SUPREME COURT OF THE UNITED STATES

No. 96–8986

ARNOLD F. HOHN, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 15, 1998]

JUSTICE KENNEDY delivered the opinion of the Court.

We granted certiorari to determine whether the Court has jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability. The Court, we hold, does have jurisdiction.

I

In 1992, petitioner Arnold Hohn was charged with a number of drug-related offenses, including the use or carrying of a firearm during and in relation to a drug trafficking offense, 18 U. S. C. §924(c)(1). Over defense counsel's objection, the District Court instructed the jury that "use" of a firearm meant having the firearm "available to aid in the commission of" the offense. App. 7, 32. The jury convicted Hohn on all counts. Hohn did not challenge the instruction in his direct appeal, and the Court of Appeals affirmed. 8 F. 3d 1301 (CA8 1993).

Two years after Hohn's conviction became final, we held the term "use" in §924(c)(1) required active employment of the firearm. Proximity and accessibility alone were not sufficient. *Bailey* v. *United States,* 516 U. S. 137 (1995). Hohn filed a *pro se* motion under 28 U. S. C. §2255 to vacate

his 18 U. S. C. §924(c)(1) conviction in light of *Bailey* on the grounds the evidence presented at his trial was insufficient to prove use of a firearm. Although the Government conceded the jury instruction given at Hohn's trial did not comply with *Bailey*, the District Court denied relief because, in its view, Hohn had waived the claim by failing to challenge the instruction on direct appeal.

While Hohn's motion was pending before the District Court, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. Section 102 of AEDPA amends the statutory provision which had required state prisoners to obtain a certificate of probable cause before appealing the denial of a habeas petition. The amended provision provides:

> "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> "(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> "(B) the final order in a proceeding under section 2255." 28 U. S. C. A. §2253(c)(1) (Supp. 1998).

Certificates of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." §2253(c)(2).

Hohn filed a notice of appeal on July 29, 1996, three months after AEDPA's enactment. The Court of Appeals treated the notice of appeal as an application for a certificate of appealability and referred it to a three-judge panel. The panel decided Hohn's application did not meet the standard for a §2253(c) certificate. In the panel's view, "*Bailey* did no more than interpret a statute, and an incorrect application of a statute by a district court, or any court, does not violate the Constitution." 99 F. 3d 892, 893 (CA8 1996). Given this determination, the panel declined

to issue a certificate of appealability.

Judge McMillian dissented. In his view, *Bailey* cast doubt on whether Hohn's conduct in fact violated 18 U. S. C. §924(c)(1). The Due Process Clause, he reasoned, does not "tolerat[e] convictions for conduct that was never criminal," so Hohn had made a sufficient showing of a constitutional deprivation. 99 F. 3d, at 895. When the Court of Appeals denied Hohn's rehearing petition and a suggestion for rehearing en banc, four judges noted they would have granted the suggestion.

Hohn petitioned this Court for a writ of certiorari to review the denial of the certificate, seeking to invoke our jurisdiction under 28 U. S. C. §1254(1). The Government now found itself in agreement with Hohn, saying his claim was, in fact, constitutional in nature. It asked us to vacate the judgment and remand so the Court of Appeals could reconsider in light of this concession. We may not vacate and remand, of course, unless we first have jurisdiction over the case; and since Hohn and the Government both argue in favor of our jurisdiction, we appointed an *amicus curiae* to argue the contrary position.

II

Title 28 U. S. C. §1254 is the statute most often invoked for jurisdiction in this Court. It provides in relevant part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . ."

The first phrase of the quoted statute confines our jurisdiction to "[c]ases in" the courts of appeals. *Nixon* v. *Fitzgerald*, 457 U. S. 731, 741–742 (1982). The question is whether an application for a certificate meets the description.

There can be little doubt that Hohn's application for a

certificate of appealability constitutes a case under §1254(1). As we have noted, "[t]he words 'case' and 'cause' are constantly used as synonyms in statutes . . . , each meaning a proceeding in court, a suit, or action." *Blyew* v. *United States,* 13 Wall. 581, 595 (1872). The dispute over Hohn's entitlement to a certificate falls within this definition. It is a proceeding seeking relief for an immediate and redressable injury, *i.e.,* wrongful detention in violation of the Constitution. There is adversity as well as the other requisite qualities of a "case" as the term is used in both Article III of the Constitution and the statute here under consideration. This is significant, we think, for cases are addressed in the ordinary course of the judicial process, and, as a general rule, when the district court has denied relief and applicable requirements of finality have been satisfied, the next step is review in the court of appeals. That the statute permits the certificate to be issued by a "circuit justice or judge" does not mean the action of the circuit judge in denying the certificate is his or her own action, rather than the action of the court of appeals to whom the judge is appointed.

The course of events here illustrates the point. The application moved through the Eighth Circuit in the same manner as cases in general do. The matter was entered on the docket of the Court of Appeals, submitted to a panel, and decided in a published opinion, including a dissent. App. 4–5. The court entered judgment on it, issued a mandate, and entertained a petition for rehearing and suggestion for rehearing en banc. *Id.,* at 5–6. The Eighth Circuit has since acknowledged its rejection of Hohn's application made Circuit law. *United States* v. *Apker,* 101 F. 3d 75 (CA8 1996), cert. pending, 97–5460. One judge specifically indicated he was bound by the decision even though he believed it was wrongly decided. 101 F. 3d, at 75–76 (Henley, J., concurring in result). These factors suggest Hohn's certificate application was as much a case

in the Court of Appeals as are the other matters decided by it.

We also draw guidance from the fact that every Court of Appeals except the Court of Appeals for the District of Columbia Circuit has adopted Rules to govern the disposition of certificate applications. *E.g.*, Rules 22, 22.1 (CA1 1998); Rules 22, 27(b) and (f) (CA2 1998); Rules 3.4, 22.1, 111.3(b) and (c), 111.4(a) and (b)(vii) (CA3 1998); Rules 22(a) and (b)(3)(g), 34(b) (CA4 1998); Rules 8.1(g), 8.6, 8.10, 22, 27.2.3 (CA5 1998); Rules 28(f), (g), and (j) (CA6 1998); Rules 22(a)(2), (h)(2), and (h)(3)(i), 22.1 (CA7 1998); Rules 22A(d), 27B(b)(2) and (c)(2) (CA8 1998); Rules 3–1(b), 22–2, 22–3(a)(3) and (b)(4), 22–4(c), 22–5(c), (d)(1), (d)(3), and (e) (CA9 1998); Rules 11.2(b), 22.1, 22.2.3 (CA10 1998); Rules 22–1, 22–3(a)(3), (a)(4), (a)(6), and (a)(7), and (b), 27–1(d)(3) (CA11 1998). We also note the Internal Operating Procedures for the Court of Appeals for the Eighth Circuit require certificate applications to be heard as a general matter by three-judge administrative panels. Internal Operating Procedures, pt. I.D.3 (CA8 1998); see also Interim Processing Guidelines for Certificates of Appealability under 28 U. S. C. §2253 and for Motions under 28 U. S. C. §2244, pt. I (CA1), 28 U. S. C. A., p 135 (1998 Pamphlet); Internal Operating Procedures 10.3.2, 15.1 (CA3 1998); Criminal Justice Act Implementation Plan, pt. I.2 (CA4), 28 U. S. C. A., p. 576 (1998 Pamphlet); Internal Operating Procedures 1(a)(1) and (c)(7) (CA7 1998); Rule 27–1, Advisory Committee Note (1) (CA9), 28 U. S. C. A., p. 290 (1998 Pamphlet); Emergency General Order in re Procedures Regarding the Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act (CA10), 28 U. S. C. A., p. 487 (1998 Pamphlet); Internal Operating Procedure 11, following Rule 47–6 (CA11 1998). These directives would be meaningless if applications for certificates of appealability were not matters subject to the control and disposition of the courts of appeals.

It is true the President appoints "circuit judges for the several circuits," 28 U. S. C. §44, but it is true as well the court of appeals "consist[s] of the circuit judges of the circuit in regular active service," §43. In this instance, as in all other cases of which we are aware, the order denying the certificate was issued in the name of the court and under its seal. That is as it should be, for the order was judicial in character and had consequences with respect to the finality of the order of the District Court and the continuing jurisdiction of the Court of Appeals.

The Federal Rules of Appellate Procedure make specific provision for consideration of applications for certificates of appealability by the entire court. Rule 22(b) states:

> "In 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 district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals."

On its face, the Rule applies only to state, and not federal, prisoners. It is nonetheless instructive on the proper construction of §2253(c).

Rule 22(b) by no means prohibits application to an individual judge, nor could it, given the language of the statute. There would be incongruity, nevertheless, were the

same ruling deemed in one instance the order of a judge acting *ex curia* and in a second the action of the court, depending upon the caption of the application or the style of the order.

Our conclusion is further confirmed by Federal Rule of Appellate Procedure 27(c). It states:

> "In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court."

As the Rule makes clear, even when individual judges are authorized under the Rules to entertain certain requests for relief, the court may review their decisions. The Eighth Circuit's Rules are even more explicit, specifically listing grants of certificates of probable cause by an individual judge as one of the decisions subject to revision by the court under Federal Rule 27(c). Rule 27B(b)(2) (CA8 1998). The recognition that decisions made by individual circuit judges remain subject to correction by the entire court of appeals reinforces our determination that decisions with regard to an application for a certificate of appealability should be regarded as an action of the court itself and not of the individual judge. We must reject the suggestion contained in the Advisory Committee Notes on Federal Rule of Appellate Procedure 22(b) that "28 U. S. C. §2253 does not authorize the court of appeals as a court to grant a certificate of probable cause." 28 U. S. C. App., p. 609. It is more consistent with the Federal Rules and the uniform practice of the courts of appeals to construe

§2253(c)(1) as conferring the jurisdiction to issue certificates of appealability upon the court of appeals rather than by a judge acting under his own seal. See *In re Burwell*, 350 U. S. 521, 522 (1956).

Some early cases from this Court acknowledged a distinction between acting in an administrative and a judicial capacity. When judges perform administrative functions, their decisions are not subject to our review. *United States* v. *Ferreira*, 13 How. 40, 51–52 (1852); see also *Gordon* v. *United States*, 117 U. S. Appx. 697, 702, 704 (1864). Those opinions were careful to say it was the nonjudicial character of the judges' actions which deprived this Court of jurisdiction. *Ferreira*, *supra*, at 46–47 (tribunal not judicial when the proceedings were *ex parte* and did not involve the issuance of process, summoning of witnesses, or entry of a judgment); *Gordon*, *supra*, at 699, 702 (tribunal not judicial when it lacks power to enter and enforce judgments). Decisions regarding applications for certificates of appealability, in contrast, are judicial in nature. It is typical for both parties to enter appearances and to submit briefs at appropriate times and for the court of appeals to enter a judgment and to issue a mandate at the end of the proceedings, as happened here. App. 4–6. Construing the issuance of a certificate of appealability as an administrative function, moreover, would suggest an entity not wielding judicial power might review the decision of an Article III court. In light of the constitutional questions which would surround such an arrangement, see *Gordon*, *supra*; *Hayburn's Case*, 2 Dall. 409 (1792), we should avoid any such implication.

We further disagree with the contention, advanced by the dissent and by Court-appointed *amicus*, that a request to proceed before a court of appeals should be regarded as a threshold inquiry separate from the merits which, if denied, prevents the case from ever being in the court of appeals. Precedent forecloses this argument. In *Ex parte*

Quirin, 317 U. S. 1 (1942), we confronted the analogous question whether a request for leave to file a petition for a writ of habeas corpus was a case in a district court for the purposes of the then-extant statute governing court of appeals review of district court decisions. See 28 U. S. C. §225(a) First (1940 ed.) (courts of appeals had jurisdiction to review final decisions "[i]n the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court"). We held the request for leave constituted a case in the district court over which the court of appeals could assert jurisdiction, even though the district court had denied the request. We reasoned, "[p]resentation of the petition for judicial action is the institution of a suit. Hence the denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals." 317 U. S., at 24.

We reached a similar conclusion in *Nixon* v. *Fitzgerald*. There President Nixon sought to appeal an interlocutory District Court order rejecting his claim of absolute immunity. The Court of Appeals summarily dismissed the appeal because, in its view, the order failed to present a "serious and unsettled question" of law sufficient to bring the case within the collateral order doctrine announced in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 547 (1949). Because the Court of Appeals had dismissed for failure to satisfy this threshold jurisdictional requirement, respondent Fitzgerald argued, "the District Court's order was not an appealable 'case' properly 'in' the Court of Appeals within the meaning of §1254." 457 U. S., at 742. Turning aside this argument, we ruled "petitioner did present a 'serious and unsettled' and therefore appealable question to the Court of Appeals. It follow[ed] that the case was 'in' the Court of Appeals under §1254 and properly within our certiorari jurisdiction." *Id.*, at 743. We elaborated: "There can be no serious doubt concerning

our power to review a court of appeals' decision to dismiss for lack of jurisdiction . . . . If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court." *Id.,* at 743, n. 23; see also *United States* v. *Nixon,* 418 U. S. 683, 692 (1974) (holding appeal of District Court's denial of motion to quash *subpoena duces tecum* was in the Court of Appeals for purposes of §1254(1)).

We have shown no doubts about our jurisdiction to review dismissals by the Courts of Appeals for failure to file a timely notice of appeal under §1254(1). The filing of a proper notice of appeal is mandatory and jurisdictional. *Torres* v. *Oakland Scavenger Co.,* 487 U. S. 312, 315 (1988); *United States* v. *Robinson,* 361 U. S. 220, 224 (1960); Advisory Committee's Notes on Fed. Rule App. Proc. 3, 28 U. S. C. App., p. 589. The failure to satisfy this jurisdictional prerequisite has not kept the case from entering the Court of Appeals, however. We have reviewed these dismissals often and without insisting the petitioner satisfy the requirements for an extraordinary writ and without suggesting our lack of jurisdiction to do so. *E.g., Houston* v. *Lack,* 487 U. S. 266 (1988); *Torres, supra; Fallen* v. *United States,* 378 U. S. 139 (1964); *United States* v. *Robinson, supra; Leishman* v. *Associated Wholesale Elec. Co.,* 318 U. S. 203 (1943).

We have also held that §1254(1) permits us to review denials of motions for leave to intervene in the Court of Appeals in proceedings to review the decision of an administrative agency. *Automobile Workers* v. *Scofield,* 382 U. S. 205, 208–209 (1965); see also *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U. S. Philips Corp.,* 510 U. S. 27, 30 (1993) *(per curiam).* Together these decisions foreclose the proposition that the failure to satisfy a threshold prerequisite for court of appeals jurisdiction, such as the issuance of a certificate of appealability, prevents a case from being in the court of appeals for purposes of §1254(1).

It would have made no difference had the Government declined to oppose Hohn's application for a certificate of appealability. In *Scofield*, we held that §1254(1) gave us jurisdiction to review the Court of Appeals' denial of a motion for leave to intervene despite the fact that neither the agency nor any of the other parties opposed intervention. 382 U. S., at 207. In the same manner, petitions for certiorari to this Court are often met with silence or even acquiescence; yet no one would suggest this deprives the petitions of the adversity needed to constitute a case. Assuming, of course, the underlying action satisfies the other requisites of a case, including injury in fact, the circumstance that the question before the court is a preliminary issue, such as the denial of a certificate of appealability or venue, does not oust appellate courts of the jurisdiction to review a ruling on the matter. For instance, a case does not lack adversity simply because the remedy sought from a particular court is dismissal for improper venue rather than resolution of the merits. Federal Rule of Civil Procedure 12(b)(3) specifically permits a party to move to dismiss for improper venue before joining issue on any substantive point through the filing of a responsive pleading, and we have long treated appeals of dismissals for improper venue as cases in the courts of appeals, see, *e.g.*, *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 151 (1976); *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.*, 406 U. S. 706, 707 (1972); *Schnell* v. *Peter Eckrich & Sons, Inc.*, 365 U. S. 260, 261 (1961); *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 223 (1957); *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 440 (1946). It is true we have held appellate jurisdiction improper when district courts have denied, rather than granted, motions to dismiss for improper venue. The jurisdictional problem in those cases, however, was the interlocutory nature of the appeal, not the absence of a proper case. *Lauro Lines s.r.l.* v. *Chasser*, 490 U. S.

495 (1989); *Van Cauwenberghe* v. *Biard*, 486 U. S. 517 (1988). In any event, concerns about adversity are misplaced in this case. Here the Government entered an appearance in response to the initial application and filed a response opposing Hohn's petition for rehearing and suggestion for rehearing en banc. App. 4, 5.

The argument that this Court lacks jurisdiction under §1254(1) to review threshold jurisdictional inquiries is further refuted by the recent amendment to 28 U. S. C. §2244(b)(3). The statute requires state prisoners filing second or successive habeas applications under §2254 to first "move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U. S. C. A. §2244(b)(3)(A) (Supp. 1998). The statute further provides "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." §2244(b)(3)(E). It would have been unnecessary to include a provision barring certiorari review if a motion to file a second or successive application would not otherwise have constituted a case in the court of appeals for purposes of 28 U. S. C. §1254(1). We are reluctant to adopt a construction making another statutory provision superfluous. See, *e.g.*, *Kawaahau* v. *Geiger*, 523 U. S. ___, ___ (1998) (slip op., at 5); *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955).

Inclusion of a specific provision barring certiorari review of denials of motions to file second or successive applications is instructive for another reason. The requirements for certificates of appealability and motions for second or successive applications were enacted in the same statute. The clear limit on this Court's jurisdiction to review denials of motions to file second or successive petitions by writ of certiorari contrasts with the absence of an analogous limitation to certiorari review of denials of applications for

certificates of appealability. True, the phrase concerning the grant or denial of second or successive applications refers to an action "by a court of appeals"; still, we think a Congress concerned enough to bar our jurisdiction in one instance would have been just as explicit in denying it in the other, were that its intention. See, *e.g.*, *Bates* v. *United States*, 522 U. S. ___, ___ (1997) (slip op., at 6) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (quoting *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (other internal quotation marks omitted)). The dissent claims the absence of similar language in §2253(c) can be explained by Congress' reliance on the rule holding certificate applications unreviewable under §1254(1). *Post*, at 8. As we later discuss, any such reliance is lessened by the Court's consistent practice of treating denials of certificate applications as falling within its statutory certiorari jurisdiction. See *infra*, at 14–15.

Today's holding conforms our commonsense practice to the statutory scheme, making it unnecessary to invoke our extraordinary jurisdiction in routine cases, which present important and meritorious claims. The Solicitor General does not dispute that Hohn's claim has considerable merit and acknowledges that the trial court committed an error of constitutional magnitude. The only contested issue is whether the constitutional violation was a substantial one. Brief in Opposition 7–8. Were we to adopt the position advanced by the dissent, the only way we could consider his meritorious claim would be through the All Writs Act, 28 U. S. C. §1651(a). Our rule permits us to carry out our normal function of reviewing possible misapplications of law by the courts of appeals without having to resort to extraordinary remedies.

Our decision, we must acknowledge, is in direct conflict

with the portion of our decision in *House* v. *Mayo*, 324 U. S. 42, 44 (1945) *(per curiam)*, holding that we lack statutory certiorari jurisdiction to review refusals to issue certificates of probable cause. Given the number and frequency of the cases, and the difficulty of reconciling our practice with a requirement that only an extraordinary writ can be used to address them, we do not think *stare decisis* concerns require us to adhere to that decision. Its conclusion was erroneous, and it should not be followed.

Stare decisis is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989).

We have recognized, however, that *stare decisis* is a "principle of policy" rather than "an inexorable command." *Payne*, *supra*, at 828. For example, we have felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument. *Gray* v. *Mississippi*, 481 U. S. 648, 651, n. 1 (1987) (questioning the precedential value of *Davis* v. *Georgia*, 429 U. S. 122 (1976) *(per curiam)*). The role of *stare decisis*, furthermore, is "somewhat reduced . . . in the case of a procedural rule . . . which does not serve as a guide to lawful behavior." *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995) (citing *Payne*, *supra*, at 828). Here we have a rule of procedure that does not alter primary conduct. And what is more, the rule of procedure announced in *House* v. *Mayo* has often been disregarded in our own practice. Both Hohn and the United States cite numerous instances in which

we have granted writs of certiorari to review denials of certificate applications without requiring the petitioner to move for leave to file for an extraordinary writ, as previously required by our rules, and without requiring any extraordinary showing or exhibiting any doubts about our jurisdiction to do so. 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4036, pp. 15–16 (2d ed. 1988) (collecting cases). Included among these examples are several noteworthy decisions which resolved significant issues of federal law. See, *e.g.*, *Allen* v. *Hardy*, 478 U. S. 255, 257–258 (1986) *(per curiam)* (refusing to permit retroactive application of *Batson* v. *Kentucky*, 476 U. S. 79 (1986), on collateral attack); *Lynce* v. *Mathis*, 519 U. S. 433, 436 (1997) (holding the cancellation of early release credits violated the *Ex Post Facto* Clause). These deviations have led litigants and the legal community to question the vitality of the rule announced in *House* v. *Mayo*. As one commentator observed: "More recent cases . . . have regularly granted certiorari following denial of leave to proceed in forma pauperis, or refusal to certify probable cause, without any indication that review was by common law writ rather than statutory certiorari. At least as to these two questions, statutory certiorari should be available." Wright, Miller, & Cooper, *supra*, at 15–16 (footnotes omitted). Our frequent disregard for the rule announced in *House* v. *Mayo* weakens the suggestion that Congress could have placed significant reliance on it, especially in light of the commentary on our practice in the legal literature.

This is not to say opinions passing on jurisdictional issues *sub silentio* may be said to have overruled an opinion addressing the issue directly. See, *e.g.*, *United States* v. *More*, 3 Cranch 159, 172 (1805) (Marshall, C. J.). Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality. *Rodri-*

guez de Quijas v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). Once we have decided to reconsider a particular rule, however, we would be remiss if we did not consider the consistency with which it has been applied in practice. *Swift & Co.* v. *Wickham*, 382 U. S. 111, 116 (1965); see also *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 307 (1962). This consideration, when combined with our analysis of the legal issue in question, convinces us the contrary holding of *House* v. *Mayo* cannot stand.

We hold this Court has jurisdiction under §1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals. The portion of *House* v. *Mayo* holding this Court lacks statutory certiorari jurisdiction over denials of certificates of probable cause is overruled. In light of the position asserted by the Solicitor General in the brief for the United States filed August 18, 1997, the decision of the Court of Appeals is vacated and remanded for further consideration.

It is so ordered.