No. 02-6683

In The
Supreme Court of the United States

HERNAN O'RYAN CASTRO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE ELEVENTH CIRCUIT'S RULING THAT PETITIONER'S 1997 HABEAS PETITION IS SUCCESSIVE UNDER § 2255.

In its brief, the government argues that, pursuant to § 2244(b)(3)(E), this Court lacks jurisdiction to review the court of appeals ruling that Petitioner's 1997 § 2255 Petition is successive. (Govt's. Br. p. 15) The government begins by concluding that because the court of appeals not only decided that the petition was successive, but also determined that the 1997 motion did not meet the gatekeeping requirements of § 2255, that the court of appeals decision was ultimately to deny Petitioner "authorization" to file a successive motion (Govt's Br. p. 16) and, therefore, 28 U.S.C. § 2244(b)(3)(E) precludes this appeal. A closer look at the court of appeals decision is therefore warranted.

In its opinion, the court of appeals stated "therefore, this subsequent § 2255 petition, filed three years later, is successive because it does not meet either of the first two requirements found under the AEDPA-O'Ryan Castro's second petition does not contain newly discovered evidence, nor does the second petition address a new rule of constitutional law." (J.A. 202-203). The court of appeals did not determine that the 1997 petition was successive *and* that it did not meet the gatekeeping requirements; the court of appeals determined that the petition was successive *because* it did not meet the gatekeeping requirements. The court of appeals analysis is thus flawed because whether or not a petition meets the gatekeeping requirements of § 2255 has nothing to do with whether or not the petition is "successive." First petitions are not

required to meet the gatekeeping provisions of § 2255. The court of appeals never addressed the issue of whether or not Castro's initial Rule 33 Motion was wrongfully re-characterized. Castro's entire argument is that his 1997 petition was the *first* § 2255 petition which he filed. The court of appeals decision was that the petition was successive, but the court of appeals gave no legally accepted reason as to why. The court of appeals flawed reasoning is certainly not sufficient to prevent an appeal to this Court under § 2244(b)(3)(E). Petitioner is not appealing the court of appeals ruling that his first titled § 2255 petition did not meet the gatekeeping requirements of § 2255. Again, petitioner is appealing the court of appeals determination that his first titled § 2255 petition was *required* to meet the gatekeeping requirements.

Next, the government argues that § 2244(b)(3)(E) also makes the court of appeals the final decision maker for the determination that the petition is successive because according to the government, "the denial of authorization to file a second or successive motion represents a single order that encompasses two legal conclusions: that the § 2255 motion is second or successive, . . . " (Govt's. Br. p. 16). The government cites no authority for such a presumption and the plain wording of the statute makes clear that § 2244(b)(3)(E) only prevents appeals to this Court from court of appeals decisions with regard to the gatekeeping requirements. A denial of authorization by the court of appeals to file a successive motion does not also represent a conclusion that the petition is successive as the government suggests. It is the district court which rules on the post-conviction motion that sets the tone for the remainder of the appellate process. If the district court, as in this case, re-characterizes the post-conviction

motion as one made under § 2244 or 2255, then any subsequently titled § 2255 petition will be a successive petition requiring certification by the court of appeals to be heard. Once the district court "labels" the post-conviction motion as one made under § 2255, the petitioner is doomed unless new evidence is found or a new rule of constitutional law applies.

In other words, if a petitioner asks a court of appeals to authorize the filing of a second or successive motion, the determination that it is successive has already been made by the way the district court treats the first motion filed. Again, in this case, Castro has never requested authorization to file a second or successive petition, as it is his argument that the district court wrongfully re-characterized his first post-conviction motion and that the court of appeals erred in "presuming" that his first titled § 2255 petition was successive.

Next, the government argues that this Court's decision in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) does not conflict with the government's argument that this Court lacks jurisdiction to review the court of appeals decision that Petitioner's § 2255 Motion is successive. (Govt.'s Br. p. 18). In *Martinez-Villareal*, the Court held that it had jurisdiction to review a court of appeals decision that a petition was not successive because the court of appeals had not granted "respondent leave to file a second or successive application." *Id.*, at 642. This is the exact situation present in this case except Castro is arguing to this Court that the court of appeals was wrong in finding that he is required to apply for authorization to file his § 2255 petition. Whether the court of appeals finds that authorization is or is not required should have nothing to do with the appealability of the decision.

The government cannot have it both ways. In *Martinez-Villareal*, the government petitioner apparently argued that this Court does have jurisdiction to hear a decision by the court of appeals that a petition is not successive, but now argues that this Court does not have jurisdiction to hear a decision by the court of appeals that a petition is successive. This Court has jurisdiction to hear this appeal and has already decided this issue in its opinion in *Martinez-Villareal*.

Next, the government argues that the proper way for a petitioner to challenge a district court's determination that a motion is second or successive is by filing a § 2244(b) motion in the court of appeals, which would in essence prevent a further appeal to this Court under § 2244(b)(3)(E). (Govt.'s Br. p. 24). Filing a § 2244(b) motion in the court of appeals to challenge a district court's determination that a § 2255 motion is second or successive is not only inappropriate, it would in essence make the chances of success for the petitioner impossible.

Again, the gatekeeping requirements are nearly impossible for a petitioner to meet. If a district court is wrong in determining that a petition is second or successive, why would a petitioner admit to the court of appeals that the petition is successive in an attempt to obtain authorization under a motion pursuant to § 2244(b) to file it? First, the petitioner would usually have no chance of success under such a motion anyway, due to the severity of the gatekeeping requirements. Secondly, the purpose of the appeal to the court of appeals, like the appeal in this case, would be to obtain a ruling from the court of appeals as to whether the gatekeeping measures of § 2244(b) were required at all. Why would Castro ever ask the court of appeals to grant him permission to file a successive or

second petition, when Castro's entire argument is that his petition is not successive? The government simply argues that all appeals with regard to wrongful re-characterizations of petitions by district courts should be appealed through the one motion which, if denied, would prevent an appeal to this court. The problem with this argument is that the motion, one pursuant to § 2244(b), is not an appropriate tool for a petitioner to use to challenge the wrongful labeling of a petition as successive by the district court, for the preceding reasons.

Finally, the government ends its argument on the jurisdiction issue by suggesting that the Court look to the language of the statute, § 2244(b)(3)(E) to determine congressional intent. (Govt.'s Br. p. 25). Castro agrees. A plain reading of the statute shows that it is only the grant or denial of an *authorization* by a court of appeals to file a second or successive application which is not appealable. The statute is silent on the appealability of a court of appeals ruling that holds a petition to be successive, thus requiring authorization. The government suggests that the language of §2244(b)(3)(E) is "broad enough" to include such appeals. (Govt.'s Br. p. 24). However, Castro urges this Court not to attempt to "broaden" the plain language of the statute on an issue as important as whether or not he will be allowed to have his statutory right to a ruling on his habeas petition.

II. THE "LAW OF THE CASE" DOCTRINE IS NOT A LEGAL BASIS FOR DISMISSING PETITIONER'S FIRST TITLED § 2255 PETITION.

The government, for the first time in briefing this Court, raises the defense of "law of the case" to argue that Castro's § 2255 petition was properly dismissed by the

district court and subsequently by the court of appeals. (Govt.'s Br. p. 26). The government did not raise this issue in its Brief in Opposition to Petitioner's Writ of Certiorari. Furthermore, neither the district court, nor the court of appeals ever considered "law of the case" doctrine when deciding to dismiss Castro's petition as successive. For these reasons, and for the reasons that follow, "law of the case" is not sufficient grounds for dismissing Castro's petition.

A. The Government did not raise "law of the case" issue in its Brief in Opposition to Castro's Petition for Writ of Certiorari and is precluded from doing so now.

Supreme Court Rule 15.2, states in part, "any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the court's attention in the brief in opposition." In its Brief in Opposition to Petitioner's Writ of Certiorari,[1] the government argued two points. First, the government argued that there is "no need for this court to resolve the differences in approach among the court of appeals," as according to the government, the " . . . Eleventh Circuit thus effectively adopted, on a prospective basis, the approach mandated by other circuits, the question on which the courts of appeals have disagreed is unlikely to arise in future cases." Secondly, the government alleged "further

[1] Of note is the fact that in its brief in opposition to Castro's Petition for Writ of Certiorari, the government also stipulated that this Court has jurisdiction to hear this appeal under 28 U.S.C. § 1254(1).

review is also unwarranted in this case because petitioner cannot prevail on his motion under § 2255 in any event." (Govt.'s Br. in Opposition to Cert Petition pp. 9 & 10).

However, the government neither mentioned "law of the case" nor made such an argument to this Court prior to filing its brief on the merits. Therefore, pursuant to Supreme Court Rule 15.2, the government's argument that the "law of the case" doctrine precludes Castro's appeal should not be considered.

B. Castro had little if any incentive to challenge the district court's re-characterization of his Rule 33 Motion for New Trial on appeal.

In its brief, the government argues that Castro should be precluded under the "law of the case" doctrine from "relitigating" the district court and court of appeals "decisions" in which Castro's Rule 33 Motion for New Trial was also labeled as a § 2255 petition. (Govt.'s Br. p. 26). However, a closer look at how the initial appeal transpired shows that the issue of "re-characterization" was never really paramount and was never actually "ruled upon" in the strictest sense of the word.

Castro's initial 1994 post-conviction motion was titled only as a Rule 33 Motion for New Trial. (J.A. p. 7). In response, the government asserted that it had no objection to the court treating the Rule 33 motion also as a § 2255 petition. (J.A. p. 110). Castro filed a reply and argued that his Rule 33 motion was appropriately titled as a Rule 33 Motion for New Trial. (J.A. p. 116). In its lengthy Order of October 28, 1994, the district court did state "in the government's response, the government asserts that it has

no objection to defendant's motion for new trial being treated as demanding relief under both Rule 33 and 28 U.S.C. § 2255. Accordingly, the court will consider defendant's motion as requesting both kinds of relief." (J.A. p. 139 & 140). However, in deciding the issue, the district court used Rule 33 analysis. (J.A. p. 140). Furthermore, the initial paragraph of the Order states "currently before the court is defendant Castro's motion for new trial pursuant to Federal Rule of Criminal Procedure 33 filed July 11, 1994. The government's response was filed August 22, 1994, the defendant's reply was filed September 12, 1994. For the reasons set forth below, defendant's motion for new trial is DENIED." (J.A. p. 137). The court of appeals simply affirmed. (J.A. p. 147).

A closer look at the facts shows that Castro had no incentive to make issue of the court's "re-characterization" at the time which in hindsight proved detrimental to his § 2255 petition. The re-characterization of the Rule 33 motion as one under Rule 33 and § 2255 had no preclusive effect because it was not essential to the rulings of the district court and the court of appeals denying the motion and affirming the denial, respectively. Nothing turned on that "re-characterization." It did not affect the standard applied in determining whether relief was warranted. The "law of the case" doctrine is not so strictly construed as to require an appeal of every seemingly minor point raised in a previous court opinion. The government's application of the "law of the case" doctrine to Castro's appeal is inappropriate because the doctrine is not as broad and final as the government argues.

"Unlike the more precise requirements of *res judicata*, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court

decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). "Law of the case directs a court's discretion, it does not limit the tribunal's power." *Arizona*, at 618.

"What identifies this as true law of the case preclusion is that the first appeals court has affirmatively decided the issue, be it explicitly or by necessary implication." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 738 (D.C. Cir. 1995). Arguably, the district court and court of appeals in Castro's case never "affirmatively decided" the issue as to what label to place on his Rule 33 motion. Simply determining to add another title to a motion in what seemingly was an attempt to *assist* Castro is not the type of affirmative decision, which if not appealed, becomes the "law of the case" for all time.

Another reason Castro had little if any reason to appeal the "re-characterization" of his Rule 33 motion is because the motion was filed prior to the enactment of AEDPA. AEDPA's gatekeeping requirements make it nearly impossible for a petitioner to file a § 2255 petition. Contrary to the government's assertions, pre-AEDPA law was not nearly as strict on successive petitions. It certainly did not provide for the practical absolute bar to second petitions as AEDPA does. As Justice Thomas stated in his dissenting opinion in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 648 (1998), " . . . before enactment of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1218, a federal court could grant relief on a claim in a second or successive application so long as the ground for relief had not already been 'presented *and determined*,' 28 U.S.C. § 2244(a) (emphasis added), or 'adjudicated,' § 2244(b), in a previous application." The

ground for relief which Castro presented in his first titled 1997 § 2255 petition and which he presented at the evidentiary hearing had never been presented by Castro or determined by any court. Therefore, prior to AEDPA being enacted, there was no reason for Castro to appeal a seemingly insignificant "re-characterization" or "additional labeling" of his Rule 33 motion. Certainly, Castro did not have the requisite incentive to appeal this issue so that the "law of the case" doctrine now precludes such an appeal.

C. "Law of the case" does not apply where such application would work a "manifest injustice."

Finally, assuming that "law of the case" does apply to Castro's appeal to this Court, "under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Arizona v. California*, 460 U.S. at 619. "Similarly, an appellate court may deviate from the law of the case if the previous decision was 'clearly erroneous and would work a manifest injustice,' which would not justify overturning a final judgment." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d at 740, citing *Arizona v. California*, 460 U.S. at 618.

Castro's entire brief on the merits addresses why re-characterization of his Rule 33 motion was "manifestly unjust". Castro's Rule 33 motion was properly pled and should not have been re-characterized. The consequences in doing so have resulted in preventing Castro from ever filing a first habeas petition, which he has a statutory right to file. The government does not dispute in its brief

on the merits that the re-characterization of Castro's Rule 33 motion was clearly erroneous. No law precludes the filing of a Rule 33 motion and a § 2255 by the same petitioner. Furthermore, presumably, the purpose for the district court's re-characterizing Castro's pre-AEDPA Rule 33 motion at the insistence of the government was to *assist* Castro. As this Court has recognized, "this accommodation is the result of the time honored practice of liberally construing pleadings of pro-se plaintiffs." *Haynes v. Kerner*, 404 U.S. 519, 520 (1972). If the purpose of re-characterizing Castro's pro-se Rule 33 motion was not to assist him, but an effort by the government to take advantage of a pro-se inmate's ignorance with regard to "abuse of the writ" principles, then this practice is "manifestly unjust" for obvious reasons. Either way, to prevent Castro from filing a habeas petition due to the argument that his previously filed post-conviction motion was re-labeled at the urging of the government is unjust and therefore "law of the case" should not prevent this appeal.

CONCLUSION

The clear wording of the statute allows this Court jurisdiction to hear Castro's argument that the district court and court of appeals erred in ruling that his 1997 habeas petition is successive. Furthermore, the government's assertion that "law of the case" doctrine precludes this appeal is incorrect for the reasons stated herein. The government apparently concedes that Castro's Rule 33 Motion for New Trial was improperly re-characterized. Therefore, Castro requests that this Honorable Court

grant him the opportunity to have his § 2255 petition ruled upon.

Respectfully submitted,

This 16th day of July, 2003

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