]

III. Analysis

The Fourth Circuit's COA procedure appears to conform with the dictates of *Miller-El* and § 2253(a) after its adoption of Rule 22(a). However, this is not necessarily favorable to appellants. Indeed, in *Reid*, Chief Judge Wilkins noted that prior to *Miller-El* the Fourth Circuit "likely [fully reviewed] many appeals that should have been dismissed for failure to satisfy the threshold requirements of § 2253(a)."[37] Subsequent to *Miller-El* it appears that the Fourth Circuit has taken to heart the Supreme Court's reminder "that issuance of a COA must not be *pro forma* or a matter of course."[38] Therefore, practitioners should vigorously argue

30. *Id.*; *see Reid*, 349 F.3d at 796 (stating that although the panel members will read the briefs on the merits, they will not resolve the merits of the case before deciding whether to issue a COA). *See generally* 28 U.S.C. § 2253(c) (2000) (requiring an appellant to obtain a COA before taking an appeal; part of AEDPA).

31. 4TH CIR. R. 22(a)(2)(B).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Reid*, 349 F.3d at 797.

38. *Miller-El*, 537 U.S. at 337; *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 generally* Maxwell C. Smith, Case Note, 16 CAP. DEF. J. 195 (2003) (analyzing Swisher v. True, 325 F.3d 225

their applications for a COA because, under Rule 22(a), the application for a COA may well be the applicant's only chance to be heard on appeal.[39] The rules provide ample opportunities for the practitioner to make these arguments regardless of the procedural posture of the case.

Additionally, practitioners should be aware of some minor procedural elements of the current rule. First, the Fourth Circuit may decide an application for a COA regardless of whether a district court has already reviewed the application.[40] Second, the rule is silent as to whether the Fourth Circuit may review a district court's decision to grant a COA.[41] Finally, although the rule allows the court to request supplemental information from any party, it does not address whether the court may accept unsolicited materials.[42] The Fourth Circuit concluded that this provision does not affect the panel's pre-existing discretion.[43]

IV. Conclusion

Prior to *Miller-El*, the Fourth Circuit's procedure for granting COAs was contrary to the standard enunciated in § 2253(c) because the court often decided an appeal on the merits and whether to issue a COA at the same time. Rule 22(a) aligns the Fourth Circuit COA procedure with the dictates of *Miller-El* and § 2253(c) by ensuring that the court will make the two decisions separately. Therefore, habeas petitioners must now clear an additional hurdle to obtain relief in the Fourth Circuit. Whereas the Fourth Circuit generally considered all habeas claims on the merits before it adopted the new Rule 22(a), now it will afford that full review only to those claims which it finds to meet the standard for granting a COA.

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(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 generally* Terrence T. Egland, Case Note, 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)).

39. *See, e.g., supra* note 38 (listing cases in which the Fourth Circuit did not consider petitioners' claims on the merits but instead refused to issue a COA).

40. *Reid*, 349 F.3d at 795 n.2.

41. *Id.* The *Reid* court noted that this question has caused a divide between other circuits. *Id.* (citing United States v. Cepero, 224 F.3d 256, 261–62, 267–68 (3d Cir. 2000) (en banc) and Ramunno v. United States, 264 F.3d 723, 725 (7th Cir. 2001)).

42. 4TH CIR. R. 22(a)(4); *Reid*, 349 F.3d at 796.

43. *Reid*, 349 F.3d at 796.