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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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CASTRO *v.* UNITED STATES

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

No. 02–6683. Argued October 15, 2003—Decided December 15, 2003

In 1994, petitioner Castro attacked his federal drug conviction in a *pro se* motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. The Government responded that the claims were more cognizable as federal habeas claims under 28 U. S. C. §2255. The District Court denied Castro's motion on the merits, referring to it as both a Rule 33 and a §2255 motion. Castro did not challenge this recharacterization of his motion on his *pro se* appeal, and the Eleventh Circuit summarily affirmed. In 1997, Castro, again *pro se,* filed a §2255 motion raising, *inter alia,* a new claim for ineffective assistance of counsel. The District Court denied the motion, but the Eleventh Circuit remanded for the District Court to consider, among other things, whether this was Castro's second §2255 motion. The District Court appointed counsel, determined that the 1997 motion was indeed Castro's second §2255 motion (the 1994 motion being his first), and dismissed the motion for failure to comply with §2255's requirement that Castro obtain the Court of Appeals' permission to file a "second or successive" motion. The Eleventh Circuit affirmed.

Held:

1. This Court's review of Castro's claim is not barred by the requirement that the "grant or denial of an authorization by a court of appeals to file a second or successive application . . . shall not be the subject of a [certiorari] petition," 28 U. S. C. §2244(b)(3)(E). Castro nowhere asked the Eleventh Circuit to grant, and it nowhere denied, such authorization. Contrary to the Government's position, the court's statement that Castro's petition could not meet the requirements for second or successive petitions cannot be taken as a statutorily relevant "denial" of an authorization request not made. Even accepting the Government's characterization, the argument would

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founder because the certiorari petition's "subject" is not the Eleventh Circuit's authorization "denial," but the lower courts' refusal to recognize that this §2255 motion is Castro's first. Moreover, reading the statute as the Government suggests would create procedural anomalies, allowing review where the lower court decision disfavors, but denying review where it favors, the Government; would close this Court's doors to a class of habeas petitioners without any clear indication that such was Congress' intent; and would be difficult to reconcile with the principle that this Court reads limitations on its jurisdiction narrowly. Pp. 3–5.

2. A federal court cannot recharacterize a *pro se* litigant's motion as a first §2255 motion *unless* it first informs the litigant of its intent to recharacterize, warns the litigant that this recharacterization means that any subsequent §2255 motion will be subject to the restrictions on "second or successive" motions, and provides the litigant an opportunity to withdraw the motion or to amend it so that it contains all the §2255 claims he believes he has. If these warnings are not given, the motion cannot be considered to have become a §2255 motion for purposes of applying to later motions the law's "second or successive" restrictions. Nine Circuits have placed such limits on recharacterization, and no one here contests the lawfulness of this judicially created requirement. Pp. 5–7.

3. Because the District Court failed to give the prescribed warnings, Castro's 1994 motion cannot be considered a first §2255 motion and his 1997 motion cannot be considered a second or successive one. The Government argues that Castro's failure to appeal the 1994 recharacterization makes the recharacterization valid as a matter of "law of the case." And, according to the Government, since the 1994 recharacterization is valid, the 1997 §2255 motion is Castro's second, not his first. This Court disagrees. The point of a warning is to help the *pro se* litigant understand not only (1) whether he should withdraw or amend his motion, but also (2) whether he should *contest* the recharacterization, say, on appeal. The lack of warning prevents his making an informed judgment as to both. The failure to appeal simply underscores the practical importance of providing the warning. Hence, an unwarned recharacterization cannot count as a §2255 motion for purposes of the "second or successive" provision whether or not the unwarned *pro se* litigant takes an appeal. Even assuming that the law of the case doctrine applies here, the doctrine simply expresses common judicial practice; it does not limit the courts' power. Pp. 7–9.

290 F. 3d 1270, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST,

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C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., joined, and in which SCALIA and THOMAS, JJ., joined with respect to Parts I and II. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined.