The Journal of Appellate Practice and Process

Volume 5 | Issue 1 Article 19

2003

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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ARTICLE

APPLICATIONS FOR CERTIFICATES OF APPEALABILITY AND THE SUPREME COURT'S "OBLIGATORY" JURISDICTION

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I. INTRODUCTION

Since 1925, with the passage of the Judges' Bill,[1] Congress increasingly has afforded the Supreme Court unfettered discretion to decide whichever cases it chooses.[2] The Court's "discretionary" docket includes almost all of the cases coming before it today,[3] while its "mandatory" or "obligatory"[4] docket now includes only a select few types of cases.[5]

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1. Judiciary Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (now codified as Title 28 of the U.S. Code).

2. Richard H. Fallon, Daniel J. Meltzer & David Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1553-55, 1580 (5th ed., Found. Press 2003); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 219-20 (8th ed. BNA 2002).

3. Fallon et al., *supra* n. 2, at 1595-96. The vast majority of these cases are brought through a petition for writ of certiorari. *Id.*

The Court is not required to rule on the merits of a case within its discretionary jurisdiction. Rather, the Court, as an exercise of its discretion, simply may refuse to hear the appeal, even if the litigant seeking review has raised a clearly meritorious claim for relief.[6] The overwhelming majority of cases filed with the Court are within its discretionary docket and, in an overwhelming majority of those cases, the Court summarily refuses to exercise its discretion to review the merits.[7]

Although the Supreme Court has never addressed the issue, it certainly appears that the Court treats an application for a certificate of appealability (COA) under 28 U.S.C. § 2253 in a federal habeas corpus case as falling within the Court's discretionary jurisdiction.[8] As discussed below, the Court's apparent treatment of COA applications in this manner is erroneous under the current statutory scheme. The Court, or at least the single Circuit Justice to whom a COA application is directed, has a legal obligation to rule on the merits of a COA application, applying the same legal standard that governs district and circuit judges in COA cases. That legal standard—commonly referred to as the "*Barefoot* standard"[9]—requires a

4. Stern et al., *supra* n. 2, at 220 (distinguishing "discretionary" from "obligatory" jurisdiction).

5. The only types of cases still within the Court's "obligatory" docket include appeals of federal three-judge trial courts' rulings on congressional apportionment challenges and certain types of civil-rights actions filed by the Attorney General. *See* Fallon et al., *supra* n. 2, at 1580.

6. *Overton v. Ohio*, 534 U.S. 982 (2001) (Breyer, J., respecting the denial of certiorari, joined by Stevens, O'Connor, & Souter, JJ.).

7. Fallon et al., *supra* n. 2, at 1595-96.

8. According to the Supreme Court databases on WestLaw and LEXIS, in all but one case in which an application for a COA (or its statutory predecessor, the certificate of probable cause (CPC) to appeal) was filed with the Supreme Court during the past three decades, the Court summarily denied the application without giving any reasons. The one case in which a CPC was granted was *Autry v. Estelle*, 464 U.S. 1301 (1983) (White, J., in chambers). There are approximately three dozen reported cases where the full Court has summarily denied a COA or CPC application over the past thirty years. There are countless other unreported cases in which an individual Circuit Justice summarily has denied a COA or CPC application. *See infra* at 182-83, 183 n. 32. This pattern certainly suggests that the Court treats a COA application like a certiorari petition or a petition for an original writ of habeas corpus, which are within its discretionary jurisdiction and are summarily denied in the vast majority of cases. *See infra* at 183-84.

9. *Barefoot v. Estelle*, 463 U.S. 880 (1983).

relatively minimal showing by a petitioner in order to authorize an appeal following a district court's denial of habeas relief.[10]

II. CERTIFICATES OF PROBABLE CAUSE AND APPEALABILITY IN FEDERAL HABEAS CASES

Beginning in 1908, a state prisoner wishing to appeal a federal trial court's denial of a petition for a writ of federal habeas under 28 U.S.C. § 2254 was required to obtain a certificate of probable cause (CPC) authorizing an appeal.[11] Congress added the CPC requirement because of delays in state capital cases caused by perceived "frivolous" appeals in federal habeas cases.[12] Without a CPC, no federal appellate jurisdiction existed.[13]

At the time of the 1908 statute, federal circuit courts did not possess appellate jurisdiction over a lower court's denial of a habeas petition and, instead, an appeal of the denial of habeas relief went directly to the Supreme Court.[14] Consistent with such a direct appeal to the Supreme Court, the 1908 CPC statute not only authorized a federal trial judge to grant or deny an application for a CPC but also authorized a "justice of the Supreme Court" to do so.[15] In 1925, Congress expanded federal circuit courts' appellate jurisdiction, which included authorizing appeals in habeas cases from a district court to a circuit court.[16] The CPC statute was amended accordingly to provide that a circuit judge, like a district judge, could issue a CPC; the

10. *See infra* at 180-81.

11. Act of March 10, 1908, ch. 76, 35 Stat. 40 (codified as amended at 28 U.S.C. § 2253).

12. *Barefoot*, 463 U.S. at 892 n. 3 to 893; *see also* Ira P. Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 Ohio St. L.J. 307, 313-14 (1983) (discussing history of 1908 legislation).

13. *See e.g. Bilik v. Strassheim*, 212 U.S. 551 (1908) (mem.) (dismissing the appeal for want of jurisdiction based on lack of a CPC).

14. *Grammer v. Fenton*, 268 F. 943, 946-47 (8th Cir. 1920).

15. Robbins, *supra* n. 12, at 313-14; *id.* at 313 nn. 36, 39 (quoting former 28 U.S.C. § 466).

16. *Id.* at 313; *Schenk v. Plummer*, 113 F.2d 726 (9th Cir. 1940) (discussing 28 U.S.C. § 466 (1925), which provided that an "appeal to the circuit court of appeals shall be allowed" from the judgment of a district court denying habeas relief if a CPC was issued); *see also U.S. ex rel. Hickey v. Jeffes*, 571 F.2d 762, 765 (3rd Cir. 1978).

amended statute logically deleted the reference to a Supreme Court Justice's having authority to grant or deny a CPC.[17]

In 1948, Congress again amended the CPC statute—recodified in the current statute, 28 U.S.C. § 2253—and inexplicably resurrected the 1908 statute's provision that a Supreme Court Justice possessed the authority to rule on a CPC application (in addition to the authority of a district or circuit judge to do so).[18] The legislative history of section 2253 does not shed any light on why Congress decided again to include Supreme Court Justices among those having authority to grant or deny a CPC.[19]

In 1996, as part of the Antiterrorism and Effective Death Penalty Act (AEDPA), Congress amended section 2253 and made sweeping changes in the federal habeas statutory scheme.[20] Congress renamed the CPC a "certificate of appealability" (COA), but continued to give Supreme Court Justices the authority to grant or deny one.[21] It also for the first time extended the COA requirement to federal prisoners who file post-conviction motions under 28 U.S.C. § 2255.[22]

The COA standard set forth in the amended version of section 2253 requires a prisoner to make "a substantial showing of the denial of a constitutional right"[23] before an appeal will be authorized. In *Slack v. McDaniel*,[24] the Supreme Court held that this statutory language essentially codified the judicial gloss that the Court had given the former CPC statute in *Barefoot v. Estelle*.[25] The *Barefoot* standard only requires that the legal issue sought to be raised on appeal "be debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve

17. Robbins, *supra* n. 12, at 313 n. 36; *Schenk*, 113 F.2d at 727, 727 n. 1.

18. *Slack v. McDaniel*, 529 U.S. 473, 480 (2000) (quoting Act of June 25, 1948, 62 Stat. 967).

19. *See* Sen. Rpt. 1559, at 9 (June 9, 1948); H.R. Rpt. 308, at app. (April 25, 1947).

20. Pub. L. No. 104-132, § 102, 110 Stat. 1217 (1996).

21. 28 U.S.C. § 2253(c)(1).

22. *See* 28 U.S.C. § 2253(c)(1)(B).

23. *Id.*

24. 529 U.S. 473, 483 (2000) (noting that the amended version of "§ 2253 is a codification of the CPC standard announced in *Barefoot v. Estelle*").

25. 463 U.S. 880.

encouragement to proceed further."[26] It does *not* require the habeas petitioner to demonstrate a likelihood that he ultimately will prevail on appeal.[27]

Recently, in *Miller-El v. Cockrell*,[28] the Supreme Court made clear that the *Barefoot* standard is not difficult for a habeas petitioner to meet. All that is required is for at least one claim raised by the petitioner to be reasonably "debatable" under the AEDPA's standards. As the Court stated:

> We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether the resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. . . . [A] COA does not require a showing that the appeal will succeed.
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> . . .
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> A prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere "good faith" on his or her part. . . . We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that the petitioner will not prevail.
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> . . .
>
> The question is the debatability of the underlying constitutional claim, not the resolution of that debate.[29]

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26. *Barefoot*, 463 U.S. at 893 n. 4 (citations and internal quotations omitted; bracketed language in original). In *Slack*, the Court held that a modified version of the *Barefoot* standard applies when a district court denies habeas relief on a "procedural," as opposed to a "substantive," ground. *See* 529 U.S. at 484 ("When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.").

27. *Barefoot*, 463 U.S. at 893 n. 4.

28. 123 S. Ct. 1029 (2003).

29. *Id.* at 1039-40, 1042 (citation omitted).

III. COA APPLICATIONS FILED WITH THE SUPREME COURT OR A CIRCUIT JUSTICE

The plain language of 28 U.S.C. § 2253(c)(1) and the corresponding procedural rule, Federal Rule of Appellate Procedure 22(b)(1), empower a single Circuit Justice to grant a COA.[30] Although both speak of a single Circuit Justice, the Supreme Court has taken the position that section 2253 vests jurisdiction not simply in a single Justice but in the entire Court as well.[31] In death-penalty cases, a COA application addressed to a single Circuit Justice typically will be referred to the entire

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30. *See* 28 U.S.C. § 2253(c)(1)(A) (providing that "[u]nless a *circuit justice* or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals" in a section 2254 habeas case) (emphasis added); Fed. R. App. P. 22(b)(1) ("[T]he applicant cannot take an appeal unless a *circuit justice* or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c).") (emphasis added).

31. *E.g. In re Hunt*, 348 U.S. 968 (1955) (mem.); *see also Davis v. Jacobs*, 454 U.S. 911, 913 (1981) (Stevens, J., addressing denial of certiorari); *id.* at 919 (Rehnquist, J., dissenting, joined by Burger, C.J., & Powell, J.); *cf. Application of Burwell*, 350 U.S. 521 (1956) (per curiam) (holding that § 2253 vests jurisdiction in an entire Court of Appeals rather than in a single circuit judge, notwithstanding the statute's reference only to a "circuit judge") (citing *Burwell v. Teets*, 350 U.S. 808 (1955) (mem.), and *Rogers v. Teets*, 350 U.S. 809 (1955) (mem.)); *Hohn v. U.S.*, 524 U.S. 236, 242-45 (1998) (COA application decided by a single circuit judge actually is decided by the Court of Appeals as opposed to being decided by the individual circuit judge "acting *ex curia*").

The Supreme Court possesses either "appellate" or "original" jurisdiction as set forth in Article III of the Constitution. *Ex parte Vallandigham*, 68 U.S. 243, 250-53 (1863). The full Court obviously does not possess "original" jurisdiction over COA applications, which do not fall within any of the limited categories set forth in Article III. *Cf. Ex parte Barry*, 43 U.S. 65, 65-66 (1844) (habeas petitions not within Supreme Court's "original" jurisdiction). It is questionable whether the full Court—as opposed to an individual Justice in his or her capacity as a Circuit Justice—possesses "appellate" jurisdiction over a COA application, except by way of its certiorari jurisdiction (whereby the Court reviews the judgment of a Court of Appeals denying a COA application as opposed to ruling on the COA application). In 28 U.S.C. § 2253, Congress intentionally mentioned only a "Circuit Justice" and did not provide the full Court with the ability to rule on a COA application. Under such circumstances, Congress has regulated or made exceptions to the Supreme Court's appellate jurisdiction by limiting the full Court's jurisdiction over COA applications filed there. *See Ex parte Yerger*, 75 U.S. 85, 97-106 (1868) (discussing Congress's ability to "regulate" and make "exceptions" to the Supreme Court's "appellate" jurisdiction described in Article III); *see also Felker v. Turpin*, 518 U.S. 651, 659-61 (1996) (same). When Congress has wished to extend the Supreme Court's appellate jurisdiction to an individual Circuit Justice as well as to the full Court, it has done so. *See* 28 U.S.C. § 2241(a)) ("Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.").

Court for disposition as a matter of course.[32] In non-capital cases, a COA application addressed to a single Circuit Justice typically will be ruled on in the first instance by the individual Justice in an unreported order[33] and, if "renewed" to another individual Justice pursuant to Supreme Court Rule 22, typically will be "referred" to the entire Court for disposition.[34] On rare occasions, when the full Court has summarily denied a COA application, one or more Justices have stated in dissent that they would grant a COA.[35]

Neither section 2253 nor Rule 22 states whether a Circuit Justice (or the Court itself) has "discretionary" jurisdiction over COA applications in the same manner in which the Court has such discretionary jurisdiction over virtually every other matter that comes before it.[36] A COA is not an "extraordinary" writ or any other type of extraordinary remedy or process that the Court possesses complete discretion to grant or deny irrespective of the merits of the application. When Congress bestows jurisdiction in a federal court, as it has on the Supreme Court (or at least on a single Circuit Justice) in 28 U.S.C. § 2253, it is well established that there is a "strict duty" and "virtually unflagging obligation . . . to exercise the jurisdiction given."[37] Therefore, the Court (or at least a single Circuit Justice) appears obligated to apply the substantive *Barefoot* standard in the same manner in which a district or circuit judge is obligated to apply that

32. *See e.g. Roberts v. Luebbers*, 534 U.S. 946 (2001) (mem.); *McFarland v. Johnson*, 523 U.S. 1103 (1998) (mem.).

33. *See* Stern, et al., *supra* n. 2, at 755.

34. *See e.g. Butler v. Cockrell*, 123 S. Ct. 1340 (2003) (mem.); *Lindow v. U.S.*, 526 U.S. 1108 (1999) (mem.); *Smalis v. Court of Common Pleas Bail Agency*, 506 U.S. 804 (1992).

35. *See e.g. Anderson v. Collins*, 495 U.S. 943 (1990) (summary order denying a CPC with the notation that Brennan & Marshall, JJ., "would grant the application"). Logically, it would seem that, when at least one Justice believes a COA should be granted, under the *Barefoot* "debatability" standard, a COA should automatically issue.

36. *Cf.* Sup. Ct. Rule 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion."); Sup. Ct. Rule 20.1 ("Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised."); *see also Felker*, 518 U.S. at 665 (discussing Court's discretionary jurisdiction over petitions for original writs of habeas corpus); *Parr v. U.S.*, 351 U.S. 513, 520 (1956) (discussing Court's discretionary jurisdiction over applications for writs of mandamus).

37. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (internal quotation marks and citations omitted).

standard.[38] There appears to be no principled basis for the exercise of a certiorari-type discretion over COA applications.

Although no decision of the Court itself has addressed the issue of whether a COA/CPC application addressed to a Circuit Justice or the full Court falls within the Court's discretionary or obligatory dockets, decisions of individual Circuit Justices in chambers have taken contrary positions. Justice White apparently believed that he had an obligation to grant a CPC when a case raised a "substantial question,"[39] while Chief Justice Rehnquist commented in 1979 that it would be an "extraordinary step" for a Circuit Justice to grant a CPC application after the lower courts have denied a CPC.[40]

Support for the proposition that a COA application falls within a Circuit Justice's obligatory jurisdiction is found in analogous decisions concerning bail applications submitted to individual Circuit Justices. Numerous such decisions have noted that Circuit Justices must engage in an "independent determination on the merits" of a bail application, at least with respect to questions of law as opposed to questions of fact.[41]

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38. Of course, the Supreme Court possesses discretionary jurisdiction to grant certiorari and reverse a Court of Appeals decision denying a COA. *See Hohn v. U.S.*, 524 U.S. 236, 253 (1998) ("We hold that this Court has jurisdiction under [28 U.S.C.] § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals."); *see also Lozado v. Deeds*, 498 U.S. 430 (1991) (per curiam) (granting certiorari, vacating order of Court of Appeals denying CPC, and remanding with instructions to grant a CPC after concluding that the habeas petitioner had met the *Barefoot* standard).

39. *See Autry v. Estelle*, 464 U.S. 1301, 1302 (1983) (White, J., in chambers) (Concluding that a habeas petitioner had raised a "substantial question" that did not "lack[] substance," Justice White stated that "*I am compelled* to issue a certificate of probable cause to appeal, as I am authorized to do under § 2253.") (emphasis added).

40. *See Spenkelink v. Wainwright*, 442 U.S. 1301, 1303 n.* (1979) (Rehnquist, J., in chambers).

41. *See e.g. Hung v. U.S.*, 439 U.S. 1326, 1328 (1978) (Brennan, J., in chambers) (noting that, although great deference must be given to decisions of district courts in denying bail, "[a] Circuit Justice has a nondelegable responsibility to make an independent determination on the merits of the [bail] application") (citation omitted); *Mecom v. U.S.*, 434 U.S. 1340, 1341 (1977) (Powell, J., in chambers) (same); *Harris v. U.S.*, 404 U.S. 1232, 1232 (1971) (Douglas, J., in chambers) (same); *Sellers v. U.S.*, 89 S. Ct. 36, 21 L. Ed. 2d 64, 66 (1968) (Black, J., in chambers) (same); *Leigh v. U.S.*, 82 S. Ct. 994, 8 L. Ed. 2d 269, 270 (1962) (Warren, C.J., in chambers) (same). Chief Justice Rehnquist has taken a contrary position, requiring a bail applicant to show "a reasonable probability that four Justices are likely to vote to grant certiorari" in his case. *Julian v. U.S.*, 463 U.S. 1308, 1309 (1983) (Rehnquist, J., in chambers); *see also Roth v. U.S.*, 77 S. Ct. 17, 1 L. Ed.2d. 34, 35 (1956) (Harlan, J., in chambers) (when lower federal courts have denied bail

These decisions interpreted the former version of Federal Rule of Criminal Procedure 46, which provided that "the trial judge, . . . the court of appeals, or any judge thereof *or . . . a circuit justice*"[42] had authority to rule on a bail application.[43] Virtually identical language appears in the current version of Federal Rule of Appellate Procedure 22(b)(1) and 28 U.S.C. § 2253(c)(1), which speak of the authority of a "Circuit Justice" to issue a COA in addition to that of a district or circuit judge.

A related but distinct question arises if one assumes that a single Circuit Justice (or the Court itself) must apply the *Barefoot* standard pursuant to the Court's obligatory jurisdiction: Should there be any deference[44] afforded to the decisions of the lower court judges who denied a COA?[45] The Supreme Court has never addressed this issue directly, but in a per curiam decision in 1967, the Court stated in passing that

> [i]t is established law that a circuit judge or justice entertaining an application for a certificate [of probable cause to appeal] should give "weighty consideration" to its prior denial by a district judge.[46]

Besides being dicta, the Court's description of the law as established was unfounded. The precedent supporting this statement cited by the Court was two Ninth Circuit decisions,

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application, Circuit Justice should be "generally reluctant to interfere with the considered view of the Court of Appeals").

42. *Reynolds v. U.S.*, 80 S. Ct. 30, 32 (1959) (Douglas, J., in chambers) (quoting former version of Fed. R. Crim. P. 46(a)(2)) (emphasis added).

43. The current version of the rule does not explicitly mention the authority of a Circuit Justice to grant a bail application. *See* Fed. R. Crim. P. 46. It is unclear whether such authority still exists.

44. As noted above, in bail cases, numerous in-chambers decisions by single Justices have spoken of affording "deference" to decisions of lower court judges who denied bail. *See* authorities cited in n. 41, *supra*. Such deference was not required by the plain language of the former version of Federal Rule of Criminal Procedure 46(a)(2).

45. No court has ever suggested that, under 28 U.S.C. § 2253 or Federal Rule of Appellate Procedure 22, a habeas petitioner only may seek a COA from *either* a circuit judge *or* a circuit justice (following denial of a COA by a district court), but not both sequentially. The plain language of the statute and rule would not support such an interpretation.

46. *Nowakowski v. Maroney*, 386 U.S. 542, 543 (1967) (per curiam). This statement was dicta because the Court was not reviewing a case where the district court had denied a CPC. Rather, the district court had *granted* a COA. *Id.* at 542.

each denying a CPC.[47] The first, *Matter of Woods*, was premised on a misunderstanding of Supreme Court precedent which led the Ninth Circuit to conclude that its appellate review of a federal district court's decision denying habeas relief—as well as its review of a CPC denial—was for abuse of discretion.[48] The second Ninth Circuit decision, *Sullivan*, was simply a one-judge order issued subsequently in another case by one of the members of the three-judge panel in *Woods*.[49]

IV. CONCLUSION

The Supreme Court (or a single Circuit Justice acting on behalf of the Court) cannot simply choose to exercise discretion and summarily deny a COA application without first meaningfully engaging in the legal analysis required by section 2253 and *Barefoot*. If, in the opinion of a single Circuit Justice or the Court itself, a COA application has satisfied the *Barefoot* standard, then "a COA *should issue* (and an appeal of the district court's order may be taken)."[50] A COA applicant who

47. *See U.S. ex rel. Sullivan v. Heinze*, 250 F.2d 427, 428-29 (9th Cir. 1957) (Barnes, J., Circuit Judge) ("While I am not bound by the decision of the court below [denying a COA], I am duty bound to give it weighty consideration."); *Matter of Woods*, 249 F.2d 614, 615 (9th Cir. 1957) (per curiam decision of a three-judge panel, including Barnes, J.) (CPC "will rarely be issued where it is sought to review a decision of the lower federal court refusing to interfere with the custody of petitioner held under process of the state court.").

48. *Woods*, 249 F.2d at 616 ("The action of the district court . . . is peculiarly a matter of sound discretion of the lower court."). In support of this proposition, the Ninth Circuit cited three Supreme Court decisions—*Urquhart v. Brown*, 205 U.S. 179 (1907); *Johnson v. U.S.*, 352 U.S. 565 (1957); and *Farley v. U.S.*, 354 U.S. 521 (1957)—none of which stands for this proposition. Two of those decisions, *Johnson* and *Farley*, were not habeas appeals but, instead, concerned the application of the *in forma pauperis* statute, 28 U.S.C. § 1915, in criminal direct appeals. *Johnson*, 352 U.S. at 566; *Farley*, 354 U.S. at 521. The Court in *Johnson* stated that a trial court's refusal to permit a defendant to proceed *in forma pauperis* on direct appeal "carries great weight," yet the Court held that the trial court's ruling "cannot be conclusive." 352 U.S. at 566. In *Urquhart*, which was a federal habeas case, the Court addressed the issue of when a federal court should intervene in a state criminal case prior to the petitioner's exhaustion of state court remedies. 205 U.S. at 182. The Court held that only in "exceptional cases" should a federal court intervene prior to the exhaustion of state court remedies. *Id.* The Court did *not* hold, as a general matter, that federal habeas relief should be granted only in "exceptional cases" or that any deference was due a district court's ruling on legal issues.

49. *Woods*, 249 F.2d at 614.

50. *Slack*, 529 U.S. at 478 (emphasis added).

has satisfied that standard need not show anything "extraordinary" or "exceptional" about his case.[51] Unlike the Court's discretionary docket, where a litigant's showing that his claim is meritorious will by itself be insufficient to result in an exercise of the Court's discretionary jurisdiction, a Circuit Justice (or the Court itself) should grant a COA if it determines that a habeas petitioner has satisfied the minimal *Barefoot* standard.

The Justices' apparent refusal to engage in "an independent determination of the merits"[52] of COA applications shirks the "unflagging obligation"[53] to exercise jurisdiction that Congress has vested in individual Circuit Justices, if not in the full Court. Unless Congress amends section 2253 to relieve Circuit Justices of their jurisdiction over COA applications—as was the case from 1925 to 1948—the Justices have a duty to exercise that obligatory jurisdiction.

51. *Cf. e.g. Felker*, 518 U.S. at 665 (indicating that in order for Court to grant original writ of habeas corpus, an extraordinary writ, petitioner must demonstrate "exceptional circumstances").

52. *Hung*, 439 U.S. at 1328 (Brennan, J., in chambers).

53. *Quackenbush*, 517 U.S. at 716.