No. 98-1976

In the Supreme Court of the United States

SIMON C. FIREMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals erred in denying petitioner's application for a certificate of appealability to permit an appeal from the district court's rejection, on a motion under 28 U.S.C. 2255, of his constitutional challenge to the $1000 campaign contribution limit established by the Federal Election Campaign Act of 1971, 2 U.S.C. 441a(a)(1)(A).

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-2a) is unreported. The order of the district court denying petitioner's motion for a certificate of appealability (Pet. App. 3a-4a) is unreported. An earlier opinion of the district court (Pet. App. 5a-26a) is reported at 20 F. Supp. 2d 229.

JURISDICTION

The court of appeals entered its judgment on February 25, 1999. A petition for rehearing was denied on April 9, 1999 (Pet. App. 27a-28a). The petition for a writ of certiorari was filed on June 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty to, *inter alia*, two counts of making contributions in excess of the $1000 statutory limit on campaign contributions to any candidate for federal office, in violation of 2 U.S.C. 441a(a)(1)(A) and 437g(d). He was sentenced to one year's probation and was fined $1 million. The district court subsequently denied his motion to vacate, set aside, or correct his sentence. Pet. App. 5a-26a. The district court (*id.* at 3a) and the court of appeals (*id.* at 1a-2a) later denied petitioner's applications for a certificate of appealability.

1. The Federal Election Campaign Act of 1971 (FECA), as amended, prohibits any person from making contributions "to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000." 2 U.S.C. 441a(a)(1)(A). In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court considered a broad range of constitutional challenges to various provisions of the FECA. The Court upheld the $1000 limit (then codified at 18 U.S.C. 608(b)(1) (Supp. IV 1974)) on contributions to candidates for federal office. 424 U.S. at 23-35. The Court explained that "the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—[provides] a constitutionally sufficient justification for the $1,000 contribution limitation." *Id.* at 26.

2. Petitioner pleaded guilty to various violations of the FECA, including two counts of making campaign contributions in excess of the $1000 statutory limit. Pet. App. 6a-7a. He was sentenced to one year's pro-

bation and was fined $1 million. *Id.* at 7a. Petitioner did not pursue a direct appeal. *Id.* at 7a-8a.

The following year, petitioner filed a motion under 28 U.S.C. 2255 (1994 & Supp. III 1997) to vacate, set aside, or correct his sentence, claiming that the $1000 contribution limit imposed by Section 441a(a)(1)(A) violates the First Amendment. The district court denied petitioner's motion. Pet. App. 5a-26a.[1] The court held that *Buckley* controlled the case, and that *Buckley*'s precedential value had not been undermined by subsequent decisions of this Court. *Id.* at 15a-19a. Petitioner argued that as a result of the effects of inflation, "the $1000 contribution limitation can no longer be deemed a narrowly tailored means to meet a compelling governmental end." *Id.* at 19a. The district court rejected that contention (*id.* at 19a-25a), explaining, *inter alia*, that "[o]n this record, [petitioner's] argument regarding the present day impact of the $1000 contribution limitation is speculative" (*id.* at 23a).

Petitioner filed an application for a certificate of appealability with the district court.[2] The court denied

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[1] The district court held that petitioner could raise his First Amendment challenge in a Section 2255 motion, notwithstanding his prior failure to raise the constitutional claim, because the challenge went to "the very power of the State to bring the defendant into court to answer the charge brought against him." Pet. App. 9a (quoting *Blackledge* v. *Perry*, 417 U.S. 21, 30 (1974)).

[2] At the time that the district court received and acted upon petitioner's application, Federal Rule of Appellate Procedure 22(b) (1997) stated, in pertinent part, that

> [i]n a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If

the application "for the reasons set forth in the Court's memorandum." Pet. App. 3a.

3. Petitioner then applied to the court of appeals for a certificate of appealability. The court of appeals denied that application "[e]ssentially for the reasons given by the district court in its memorandum and order." Pet. App. 1a.

DISCUSSION

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court upheld the FECA's $1000 contribution limit against a First Amendment challenge. Because petitioner's constitutional claim is foreclosed by existing precedent, the court of appeals correctly denied his motion for a certificate of appealability. It is possible, however, that this Court's decision in *Nixon* v. *Shrink Missouri Government PAC*, No. 98-963 (to be argued Oct. 5, 1999), will bear on the proper resolution of petitioner's constitutional challenge. The petition for a writ of certiorari should therefore be held pending this Court's decision in *Shrink Missouri* and then disposed of as appropriate in light of that decision.

1. At the time that the district court denied petitioner's application for a certificate of appealability,

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> an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge.

Interim Local Rule 22.1 of the Court of Appeals for the First Circuit stated that the procedure set forth in Federal Rule of Appellate Procedure 22(b) would apply to requests for certificates of appealability filed under 28 U.S.C. 2255. See Pet. 5.

Federal Rule of Appellate Procedure 22(b) stated that when a federal district court denies a state prisoner's petition for habeas corpus relief, "the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue." See note 2, *supra*. Interim Local Rule 22.1 of the Court of Appeals for the First Circuit stated that the procedure set forth in Federal Rule of Appellate Procedure 22(b) would apply to requests for certificates of appealability filed in cases under 28 U.S.C. 2255. See Pet. 5. In the instant case, the district court in denying petitioner's application for a certificate of appealability stated only that the motion was denied "for the reasons set forth in the Court's memorandum" opinion dismissing petitioner's claims on the merits. Pet. App. 3a. Petitioner contends (Pet. 8-13) that the district court violated Rule 22(b) by failing to provide a more thorough explanation of its decision to deny a certificate of appealability. That claim does not warrant this Court's review.

a. At the time the district court denied petitioner's request for a certificate of appealability, Rule 22(b) applied by its terms only to "a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court."[3] See *Hohn* v. *United States*, 524 U.S. 236, 244 (1998) ("On its face,

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[3] Federal Rule of Appellate Procedure 22(b)(1) currently provides that the grant or denial of certificates of appealability in Section 2255 cases will be governed by the same procedures—including the requirement that the district court "must either issue a certificate of appealability or state why a certificate should not issue"—that apply to habeas corpus petitions filed by state prisoners. That amendment became effective December 1, 1998—approximately one month after the district court denied petitioner's motion for a certificate of appealability (see Pet. App. 3a).

[former Rule 22(b)] applies only to state, and not federal, prisoners."). The district court's failure to give a more extensive explanation of its ruling therefore involved at most a violation of First Circuit Interim Local Rule 22.1. Implementation of a Local Rule by courts within the First Circuit does not warrant this Court's review.

b. The district court's handling of petitioner's application for a certificate of appealability is not part of the case that is presently before this Court. Both under current Rule 22(b)(1) and under former Rule 22(b), a petitioner may request a circuit judge to issue a certificate of appealability "[i]f the district judge has denied the certificate." The district court's denial is therefore a jurisdictional prerequisite to the court of appeals' consideration of an application for a certificate of appealability. See *Gardner* v. *Pogue*, 558 F.2d 548, 550 (9th Cir. 1977). The court of appeals' application proceeding, however, is otherwise separate from the district court's application proceeding; the former is not an appeal of the latter. Cf. *Hohn*, 524 U.S. at 240 (holding that a petitioner's "application" to the court of appeals for a certificate of appealability constitutes a "case" under 28 U.S.C. 1254). If the district court has committed a procedural error during its application proceeding, the proper avenue of correction (if the error is prejudicial to the applicant) is by writ of mandamus, assuming the standards for the writ are met. See *Herrera* v. *Payne*, 673 F.2d 307, 308 (10th Cir. 1982). The court of appeals in this case therefore did not "depart[] from the accepted and usual course of judicial proceedings" (Pet. 9) by failing to address, in

passing on his application for a certificate of appealability, the district court's alleged procedural error.[4]

2. To obtain a certificate of appealability, a petitioner must make a "substantial showing of a denial of [a] federal right." In other words, he must demonstrate that "the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot* v. *Estelle*, 463 U.S. 880, 893 n.4 (1983) (brackets, emphasis, and internal quotation marks omitted).[5] Because this Court in *Buckley* upheld the FECA's $1000 contribution limit against a First Amendment challenge,

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[4] Petitioner's claim of a circuit conflict (Pet. 12-13) is without basis. The court in *Gardner* v. *Pogue*, 558 F.2d 548, 550 (9th Cir. 1977), simply restated the requirements of former Rule 22(b). The court in *Herrera* v. *Payne*, 673 F.2d 307, 308 (10th Cir. 1982), held that the district court's non-compliance with those requirements justified an award of mandamus relief. Neither decision suggests that a court of appeals in ruling on a motion for a certificate of appealability must evaluate the district court's performance of its procedural obligations.

[5] The Court in *Barefoot* construed an earlier version of 28 U.S.C. 2253, which required a petitioner to make a "substantial showing of the denial of [a] federal right" in order to obtain a "certificate of probable cause" before appealing the merits of a district court order denying a habeas corpus petition or a motion under 28 U.S.C. 2255. The courts of appeals have uniformly continued to apply the *Barefoot* standard under the present version of Section 2253. See, *e.g.*, *Yeatts* v. *Angelone*, 166 F.3d 255, 256 (4th Cir.), cert. denied, 119 S. Ct. 1517 (1999); *Cox* v. *Norris*, 133 F.3d 565, 569 (8th Cir. 1997), cert. denied, 119 S. Ct. 89 (1998); *Lennox* v. *Evans*, 87 F.3d 431, 434 (10th Cir. 1996) (specifically stating that the *Barefoot* standard remains applicable), cert. denied, 519 U.S. 1081 (1997), overruled on other grounds by *United States* v. *Kunzman*, 125 F.3d 1363 (10th Cir. 1997).

the court of appeals correctly denied petitioner's application for a certificate of appealability.

The gravamen of petitioner's First Amendment claim is that the effects of inflation have diminished the significance of a $1000 campaign contribution, thereby rendering the FECA limit unconstitutional. See Pet. 13-18. Whatever the merits of that argument, however, it could provide no basis for a lower federal court to invalidate, on First Amendment grounds, a statutory provision that was previously sustained by this Court against First Amendment challenge. See *Barefoot*, 463 U.S. at 894 (court of appeals may deny a certificate of appealability if it is "confident that petitioner's claim is squarely foreclosed by statute, rule, or authoritative court decision"); cf. *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

3. On January 25, 1999, this Court granted the petition for a writ of certiorari in *Nixon* v. *Shrink Missouri Government PAC*, No. 98-963. See 119 S. Ct. 901. *Shrink Missouri* is scheduled for oral argument on October 5, 1999. That case involves a First Amendment challenge to Missouri's $1075 limit on contributions to candidates for statewide public office. The respondents in *Shrink Missouri* argue, *inter alia*, that as a result of the effects of inflation, Missouri's $1075 contribution limit is substantially more burdensome than the $1000 FECA limit upheld by this Court in *Buckley* in 1976. See 98-963 Resp. Br. at 46-47. Because the Court's decision in that case may bear on the proper resolution of petitioner's constitutional claims,

the petition should be held pending this Court's decision in *Shrink Missouri* and then disposed of as appropriate.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Nixon* v. *Shrink Missouri Government PAC*, No. 98-963 (to be argued Oct. 5, 1999), and then disposed of as appropriate.

Respectfully submitted.

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