SUPREME COURT OF THE UNITED STATES

No. 02–6683

HERNAN O'RYAN CASTRO, PETITIONER *v.* UNITED STATES

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

[December 15, 2003]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and concurring in the judgment.

I concur in Parts I and II of the Court's opinion and in the judgment of the Court. I also agree that this Court's consideration of Castro's challenge to the status of his recharacterized motion is neither barred by nor necessarily resolved by the doctrine of law of the case.

I write separately because I disagree with the Court's laissez-faire attitude toward recharacterization. The Court promulgates a new procedure to be followed if the district court desires the recharacterized motion to count against the *pro se* litigant as a first 28 U. S. C. §2255 motion in later litigation. (This procedure, by the way, can be ignored with impunity by a court bent upon aiding *pro se* litigants at all costs; the only consequence will be that the litigants' later §2255 submissions cannot be deemed "second or successive.") The Court does not, however, place any limits on when recharacterization may occur, but to the contrary treats it as a routine practice which may be employed "to avoid an unnecessary dismissal," "to avoid inappropriately stringent application of formal labeling requirements," or "to create a better correspondence between the substance of a *pro se* motion's claim and its underlying legal basis." *Ante*, at 6. The Court does not address whether Castro's motion filed

under Federal Rule of Criminal Procedure 33 should have been recharacterized, and its discussion scrupulously avoids placing any limits on the circumstances in which district courts are permitted to recharacterize. That is particularly regrettable since the Court's new recharacterization procedure does not include an option for the *pro se* litigant to insist that the district court rule on his motion as filed; and gives scant indication of what might be a meritorious ground for contesting the recharacterization on appeal.

In my view, this approach gives too little regard to the exceptional nature of recharacterization within an adversarial system, and neglects the harm that may be caused *pro se* litigants even when courts do comply with the Court's newly minted procedure. The practice of judicial recharacterization of *pro se* litigants' motions is a mutation of the principle that the allegations of a *pro se* litigant's complaint are to be held "to less stringent standards than formal pleadings drafted by lawyers." *Haines* v. *Kerner*, 404 U. S. 519, 520 (1972) (per curiam). "Liberal construction" of *pro se* pleadings is merely an embellishment of the notice-pleading standard set forth in the Federal Rules of Civil Procedure, and thus is consistent with the general principle of American jurisprudence that "the party who brings a suit is master to decide what law he will rely upon." *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25 (1913). Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.

Recharacterization is unlike "liberal construction," in that it requires a court deliberately to override the *pro se* litigant's choice of procedural vehicle for his claim. It is thus a paternalistic judicial exception to the principle of party self-determination, born of the belief that the "parties know better" assumption does not hold true for *pro se* prisoner litigants.

I am frankly not enamored of any departure from our traditional adversarial principles. It is not the job of a federal court to create a "better correspondence" between the substance of a claim and its underlying procedural basis. But if departure from traditional adversarial principles is to be allowed, it should certainly not occur in any situation where there is a risk that the patronized litigant will be harmed rather than assisted by the court's intervention. It is not just a matter of whether the litigant is *more likely*, or even *much more likely*, to be helped rather than harmed. For the overriding rule of judicial intervention must be "First, do *no harm*." The injustice caused by letting the litigant's own mistake lie is regrettable, but incomparably less than the injustice of *producing* prejudice through the court's intervention.

The risk of harming the litigant always exists when the court recharacterizes into a first §2255 motion a claim that is procedurally or substantively deficient in the manner filed. The court essentially substitutes the litigant's ability to bring his merits claim now, for the litigant's *later* ability to bring the same claim (or any other claim), perhaps with stronger evidence. For the later §2255 motion will then be burdened by the limitations on second or successive petitions imposed by AEDPA (the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214). A *pro se* litigant whose non-§2255 motion is dismissed on procedural grounds and one whose recharacterized §2255 claim is denied on the merits both end up as losers in their particular actions, but the loser on procedure is better off because he is not stuck with the consequences of a §2255 motion that he never filed.

It would be an inadequate response to this concern to state that district courts should recharacterize into first §2255 motions *only* when doing so is (1) procedurally necessary (2) to grant relief on the merits of the underlying claim. Ensuring that these conditions are met would

often enmesh district courts in fact- and labor-intensive inquiries. It is an inefficient use of judicial resources to analyze the merits of every claim brought by means of a questionable procedural vehicle simply in order to determine whether to recharacterize—particularly in the common situation in which entitlement to relief turns on resolution of disputed facts. Moreover, even after that expenditure of effort the district court cannot be certain it is not prejudicing the litigant: the court of appeals may not agree with it on the merits of the claim.

In other words, even fully informed district courts that try their best not to harm *pro se* litigants by recharacterizing may nonetheless end up doing so because they cannot predict and protect against every possible adverse effect that may flow from recharacterization. But if district courts are unable to provide this sort of protection, they should not recharacterize into first §2255 motions at all. This option is available under the Court's opinion, even though the opinion does not prescribe it.

The Court today relieves Castro of the consequences of the recharacterization (to-wit, causing his current §2255 motion to be dismissed as "second or successive") because he was not given the warning that its opinion prescribes. I reach the same result for a different reason. Even if one does not agree with me that, because of the risk involved, pleadings should *never* be recharacterized into first §2255 motions, surely one must agree that running the risk is unjustified *when there is nothing whatever to be gained by the recharacterization.* That is the situation here. Castro's Rule 33 motion was valid as a procedural matter, and the claim it raised was no weaker on the merits when presented under Rule 33 than when presented under §2255. The recharacterization was therefore unquestionably improper, and Castro should be relieved of its consequences.

Accordingly, I concur in the judgment of the Court.