No. 02-145

In the Supreme Court of the United States

GORDON P. COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, when reviewing the denial of petitioner's motion under 28 U.S.C. 2255, the court of appeals had authority to decline consideration of issues not included in the certificate of appealability issued by the district court, because petitioner did not move for an expanded certificate as required by local rule.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the *Federal Reporter*, but is reprinted in 31 Fed. Appx. 501.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2002. A petition for rehearing was denied on May 1, 2002 (Pet. App. D1-D2). The petition for writ of certiorari was filed on July 26, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner

was convicted of conspiracy, in violation of 18 U.S.C. 371; unlawful disposal of sewage sludge, in violation of 33 U.S.C. 1342 and 1319(c)(2)(A); and mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 51 months of imprisonment. The court of appeals affirmed his convictions and sentence, *United States* v. *Cooper*, 173 F.3d 1192 (3d Cir. 1999), and this Court denied certiorari, 528 U.S. 1019 (1999). Petitioner then filed a motion under 28 U.S.C. 2255 to vacate his sentence. The district court denied the motion (Pet. App. B1-B11) and issued a certificate of appealability (COA) for only one of petitioner's several claims (Pet. App. C1-C4). The court of appeals, limiting the scope of review to the issue included in the COA, affirmed the denial of the Section 2255 motion. Pet. App. A1-A3.

1. Petitioner orchestrated the illegal dumping of untreated sewer sludge in southern California. As the officer of a sewage disposal firm that contracted with the city of San Diego, petitioner arranged for the disposal of the city's sewage sludge. The firm originally arranged to haul the sludge to a treatment site for safe compost, but the site became overwhelmed. Petitioner then instructed employees to haul the sludge to Mexico, outside the city's jurisdiction. When Mexican authorities detained the sludge trucks, petitioner directed the dumping of the sludge, under cover of night, on a California farm. Petitioner falsely informed the farm's owner that the dumping was authorized by permit. He also caused the submission of false "weighmaster" certificates indicating that the sludge was still going to Mexico. 173 F.3d at 1196-1198.

A grand jury indicted petitioner for conspiracy to violate the laws of the United States (18 U.S.C. 371), unlawful disposal of sewage sludge (33 U.S.C. 1319(c)(2)(A) and 1342), and mail fraud (18 U.S.C. 1341).

After a jury trial, petitioner was convicted of all the charges and sentenced to 51 months of imprisonment. 173 F.3d at 1200. The court of appeals affirmed his convictions and sentence, *id.* at 1196, and this Court denied his petition for certiorari, 528 U.S. 1019.

2. In November 2000, petitioner filed a motion under 28 U.S.C. 2255 that raised numerous challenges to his convictions and sentence. The district court denied the motion. Pet. App. B1-B11.[1]

Petitioner then filed a motion in the district court requesting a COA authorizing appeal. See 28 U.S.C. 2253(c)(1) ("Unless a circuit justice or judge issues a [COA], an appeal may not be taken to the court of appeals from—* * * the final order in a proceeding under section 2255."). The district court granted a COA limited to one of petitioner's issues: whether his Sixth Amendment rights were violated when his counsel failed to uncover alleged perjury committed at trial. See 28 U.S.C. 2253(c)(3) ("The certificate * * * shall indicate which specific issue or issues satisfy the showing required."). Pet. App. C3. Petitioner filed a notice of appeal from the district court's denial of his motion. He then attempted to raise in the court of appeals claims that the district court had not included in the COA. See Pet. App. A2.

3. In an unpublished memorandum opinion, the court of appeals affirmed the district court's denial of

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[1] The district court refused to entertain most of petitioner's claims because petitioner had already unsuccessfully raised the claims on direct appeal. The court did, however, evaluate two of the claims: that petitioner had received ineffective assistance when his counsel failed to uncover the government's alleged use of perjured testimony at trial, and that he had received ineffective assistance when his counsel failed to challenge a sentence enhancement. Pet. App. B5.

petitioner's Section 2255 motion. Pet. App. A1-A3. The court of appeals limited the scope of its review to the Sixth Amendment issue included in the COA. Pet. App. A2. The court explained that, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. 2261 *et seq.*, review of the denial of a motion under 28 U.S.C. 2255 is limited to those issues specified in a COA. Pet. App. A2 (citing 28 U.S.C. 2253(c)). The court observed that petitioner had not filed a motion in the court of appeals requesting certification of additional issues beyond those included in the COA granted by the district court. The court explained that such a motion is required by Ninth Circuit Rule 22-1(d). That rule provides as follows:

> If the district court denies a [COA] in part, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants, broader certification. Petitioners desiring broader certification must file, in the court of appeals, a separate motion for broader certification, along with a statement of reasons why a certificate should be granted as to any issues(s) within thirty-five days of the district court's entry of its order denying a [COA]. Respondent may file an opposition within thirty-five days of the date petitioner's motion is served. If a motion for broader certification is filed in a capital case where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after service of the motion. Otherwise, respondent shall file a response within thirty-five days of the date petitioner's motion is served.

9th Cir. R. 22-1(d); see Pet. App. E3. Because petitioner failed to file a request to expand the COA within

35 days of the district court order granting the limited COA, the court of appeals declined to consider the additional issues that petitioner had briefed. Pet. App. A2.

Addressing the issue on which petitioner had obtained a COA, the court of appeals affirmed the district court's ruling that petitioner's Sixth Amendment rights were not violated. Pet. App. A2-A3. The court of appeals held that petitioner had not shown that his counsel performed deficiently in failing to uncover the alleged perjury at trial because petitioner had not established that counsel knew of any facts that would have warranted further inquiry into the alleged perjury. See Pet. App. A2 (citing *Strickland* v. *Washington*, 466 U.S. 668, 686, 690 (1984)). The court further held that petitioner had not shown prejudice from counsel's actions because there was no reasonable probability that the outcome of the trial would have been different if counsel had impeached the witness with the alleged perjured testimony. Pet. App. A2-A3.

ARGUMENT

Petitioner contends that the court of appeals was required to consider whether to expand the COA granted by the district court to encompass his additional claims despite his failure to move for an expanded COA within the time limit established by Ninth Circuit Rule 22-1. That issue does not warrant this Court's review.

Under 28 U.S.C. 2253(c), a federal prisoner must obtain a COA from the district court or the court of appeals before he may appeal the district court's denial of collateral relief under 28 U.S.C. 2255. Section 2253(c)(1) provides that "an appeal may not be taken" from "the final order in a proceeding under Section

2255" "[u]nless a circuit justice or judge" issues a COA. 28 U.S.C. 2253(c)(1). Section 2253(c)(2) further provides that a COA may issue only if the prisoner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Section 2253(c)(3) requires that any COA "indicate which specific issue or issues satisfy the showing required by paragraph (2)." 28 U.S.C. 2253(c)(3).

Federal Rule of Appellate Procedure 22(b)(1) also provides that a Section 2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a [COA]." Fed. R. App. P. 22(b)(1). The rule indicates that the COA process begins in the district court, but, if the district court does not issue a COA, the movant may request a COA from the court of appeals:

> If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a [COA] or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

Fed. R. App. P. 22(b)(1). In addition, Rule 22(b)(2) provides:

> A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

Fed. R. App. P. 22(b)(2).

Because of Section 2253(c)(3)'s requirement that a COA "indicate which specific issue or issues" meet the standard for appealability in Section 2253(c)(2), COAs are "granted on an issue-by-issue basis." *Lackey* v. *Johnson*, 116 F.3d 149, 151 (5th Cir. 1997). The scope of review on appeal is limited to the issues specified in the COA. *Ibid.*; *Valverde* v. *Stinson*, 224 F.3d 129, 136 (2d Cir. 2000); *Bui* v. *Dipaolo*, 170 F.3d 232, 237 (1st Cir. 1999), cert. denied, 529 U.S. 1086 (2000); *Hiivala* v. *Wood*, 195 F.3d 1098, 1102-1103 (9th Cir. 1999), cert. denied, 529 U.S. 1009 (2000); *Sylvester* v. *Hanks*, 140 F.3d 713, 715 (7th Cir. 1998); *Ramsey* v. *Bowersox*, 149 F.3d 749, 759 (8th Cir. 1998), cert. denied, 525 U.S. 1166 (1999); *Murray* v. *United States*, 145 F.3d 1249, 1251 (11th Cir. 1998); *In re Certificates of Appealability*, 106 F.3d 1306, 1308 (6th Cir. 1997).

If the district court declines to issue any COA at all and the Section 2255 movant fails to make an express request to a circuit judge for a COA, the plain language of Federal Rule of Appellate Procedure 22(b) provides that a notice of appeal constitutes a request to the court of appeals for a COA as to all issues raised in the Section 2255 motion. Fed. R. App. P. 22(b)(1) & (2); *Slack* v. *McDaniel*, 529 U.S. 473, 483 (2000); *Bui*, 170 F.3d at 237. Rule 22(b), however, does not expressly address whether a notice of appeal serves as a request to the court of appeals to expand a COA granted by the district court to cover issues that the district court declined to certify. The courts of appeals have taken differing views on the answer to that question. See *Jones* v. *United States*, 224 F.3d 1251, 1256 (11th Cir. 2000) (noting different approaches and declining to decide the issue).

The Sixth, Seventh, and Tenth Circuits have chosen to treat a notice of appeal as a constructive request to review the district court's partial denial of certification. See *Ross* v. *Ward*, 165 F.3d 793, 797 (10th Cir.), cert. denied, 528 U.S. 887 (1999); *Kincade* v. *Sparkman*, 117 F.3d 949, 953 (6th Cir. 1997); *Porter* v. *Gramley*, 112 F.3d 1308, 1312 (7th Cir. 1997), cert. denied, 522 U.S. 1093 (1998). Other courts of appeals have declined to do so and instead require a specific request in the court of appeals to expand the certificate. See *Bui*, 170 F.3d at 237 (1st Cir.); *United States* v. *Kimler*, 150 F.3d 429, 430 (5th Cir. 1998); *United States* v. *Zuno-Arce*, 209 F.3d 1095, 1099-1101 (9th Cir. 2000); 3d Cir. R. 22.1(b). Three of those circuits have adopted local rules that specify the procedure that a Section 2255 movant who has been granted a limited COA should follow in order to request an expanded COA from the court of appeals. See 1st Cir. R. 22.1(c);[2] 3d Cir. R. 22.1(b);[3] 9th Cir.

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[2] In the First Circuit, after the district court's partial denial of a COA, the "petitioner must apply promptly, within the time set by the clerk of the court of appeals, to the court of appeals for an expanded [COA]." 1st Cir. R. 22.1(c) (reproduced at Pet. App. E1-E2). The circuit rule further specifies:

> If the petitioner fails to apply for an expanded [COA] within the time designated by the clerk, the appeal will proceed only with respect to the issues on which the district court has granted a certificate; this court will not treat an inexplicit notice of appeal, without more, as a request for a [COA] with respect to issues on which the district court has denied a certificate.

Ibid.

[3] The Third Circuit's rule provides:

> If the district court grants a [COA] as to only some issues, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants,

R. 22-1(d).[4] The court of appeals in this case followed the Ninth Circuit's local rule and declined consideration of issues outside the district court's COA.

Petitioner contends (Pet. 8, 12, 13-17) that this Court's review is necessary to establish a uniform procedure to be followed by all the courts of appeals. There is, however, no need for plenary review by this Court in order to establish a uniform procedure. The courts of appeals have supervisory authority to structure discretionary procedures to govern appellate

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> certification of additional issues. Petitioners desiring certification of additional issues must file, in the court of appeals, a separate motion for additional certification, along with a statement of the reasons why a certificate should be granted as to any issue(s) within 21 days of the docketing of the appeal in the court of appeals. * * * If the motions panel denies the motion to certify additional issues, the parties may brief only the issues certified. The merits panel may direct briefing of any additional issues it wishes to consider.

3d Cir. R. 22.1(b) (reproduced at Pet. App. E2).

[4] As noted above, the Ninth Circuit's rule provides:

> If the district court denies a [COA] in part, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants, broader certification. Petitioners desiring broader certification must file, in the court of appeals, a separate motion for broader certification, along with a statement of reasons why a certificate should be granted as to any issues(s) within thirty-five days of the district court's entry of its order denying a [COA]. Respondent may file an opposition within thirty-five days of the date petitioner's motion is served. If a motion for broader certification is filed in a capital case where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after service of the motion. Otherwise, respondent shall file a response within thirty-five days of the date petitioner's motion is served.

9th Cir. R. 22-1(d) (reproduced at Pet. App. E4).

practice within their jurisdictions. See *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993). The existence of different rules of procedure in different circuits does not pose a problem, because litigants, attorneys, and district courts within each circuit can ascertain the applicable local rule and adhere to it. Ninth Circuit Rule 22-1 clearly provides that a Section 2255 movant who has received only a partial COA from the district court is required to move the court of appeals for an expanded COA. That rule was promulgated on January 1, 1999. See *United States* v. *Christakis*, 238 F.3d 1164, 1168 n.5 (9th Cir. 2001). The district court ruled on petitioner's request for a COA on April 26, 2001, nearly two and one-half years after the promulgation of the rule. There is therefore no unfairness in holding petitioner to the rule.

Furthermore, the difference in approach among the courts of appeals is more a matter of form than substance. Petitioner cites no case, and we are aware of none, in which a court of appeals has held that it lacks the *power* to expand on its own initiative the issues that it will consider on appeal when the Section 2255 movant has filed a general notice of appeal and briefed uncertified issues. Indeed, the Third Circuit's local rule requiring a movant who seeks broader certification "to file a motion within 21 days of docketing the appeal" explicitly provides that "[t]he merits panel may direct briefing of any additional issues it wishes to consider." 3d Cir. R. 22.1(b). And the First and Ninth Circuit rules do not preclude a merits panel from exercising its discretion to grant an expanded COA in order to consider an issue that it deems worthy of appellate review. Therefore, the different procedural approaches of the courts of appeals are unlikely to affect the outcome of many cases. In the event that the difference in ap-

proach were to become problematic or unfair, the appropriate response would be amendment of the Federal Rules of Appellate Procedure to address the issue, rather than resolution of the issue by this Court in the exercise of its certiorari authority.

Petitioner also errs in contending (Pet. 8, 11, 12-13) that the court of appeals' requirement that he move for an expanded certificate conflicts with this Court's decision in *Slack* v. *McDaniel*, 529 U.S. 473 (2000). Petitioner's contention rests on a misinterpretation of *Slack*.

The petitioner in *Slack* sought review of a habeas petition that he had filed in district court before the effective date of the AEDPA but had appealed after that date. See 529 U.S. at 481-482. The district court had treated his notice of appeal as a request for a certificate of probable cause (CPC), the pre-AEDPA precursor to a COA, and had denied the CPC. The court of appeals had likewise denied a CPC. See *id.* at 480. This Court held that the COA requirement of the AEDPA, rather than the pre-AEDPA CPC requirement, applied because the petitioner had filed his notice of appeal after the AEDPA's effective date. *Id.* at 478, 482. The Court then stated that, because the petitioner had not requested a COA, the court of appeals "should have treated [petitioner's] notice of appeal as an application for a COA" under Federal Rule of Appellate Procedure 22(b). 529 U.S. at 483. The Court thereafter addressed the standard that the court of appeals should have applied to determine whether the petitioner was entitled to a COA. *Id.* at 483-490.

Petitioner argues that *Slack* requires a court of appeals to treat a notice of appeal as a request for an expanded COA when the district court has granted only a limited COA. The Court in *Slack*, however, had no

occasion to address that question. As noted above, the petitioner in *Slack* had not filed a request for a certificate, and both the district court and the court of appeals had denied him a certificate on any issue. This Court's discussion therefore dealt solely with the procedure when "no express request for a certificate is filed," a situation addressed directly by Federal Rule of Appellate Procedure 22(b)(2). The Court did not discuss the situation that is presented by this case and is not addressed by Rule 22(b)—when the petitioner has requested and received a COA, but the COA is limited to certain issues.

Petitioner also claims (Pet. 6-7, 14-16) that the Ninth Circuit's decision here conflicts with its decision in *Solis* v. *Garcia*, 219 F.3d 922 (2000), cert. denied, 122 S. Ct. 94 (2001). Any conflict between those two decisions should be resolved by the court of appeals rather than this Court. See *United States* v. *Wisniewski*, 353 U.S. 901 (1957) (per curiam). In any event, there is no conflict.

The court in *Solis* did treat the petitioner's brief, which addressed issues beyond the scope of the COA that he had received from the district court, as a request to expand the COA. See 219 F.3d at 926. The court did not, however, discuss Rule 22-1. Moreover, the district court in *Solis* had granted the limited COA more than 35 days before the effective date of Rule 22-1, so it was not practicable for the petitioner to comply with the rule. See *United States* v. *Zuno-Arce*, 245 F.3d 1108, 1109 & n.2 (9th Cir. 2001) (Browning, C.J., dissenting). *Solis* is thus merely an implicit decision not to apply Rule 22-1 to an appeal initiated before its effective date. See *ibid.* As noted above, petitioner's appeal was initiated more than two years after Rule 22-1's effective date. *Solis* is therefore inapposite. See *Christakis*, 238 F.3d at 1168 n.5 ("The district court

granted Christakis's partial COA on February 23, 1999, almost two months after the effective date of Circuit Rule 22-1. Christakis failed to file a motion to broaden the certificate within 35 days, so this appeal should be confined to the sole issue [contained in the COA].").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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