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I. Facts

In the early morning of August 12, 1990, Joseph Earl Bates ("Bates") kidnapped and killed Charles Edwin Jenkins ("Jenkins").[1] On the evening of August 11, Bates went to a night club with Gary Shaver ("Shaver").[2] Jenkins asked Bates and Shaver for a ride home from the club at approximately 2:00 a.m.[3] Bates stopped his truck twice during the ride, and during the second stop he hit Jenkins three times on the back of the head with a shovel.[4] When Jenkins regained consciousness, Bates hit him again and hog-tied him in the back of his truck.[5]

Several weeks earlier, an unknown individual had fired shots into Bates's home.[6] As a result, Bates set up a temporary campsite on the property of Hal Eddleman ("Eddleman"), Bates's employer.[7] Bates stopped at Eddleman's house on the way to his campsite, told Eddleman that "he 'got one of the MF's' " and asked him and another friend if they wanted to "watch or help."[8] Bates then took Jenkins to his campsite and questioned him regarding the identity of the person who shot at his home.[9] Bates found Jenkins's answers unsatisfactory and tied Jenkins to a tree.[10] Bates put a gun to Jenkins's throat, but Jenkins maintained that he was not sure who fired the shots.[11] Bates then untied Jenkins and shot him in the throat in the back of his truck.[12] After consulting with Eddleman about the best way to dispose of the body, Bates threw Jenkins's body into the Yadkin River.[13] Afterward, Bates told a friend that he had to kill Jenkins and that it did not matter because he would get the same amount of time for murder as

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1. Bates v. Lee, 308 F.3d 411, 415-16 (4th Cir. 2002).
2. *Id.* at 415.
3. *Id.* at 416.
4. *Id.*
5. *Id.*
6. *Id.* at 415.
7. *Bates*, 308 F.3d at 415.
8. *Id.* at 416.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Bates*, 308 F.3d at 416.

for kidnapping.[14] Bates gave police a thirteen page confession in which he confessed to beating, kidnapping, and shooting Jenkins.[15] He stated that he killed Jenkins because Jenkins would not tell him who had shot at his house and because Jenkins spit on him.[16]

Bates was found guilty of first degree murder and first degree kidnapping. He received a death sentence for the first degree murder conviction. The Supreme Court of North Carolina granted Bates a new trial. A second jury convicted Bates of first degree murder and kidnapping based on both the felony murder rule and premeditation and deliberation. The trial judge accepted the jury's recommendation of a death sentence for the first degree murder conviction and also sentenced Bates to forty years for the kidnapping conviction. The jury based its recommendation of death on the "kidnapping and the especially heinous, atrocious, or cruel nature of the crime."[17]

On direct appeal, the Supreme Court of North Carolina affirmed Bates's second conviction and sentence and the United States Supreme Court denied certiorari.[18] The North Carolina Superior Court denied Bates's Motion for Appropriate Relief.[19] The Supreme Court of North Carolina affirmed.[20] The United States District Court for the Middle District of North Carolina denied Bates's petition for a writ of habeas corpus.[21] The district court found no substantial issue and declined to issue Bates a certificate of appealability.[22] In its decision, the United States Court of Appeals for the Fourth Circuit appeared to be reviewing Bates's claims on the merits; the court did not discuss its grant of a certificate of appealability.[23]

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14. *Id.* at 419-20.

15. *Id.* at 415.

16. *Id.* at 416.

17. *Id.* at 416-17; *see* N.C. GEN. STAT. § 15A-2000(e)(9) (2001) (stating that a capital felony that is "especially heinous, atrocious, or cruel" can be considered an aggravating circumstance).

18. State v. Bates, 473 S.E.2d 269 (N.C. 1996) (affirming second conviction and sentence of death); Bates v. North Carolina, 519 U.S. 1131 (1997) (mem.) (denying certiorari).

19. *Bates*, 308 F.3d at 417.

20. *Id.*

21. *Id.*; *see* 28 U.S.C. § 2254 (2000) (setting forth evidentiary requirements for writ of habeas corpus; part of AEDPA).

22. *Bates*, 308 F.3d at 417. Under § 2253, Bates was required to seek a certificate of appealability before appealing the district court's denial of habeas relief. *See* 28 U.S.C. § 2253 (2000) (requiring a judge to grant a certificate of appealability before an appeal may be taken to the court of appeals).

23. In his concurring opinion in *Miller-El v. Cockrell*, Justice Scalia noted *Bates* as a case that proceeded flatly in contravention of § 2253 because it was considered on the merits even though a certificate of appealability never had issued. Miller-El v. Cockrell, 123 S. Ct. 1029, 1046 n.* (2003) (Scalia, J., concurring). Section 2254 applies when the court of appeals reviews a claim for which the district court granted a certificate of appealability. *See* § 2254. However, when a court reviews a denial of a certificate of appealability, it considers whether the applicant has "made a substantial showing of the denial of a constitutional right." § 2253. For more information about *Miller-El*, see

In his appeal to the United States Court of Appeals for the Fourth Circuit, Bates argued that the Supreme Court of North Carolina unreasonably applied clearly established federal law by denying his claims on appeal.[24] First, Bates argued that the jury should have been instructed on the lesser included offense of second degree murder.[25] Second, Bates contended that his Fifth and Fourteenth Amendment due process rights were violated by the prosecutor's closing arguments at the penalty phase.[26] Finally, Bates argued that the "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague and overbroad.[27]

II. Holding

The Fourth Circuit affirmed the district court's dismissal of Bates's petition for habeas relief and held that the Supreme Court of North Carolina did not unreasonably apply clearly established Supreme Court precedent by rejecting Bates's appeal.[28] The Fourth Circuit found: (1) the trial court did not err by refusing to give a second degree murder instruction;[29] and (2) the prosecutor's closing argument did not violate Bates's Fifth Amendment or due process rights.[30]

III. Analysis

A. Jury Instruction on Second Degree Murder

Bates argued that the trial court should have given the jury a second degree murder instruction because enough evidence existed to negate the deliberation necessary for a first degree murder charge.[31] He alleged that the trial court's failure to give a second degree instruction constituted a due process violation.[32] Under *Hopper v. Evans*[33] and *Beck v. Alabama,*[34] a court must give an instruction

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Priya Nath, Case Note, 15 CAP. DEF. J. 407 (2003) (analyzing Miller-El v. Cockrell, 123 S. Ct. 1029 (2003)).

24. *Bates*, 308 F.3d at 417-18.

25. *Id.* at 417.

26. *Id.* at 417-18.

27. *Id.* The Fourth Circuit rejected Bates's claim that the "especially heinous, atrocious, or cruel" aggravating circumstance instruction was unconstitutionally vague and overbroad. The court concluded that the North Carolina jury instruction did not violate any of Bates's constitutional rights. *Id.* at 424.

28. *Id.* at 415, 417.

29. *Id.* at 420.

30. *Bates*, 308 F.3d at 421-23.

31. *Id.* at 418.

32. *Id.*

33. 456 U.S. 605 (1982).

34. 447 U.S. 625 (1980).

on a lesser included offense when the evidence warrants such an instruction.[35] The Fourth Circuit noted that the only "question here [was] whether the North Carolina courts' finding that there was insufficient evidence to support a second degree murder instruction was so wrong as to amount to a fundamental miscarriage of justice."[36]

Bates argued that due to circumstances in his life at the time of the murder he was "distressed and thus unable to form the mental state to commit first degree murder."[37] He also claimed that his statement that Jenkins spit at him and angered him, in combination with his personal circumstances, effectively negated deliberation.[38] The Fourth Circuit noted that," '[t]he decision of whether there is enough evidence to justify a lesser included offense charge rests within the sound discretion of the trial judge.' "[39]

North Carolina courts consider a list of factors when analyzing whether premeditation and deliberation existed at the time of the offense.[40] This list includes "provocation by the deceased" and "the defendant's conduct and statements before and after the killing."[41] As to provocation, the court noted that before Jenkins cursed at and spit on Bates, Bates had kidnapped and beaten Jenkins.[42] In addition, the court found that Bates's statements before and after kidnapping Jenkins supported the existence of premeditation and deliberation.[43] North Carolina law requires evidence of more than mere anger for a court to give a second degree murder instruction.[44] It requires " 'evidence [that] would permit a reasonable finding that the defendant's anger and emotion were enough to disturb the defendant's ability to reason.' "[45] The Fourth Circuit agreed with the state courts' determinations that the evidence demonstrated significant premeditation and deliberation and did not support any claim that Bates's ability to reason was disturbed.[46] As a result, the Fourth Circuit found that the Supreme

35. *Bates*, 308 F.3d at 418; Hopper v. Evans, 456 U.S. 605, 611 (1982) (concluding that due process only requires a jury instruction on a lesser included offense if the evidence warrants such an instruction); Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (holding that the death penalty may not be imposed if the evidence supported a verdict of guilt of a lesser included offense and the court failed to allow the jury to consider such a verdict). The Fourth Circuit further defined the trial court's duty to give an instruction on a lesser included offense through a series of circuit court decisions. *Bates*, 308 F.3d at 418.

36. *Bates*, 308 F.3d at 418.

37. *Id.* at 419.

38. *Id.*

39. *Id.* at 418 (quoting United States v. Chapman, 615 F.2d 1294, 1298 (10th Cir. 1980)).

40. *Id.* at 418-19.

41. *Id.* (citing State v. Fisher, 350 S.E.2d 334, 338 (N.C. 1986)).

42. *Bates*, 308 F.3d at 419.

43. *Id.* at 419-20.

44. *Id.* at 419.

45. *Id.* (quoting State v. Perry, 450 S.E.2d 471, 474 (N.C. 1994)).

46. *Id.* at 419-20.

Court of North Carolina did not unreasonably apply *Hopper* and *Beck* to Bates's case.[47] The North Carolina courts' application of *Hopper* and *Beck*, therefore, did not amount to a "fundamental miscarriage of justice."[48]

B. *Prosecution's Closing Arguments*

1. *Fifth Amendment Rights*

In his closing argument at the sentencing hearing, the prosecutor pointed out occasions when witnesses had cried on the stand.[49] He then asked whether the jurors had ever witnessed Bates crying.[50] Bates contended that this question implied that Bates should have testified and thus violated his Fifth Amendment right to remain silent.[51]

Bates argued that under *Lesko v. Lehman*[52] the prosecutor's remarks violated his right to remain silent.[53] The court disagreed, stating that in *Lesko* the prosecutor pointed to the defendant's failure to make a particular statement, whereas the prosecutor in Bates's case referenced Bates's overall demeanor during trial.[54] The court found that the prosecutor never directly or indirectly referenced Bates's decision not to testify; his comments only referred to Bates's lack of remorse and to his demeanor during trial.[55] As a result, his comments did not violate Bates's Fifth Amendment right not to testify.[56]

2. *Prosecutor's Rhetoric*

During Bates's sentencing hearing, the prosecutor commented that Bates had been given the benefit of a trial and of two good lawyers.[57] Bates contended that these comments deprived him of a fair trial.[58] He also alleged that his defense counsel was discredited by the prosecutor, which created prejudice

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47. *Id.* at 420; *see Hopper*, 456 U.S. at 611; *Beck*, 447 U.S. at 637-38.

48. *See Bates*, 308 F.3d at 418-20.

49. *Id.* at 420.

50. *Id.*

51. *Id.*

52. 925 F.2d 1527 (3d Cir. 1991).

53. *Bates*, 308 F.3d at 421; *see* Lesko v. Lehman, 925 F.2d 1527, 1544-45 (3d Cir. 1991) (concluding that the prosecutor's comments about the defendant's failure to apologize for his crime while on the stand violated the defendant's Fifth Amendment privilege against self-incrimination).

54. *Bates*, 308 F.3d at 421; *Lesko*, 925 F.2d at 1544-45.

55. *Bates*, 308 F.3d at 421-22.

56. *Id.* at 422; *see* Howard v. Moore, 131 F.3d 399, 421 (4th Cir. 1997) (stating that the prosecutor's comments regarding the defendant's lack of remorse did not violate the defendant's Fifth Amendment rights); Gaskins v. McKellar, 916 F.2d 941, 951 (4th Cir. 1990) (concluding that the prosecutor's reference to the defendant's lack of remorse did not constitute an "improper comment" on the defendant's refusal to testify).

57. *Bates*, 308 F.3d at 416.

58. *Id.* at 422.

against him.[59] The court stated that " 'the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated' " should be considered when determining if a denial of due process has occurred.[60]

The court found that the prosecutor's comments were based upon facts brought forward during trial or upon facts obvious to the jurors.[61] The statements were found not to be pervasive and the judge instructed the jurors to consider the evidence and not base their decision on either counsel's arguments.[62] In addition, the court noted that regardless of whether the comments were improper, Bates did not object to them at the time.[63] The court concluded that Bates was not denied due process.[64]

IV. Application in Virginia

The Fourth Circuit's denial of Bates's petition for a writ of habeas corpus illustrates a critical aspect of trial advocacy in capital defense. Attorneys must notice and object to an error at the time that it occurs.[65] Counsel cannot defer his objection until the completion of the opening statement or closing argument. The court did not hesitate to reject Bates's claim that the prosecutor's closing argument at the penalty phase violated his Fifth Amendment and due process rights. The court considered Bates's argument on its merits but noted that it could not "ignore the fact that Bates at no time objected."[66]

In its analysis of Bates's claim that the North Carolina court unreasonably applied relevant federal precedent under § 2254, the Fourth Circuit first set forth the applicable Supreme Court precedent.[67] The Fourth Circuit further defined a reasonable application of this precedent through circuit court decisions.[68] Analytically, if the court of appeals can further define a reasonable application through the decisions of the circuit courts, then it is equally open to the defen-

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59. *Id.*

60. *Id.* (quoting Boyd v. French, 147 F.3d 319, 329 (4th Cir. 1998)).

61. *Id.*

62. *Id.* at 423.

63. *Bates*, 308 F.3d at 423.

64. *Id.* at 422.

65. *See* Mack v. Commonwealth, 454 S.E.2d 750, 752 (Va. Ct. App. 1995) (holding that defendant was barred procedurally from appealing Commonwealth's argument because he did not object at trial); Russo v. Commonwealth, 148 S.E.2d 820, 824-25 (Va. 1966) (holding that objection made at conclusion of Commonwealth's opening statement waived the objection to the improper statement made in opening); *see also* Ashley Flynn, *Procedural Default: A De Facto Exception to Civility?*, 12 CAP. DEF. J. 289 (2000) (explaining how an attorney's civility can lead to procedural default); Matthew K. Mahoney, *Bridging the Procedural Default Chasm*, 12 CAP. DEF. J. 305 (2000) (providing a guide to the fundamentals of preserving issues for appellate and habeas review).

66. *Bates*, 308 F.3d at 423.

67. *Id.* at 417-23.

68. *Id.*

dant to use circuit court decisions to define an unreasonable application. If authority from other circuits supports a defendant's claim that the state court unreasonably applied federal law, counsel should consider using these decisions for support.

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