

+UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-8525

UNITED STATES OF AMERICA,)	
)	
Appellee,)	
)	
v.)	MOTION BY UNITED STATES TO
)	DISMISS APPEAL ON THE GROUND
)	THAT THE CERTIFICATE OF
JEFFREY R. MACDONALD,)	APPEALABILITY WAS GRANTED
)	IMPROVIDENTLY
Appellant.)	
_____)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby respectfully moves to dismiss this appeal. The Certificate of Appealability ("COA") issued under 28 U.S.C. § 2253(c) was improvidently granted, because the legal claims embraced by the COA are not of constitutional magnitude. This Court therefore lacks jurisdiction over this appeal.

This case is set for oral argument on March 23.¹

¹The Government regrets that this motion was not filed earlier. In preparation for oral argument in the above-styled case, and in consultation with the Appellate Section of the Criminal Division of the Department of Justice, the issues which confer this Court's statutory jurisdiction under 28 U.S.C. § 2253 have come into sharper focus, and our duty requires that they be brought to the Court's attention in the appropriate manner. We apologize for the delay in bringing this matter to the Court's attention.

PROCEDURAL BACKGROUND

On November 4, 2008, the United States District Court for the Eastern District of North Carolina entered an order in which it ruled against petitioner Jeffrey R. MacDonald on five pending motions relating to his request for habeas relief pursuant to 28 U.S.C. § 2255: (1) MacDonald's Motion to Vacate pursuant to 28 U.S.C. § 2255 (D.E. 111; J.A. 907-78)²; (2) MacDonald's Motion to Add Additional Predicate (D.E. 122; J.A. 1088-93); (3) MacDonald's Motion to Expand the Record with Itemized Evidence (D.E. 124; J.A. 1256-60); (4) The Government's Motion to Strike Exhibits (D.E. 129; J.A. 1340-52); and (5) MacDonald's Motion to Supplement Itemized Evidence (D.E. 144; J.A. 1468-72). (J.A. 1517, 1562-63).

MacDonald sought a COA from the district court to permit an appeal of the rulings on each of the five motions. (S.J.A. 1718-30). Of the five rulings MacDonald sought to appeal, only one, the denial on the merits of his Motion To Vacate Sentence under 28 U.S.C. § 2255 (D.E. 111; J.A. 907-78), involved an underlying constitutional claim. The other four rulings involved free-standing claims of actual innocence unrelated to any alleged constitutional claim, and/or the right to expand the record under Rule 7 of the Rules Governing Section 2255 Proceedings. (D.E. 122

²"D.E." refers to the relevant docket entry on the district court's docket sheet, "J.A." refers to the joint appendix filed in this Court, and "S.J.A." refers to the supplemental joint appendix filed in this Court.

(J.A. 1088-93); D.E. 124 (J.A. 1256-60); D.E. 129 (J.A. 1340-52); and D.E. 144 (J.A. 1468-72)). These four motions were denied on procedural grounds. (J.A. 1534-38).

The Government opposed MacDonald's request for a COA (J.A. 1627-70), and the district court denied the request (J.A. 1674). The district court concluded that MacDonald had "failed to make a substantial showing of the denial of a constitutional right, or to demonstrate that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that such jurists would find it debatable whether the district court was correct in its procedural rulings." (J.A. 1674).

MacDonald then filed an application for a COA in this Court. This Court directed MacDonald to file an Informal Brief, and allowed the filing of a brief by the Innocence Project as *amici*, but did not request a response from the Government. In seeking a COA relating to the district court's ruling denying the motion to vacate (D.E. 111 (J.A. 907-78)), MacDonald did not make any showing, much less a substantial showing, of the denial of a constitutional right. (See Appellant's Corrected Informal Opening Brief, No. 08-8525, filed in this Court on February 20, 2009). MacDonald did not allege any constitutional deprivation with respect to the district court's procedural rulings, *i.e.*, its rulings on the other four motions (D.E. 122 (J.A. 1088-93); D.E.

124 (J.A. 1256-60); D.E. 129 (J.A. 1340-52); and D.E. 144 (J.A. 1468-72)).

On June 9, 2009, this Court granted MacDonald "a certificate of appealability on the issue of whether the district court's procedural decisions prohibiting expansion of the record to include evidence received after trial and after the filing of the 28 U.S.C.A. § 2255 (West Supp. 2009) motion was erroneous in light of 28 U.S.C. § 2244(b)(2)(B)(ii) (2006)." (S.J.A. 1743). The order of this Court granting the COA did not encompass the district court's ruling denying habeas relief on the merits of MacDonald's motion to vacate his sentence (D.E. 111; J.A. 907-78), the only motion which alleged a constitutional violation. Instead, the only issue on which this Court granted the COA was an issue of statutory construction -- whether the district court misconstrued 28 U.S.C. § 2244(b)(2)(B)(ii) (2006) when it made its procedural decisions to prohibit the expansion of the record. (S.J.A. 1743). These were the issues presented in the four procedural motions (D.E. 122 (J.A. 1088-93); D.E. 124 (J.A. 1256-60); D.E. 129 (J.A. 1340-52); and D.E. 144 (J.A. 1468-72)).

DISCUSSION

Subject matter jurisdiction refers to a court's "'statutory or constitutional power to adjudicate the case.'" United States v. Cotton, 535 U.S. 625, 630 (2002) (quoting Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 89 (1998)). Subject matter

jurisdiction "can never be forfeited or waived." Id. Therefore, "the lack of subject matter jurisdiction can be raised at any time." United States v. Beasley, 495 F.3d 142, 147 (4th Cir. 2007).

The statute governing appellate jurisdiction in federal habeas proceedings is 28 U.S.C. § 2253. Under Section 2253(c)(1) an appeal may not be taken to the court of appeals unless a circuit justice or judge issues a certificate of appealability ("COA"). Thus, "[a] prisoner who seeks to appeal 'the final order in a proceeding under section 2255' . . . must obtain a COA as a 'jurisdictional prerequisite' to appeal." United States v. Hadden, 475 F.3d 652, 659 (4th Cir. 2007) (quoting Miller-El v. Cockrell, 537 U.S. 322, 336 (2003)).

Additionally, Section 2253(c)(2) provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right," and Section 2253(c)(3) provides that "[t]he certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." See Miller-el v. Cockrell, 537 U.S. at 336 ("[Section] 2253(c) permits issuance of a COA only where a petitioner had made a 'substantial showing of the denial of a constitutional right.'"); Reid v. True, 349 F.3d 788, 795 (4th Cir. 2003) ("A COA 'may issue . . . only if the applicant has made a substantial showing of the denial of a

constitutional right' and must specify the issue or issues as to which the COA has been granted."); Murphy v. Netherland, 116 F.3d 97, 99-100 (4th Cir. 1997) (denying appeal from the denial of habeas petition claiming violation of rights under the Vienna Convention).

In his informal brief seeking a COA, MacDonald sought leave to prosecute an appeal on each of the district court's five rulings, which included the denial of a motion to vacate pursuant to 28 U.S.C. § 2255 based upon allegations that a prosecutor had threatened a potential defense witness (D.E. 111 (J.A. 907-78)), and the denial on procedural grounds of MacDonald's motions relating to his attempts to expand the record (D.E. 122 (J.A. 1088-93), D.E. 124 (J.A. 1256-60), D.E. 144 (J.A. 1468-72)), as well as the granting of the Government's motion to strike exhibits (D.E. 129 (J.A. 1340-52)), also on procedural grounds. (See J.A. 1517). The sole issue upon which this Court granted a COA was "whether the district court's procedural decisions prohibiting expansion of the record to include evidence received after trial and the filing of the 28 U.S.C.A. § 2255 (West Supp. 2009) motion was erroneous in light of 28 U.S.C. § 2244(b)(2)(B)(ii) (2006)." (S.J.A. 1743). That issue, on its face, does not implicate the denial of a constitutional right as required by Section 2253(c)(2), but only involves a question of statutory construction. In United States v. Harden, 45 F. App'x 237, 239 (4th Cir. 2002) (unpub.), this Court

squarely held that "disputes about statutory questions are insufficient to support the issuance of [a COA]." Id. (citing Ramunno v. United States, 264 F.3d 723, 725 (7th Cir. 2001)). Because this Court granted a COA that was limited to an issue that does not implicate the denial of a constitutional right, the Court lacks jurisdiction to entertain the appeal.

STATEMENT PURSUANT TO LOCAL RULE 27(a)

The undersigned attorney has informed Joseph E. Zeszotarski, counsel for the appellant, of this motion, and he opposes this motion.

CONCLUSION

Because the issue upon which the Court granted a COA is not of constitutional magnitude, it does not meet the requirement of 28 U.S.C. § 2253(c)(2). It therefore is respectfully submitted that the Court's Certificate of Appealability should be revoked as improvidently granted, and the instant appeal dismissed. See, e.g., Langley v. Norris, 465 F.3d 861 (8th Cir. 2006) (revoking COA as improvidently granted and dismissing appeal); Phelps v. Alameda, 366 F.3d 722 (9th Cir. 2004) (vacating COA as improvidently

granted and dismissing appeal); Marshall v. Hendricks, 307 F3d 36, 81-82 (3d Cir. 2002) (dismissing COA as to some issues because it was improvidently granted).

Respectfully submitted this 13th day of March, 2010.

GEORGE E. B. HOLDING
United States Attorney

By: /s/ John Stuart Bruce
JOHN STUART BRUCE
First Assistant United States Attorney

JOHN F. DE PUE
BRIAN M. MURTAGH
Special Assistant United States Attorneys

310 New Bern Avenue
Federal Building, Suite 800
Raleigh, North Carolina 27601-1461
Telephone: (919) 856-4530

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2010, I electronically filed the foregoing motion with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

Joseph E. Zeszotarski, Jr.
Andrew H. Good
Philip G. Cormier
Harvey A. Silverglate
James E. Coleman, Jr.

I further certify that on March 13, 2010, I have mailed the foregoing motion by First Class Mail, postage prepaid, to the following non-CM/ECF participant, addressed as follows:

Barry C. Scheck
Benjamin N. Cardozo School of Law
Yeshiva University
Innocence Project
55 5th Avenue
New York, NY 10003

/s/ John Stuart Bruce
JOHN STUART BRUCE
First Assistant United States Attorney