No. 10-895

In The Supreme Court of the United States

RAFAEL ARRIAZA GONZALEZ,

Petitioner,

V.

RICK THALER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I. Whether there was jurisdiction to issue a certificate of appealability under 28 U.S.C. §2253(c) and to adjudicate petitioner's appeal.

II. Whether the application for a writ of habeas corpus was out of time under 28 U.S.C. §2244(d)(1) due to "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."

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INTEREST OF *AMICUS CURIAE*[1]

Since its founding over 29 years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking about religion or defending the rights of individuals against illegal searches and seizures, The Rutherford Institute offers assistance—and hope—to thousands.

The case now before the Court concerns the Institute because the decision on the first question certified by the Court will affect the opportunity for prisoners to seek relief from criminal convictions and sentences obtained in violation of fundamental constitutional rights. The writ of habeas corpus has been "aptly described as 'the highest safeguard of

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[1] Counsel of record to the parties in this case have consented to the filing of this *amicus* briefs in support of either party or neither party. No counsel to any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its counsel have contributed monetarily to its preparation or submission.

liberty,'" *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996) (quoting *Smith v. Bennett*, 365 U.S. 708, 712 (1961)), and rules regulating judicial consideration of a prisoner's right to the writ should be construed in ways that maintain access to the federal courts. The Institute asks that this Court recognize these principles and protect the constitutional rights of individuals by deciding that there was jurisdiction both to issue the certificate of appealability obtained by the petitioner and to decide the petitioner's appeal.

SUMMARY OF THE ARGUMENT

The jurisdiction of the circuit judge to issue the certificate of appealability should not be affected by the omission from the certificate of the specific issue of substantial import that is required to be set forth under 28 U.S.C. § 2253(c)(3). Jurisdiction of a court or judge to act depends upon the facts as they actually existed, and not the manner in which the authority is exercised, so any defect in the manner in which the circuit judge issued the certificate of appealability does not affect jurisdiction. To the extent jurisdiction to issue the certificate may be impugned on the basis that no "substantial showing of the deprivation of a constitutional right" was made, this should be rejected as a ground for now denying the court of appeals' jurisidiction. The decision of the circuit judge to issue the certificate is entitled to a presumption of correctness and validity and there are no circumstances upon which that presumption should be deemed rebutted.

The deficiency of the form and recitals on the certificate of appealability also should not be held to affect the jurisdiction of the court of appeals to hear the case. Procedural errors by the courts should not be a bar to the vindication of important constitutional rights. Moreover, the gatekeeping function of 28 U.S.C. § 2253 is fully served so long as the certificate is issued.

ARGUMENT

I. JURISDICTION EXISTED TO ISSUE THE CERTIFICATE OF APPEALABILITY TO THE PETITIONER

As the petitioner's brief correctly argues, there was jurisdiction to issue the certificate of appealability under 28 U.S.C. § 2253(c)(1). By its terms, the statute grants to "a circuit justice or judge" the authority to issue a certificate of appealability, and the certificate was issued by Circuit Judge Garza. J.A. 347. *See also* Fed. R. App. P. 22(b) (habeas corpus applicant may request issuance of a certificate of appealability by a "circuit judge"). Because the statute and rule granted Judge Garza the power to issue the certificate, jurisdiction to issue the certificate existed. *See Hagans v. Levine*, 415 U.S. 528, 538 (1974) (jurisdiction is the authority conferred by Congress to decide a particular kind of case) and *In re Brown*, 346 F.2d 903, 910 (5th Cir. 1965) (although jurisdiction is lodged with a court, such jurisdiction may be exercised by a single judge on behalf of the court).

The only grounds on which jurisdiction to issue the certificate might be denied are (1) that the materials presented to the Court of Appeals did not make a "substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2), or (2) that the certificate itself did not conform with 28 U.S.C. § 2253(c)(3) by specifying the constitutional issue found to be substantial by the issuing circuit judge. In raising the jurisdictional issue for the first time in its Brief in Opposition to the Petition for Certiorari, the respondent focused its argument on the latter requirement, questioning the validity of the certificate of appealability because it "nowhere states that Gonzalez has advanced a substantial *constitutional* claim." Cert. Opp. 13.

However, the fact that the certificate of appealability had an omission cannot be deemed to affect the jurisdiction of the circuit judge to issue the certificate. The petitioner clearly had a right to seek the certificate of appealability and the circuit judge had the power to issue it or not issue it. What matters are the circumstances at the time the decision was made, not some circumstance that occurred after the fact. This Court has referred to the rule that "subject-matter jurisdiction 'depends on the state of things at the time the action is brought[.]'" *Rockwell Intern. Corp. v. United* States, 549 U.S. 457, 473 (2007) (quoting *Mullan v. Torrance*, 9 Wheat. 537, 539, 6 L. Ed. 154 (1824)). *See also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (subject-matter jurisdiction is determined on the basis of facts alleged, and not by the possibility that it will be determined later that the facts are not as pleaded).

And as noted in *Schlesinger v. Councilman*, 420 U.S. 738, 742 n. 5 (1975):

> We think that so long as the court's subject-matter jurisdiction actually existed and adequately appeared to exist from the papers filed, see n. 9, infra, any defect in the manner in which the action was instituted and processed is not itself jurisdictional and does not prevent entry of a valid judgment. See 2 J. Moore, Federal Practice 3.04, pp. 718-720, 3.06(1), pp. 731-732 (2d ed. 1974).

Otherwise, the only reason which could conceivably have deprived the circuit judge of jurisdiction to issue the certificate of appealability is if petitioner's filings in connection with the application did not make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Significantly, the respondent's opposition to the Petition for Writ of Certiorari did not specifically assert this as a ground for denying the petition, relying solely on the failure of the certificate to "state" or specifically identify the substantial constitutional claim. That respondent focused on the omission from the certificate of appealability is not surprising given that the "substantial showing" requirement of § 2253(c)(2) does not relate to the form of the certificate, but relates to the substance of the *applicant's* filings. As shown by the petitioner's merits brief, a substantial Sixth Amendment speedy trial claim was and is presented in this case. Br. for Pet. 16-20.

In any event, the "substantial showing" requirement of § 2253(c)(2) is not jurisdictional, Br. of Pet. 21-25, as nearly all the circuit courts considering the issue have held. *Id.* at 16, n. 3 (citing cases ruling that 28 U.S.C. § 2253(c)(2) is not jurisditional).

Even if satisfaction of the "substantial showing of the denial of a constitutional right" is a jurisdictional prerequisite to the issuance of a certificate of appealability, not only was that requirement satisfied with respect to petitioner's Sixth Amendment claim, Br. of Pet. 16-20, it should be presumed here that the circuit judge made the required determination. "There is no principle of law better settled, than that every act of a court of competent jurisdiction, shall be presumed to have been rightly done till the contrary appears. This rule applies as well to every judgment or decree rendered, in the various stages of their proceedings, from the initiation to their completion; as to their adjudication that the plaintiff has a right of action." *Voorhees v. Jackson, ex dem. Bank of U.S.*, 35 U.S. 449, 469-470 (1836). In *Applegate v. Lexington & Carter County Min. Co.*, 117 U.S. 255, 269 (1886), the Court held that it was improper to exclude evidence of the record in a prior case on the ground that the record did not show on its face that notice of the proceedings were published or posted as required by statute. "It is to be presumed," the Court wrote, "that the court, before making its decree, took care to see that its order of constructive service, on which its right to make the decree depended, had been obeyed." *Id.*

It is wholly appropriate to apply this presumption of regularity and correctness here. Nothing in the record indicates that Circuit Judge Garza did not consider the requirement that petitioner make a substantial showing of a deprivation of a constitutional right. It is implausible to assume that he did not make the required determination given the fact that the "substantial showing" requirement has been in effect for over 14 years and the fact that the requirement is effectively the only determination that must be made with respect to each and every application for a certificate of appealability.

Furthermore, *Slack v. McDaniel*, 529 U.S. 473, 485 (2000), made it eminently clear that, with respect to appeals from denials of habeas petitions based upon procedural grounds, the certificate of appealability inquiry has two components, "one directed at the underlying constitutional claim and one directed at the district court's procedural holding." Indeed, *Slack* encouraged courts to reject certificate applications notwithstanding error on a procedural issue by stressing that a court could first decide whether a substantial constitutional issue was presented by the applicant. *Id.* at 485. Given these instructions, it would be unreasonable to conclude that the circuit judge here ignored the requirement that the applicant make a substantial showing of a deprivation of a constitutional right.

Additionally, the fact that the Sixth Amendment speedy trial claim was not set forth on the certificate is wholly understandable in light of the decision that was rendered in the district court.

That court disposed of the petitioner's entire habeas application solely on the basis that the application was untimely. *Gonzalez v. Quarterman*, 2008 WL 4055779 (N.D. Tex. Aug. 20, 2008). Thus, the timeliness question identified in the certificate of appealability was the primary issue that would need to be decided on appeal in determining whether petitioner was entitled to the writ. Had the court of appeals decided the district court wrongly decided the procedural issue, it likely would have remanded the case to the district court without considering the merits of the Sixth Amendment issue in full because whether the petitioner was denied his right to a speedy trial would likely have been deemed fact-sensitive and more appropriately left to a lower court in the first instance. *Holland v. Florida*, 130 S. Ct. 2549, 2565 (2010). Because the timeliness issue was the principal, if not sole, issue the court of appeals would have had to decide on the appeal, it is not surprising that it was the issue listed on the certificate of appealability. Listing that issue, and not petitioner's Sixth Amendment claim, does not suggest that the circuit judge did not consider and determine that the petitioner's application made a substantial showing of a denial of a constitutional right.

II. JURISDICTION EXISTED TO HEAR AND DECIDE THE PETITIONER'S APPEAL TO THE COURT OF APPEALS

With respect to the jurisdiction to adjudicate the petitioner's appeal, such jurisdiction could be denied only if the omission of the specific

constitutional issue from the face of the certificate of appealabilty deprived the court of appeals of jurisdiction. Otherwise, the court of appeals clearly had jurisdiction because the certificate had been issued in accordance with the requirements of *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Additionally, the petitioner complied with statutes and rules necessary to vest the court of appeals with jurisdiction over his appeal. Br. of Pet. 14-15.

To deny a prisoner the opportunity for federal court review of his constitutional claims because of an omission from the certificate of appealability is overly formalistic and not consistent with the purposes for which the requirement of a certificate was imposed under the Antiterrorism and Effective Death Penalty Act (AEDPA). In *Slack*, 529 U.S. at 483, this Court rejected the contention that the erroneous denial of a habeas petition on procedural grounds was not appealable. "The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a [certificate of appealability] under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights."

Similarly, the procedural error of an appellate court (or, perhaps, a staff attorney, *see Beyer v. Litscher*, 306 F.3d 504, 506 (7th Cir. 2002)) in omitting to set forth in the certificate of appealability the substantial constitutional claim at issue should not bar a prisoner from the opportunity to have that claim reviewed. This principle is particularly applicable in cases such as the one presently before

the court, where the habeas petition was denied on questionable procedural grounds and the district court never considered the merits of the petitioner's constitutional claim. A decision that the omission is not fatal to the applicant's appeal is consistent with precedent holding that the AEDPA's provisions should be interpreted in a way that avoids creating a risk that habeas applicants may forever lose their opportunity for any federal review of their constitutional claims. *Panetti v. Quarterman*, 551 U.S. 930, 945-46 (2007); *Rhines v. Webber*, 544 U.S. 269, 265 (2005).

The consequences of a decision that there was no jurisdiction because of the omission from the certificate of appealability will fall particularly hard upon *pro se* habeas applicants like the instant petitioner who are unsophisticated in the procedural and legal niceties of habeas corpus practice. *Pro se* applicants will not appreciate the significance of omissions from certificates of appealability like the one at issue here and will be unable to protect their ability to appeal and, as in this case, their right to federal court review of the merits of their constitutional claim by bringing the omission to the attention of the court. *Pro se* litigants have traditionally been given protection and special consideration by the courts. *See Castro v. United States*, 540 U.S. 375, 381-82 (2003) (court may change label attached to pleading by a *pro* se habeas applicant in order to avoid unnecessary dismissal or to avoid inappropriately stringent application of labeling requirements) and *Lee v. Wiman*, 280 F.2d 257, 264 (5th Cir. 1960) ("An application for habeas corpus presented by a prisoner without the aid of

counsel will not be dismissed for mere technical defects, but will be considered with solicitude for the essential rights of the accused."). Recognizing that the omission from the certificate of appealability at issue here was not sufficient to deprive the court of appeals of jurisdiction will further the policy of protecting *pro se* habeas applicants like the petitioner.

In the final analysis, how the issue specification requirement of 28 U.S.C. § 2253(c)(3) is construed and applied must take account for the fact that § 2253(c) is essentially a "gatekeeping" provision. *Boumediene v. Bush*, 553 U.S. 723, 774 (2008). The concept of a threshold or gateway test for the appealability of district court denials of habeas applications is meant to weed out frivolous petitions, hasten finality of the criminal process, *Miller-El*, 537 U.S. at 337, and promote judicial efficiency and conservation of judicial resources. *Panetti*, 551 U.S. at 945. "By obliging applicants to make a threshold showing before their cases are aired out on appeal, the [certificate of appealability] serves an important screening function and conserves the resources of appellate courts." *Medellin v. Dretke*, 544 U.S. 660, 678 (2005) (O'Connor, J., dissenting).

That function is fully served if the certificate is issued, and defects in the form or content of the certificate should not affect the jurisdiction of the court of appeals to hear the appeal. A judge has had the opportunity to review the certificate application and has determined that there is a constitutional issue presented that is, at the very least, debatable

and should be reviewed on appeal. Whether the precise reasoning of the judge is set forth or the particular issue is identified is not crucial because in the final analysis the judge has found that the case merits review. While there may be more justification for requiring that § 2253(c)(3) be strictly applied when the certificate is issued by a district court judge so that the court of appeals is alerted to the substantial constitutional issue, the same concern does not apply when, as in the instant case, the certificate is issued in the court of appeals.

Moreover, a ruling that defects in the form of a certificate of appealability affect the jurisdiction of the court of appeals will allow for the waste of judicial resources. An after-the-fact holding that jurisdiction did not exist will come after the parties and the court have already invested substantial time in briefing and the review process, contrary to the policy of judicial economy underlying 28 U.S.C. § 2253(c). *Porterfield v. Bell*, 258 F.3d 484, 485 (6th Cir. 2001).

CONCLUSION

For the reasons set forth above, *amicus* requests that this Court hold that any defects in the certificate of appealability issued to the petitioner were not jurisdictional and that the appeal was properly decided by the court of appeals. Technicalities should not stand in the way of persons from obtaining review of substantial claims that their right to life and liberty have been unconstitutionally compromised.

Respectfully submitted,

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