IN THE SUPREME COURT OF THE UNITED STATES

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HERNAN O'RYAN CASTRO, :

Petitioner :

v. : No. 02-6683

UNITED STATES. :

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Washington, D.C.

Wednesday, October 15, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

MICHAEL G. FRICK, ESQ., Brunswick, Georgia; on behalf of the Petitioner.

DAN HIMMELFARB, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-6683, Hernan O'Ryan Castro v. the United States.

Mr. Frick.

ORAL ARGUMENT OF MICHAEL G. FRICK

ON BEHALF OF THE PETITIONER

MR. FRICK: Mr. Chief Justice, and may it please the Court:

In holding that Hernan O'Ryan Castro's first titled 28 U.S.C., section 2255 petition was second or successive under the Antiterrorism and Effective Death Penalty Act of 1996, the Eleventh Circuit Court of Appeals has placed itself in conflict with every other court of appeals circuit in the United States, save the Fifth, in how they view or treat the impact of a prior post-conviction motion which has been sua sponte re-characterized or treated as a 2255 petition by the district court.

QUESTION: Is recharacterization pretty much of a judge-made thing? There's -- there's no statute that provides for it, is there?

MR. FRICK: That is absolutely correct. It is a judge-made -- it is a judge-made thing. It is something

that has been -- that has grown up among the courts in an attempt to save what would otherwise be generally in the case of a pro se prisoner, a facially deficient or an ineptly pleaded document, and by recharacterizing it, it's trying to take substance and putting into form so that the court can actually rule on the substance of the particular motion that was pleaded.

QUESTION: Well, what's the difference in the two? I'm -- I'm the trial judge and I receive a motion under rule 33 that's within the time limits under rule 33.

MR. FRICK: Yes, Your Honor.

QUESTION: When do I recharacterize it?

MR. FRICK: Justice Kennedy, at the present time recharacterization in our opinion should only be done at such time as the court determines that there is absolutely no viable way that it's going to be able to take the document as pleaded under the title that it's given to the court and effectuate a remedy therefrom.

Now, it is our contention that, as in the Adams and Miller cases from the Second and Third Circuits, that at the present time, under the restrictions of the AEDPA, that a recharacterization should never take place by a court unless there is concurrence on the part of the petitioner himself and he's given the --

QUESTION: Well, I -- I understand that -- that

argument of yours.

MR. FRICK: Yes, sir.

QUESTION: But what I'm asking is what is -- what factors does the judge take into account or should take into account when he or she is asked to recharacterize the motion? I -- I get -- I'm the trial judge. I get a rule 33 motion, which is within the time limits, and then the Government or -- says, now you should recharacterize. What -- what are factors that I consider when I recharacterize? You -- you indicate that you should never recharacterize unless you have to for some reason?

MR. FRICK: Yes, sir, and I do not believe that it is the Government's part to ask the court to recharacterize something.

QUESTION: Is there any authority for that? If -- if I wanted to go look in -- in some manual or --

MR. FRICK: No, Your Honor. There --

QUESTION: -- some practice book to know when I can recharacterize, when I can't?

MR. FRICK: No, Your Honor, but the D.C. Circuit -- but first of all, all of the cases that we have cited except for the Eleventh Circuit and the Fifth Circuit have addressed issues, have addressed circumstances under which recharacterization was done of certain motions that were

pleaded in order to help ostensibly the individual who pled the motion.

QUESTION: But here the Government and the trial court the first time around just said they would have no objection, didn't they, having treated it as a 2254? They didn't urge that it be recharacterized, the rule 33 motion.

MR. FRICK: No, they did not ask that it be recharacterized, Your Honor. What they said is that they had no objection to it being considered as also seeking relief under 2255. But my client, Mr. Castro, had presented to the court, unlike in virtually all of the other cases in the other circuits -- and this is one of the points that makes this such a strong case for Mr. Castro -- his rule 33 motion was absolutely correct in all respects insofar as seeking the remedy that he did.

The Eleventh Circuit's initial opinion in this case, in fact, recognized the opinion that it later vacated sua sponte -- actually recognized the fact that he had brought a proper rule 33 motion under -- under Brady.

QUESTION: And when you say a proper rule 33 motion, you don't necessarily mean one on which relief will be granted I take it.

MR. FRICK: No, Your Honor. It is, nonetheless, a motion that does not require recharacterization in order

for the court to get to the merits of the issue presented.

The district court --

QUESTION: It was the Government who intruded 2255 into this case. The district judge didn't suggest it. The prisoner, who never appeared before the court, certainly didn't suggest it. 2255, as I understand, was first uttered by the Government in -- in its pleading to the court.

MR. FRICK: That's absolutely correct, Justice Ginsburg, and the court -- the district court's order, interestingly enough, starts out by saying we have before us Hernan O'Ryan Castro's motion for a new trial under rule 33, and then it ends in conclusion by stating for the above reasons, we deny Hernan O'Ryan Castro's rule 33 motion for new trial. It is only in the body of the opinion itself that there is reference to the Government having requested that it also be considered as requesting relief under 2255 and that they would, therefore, take that consideration.

QUESTION: Well, let's get exactly straight what the Government said because I had thought the Government said it have -- it would have no objection. Now, you're saying the Government requested. Those are two different things.

MR. FRICK: Your Honor, if I stated that, I'm

incorrect. The Government suggested -- the Government stated that it had no objection, as Your -- as Your Honor has stated. It had no objection to it being so characterized.

QUESTION: But no one had proposed it other than the Government.

MR. FRICK: That's correct. Not up until that point in time, there had been no suggestion whatsoever of 2255 --

QUESTION: And the Government was -- I take it, was intending to be helpful. They thought that 2255 was a better rubric. Why I don't know. It isn't clear even now. The -- the district judge in the end I -- didn't he say I'll treat it as both?

MR. FRICK: Yes, Your Honor. He -- he said that he would treat it as seeking relief under both rule 33 and 2255. Mr. Castro, in his brief in response to the Government's brief, stated that I didn't file a -- a 2255 and I object to it being characterized or considered as seeking relief under 2255. But there was no argument on the point, and it was never anything that -- where argument was presented other than through the briefs on that issue.

QUESTION: And what -- at what point did Mr. Castro get representation? Not at this stage he didn't

have any lawyer.

MR. FRICK: Absolutely not, Your Honor. We -- we were not appointed by the court until this matter had gone before the Eleventh Circuit Court of Appeals who vacated the opinion of the district court and remanded it because the -- now we're talking about the subsequently filed 2255. The -- the first titled 2255 that was filed several years later. It was not until that was on appeal that the Eleventh Circuit appointed counsel -- had the district court appoint counsel.

QUESTION: So throughout the original rule --

MR. FRICK: Totally pro se.

QUESTION: And even when he -- his first styled 2255, he was still pro se until that one went up on appeal.

MR. FRICK: Yes, Justice Ginsburg, that's correct.

QUESTION: And pro se, Castro filed an appeal from the merits determination of the district court?

MR. FRICK: Yes, Justice O'Connor, that's correct.

QUESTION: But didn't raise, as an issue, the treatment of his -- the recharacterization --

MR. FRICK: That is correct.

QUESTION: -- to also consider --

MR. FRICK: That was not raised -- that was not raised as an issue by him at that point in time.

QUESTION: And what are we to make of that?

MR. FRICK: Your Honor, I would suggest that we make nothing of it. The Government has suggested that this places this case under one of three things. It's law of the case, or if the Court doesn't buy law of the case, then look at either waiver or forfeiture to the extent that there may be some difference between those two particular things.

QUESTION: At the time Mr. Castro appealed, had AEDPA been enacted?

MR. FRICK: At the time that he appealed?

QUESTION: Mm-hum. We can find it out.

MR. FRICK: I -- I'm sorry, Your Honor.

QUESTION: But --

MR. FRICK: We -- we have two or three different appeals.

QUESTION: I thought, frankly, that he had appealed in March of 1996 and AEDPA was enacted in April.

MR. FRICK: Yes, Your Honor. At page 147 of the joint appendix there's a March 19th, 1996 Eleventh Circuit affirmance of the district court denial of the rule 33 motion for new trial, and in that order the court states that this is an appeal from the denial of relief in regard

to a combined motion to vacate, set aside, or correct sentence, 2255, and motion for new trial.

Of course, it is our contention that that statement is not actually accurate because there had never been a motion filed by anyone seeking relief under 2255. It had simply been a characterization.

QUESTION: Now, that -- that would mean that when the district court decided to treat this as being under either or both of those provisions, it was doing him no harm, AEDPA not yet being in existence. Is that right?

MR. FRICK: I believe that that was the -- yes, Your Honor. I believe that is -- that is correct from the standpoint --

QUESTION: It's only the subsequent enactment of AEDPA that caused the recharacterization to be harmful to him.

MR. FRICK: Yes, Your Honor, and not only that, but not only was this a pre-AEDPA filing of the rule 33 plus recharacterization at that time, it was a denial of the -- that relief, that joint relief, pre-AEDPA.

QUESTION: What do you make of the argument on the other side that although, of course, there was no AEDPA at that point, we did have a -- a structure of -- of rules governing abuse of the writ and second and successive petitions and that he would have -- he would

have run afoul of those rules, or at least there was reason to be concerned that he might run afoul of those rules, and therefore, the enactment of AEDPA really shouldn't make any difference in our analysis?

MR. FRICK: Well, Your Honor, I -- the Government's brief seems to pretty much equate abuse of the writ with the restrictions placed under 2255.

QUESTION: And I'll -- I'll stipulate here that they're -- you know, they're not exactly identical. But the argument is your concern basically here with the unfairness of tagging him with an earlier petition, and it's unfair because of the -- the consequences under AEDPA. And they're saying it would have been just as unfair or just as fair in the pre-AEDPA law. It's a fairness argument. What do -- what do you say to that?

MR. FRICK: Yes, sir. I -- I believe that the other circuits of this country, courts of appeals, have addressed the difference between the abuse of the writ and the impact of having filed an initial 2255 under AEDPA and having that.

QUESTION: Right. What -- what do you say? What do you say? What's your answer to the Government?

MR. FRICK: I say that there is a significant difference as stated by those other circuits between the difficulty in getting a second petition filed under abuse

of the writ. It -- it wasn't as difficult to get a second petition filed.

QUESTION: Is -- is the -- is the basic difference that you have to go to the court of appeals and that's a tough standard, whereas under our prior law, you -- you didn't have to go through that step?

MR. FRICK: That would certainly be one of the differences, Your Honor. But the recharacterization itself in Mr. Castro's case was not to his benefit. There -- there's no contention that the Government did it to legally entrap him, but that's the circumstance that he ultimately found himself in, having had the court recharacterize it, so to speak.

QUESTION: Well, but isn't -- isn't there another point that filing a legitimate -- maybe -- on the merits motion for new trial on ground A and later -- and -- and having it denied, then later filing a 2255 on ground B under our abuse of the writ doctrine -- that would not have been an abuse of the writ, would it?

MR. FRICK: That's correct, Justice Stevens. It's also important, I believe, to -- to consider that while Mr. Castro was -- while Mr. Castro was pro se, that's not -- that's not a critical element in connection with this case. These same pitfalls would have befallen attorneys representing him with a recharacterization

problem as -- as it was done at that time, although I'm not so sure that the Government would have suggested that it would not object to it being recharacterized as a 2255 if there had been counsel on the other side at that time.

QUESTION: But as far as raising a question on appeal, it's more likely, if he had counsel, that the pro se prisoner gets to see a document that starts out by saying you made a rule 33 motion, and the bottom line is, as you pointed out, your motion is denied, and that 2255 comes up only in the body of the opinion. That is something that a lawyer is far more likely to spot than a pro se prisoner who sees I made a motion under rule 33, and the bottom line of this judgment is my motion is denied.

MR. FRICK: Yes, Your Honor. That's correct.

QUESTION: Would he have been able to appeal the trial court's treatment of it as -- as under the habeas provision? Would he have been able to appeal? I mean, the Government says it's law of the case because he should have appealed it. He -- he was the --

MR. FRICK: Your Honor, I don't know what point he would have appealed. The -- the district court's consideration of the motion throughout the entire motion used the analysis of -- of Brady and Giglio in reaching the point that his motion for new trial should be denied.

There was one brief remark about 2255 and the constitutional application in it, but it was not, in effect, necessary to the decision that the court rendered. And therefore, I do not believe that law of the case applied.

QUESTION: Well, even -- even if it wasn't necessary, he would have had to go to appeal saying I agree with the judgment below. I should have been denied relief. But I want you to write an opinion saying that it was wrong for the court to treat this -- I mean, the normal appellate judge would say, look it, you know, you have nothing to complain about if you agree that you should have been denied relief under the other one.

MR. FRICK: Yes, Your Honor.

Your Honor, the -- the question presented before this Court is not quite as narrow in our view as looking specifically at the facts of this case, with it being a pre-AEDPA when most of the other circuit cases are post-AEDPA, both in the recharacterization phase and in the filing of a first titled 2255. The question that we were asked pertaining to this Court dealt with when a first post-conviction motion is recharacterized sua sponte as a 2255, is a subsequent first titled 2255 rendered second or successive under the AEDPA. The -- the answer to that is no in our opinion.

But the significance and the point I wanted to make there is that the Government's contention that we've got a law of the case issue -- law of the case is very -- I'm not sure exactly what the law of the case is going to ultimately result in other than the determination that there had been a recharacterization sua sponte as a 2255. And under that circumstance that's what we're here arguing about.

QUESTION: One thing you might touch on, Mr. Frick, during the course, the Government contends we don't have jurisdiction over this petition. Perhaps you might want to discuss that --

MR. FRICK: Yes.

QUESTION: -- at some point.

MR. FRICK: Thank you, Chief Justice Rehnquist.

Under Stillert -- excuse me -- Stewart v. Martinez-Villareal and Slack v. McDaniel, this Court has already made the determination that it has jurisdiction to consider and review a circuit court of appeals' decision pertaining to whether or not a first titled 2255 is second or successive following recharacterization. Both of those cases dealt with that issue. They were different fact situations, but the bottom line was this Court took jurisdiction under those cases to consider the issue of successive or second petition under AEDPA.

In addition, a -- an actual look at the statute, 28 U.S.C. 2244(b)(3)(E), which is in the appendix of the Government's brief, appendix 2a, that is the statute that the Government contends shows that this Court does not have jurisdiction. What that particular section deals with is a proscription against this Court having jurisdiction when a court of appeals has granted or denied a request for authorization for a district court to consider a second or successive petition. That is a recognition on the part -- the statute recognizes that there has been a first 2255 so characterized as such, so pleaded as such by the petitioner, and that he has then come before them with what he recognizes is a second motion, and he's going to the court of appeals and saying, under AEDPA there are restrictions that we have not had before, and I am required to come before you and meet certain gatekeeping requirements in order for the district court to hear my second or successive petition. There is no first 2255 for a second -- for -- for the first titled 2255 to be successive to or to be second to. And therefore, section 2244(b)(3)(E) is not applicable.

Now, the Government's argument in that regard is that because the Eleventh Circuit looked at the appeal and said, you don't meet the gatekeeping requirements, that that determination that it did not meet the gatekeeping

requirements was a further sua sponte determination and recharacterization of his appeal into a request for certificate of authorization, and that therefore, under that scenario, 2244(b)(3)(E) should serve as a bar to jurisdiction. We strongly suggest, Your Honors, that that is not the case.

The AEDPA and the -- changed jurisdiction. It -- it limited this Court's jurisdiction to review very important habeas corpus -- habeas petitions, and in so, it should be strictly construed. The Government would have a further sua sponte recharacterization in this chain and prevent this Court from having jurisdiction to even hear the matter.

QUESTION: As I understand your position, though, you don't even have to read strict construction. You -- I think it's your view, isn't it, that subsection (E) just doesn't speak to the question whether we have jurisdiction over a decision by a court of appeals as to whether or not a particular petition is second or successive?

MR. FRICK: That is correct, Your Honor. I was simply addressing the Government's position in trying to craft a -- a way under 2244(b)(3)(E) to prevent this Court from having jurisdiction of the matter.

QUESTION: Mr. Frick, the other -- some of the

other courts of appeals have given the district court instructions about how they should deal with cases of recharacterization.

MR. FRICK: That's correct, Your Honor.

QUESTION: Those tests are not identical. Of the array of instructions to district judges to deal with this situation, which do you think is the soundest approach?

MR. FRICK: Your Honor, I believe that the -- the Second Circuit Adams case sets forth probably the best bright line test, that being that the petitioner -- that -- that when a court has a petition that it thinks would better be served as recharacterized, that they should inform the petitioner first that they believe it should be recharacterized in order for them to grant relief, that it should be recharacterized as a 2255, obtain the consent of the petitioner, and if they don't obtain the consent of the petitioner, then offer the petitioner the opportunity to withdraw the petition and file it at a later point in time, assuming that it can be refiled at some point in time, and not be -- not run into problems with the statute of limitations, or at least tell the petitioner that it is going to consider this recharacterized and they've got 5 days, 10 days to add any other constitutional claims that would appropriately be brought under a 2255 before they

will rule on it so that --

QUESTION: Is recharacterization done only with pro se litigants? If I were an attorney, I'm not sure I'd be terribly happy to have a lawyer -- to have the judge say, well, this is the wrong kind of writ, I'm going to treat it thus.

MR. FRICK: Chief Justice Rehnquist, there are circumstances I understand, not from personal knowledge, where recharacterization does take place in spite of the fact that there is an attorney. But the actual process and -- and the recharacterizations that have taken place over the years have been for the benefit of a pro se prisoner.

Your Honor, I know --

QUESTION: But -- but you -- you want us to simply adopt a rule for what happens, what warnings have to be given, what requirements have to be met, when there's recharacterization. You're not asking us to go further and say when recharacterization is appropriate.

MR. FRICK: I think when recharacterization is appropriate, it's appropriate.

QUESTION: You're not asking us to address the -- the --

MR. FRICK: Yes, Your Honor. I think that -- that the issue of recharacterization should continue to

come up. It should continue to benefit pro se prisoners in particular and prisoners in general, but it should only be done under circumstances where the particular petition that has been filed is inadequate or ineptly pleaded and cannot be considered, under which circumstance it should just then be dismissed, as the Palmer case in the D.C. Circuit has suggested. Let the petitioner be the master of his own motion or petition.

If there are no further questions, I'd like to reserve the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Frick.

Mr. Himmelfarb, we'll hear from you.

ORAL ARGUMENT OF DAN HIMMELFARB

ON BEHALF OF THE RESPONDENT

MR. HIMMELFARB: Mr. Chief Justice, and may it please the Court:

This Court lacks jurisdiction to review the court of appeals' decision because the court of appeals denied authorization to file a second or successive 2255 motion.

QUESTION: But that's only if you know that it's a second or a successive petition.

MR. HIMMELFARB: Justice Stevens, the interpretive question we think that's presented, as far as the jurisdictional issue goes, is whether a denial of

authorization is simply a finding that the gatekeeping requirements have not been satisfied or rather whether it encompasses both that determination and the subsidiary determination that the motion is in fact second or successive. It's our position that it is a single order encompassing both.

QUESTION: Is -- is it your view that the Court would never have jurisdiction to review a determination by a court of appeals that a petition was or was not a second or successive?

MR. HIMMELFARB: No. There -- there are two circumstances when it can. One is the Martinez-Villareal situation, and there this Court had jurisdiction because the court of appeals found that the motion was not second or successive and so didn't grant or deny authorization. So it didn't fall within 2244(b)(3)(E).

The second situation will be one where the court of appeals finds that the motion is second or successive and doesn't go on to reach --

QUESTION: So our jurisdiction depends on how the court of appeals resolved the issue.

MR. HIMMELFARB: That's right. It depends upon, as the statute makes clear, whether there was a grant or denial of authorization.

QUESTION: I don't understand your second

instance.

MR. HIMMELFARB: The second instance -- let me back up to try to answer that as clearly as I can.

The ordinary case where a court of appeals is able to address the question whether the district court properly found that a motion was second or successive is a case where a motion for authorization to file the motion is filed in a court of appeals. That's because in many circuits, once a district court finds that a motion is second or successive, it's obligated to transfer the case to the court of appeals so it can make the gatekeeping determination. And even in cases where a district court is permitted to dismiss and does rather than transfer, and once it's found that the motion is second or successive, it's going to be a rare case where the defendant is able to take an appeal from the dismissal because under this Court's decision in Slack v. McDaniel, he'll only be able to get a certificate of appealability if he makes two showings: first, that the procedural ruling that it was second or successive is subject to debate among reasonable jurists; and in addition to that, that there was some underlying constitutional claim that has arguable merit.

So in a rare circumstance, when an appeal can be taken on the issue of whether the motion is second or successive, and in the rare circumstance where the court

of appeals, after affirming that finding, does not go on to reach the gatekeeping issue, as courts of appeals often do just to bring the case to a close, that will be the rare case where there has been a court of appeals' finding that the motion is second or successive, but yet no grant or denial such that 2244(b)(3)(E) does not deprive this Court of jurisdiction.

That is not this case.

QUESTION: So in any case, your view is no matter how absurd, if a -- the court of appeals says a 60(b) motion is second or successive, if they say a complaint in a 1983 action is a second or successive habeas petition, no matter how absurd, once the court of appeals says this is a second or successive application, nobody has any right to appeal here, even though that isn't what the statute says.

MR. HIMMELFARB: So long as there is a grant or denial of authorization, the court of appeals' decision cannot be second-guessed.

QUESTION: Now, why would we -- why would we interpret a statute that doesn't say that to -- what it says is, it says that they shall not file a second or successive application, in other words, if it is a second or successive application. It doesn't say if it isn't. It doesn't tell us what to do if it isn't. So why would

we adopt this interpretation that you say where the statute doesn't say it, which would perhaps deprive people of all kinds of right to petition the Supreme Court in cases where they might be right?

MR. HIMMELFARB: The interpretive question is whether a denial of authorization under 2244(b)(3)(E) is simply a finding that the gatekeeping requirements haven't been satisfied or whether it's both that and the subsidiary finding that the motion is second or successive. Nobody would take the position I think that if the court of appeals finds the gatekeeping requirements not satisfied and therefore denies authorization, and yet manifestly errs in so finding, this Court would, nevertheless, have jurisdiction to review it. There's no manifest error exception to 2244(b)(3)(E).

QUESTION: Well, but that's -- you -- you call it a subsidiary question, whether or not it's second or successive. You want to reach the gatekeeping question first. That's not the way the statute reads.

MR. HIMMELFARB: Well, we think it is.

QUESTION: And why isn't it -- why isn't it a predicate? You read the statute. So it says the denial or grant of an authorization by the court of appeals to file what the court of appeals finds is a second or successive petition, but that's not what the statute says.

MR. HIMMELFARB: We think the statute does say that, Justice Kennedy, for two reasons. The first is that 2244(b)(3)(E) speaks at -- speaks of a denial of authorization. If Congress had intended that to mean only a finding that the gatekeeping requirements had -- had not been satisfied, it could have used narrower language, as indeed it did in 2244(b)(3)(C) which refers specifically to the gatekeeping requirements. We think that's the first textual indication that our position is correct.

The second textual indication is that in 2244(b)(3)(A) and (b)(3)(B), Congress speaks of an order authorizing the district court to consider the application. We think it's reasonable to view an order granting or denying an authorization to be synonymous with 2244(b)(3)(E)'s reference to a grant or denial of authorization.

QUESTION: Well, at the very least, if the statute is ambiguous, it seems to me you have to answer Justice Breyer's concern that an erroneous determination here can foreclose the petitioner from exercising some very important rights.

MR. HIMMELFARB: Our view is that the statute is not ambiguous. After applying all the relevant tools of statutory construction, the best reading of it is that Congress intended to include the subsidiary determination

when it said that this Court may not review a denial of authorization.

QUESTION: Sometimes there might be a constitutional question. I mean, where for example an opinion appealed to this Court might be required as a matter of due process and what the lower court does, the court of appeals -- it -- it erroneously characterizes that effort to come to the -- that effort to appeal, which the Constitution would protect. It erroneously characterizes it as a second or successive petition, and in your view Congress would have just said, even however erroneous it is, it can't come here. What do we do about the constitutional requirement?

MR. HIMMELFARB: Well, Justice Breyer, you could imagine a case where there is a very serious constitutional claim raised, but there's absolutely no dispute that it's being raised in a second or successive motion, and the defendant can't satisfy at the substantive gatekeeping requirements. The court of appeals says it's second or successive. You don't satisfy the gatekeeping requirements. We deny authorization. I don't think anyone would take the view that under 2244(b)(3)(E) that defendant would, nevertheless, be able to seek certiorari from this Court. So the whole point of 2244(b)(3)(E) is to give the court of appeals the final say.

QUESTION: And one final thing. You realize the language, of course, says that you cannot ask for cert from the denial of an authorization by a court of appeals to file a second or successive application. And your opponents are saying we're not appealing the denial of the request to file a second or successive application. We are appealing the determination that this is a second or successive application, a matter that the statute is silent about.

MR. HIMMELFARB: What my opponent is appealing is the court of appeals' decision, which is a single order, which does two things. It affirms the district court's finding that the motion was second or successive, and then goes on repeatedly to say that under AEDPA's gatekeeping requirements, he may not file it. The court of appeals denied authorization to file the motion under 2244(b)(3)(E). This Court lacks jurisdiction.

QUESTION: But what do you say to his point that he didn't even try to file a -- try to seek an authorization to file a second or successive because he never thought it was a second or successive? He did not seek authorization to file such a motion.

MR. HIMMELFARB: That's true, Justice Stevens.

QUESTION: So how can you have denied such an authorization?

MR. HIMMELFARB: Well, it's -- as -- as I've said, the ordinary way that a defendant is able to challenge a district court's determination that his motion is second or successive in the court of appeals is not via appeal because ordinarily either the case has been transferred or he can't get a certificate of appealability. So he does it in the context of an authorization motion. And in that case, the court of appeals may find --

QUESTION: But, of course, he didn't file an authorization motion in this case.

MR. HIMMELFARB: That's true. That brings me to my second point. In many cases within the category of the rare case where a defendant is able to take an appeal from a dismissal of a motion as second or successive, after the court of appeals affirms the finding that the motion is second or successive, it will often go on to treat the appeal as an implied request for authorization to file the motion because otherwise you've got a lingering question of whether this motion found to be second or successive can or cannot be filed, and it will reach that question just to bring the matter to a close.

It's our position, of course, that if the Court does have jurisdiction, the court of appeals' decision should be affirmed. The district court treated

petitioner's first post-conviction motion as one that sought relief under two different provisions of Federal law, rule 33 --

QUESTION: Why didn't the U.S. attorney who said, Your Honor, I don't object -- this is a rule 33 motion, but introduced 2255. Why didn't the assistant U.S. attorney advise the pro se litigant of the consequences of that recharacterization? If the U.S. attorney is going to take a pleading that a prisoner puts in and says this is my rule 33 motion and for whatever benign purpose, the assistant U.S. attorney thinks it would be in the interest of justice to treat it as a 2255, didn't someone have an obligation to alert the prisoner of the consequences of that?

MR. HIMMELFARB: Justice Ginsburg, we do not defend what was done in the district court in connection with the first post -- post-conviction motion. We do not take the position --

QUESTION: Well, wasn't that all -- didn't that occur before AEDPA had been passed?

MR. HIMMELFARB: Yes, it did, Justice O'Connor.

QUESTION: Were there the same consequences then as there were post-AEDPA?

MR. HIMMELFARB: In -- in some respects they were the same; in some respects they were different. We

think, for relevant purposes, they were the same. This Court has characterized the abuse of the writ doctrine, which of course predated AEDPA, as a modified res judicata rule. A slightly less modified res judicata rule is codified in AEDPA. But at least since McCleskey v. Zant, which is a 1991 decision, a prisoner was presumptively entitled to file only one 2255 motion. The showing he would have to make to be able to file a second one was slightly different and slightly easier to make than it is post --

QUESTION: Well, he -- he never -- he did not in the district court file such a motion. He filed this rule 33(b) thing, that the Government then volunteered it wouldn't mind if the court treated as a 2255, and the district court treated it as such. It was not Castro's urging.

MR. HIMMELFARB: That's true, Justice O'Connor, and --

QUESTION: And there was no enactment at that time of AEDPA.

MR. HIMMELFARB: That -- that is true as well. We do not take the position that the motion was properly characterized as a 2255 motion. We take two positions. One is that the Court may not reach that question because it lacks jurisdiction, and second, that if the Court does

have jurisdiction, it should not reach that question because there was a forfeiture. The characterization could have been appealed, but wasn't.

QUESTION: Well, this -- this business of having a court recharacterize a motion as a 2255 motion was a doctrine that seems to have been developed before AEDPA was enacted, and some circuits since the enactment of AEDPA have decided that if they're going -- if the district court is going to do that, that some notice should be given, certainly to a pro se petitioner, about the consequences of that recharacterization. Now, should we propose such a rule or adopt such a rule in our supervisory capacity?

MR. HIMMELFARB: Justice O'Connor, we have no objection in principle to requiring that -- to -- to a rule requiring that a district court provide a defendant with notice before characterizing a post-conviction motion as a 2255 motion. Our position is that --

QUESTION: If we were to do it, which -- which version would be the best?

MR. HIMMELFARB: Well, I'll answer that question. Before I do, I just want to make clear that our position is that this is not an appropriate case to do that because our view is that any objection to notice, either a lack of notice or an inadequate -- inadequacy of

notice has to be made in connection with a motion that's characterized. And once you get to a subsequent stage of the litigation, it's too late for that to happen.

QUESTION: Mr. Himmelfarb, the -- the reality is we have a pro se litigant who loses in the district court. He gets a piece of paper that says, your motion under rule is now being disposed of, and then the bottom line says, your motion is denied. Do you really think that a pro se litigant forfeits his rights to raise what may be a very important substantive question on habeas because he didn't know to look to the body of the opinion that said something about 2255 and that that's a forfeiture? I mean, even a lawyer might have missed it when the thing starts out, this is a rule 33 motion, motion denied.

That's what you're urging, that that kind of forfeiture be visited on a pro se prisoner who was uncounseled and never appeared before any court to be told anything. That strikes me as the Government not turning square corners.

MR. HIMMELFARB: Justice Ginsburg, we don't think that's the case at all. There is, of course, no right to counsel in connection with post-conviction litigation and the vast majority of --

QUESTION: The right to know the consequences of what you're doing. You can -- a forfeiture is usually

knowing. Here, this litigant had no reason to know about anything other than he was appealing from the denial of his rule 33 motion.

MR. HIMMELFARB: The -- the defendant in this case, petitioner, did litigate the question of characterization. When the Government in its opposition to his rule 33 motion recommended that it be treated as both a rule 33 motion and a 2255 motion, in his reply he objected. He took the position that it should not be treated as a 2255 motion and should be treated only as a rule 33 motion. So he was aware of -- of what was being done and he felt that it was a significant enough decision that it should be litigated, and he objected.

Our position is that he should have continued to object. AEDPA imposes all types of restrictions on post-conviction litigation.

QUESTION: Yes, but my question to you is, did he have any reason to know? You say he put in his objection, yes. Then he gets a document that only in the body refers to 2255. Why couldn't he reasonably see that piece of paper as saying, you filed a rule 33 motion, your motion is denied? I mean, you are loading a lot onto a pro se litigant who has never appeared before any court.

MR. HIMMELFARB: We don't think that the fact

that he is pro se should have any part in the analysis

because that would create all sorts of difficulties in other AEDPA cases where you have difficult questions, particularly difficult, perhaps byzantine, procedural rules that a petitioner is obligated to follow.

QUESTION: Well, usually courts do their best when they deal with pro se litigants to have them understand what's going on. I mean, we have all kinds of procedures in our criminal justice system just to assure that people will understand what the rules are and what the pitfalls are.

MR. HIMMELFARB: That's true, Justice Ginsburg. AEDPA is not one of those statutes. Once a -- a defendant who files a self --

QUESTION: Yes, but you're not relying on AEDPA on this branch of the case. We're back before the days of AEDPA. You're saying because he didn't in his appeal from the denial of the rule 33 motion say, and P.S., court of appeals, there was a mischaracterization -- all of that happened before AEDPA, and that's what you're holding him to.

MR. HIMMELFARB: That's true, Justice Ginsburg, but even before AEDPA, the rules governing post-conviction litigation could be quite difficult to navigate, and even

before AEDPA, most post-conviction litigation was carried out pro se. There are two different places in -- in the district court --

QUESTION: But you just -- you just agreed. You said you had no reservation about what these other courts have said must go on in the district courts. You just don't think that this is a proper case because there's no jurisdiction. But you -- you are recognizing that courts, wanting to do justice, do and should inform litigants of the consequences.

MR. HIMMELFARB: Justice Ginsburg, I don't want to leave the Court with that impression. I think I started to answer another Justice's question and in -- in answering it, I said that in principle we have no objection to a rule requiring notice before recharacterization.

QUESTION: In principle, you have no objection. What about in practice?

MR. HIMMELFARB: In practice as well. It's the nature of the notice that I wanted to say a little bit more about. Some of the decisions on which petitioner relies have -- have language in them that not only -- suggesting that not only must the defendant be notified that the district court plans to treat the motion as a

2255 motion, but also that he be warned of its consequences. We have no objection insofar as there's a requirement that he be notified of how it would be

treated.

We don't think there should be warnings about the consequences. Once a defendant is notified that the motion is going to be treated as a 2255 motion, he stands in no different position from somebody who's filed a self-styled 2255 motion, and the law has never required that that --

QUESTION: Is -- is there one of the circuits that has taken the position that you, in principle and in practice, would say is a sound one?

MR. HIMMELFARB: I think if -- if we had to choose, we would prefer the Third Circuit's rule under which essentially there are three options when a post-conviction motion, not styled a 2255 motion, is filed. The defendant has the option of having it ruled upon as filed. He can be given notice that it's going to be recharacterized, and it will be recharacterized, or he can withdraw it so that he will not be prevented from filing a second --

QUESTION: See, do you think on that -- that -- you're now answering Justice O'Connor's question which is

just what I was interested in. On page 42 of your brief, you basically say that on the substantive rule here, you agree with the other side. I mean, pretty much. And that's what all the circuits have done. And then you

impose a couple of procedural obstacles.

Well, assume you don't win your procedural obstacles. All right. Suppose I find and the Court finds that this is appealable, and suppose this law of the case thing is -- you say -- why shouldn't he have the advantage of the rule, this particular person, the rule that we're about to announce?

Now, at that point, I want to know what rule are we about to announce under what power. And here I'd like your opinion on two approaches which are different.

One is we announce a rule on our supervisory authority, as most of the courts have done, and then we have two difficulties. One, we're in an area we know not what. You know, we're not involved in recharacterization as a daily basis. And moreover, we're not sure what rule to pick or what exact formulation, which will make a huge difference.

Now, the other approach is the First Circuit's approach, which is not the reason it commends itself to me, but I just put it out there. And that is to say we

interpret the words, second or successive petition, in AEDPA not to include this. You see, what they were talking about in Congress was not this. They didn't think a second or successive petition was second or successive where the first one took place under these no-warning

circumstances before AEDPA was even enacted. Now, I think they come to exactly the same place, but that second approach, which they followed, doesn't get us into the business of writing rules in some kind of supervisory capacity in the dark.

Now -- but I want the SG's view, i.e., your view, on the comparative merits of those two ways of getting to the same place. And I'm really uncertain. I -- I'd be very interested in what you think.

MR. HIMMELFARB: Our view is that the First Circuit's view, which does not require notice but simply says that if there is no notice, the second motion is deemed to be a first motion, should not be adopted because we think it's inconsistent with the basic principle of post-conviction litigation, which we're urging this Court to adopt in this case, that you have to file your challenges to rulings made against you at the earliest possible opportunity. The First Circuit's rule, in effect, gives the defendant a right to file a later

appeal.

QUESTION: Yes, but I think you're missing -- say -- say the same content. Let's have equivalent content to the rule. Is it better for us to -- to say we're reading AEDPA or is it better for us to say we are -- which is open to the -- this kind of reading. We have

to decide the scope of those words in the -- in the block of AEDPA. Or is it better for us to try to write a rule? That -- that's what I'm interested in. I can work out the rest of the content, and actually the First Circuit approach needn't have a content. I mean, it can really have quite a minimal content, but -- but that's what I'm interested in.

MR. HIMMELFARB: We don't --

QUESTION: Am I being clear? Do you understand it?

MR. HIMMELFARB: Yes. We don't AEDPA can reasonably be read to say that a 2255 motion is one that is characterized as not filed as one, but is characterized one after notice, and that if there's no notice, it's not a 2255 motion. Our position on notice is that it's essentially an adjunct of the prior decision to recharacterize.

And I want to be clear. Recharacterization,

particularly in a post-AEDPA world, does not benefit only the defendant, a defendant who might be able -- might not be able to get his claim ruled upon if it's not recharacterized.

QUESTION: I'm sure that's right, but you -- you think we should go into the rule-writing business, say, in our supervisory capacity. These -- these rules -- this

kind -- this is the consequence that attaches to recharacterization. A recharacterization is not a recharacterization that fits within AEDPA unless it gets notice, et cetera, et cetera. That's what you think we ought to do.

MR. HIMMELFARB: No. Our position --

QUESTION: If we -- I know you don't really, but I mean, if we get to that point and we've -- we reject your other two.

MR. HIMMELFARB: To the extent that the Court wishes to impose a notice requirement, our view is that it should go essentially like this. It is important to recharacterize a post-conviction motion not styled a 2255 motion if it seeks relief available only under 2255. It's important because it can help the defendant. It's also important because if it's not recharacterized, you run the risk that Congress' clear purpose to prohibit second or

successive post-conviction motions could be evaded.

We -- that -- that is essentially a judge-made rule, recharacterization. We think, as a matter of fairness and also as a matter of reducing potential litigation, it is appropriate, once you've got the judge-made rule that says you should recharacterize, to go further and say, before you do, notice has to be given.

QUESTION: Wouldn't it -- wouldn't it be much

simpler just to say if a district court recharacterizes, it must do this without going into when or why you should recharacterize?

MR. HIMMELFARB: It probably -- I think it would, Mr. Chief Justice. Our only point is that if there's going to be a recharacterization and there's going to be notice, the only notice should be I plan to recharacterize. We don't think that the district court should give any kinds of warnings about the consequences of recharacterization for the reasons I gave Justice Ginsburg.

QUESTION: But didn't the -- doesn't that -- isn't that included in the Third Circuit formulation?

MR. HIMMELFARB: I think it may well be. I think most of the courts of appeals take the view that you should not only give notice of the intent to

recharacterize, you should also give some sort of warnings about the consequences of the --

QUESTION: Why do you want --

QUESTION: You should give an opportunity to -- to say I'll withdraw my petition or I'll amend my petition to say everything that I could say under the heading of 2255.

MR. HIMMELFARB: Our view is that giving notice of an intent to recharacterize puts the defendant in the

same position as one who filed a self-styled 2255, and under the law of post-conviction litigation, such a defendant is held responsible for the consequences of filing that motion.

QUESTION: That's not the position that any of the circuits have taken.

MR. HIMMELFARB: I think that -- I think that's probably right. I think they -- to the extent they require notice, within that notice, they think there should be some warning about the consequences of characterization. We think that that can't be reconciled with the fact that there's a detailed procedural scheme governing post-conviction motions and Congress said nothing about warnings as it did, for example, in the context --

QUESTION: Isn't there a difference between a case in which a litigant makes up his mind to file a 2255 -- presumably he should have found out what's the consequence of that -- and the situation in which he files something else and the judge says, I'm going to change it? How does he know what the consequences are if he hasn't had a chance to think it through?

MR. HIMMELFARB: Justice Stevens, the way we envision the regime working is that the motion is filed and the district court issues an order which it serves on

parties, giving notice that it intends to recharacterize and some amount of time will elapse before the defendant is obligated to come back to the court and tell the court whether it wishes for the court to go forward with recharacterization or allow him to withdraw. So within that period of --

QUESTION: But you would say the recharacterization could not take place until after there was that time -- notice and a time to accept or object to it.

MR. HIMMELFARB: That's right. I think that's reasonably encompassed --

QUESTION: Which, of course, didn't happen here.

MR. HIMMELFARB: That's true. No notice was

given here.

QUESTION: The -- the point of implausibility I -- I have with your argument is that when the district -- your argument to the effect that no notice of consequence needs to be given, merely a notice that recharacterization will take place. The -- the point is that when a point does that, the court is understood to be trying to help out the defendant. Whether the court puts it in precisely those words or not, that's -- that's the object. The -- the court, in effect, is saying, look, I'm going to help you here because you don't know how to plead this stuff,

and -- and I'm going to recharacterize this as under 2255.

It seems very odd for the court, in effect, to be in the position of saying, I'm going to help you out by recharacterizing and at the same time keep its mouth shut about the fact that when it does recharacterize, the consequence is going to be that that fellow is going to be out on his ear if he ever wants to walk in with another claim that could have been made under 2255. It seems to me that if courts are going to help, they've got to help in a -- in a way that does not mislead the defendant, and your argument says they can help, as it were, in a way that does mislead him.

MR. HIMMELFARB: Justice Souter, the -- the

purpose of helping defendants is not the only reason for recharacterization. It also serves the interest of vindicating Congress' purpose in enacting the bar on second or successive motions in AEDPA. It vindicates -- this Court made that clear --

QUESTION: Thank you, Mr. Himmelfarb.

Mr. Frick, you have 4 minutes remaining.

MR. FRICK: Your Honor, if there are no further questions, we would waive rebuttal.

CHIEF JUSTICE REHNQUIST: The case is submitted. Thank you.

MR. HIMMELFARB: Thank you, Your Honor.

(Whereupon, at 11:56 a.m., the case in the above-entitled matter was submitted.)