

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

HERNAN O' RYAN CASTRO, :

Petitioner :

v. : No. 02-6683

UNITED STATES. :

- - - - -X

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.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
MICHAEL G. FRICK, ESQ.	
On behalf of the Petitioner	3
DAN HIMMELFARB, ESQ.	
On behalf of the Respondent	21

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

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

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

11 MR. FRICK: Yes, Your Honor.

12 QUESTION: When do I recharacterize it?

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

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

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

1 argument of yours.

2 MR. FRICK: Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

2 The district court --

3 QUESTION: It was the Government who intruded
4 2255 into this case. The district judge didn't suggest
5 it. The prisoner, who never appeared before the court,
6 certainly didn't suggest it. 2255, as I understand, was
7 first uttered by the Government in -- in its pleading to
8 the court.

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

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

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

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

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

7 MR. FRICK: That's correct. Not up until that
8 point in time, there had been no suggestion whatsoever of
9 2255 --

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

15 MR. FRICK: Yes, Your Honor. He -- he said that
16 he would treat it as seeking relief under both rule 33 and
17 2255. Mr. Castro, in his brief in response to the
18 Government's brief, stated that I didn't file a -- a 2255
19 and I object to it being characterized or considered as
20 seeking relief under 2255. But there was no argument on
21 the point, and it was never anything that -- where
22 argument was presented other than through the briefs on
23 that issue.

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

1 have any lawyer.

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

11 QUESTION: So throughout the original rule --

12 MR. FRICK: Totally pro se.

13 QUESTION: And even when he -- his first styled
14 2255, he was still pro se until that one went up on
15 appeal.

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

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

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

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

24 MR. FRICK: That is correct.

25 QUESTION: -- to also consider --

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

3 QUESTION: And what are we to make of that?

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

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

13 MR. FRICK: At the time that he appealed?

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

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

16 QUESTION: But --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 MR. FRICK: Yes, Your Honor.

15 Your Honor, the -- the question presented before
16 this Court is not quite as narrow in our view as looking
17 specifically at the facts of this case, with it being a
18 pre-AEDPA when most of the other circuit cases are post-
19 AEDPA, both in the recharacterization phase and in the
20 filing of a first titled 2255. The question that we were
21 asked pertaining to this Court dealt with when a first
22 post-conviction motion is recharacterized sua sponte as a
23 2255, is a subsequent first titled 2255 rendered second or
24 successive under the AEDPA. The -- the answer to that is
25 no in our opinion.

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

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

13 MR. FRICK: Yes.

14 QUESTION: -- at some point.

15 MR. FRICK: Thank you, Chief Justice Rehnquist.

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

1 In addition, a -- an actual look at the statute,
2 28 U. S. C. 2244(b) (3) (E), which is in the appendix of the
3 Government's brief, appendix 2a, that is the statute that
4 the Government contends shows that this Court does not
5 have jurisdiction. What that particular section deals
6 with is a proscription against this Court having
7 jurisdiction when a court of appeals has granted or denied
8 a request for authorization for a district court to
9 consider a second or successive petition. That is a
10 recognition on the part -- the statute recognizes that
11 there has been a first 2255 so characterized as such, so
12 pleaded as such by the petitioner, and that he has then
13 come before them with what he recognizes is a second
14 motion, and he's going to the court of appeals and saying,
15 under AEDPA there are restrictions that we have not had
16 before, and I am required to come before you and meet
17 certain gatekeeping requirements in order for the district
18 court to hear my second or successive petition. There is
19 no first 2255 for a second -- for -- for the first titled
20 2255 to be successive to or to be second to. And
21 therefore, section 2244(b) (3) (E) is not applicable.

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

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

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

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

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

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

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

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

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

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

1 will rule on it so that --

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

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

14 Your Honor, I know --

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

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

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

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

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

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

11 QUESTION: Very well, Mr. Frick.

12 Mr. Himmelfarb, we'll hear from you.

13 ORAL ARGUMENT OF DAN HIMMELFARB

14 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

25 QUESTION: I don't understand your second

1 instance.

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

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

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

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

8 That is not this case.

9 QUESTION: So in any case, your view is no
10 matter how absurd, if a -- the court of appeals says a
11 60(b) motion is second or successive, if they say a
12 complaint in a 1983 action is a second or successive
13 habeas petition, no matter how absurd, once the court of
14 appeals says this is a second or successive application,
15 nobody has any right to appeal here, even though that
16 isn't what the statute says.

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

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

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

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

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

20 MR. HIMMELFARB: Well, we think it is.

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

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

10 The second textual indication is that in
11 2244(b) (3) (A) and (b) (3) (B), Congress speaks of an order
12 authorizing the district court to consider the
13 application. We think it's reasonable to view an order
14 granting or denying an authorization to be synonymous with
15 2244(b) (3) (E)'s reference to a grant or denial of
16 authorization.

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

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

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

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

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

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

10 MR. HIMMELFARB: What my opponent is appealing
11 is the court of appeals' decision, which is a single
12 order, which does two things. It affirms the district
13 court's finding that the motion was second or successive,
14 and then goes on repeatedly to say that under AEDPA's
15 gatekeeping requirements, he may not file it. The court
16 of appeals denied authorization to file the motion under
17 2244(b) (3) (E). This Court lacks jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 QUESTION: Well, he -- he never -- he did not in
12 the district court file such a motion. He filed this rule
13 33(b) thing, that the Government then volunteered it
14 wouldn't mind if the court treated as a 2255 and the
15 district court treated it as such. It was not Castro's
16 urging.

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

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

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

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

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

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

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

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

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

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

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

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

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

1

33

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

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

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

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

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

1 that he is pro se should have any part in the analysis
2
3 because that would create all sorts of difficulties in
4 other AEDPA cases where you have difficult questions,
5 particularly difficult, perhaps byzantine, procedural
6 rules that a petitioner is obligated to follow.

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

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

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

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

1 before AEDPA, most post-conviction litigation was carried
2 out pro se. There are two different places in -- in the
3
4 district court --

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

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

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

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

1 2255 motion, but also that he be warned of its
2 consequences. We have no objection insofar as there's a
3 requirement that he be notified of how it would be
4
5 treated.

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

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

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

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

1 just what I was interested in. On page 42 of your brief,
2 you basically say that on the substantive rule here, you
3 agree with the other side. I mean, pretty much. And
4 that's what all the circuits have done. And then you
5
6 impose a couple of procedural obstacles.

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

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

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

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

1 interpret the words, second or successive petition, in
2 AEDPA not to include this. You see, what they were
3 talking about in Congress was not this. They didn't think
4 a second or successive petition was second or successive
5 where the first one took place under these no-warning
6
7 circumstances before AEDPA was even enacted. Now, I think
8 they come to exactly the same place, but that second
9 approach, which they followed, doesn't get us into the
10 business of writing rules in some kind of supervisory
11 capacity in the dark.

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

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

1 appeal.

2 QUESTION: Yes, but I think you're missing --
3 say -- say the same content. Let's have equivalent
4 content to the rule. Is it better for us to -- to say
5 we're reading AEDPA or is it better for us to say we are
6 -- which is open to the -- this kind of reading. We have
7
8 to decide the scope of those words in the -- in the block
9 of AEDPA. Or is it better for us to try to write a rule?
10 That -- that's what I'm interested in. I can work out the
11 rest of the content, and actually the First Circuit
12 approach needn't have a content. I mean, it can really
13 have quite a minimal content, but -- but that's what I'm
14 interested in.

15 MR. HIMMELFARB: We don't --

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

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

25 And I want to be clear. Recharacterization,

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

5 QUESTION: I'm sure that's right, but you -- you
6 think we should go into the rule-writing business, say, in
7 our supervisory capacity. These -- these rules -- this
8
9 kind -- this is the consequence that attaches to
10 recharacterization. A recharacterization is not a
11 recharacterization that fits within AEDPA unless it gets
12 notice, et cetera, et cetera. That's what you think we
13 ought to do.

14 MR. HIMMELFARB: No. Our position --

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

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

1 successive post-conviction motions could be evaded.

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

8 QUESTION: Wouldn't it -- wouldn't it be much
9
10 simpler just to say if a district court recharacterizes,
11 it must do this without going into when or why you should
12 recharacterize?

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

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

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

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

3 QUESTION: Why do you want --

4 QUESTION: You should give an opportunity to --
5 to say I'll withdraw my petition or I'll amend my petition
6 to say everything that I could say under the heading of
7 2255.

8 MR. HIMMELFARB: Our view is that giving notice
9 of an intent to recharacterize puts the defendant in the
10
11 same position as one who filed a self-styled 2255, and
12 under the law of post-conviction litigation, such a
13 defendant is held responsible for the consequences of
14 filing that motion.

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

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

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

8 MR. HIMMELFARB: Justice Stevens, the way we
9 envision the regime working is that the motion is filed
10 and the district court issues an order which it serves on
11
12 parties, giving notice that it intends to recharacterize
13 and some amount of time will elapse before the defendant
14 is obligated to come back to the court and tell the court
15 whether it wishes for the court to go forward with
16 recharacterization or allow him to withdraw. So within
17 that period of --

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

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

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

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

1 given here.

2 QUESTION: The -- the point of implausibility I
3 -- I have with your argument is that when the district --
4 your argument to the effect that no notice of consequence
5 needs to be given, merely a notice that recharacterization
6 will take place. The -- the point is that when a point
7 does that, the court is understood to be trying to help
8 out the defendant. Whether the court puts it in precisely
9 those words or not, that's -- that's the object. The --
10 the court, in effect, is saying, look, I'm going to help
11 you here because you don't know how to plead this stuff,
12
13 and -- and I'm going to recharacterize this as under 2255.

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

25 MR. HIMMELFARB: Justice Souter, the -- the

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

6 QUESTION: Thank you, Mr. Himmel farb.

7 Mr. Frick, you have 4 minutes remaining.

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

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

12 MR. HIMMELFARB: Thank you, Your Honor.

13

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

16

17

18

19

20

21

22

23

24

25