No. 16-1298

In the Supreme Court of the United States

ASTRIT BEKTESHI, AKA ERMIR MUHAMET GONXHI, AKA ERIMI GOXHAJ, AKA MIRI, AKA BILLY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly denied petitioner's request for a certificate of appealability under 28 U.S.C. 2253(c) and dismissed his appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unreported but is available at 675 Fed. Appx. 500. The opinion of the district court (Pet. App. A7-A35) is also unreported but is available at 2016 WL 429959.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 2017. The petition for a writ of certiorari was filed on April 25, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Texas, petitioner was convicted of conspiracy to possess with intent to distribute cocaine, heroin, ecstasy, or marijuana, in violation

of 21 U.S.C. 846. Pet. App. A8. The district court sentenced petitioner to 135 months of imprisonment, to be followed by five years of supervised release. *Id.* at A9; Judgment 2-3. Petitioner moved to vacate his sentence under 28 U.S.C. 2255 on the ground that he had received ineffective assistance of counsel. The district court denied the motion. Pet. App. A7-A35. Petitioner filed a notice of appeal and requested a certificate of appealability (COA) from the court of appeals pursuant to 28 U.S.C. 2253(c). The court of appeals denied petitioner's request for a COA and dismissed the appeal. Pet. App. A1-A3.

1. Petitioner was the leader of a Chicago-based drug ring that trafficked in various illegal narcotics, including marijuana and cocaine. Pet. App. A7-A8. From 2005 to 2009, petitioner conspired to distribute between 15 and 50 kilograms of cocaine and more than 100 kilograms of marijuana. *Id.* at A19. On separate occasions, petitioner possessed with intent to distribute 26 pounds of marijuana and more than 50 pounds of cocaine. *Ibid.*

2. A federal grand jury in the Eastern District of Texas indicted petitioner on one count of conspiracy to possess with intent to distribute cocaine, heroin, ecstasy, or marijuana, in violation of 21 U.S.C. 846. Pet. App. A8; Indictment 2. Petitioner pleaded guilty pursuant to a written plea agreement. Pet. App. A8. The plea agreement included an express waiver of petitioner's right to collaterally attack his conviction or sentence under 28 U.S.C. 2255, with an exception for "a claim of ineffective assistance of counsel that affects the validity of the waiver or the plea itself." Pet. App. A12; Plea Agreement 4.

Eight months after pleading guilty, petitioner filed a motion to withdraw his guilty plea. Petitioner claimed

that "he [wa]s innocent of the charge and his plea of guilty * * * was not knowingly and voluntarily entered." D. Ct. Doc. 268, at 3 (Aug. 2, 2012). Following a hearing, a magistrate judge recommended that petitioner's motion be denied. D. Ct. Doc. 273 (Sept. 11, 2012). The magistrate judge found that petitioner's guilty plea was knowing and voluntary and found no "fault with the representation provided by counsel" during plea negotiations. *Id.* at 5. The district court adopted the magistrate judge's report and recommendation. D. Ct. Doc. 278 (Oct. 5, 2012). Petitioner filed a notice of appeal, but later moved to dismiss that appeal. Pet. App. A10. The court sentenced petitioner to 135 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

Petitioner then filed a motion to vacate his sentence under 28 U.S.C. 2255. He claimed that he had received ineffective assistance of counsel because defense counsel had failed to: (1) move for a downward departure based on petitioner's immigration status; (2) conduct a reasonable investigation; (3) effectively communicate with petitioner; and (4) object to certain parts of the presentence investigation report. Pet. App. A10; D. Ct. Doc. 406-1, at 2 (Feb. 14, 2014). With respect to his effective-communication claim, petitioner contended that, "[h]ad counsel effectively communicated with [petitioner] by using an interpreter, [petitioner] would have been able to assist counsel in the preparation of a defense strategy, and[,] at the very least, negotiated a better plea agreement." D. Ct. Doc. 406-1, at 16.

The district court denied petitioner's Section 2255 motion. Pet. App. A7-A35. The court found that petitioner had knowingly and intelligently pleaded guilty and that he had waived his right to bring a Section 2255

motion under the terms of his plea agreement. *Id.* at A20-A21. The court observed, however, that some of petitioner's ineffective-assistance claims "could arguably affect the validity of the waiver and plea itself." *Id.* at A21. The court did not specify which claims it was referring to, however, and it addressed and rejected each of petitioner's ineffective-assistance claims on the merits. *Id.* at A22-A34. Petitioner did not ask the court for a COA, which is a prerequisite to an appeal from a final order denying relief under Section 2255, see 28 U.S.C. 2253(c)(1)(B), and the court did not consider whether to issue one. Pet. App. A2.

3. Petitioner filed a notice of appeal and requested a COA from the court of appeals. Pet. App. A2. In a brief supporting his motion for a COA, petitioner advanced the same four ineffective-assistance claims he had advanced in the district court. Pet. C.A. Br. 1. Petitioner did not squarely address the district court's conclusion that petitioner had waived his right to challenge his conviction or sentence under Section 2255, and petitioner did not argue that any ineffective assistance provided by counsel affected the validity of the waiver or the plea itself. *Id.* at 10-18.

The court of appeals denied petitioner's motion for a COA and dismissed his appeal for lack of jurisdiction. Pet. App. A1-A3. The court noted that petitioner had failed to move for a COA in the district court and that the district court had failed to either grant or deny a COA as required by Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts (Rules for Section 2255 Proceedings). Pet. App. A2. The court of appeals "assume[d] without deciding that [it] therefore lack[ed] jurisdiction over [petitioner's]

appeal pursuant to Rule 11(a)." *Ibid.* The court concluded, however, that it would "nevertheless decline to remand this case to the district court for a COA ruling because [petitioner] has not addressed, and has thus waived any challenge to, the district court's denial of his [Section] 2255 motion on procedural grounds." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 5-13) that the court of appeals erroneously dismissed his appeal for lack of jurisdiction. He contends (Pet. 10) that when a district court denies a Section 2255 motion but fails to grant or deny a COA, the court of appeals should "either rule on [the] request for a COA or remand the case to the district court so that the district court can make an initial determination of whether to grant a COA." But the court of appeals denied petitioner's request for a COA because petitioner did not address the district court's procedural ruling on the Section 2255 motion. It was on that basis, and not on the basis that it lacked jurisdiction over the appeal because of the district court's failure to grant or deny a COA, that the court of appeals declined to remand this case to the district court. Further review of the court of appeals' decision is unwarranted.

1. Section 2253(c)(1)(B) of Title 28 of the United States Code provides that "an appeal may not be taken to the court of appeals from" a final order in a Section 2255 proceeding "[u]nless a circuit justice or judge issues a [COA]." 28 U.S.C. 2253(c)(1)(B); accord Fed. R. App. P. 22(b) ("[I]n a [Section] 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a [COA] under [Section] 2253(c)."). Rule 11(a) of the Rules for Section 2255 Proceedings further provides that "[t]he district court must

issue or deny a [COA] when it enters a final order adverse to the applicant." *Ibid.*

In petitioner's case, the district court did not follow Rule 11(a)'s instruction to issue or deny a COA when it entered a final order denying petitioner's Section 2255 motion. Pet. App. A2. The court of appeals "assume[d] without deciding" that, as a result, it "lack[ed] jurisdiction over [petitioner's] appeal." *Ibid.* It nevertheless declined to remand the case to the district court for a ruling on petitioner's COA application because petitioner "ha[d] not addressed, and ha[d] thus waived," any challenge to the district court's denial of the Section 2255 motion on procedural grounds. *Ibid.*

In light of the circumstances, the court of appeals properly denied petitioner's request for a COA and dismissed his appeal. In *Slack* v. *McDaniel*, 529 U.S. 473 (2000), the Court explained that when a district court denies a habeas petition on procedural grounds, a COA "should issue (and an appeal of the district court's order may be taken) if the prisoner shows * * * that jurists of reason" both (1) "would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and (2) "would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 478. The court of appeals explained (Pet. App. A2) that petitioner had failed to address the district court's procedural ruling—*i.e.*, that petitioner's Section 2255 motion was barred by the waiver in his plea agreement—in his COA application. See *id.* at A20-A21. The court of appeals thus declined to send the case back to the district court for a ruling on the COA. *Id.* at A2. The court of appeals properly treated any challenge to the district court's procedural ruling as having been relinquished, and that factbound determination would not warrant

this Court's review. See Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

2. Contrary to petitioner's contention (Pet. 5-13), there is no conflict among the circuits on the question presented that warrants review by this Court.

The requirement that a COA must issue before an appeal may be taken to the court of appeals is jurisdictional. *Gonzalez* v. *Thaler*, 565 U.S. 134, 142 (2012). Section 2253 gives both circuit judges and district judges the authority to issue a COA, see *id.* at 142-143, and Rule 11(a) "requires district judges to decide whether to grant or deny a COA in the first instance." *Id.* at 143 n.5. Petitioner observes (Pet. 11-12) that when a district court fails to either grant or deny a COA, some courts of appeals will remand the case to the district court for a COA ruling while others will overlook the violation of Rule 11(a) and grant or deny a COA themselves. Petitioner takes issue with neither approach. See Pet. 10, 13.

Petitioner instead claims (Pet. 13-14) that the Fifth Circuit is an "outlier" because, according to petitioner, if a person seeking habeas or Section 2255 relief in the Fifth Circuit "does not seek a COA from the district court," then the "case is over." That is incorrect. The Fifth Circuit generally remands such cases to the district court, just as petitioner advocates. In the precedent cited by the court of appeals in reference to its potential "lack of jurisdiction" over the case in light of Rule 11(a) (Pet. App. A2-A3), the court of appeals "remand[ed] * * * to the district court for the limited purpose of considering whether a COA should issue." *Cardenas* v. *Thaler*, 651 F.3d 442, 447 (5th Cir. 2011) (capitalization altered). The court of appeals followed the

same remand procedure in the precedent on which petitioner focuses in challenging the court of appeals' practices. See *Muniz* v. *Johnson*, 114 F.3d 43, 45-46 (5th Cir. 1997); see also, *e.g.*, *United States* v. *Youngblood*, 116 F.3d 1113, 1115 (5th Cir. 1997) (per curiam).

Contrary to the supposition of the question presented (Pet. i), the court of appeals' disposition of this particular case did not turn on any view that it had no "jurisdiction * * * to rule upon [his] request for a [COA]." Indeed, the court specifically stated that it was not "deciding" whether it "lack[ed] jurisdiction" as a result of the district court's failure to "rule on whether to grant or deny [petitioner] a COA" as required by Rule 11(a). Pet. App. A2-A3.[*] Petitioner's suggestion (Pet. 13) that his case was "over" as a result of the district court's failure to either grant or deny a COA accordingly misunderstands the decision below. Petitioner's case was

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[*] Petitioner reads *Muniz* as holding that a court of appeals not only lacks jurisdiction over *the appeal* in the absence of a COA ruling by the district court but additionally lacks "jurisdiction to rule upon" the initial "request for a COA." Pet. 10. *Muniz*, however, contains no statement to that effect, although a subsequent court of appeals decision has stated that "the absence of a prior determination by the district court on whether a COA should issue pose[s] a jurisdictional bar to this court's consideration of *whether to grant or deny a COA*." *Cardenas*, 651 F.3d at 445 (emphasis added). The wording of that statement is in some tension with the distinction this Court has drawn "between court-promulgated rules and limits enacted by Congress," only the latter of which can be jurisdictional. *Bowles* v. *Russell*, 551 U.S. 205, 211-212 (2007); see *United States* v. *Martinez*, 496 F.3d 387, 388 (5th Cir.) (per curiam) (acknowledging this distinction), cert. denied, 552 U.S. 1070 (2007). But as the court of appeals itself effectively recognized by declining to decide the issue, whether Rule 11(a) is effectively "jurisdictional" is a question that, for the reasons described above, makes no difference to this case.

"over" not for that reason, but instead because (i) in his plea agreement, he waived his right to collaterally attack his conviction or sentence under Section 2255; and (ii) he nevertheless brought a collateral attack without offering any argument that the waiver or the plea itself was invalid. That was the ground on which the court of appeals dismissed petitioner's appeal and denied his COA application. The denial of petitioner's COA request was proper for that reason, see *Slack*, 529 U.S. at 478, and the outcome of petitioner's case would be unaffected by this Court's resolution of the question regarding jurisdiction raised by petitioner. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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