

No.

IN THE
SUPREME COURT OF THE UNITED STATES

JAVIER ROJAS CISNEROS - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

JAVIER ROJAS CISNEROS

JUAN GABRIEL CISNEROS

BR 40178079

901 COUNTY ROAD 201

FALFURRIAS, TEXAS 78355

QUESTION(S) PRESENTED

1. DID THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT FAILED TO UNDERTAKE THE NOTICE-AND-WARNING REQUIREMENT OF A PRO SE FILING AS A §2255 MOTION MANDATED BY THIS COURT'S PRECEDENT?
2. DID THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT IMPROPERLY SIDESTEPED THE DISTRICT COURT'S SUA SPONTE INDICATIVE RULING ORDER ACKNOWLEDGING ITS MISTAKE AND WILLINGNESS TO CORRECT ITS ERROR BY PAYING UPSERVICE TO THE NOTICE-AND-WARNING REQUIREMENT MANDATED BY THIS COURT'S PRECEDENT AND JUSTIFYING ITS DENIAL OF A COA BASED ON ITS MISUNDERSTANDING OF PETITIONER'S ACTUAL COURT SUPERVISION AND UNTIMELINESS?
3. DOES A DISMISSAL OF A §2255 MOTION AS SUCCESSIVE REQUIRES A CERTIFICATE OF APPEALABILITY UNDER §2253(c) FROM THE COURT OF APPEALS WHEN THE DISMISSAL WAS FOR LACK OF JURISDICTION?
4. DOES THE ONE-YEAR REQUIREMENT TO FILE A §2255 MOTION APPLIES TO A LATER §2255 MOTION THAT WAS FILED AFTERWARDS DUE TO THE DISTRICT COURT'S FAILURE TO GIVE CASTRO WARNINGS WHEN IT RECHARACTERIZED THE INITIAL FILING THAT WAS FILED BEFORE THE ONE YEAR REQUIREMENT EXPIRED?

LIST OF PARTIES

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TABLE OF CONTENTS

OPINIONS BELOW	-1
JURISDICTION	-1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	-2
STATEMENT OF THE CASE	-3
REASONS FOR GRANTING THE WRIT	-11
CONCLUSION	-29
CONSTITUTIONALITY OF SEVERANCE	31

INDEX OF APPENDICES

APPENDIX A - 9/17/18 OPINION OF COURT OF APPEALS DENYING COA.

APPENDIX B - 4/18/18 DISTRICT COURT'S ORDER AS A SUA SPONTE
INDICATIVE RULING

TABLE OF AUTHORITIES

CASES

PAGE NUMBER

WHITE STATES v. PENA, 713 F. App'x 271, 272 (5 th Cir. 2017)	- 10
CASTRO v. UNITED STATES, 540 U.S. 375 (2003)	- Passim
GONZALEZ v. CROSBY, 545 U.S. 524, 541 (2005)	- 11
JORDAN v. FISHER, 135 S. Ct. at 2652 n. 2 (2015)	- 13, 20
GRIFFITH v. KENTUCKY, 479 U.S. 314 at 323 (1987)	- 17
POWELL v. NEVADA, 511 U.S. 79, 84 (1994)	- 17
TENNARD, 542 U.S. at 283	- 20
MILLER-EL, 537 U.S. at 327	- 20
ACKERMANN v. UNITED STATES, 340 U.S. 193, 199 (1950)	- 20

STATUTE AND RULES

18 U.S.C. § 752(a)

28 U.S.C. § 2244(b); § 2244(b)(3)(A)

28 U.S.C. § 2253(c)(1)(B)(2)

28 U.S.C. § 2255; § 2255(f)(3), (4)

Fed. R. Civ. P. 60(b)(6); 60(b)(4)

Fed. R. Civ. P. 72(b)(3) -

OTHER

AEDPA, Pub. L. 104-132, 110 Stat. 1214 (1996)

(iv)

PETITION FOR WRIT OF CERTIORARI

Xavier Rojas Cisneros respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The September 17, 2018 opinion of the Fifth Circuit Court of Appeals denying Cisneros a certificate of appealability is unreported and attached as Appendix A.

The April 18, 2018 District Court's Order as a *Sua Sponte* Indicative Ruling is unreported and attached as Appendix B.

JURISDICTION

The Fifth Circuit Court of Appeals entered its judgment on September 17, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved a federal criminal defendant's Constitutional right under the Fifth, and Sixth Amendments.

The Fifth Amendment provides in relevant part: In all criminal actions, no person shall be deprived of life, liberty, or property without due process of law.

The Sixth Amendment provides in relevant part: In all prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense.

This case also involves the application of 28 U.S.C. § 2244(b), which states: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

This case further involves the application of 28 U.S.C. § 2253(c), which states:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --

(B) the final order in a proceeding under section 2255 [28 U.S.C. § 2255],

(2) A certificate of appealability may issue under paragraph

(1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF CASE

On August 16, 1995, a federal grand jury - sitting in Houston, Texas - returned an indictment against Cisneros and eight co-conspirators. U.S. v. Cisneros, Criminal No. 4:95-196-7, Docket No. 1. As relevant here, Cisneros was indicted for one count of conspiracy to assist in the escape of federal prisoners, pursuant to 18 U.S.C. § 752(a). Id. Cisneros was one of those prisoners that the conspiracy planned to free from the Cameron County jail. Id. Cisneros was incarcerated on drug-related charges at the time. U.S. v. Cisneros, Criminal No. 1:94-181-13, Docket No. 152.

On September 22, 1995, Cisneros pled guilty, pursuant to a plea agreement, to one count - the only count that charged him - of conspiracy to assist in the escape of federal prisoners. Criminal No. 4:95-196, Docket No. 264.

On November 16, 1995, Cisneros was sentenced to twelve (12) months of incarceration. Id. That sentence was to run consecutive to the sentences in Criminal No. 1:94-181. Cisneros was sentenced to 262 month imprisonment in Criminal No. 1:94-181, Docket No. 474.

At the time when Cisneros was convicted, there was a longstanding practice in which the courts treated as a request for habeas relief under 28 U.S.C. § 2255 a pleading that a pro se prisoner has labeled differently.

The Antiterrorism and Effective Death Penalty Act

did not went into effect until after Cisneros was convicted, so, under the one-year grace period, he had until April 23, 1997, to file his § 2255 petition.

Unbeknown to Cisneros that his attorney had failed to file a Notice of Appeal when requested to do so, on December 24, 1996, four (4) months prior to the deadline to file his § 2255 petition, he filed in the district court a motion pursuant to Fed. R. Civ. P. 60(b)(6) and clearly stated in the face of the petition, that it was not a § 2255 motion. In that petition, Cisneros's only argument was that the district court lacked jurisdiction to indict him in Criminal No. 4:95-196, because the offense did not occur on federal land. Id. This petition was docketed in Civil Action No. 1:97-003, Docket No. 1.

Without any notice of its intention to recharacterize the Rule 60(b)(6) into a section 2255 petition or any warning that the recharacterization meant that any subsequent § 2255 motion would be subjected to the restrictions on second or successive motions and, without providing Cisneros with an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believed he had, the district court on February 18, 1997, ordered the government to respond to Cisneros petition. Id., Docket No. 2.

Despite Cisneros labeling of the petition as a Rule 60(b)(6) motion and not a § 2255, the district court on May 28, 1998, reached a determination and dismissed the

petition as one brought under 28 U.S.C. § 2255. Id., Docket No. 16.

Thereafter, Cisneros filed several motions for reconsideration objecting to the district court's recharacterization of his Rule 60(b)(6) motion into one brought under § 2255, and on October 30 and December 9, 1998, the district court denied Cisneros' motions for reconsideration. Id., at Docket No. 16.

Cisneros then filed in the district court a motion requesting a certificate of appealability, however, on May 28, 1999, the district court denied the motion and denied a certificate of appealability. Id., at Docket No. 19.

In its order the district court stated: "This Court dismissed Petitioner's [Cisneros] Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2255 (Civil Action Number B-97-003) on the 28th day of May, 1998 and dismissed his Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255 on the 22nd day of September, 1997 (Civil Action Number B-96-178). Petitioner's subsequent Motions for Reconsideration were denied on the 9th day of December, 1998 (B-97-003) and the 20th day of October, 1998 (B-96-178). Petitioner then filed his Notice of Appeal in both cases on the 30th day of December, 1998. It is this Court's opinion that Petitioner has failed to make this showing in either case and therefore his Certificate of Appealability for both case are hereby DENIED." Id.

Cisneros then filed an application for a certificate of appealability in the Fifth Circuit Court of Appeals and on March 8, 2000, the Court denied the application. *Id.*, at Docket No. 20.

In its denial order, the Fifth Circuit stated: Cisneros "current §2255 motion [i.e., Civil Action No. B-96-178 and Civil Action No. B-97-003] is successive." *Id.*

Cisneros family and friends, from March 7, 1999 through March of 2009, retained/hired several attorneys to assist and represent Cisneros and his brother Juan Gabriel in their §2255's motion based on *Castro v. United States*, however, said attorneys never provided, for approximately 10 years, the legal services they promised to represent and would be provided, and thereafter, complaints were filed against them in the Texas Bar Association. See Motion for Appointment of Counsel filed by Cisneros's brother Juan Gabriel on July 10, 2013, pursuant to 18 U.S.C. § 3006A in Civil Case 1:13-058, Docket No. 17-A thru G.

On November 7, 2016, Cisneros filed a petition pursuant to 28 U.S.C. § 2255, seeking habeas relief under ineffective assistance of counsel grounds. This petition was docketed in Civil Case 1:16-289, Docket No. 1.

In that petition Cisneros claimed that his §2255 motion was his first.

Cisneros grounds for relief are based largely upon ineffective assistance of counsel during pre-guilty-plea stage of criminal proceedings as well as sentencing and appeal process. Id.

In ground one, Cisneros alleged that the indictment in the instant case failed to charge an offense against him, therefore invalid because he could not be convicted for assisting in his own escape. Id.

In ground two, Cisneros alleged that he received ineffective assistance of counsel in regards to his guilty plea. Cisneros also contended that he received ineffective assistance of counsel in regards to the defective indictment, defective plea agreement and counsel's failure to file a notice of appeal when requested to do so. Id.

Cisneros provided the court with the exact terms of the promise, exactly when, where, and by whom the promise was made, and the precise identity of an eyewitness to the promise, along with Cisneros's sworn affidavit as well as that of his brother. Moreover, the petition was made under the penalty of perjury.

However, right after Cisneros filed his pro se § 2255 petition, and without calling for a response from the government, the magistrate judge issued a report recharacterizing Cisneros pro se § 2255 into a Rule 10(b)(4) motion and recommending that the petition be denied as meritless, without even considering the factual allegations

made in the petition. Id., at Docket No. 5.

Cisneros timely submitted his objections to the magistrate's report and recommendation. Id., at Docket No. 9.

However, on the 7th day of March, 2017, the district court entered an order in which it adopted the magistrate judge's report in full and denied Cisneros's §2255 petition as a motion for reconsideration. Id., at Docket No. 10.

On May 1, 2017, Cisneros submitted his application for a certificate of appealability to the Fifth Circuit Court of Appeals. The application was docketed in Case No. 17-40316.

In its application Cisneros requested a certificate of appealability on the following issues:

1. Whether the district court erred in finding that Cisneros's November 7, 2016 §2255 petition was a second or successive in light of clearly established law as defined by the Supreme Court in *Castro v. United States*?
2. Whether a COA should issue when a district court fails to follow Supreme Court dictates that require a court to comply with the notice and warning requirement before recharacterizing a pro se prisoner's petition as a §2255, and if the court fails to comply with any of this requirements, a subsequent §2255 petition filed cannot be held to the stringent restrictions of §2244(b)?
3. Whether the district court erred by failing to conduct

an independent and de novo review of Cisneros's objections to the magistrate's report and recommendation, as required by Fed. R. Civ. P. 72(b)(3)?

4. Whether Cisneros received ineffective assistance of counsel in regards to his guilty plea?
5. Whether Cisneros received ineffective assistance of counsel in regards to counsel's failure to file a notice of appeal when requested to do so?
6. Whether Cisneros received ineffective assistance of counsel in regards to the deficient indictment?
7. Whether Cisneros received ineffective assistance of counsel in regards to the plea agreement?

Almost a year after Cisneros submitted his application for a certificate of appealability to the Fifth Circuit, on April 18, 2018, the district court issued an order as a sua sponte indicative ruling, pursuant to Fed. R. Civ. P. 62.1 to the Fifth Circuit stating the following:

On November 7, 2016, Petitioner Javier Rojas Cisneros filed what the Court construed to be a "Motion for Relief from Final Judgment" pursuant to FED. R. Civ. P. 60(b)(4), Dkt. No. 1. Due to an internal reference to Rule 60, the Court ruled on that basis; however, after further review, the Court now finds that it should have been considered a § 2255 petition. If the Court had jurisdiction, it would correct this error. Cisneros

objected to the prior construction of his petition as well as to the Court's decision not to hold an evidentiary hearing on his claim of ineffective assistance of counsel. Dkt. No. 9.

Cisneros has appealed this Court's denial of his motion. Dkt. No. 14. The appeal divests this Court of the jurisdiction to correct its error. *United States v. Peña*, 713 F. App'x 271, 272 (5th Cir. 2017). See App. B.

However, on September 17, 2018, the Fifth Circuit issued a Per Curiam opinion denying Cisneros request for a certificate of appealability. In its opinion the Fifth Circuit recognized that the "district court may have erred in treating Rojas-Cisneros's section 2255 motion as a Rule 60 motion." And that "The 2016 motion also should not be treated as a successive motion for postconviction relief because the district court did not notify him that it was treating his 1996 filing as a section 2255 motion. See *Castro v. United States*, 540 U.S. 375 (2003)." However, the Fifth Circuit concluded that "Nonetheless, there is no arguable basis for allowing Rojas-Cisneros to proceed with his recent motion. It was filed twenty years after his conviction (the one-year sentence for the escape conviction was tacked on to a lengthy drug and money laundering sentence, which is why this still mattered).¹ So the new motion was timely only

¹ The Fifth Circuit wrongly states that Cisneros is no longer in custody or under court supervision. Cisneros is no longer in custody, however, he is under court supervision. His supervised release ends on the year 2025.

if it relied on new evidence or a right recently recognized by the Supreme Court and made retroactive to cases on collateral review. 28 U.S.C. 2255(f)(3), (4). Rojas-Cisneros did not attempt to meet either of these avenues for seeking postconviction relief more than a year after his judgment became final." See App. A.

REASONS FOR GRANTING THE WRIT

The panel's decision contravened this Court's precedent and deepened two circuit splits in a case raising an issue of grave significance: whether the criminal justice system will tolerate a violation of the Fifth and Sixth Amendments to the U.S. Constitution, due to a previous re-characterization by the district court of his pro se Rule 60(b)(2) motion into a §2255 - without any notice of the recharacterization or warning of the restrictions on second or successive motions- resulted in a disastrous deprivation of the only opportunity Cisneros has to challenge the unconstitutionality of his conviction and sentence through the entitlement of every prisoner to one full round of Federal habeas review announced by this Court in *Gonzalez v. Crosby*, 545 U.S. 524, 541 (2005).

This Court has repeatedly stressed "that before recharacterizing a pro se litigant's motion as a first §2255 motion, the district court must notify the pro se litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any

subsequent §2255 motion will be subject to the restrictions on 'second or successive' motions. Where the district court recharacterizes a pro se litigant's motion as a first §2255 motion, it can have serious consequences because it subjects any subsequent §2255 motion to the restrictive conditions that federal law imposes upon a second or successive §2255 motion." See 28 U.S.C. §2255(h). *Castro v. United States*, 540 U.S. 383, 124 S.Ct. at 792 (2003). This is not a case where, for example, Cisneros has already presented his Ineffective Assistance of Counsel and Defective Indictment claims in a first §2255 petition in the district court and were adjudicated on the merits.

Instead, this is a case where, a previous pro se Rule 60(b)(6) motion that was filed in the district court four (4) months before expiration of the one-year grace period, that is, April 23, 1997, and recharacterized as a §2255 motion. The district court without any notice of its intention to recharacterize the Rule 60(b)(6) into a §2255 motion or any warning that the recharacterization meant that any subsequent §2255 motion would be subjected to the restrictions on second or successive motions and, without providing Cisneros with an opportunity to withdraw the motion or to amend it so that it contains all the §2255 claims he believed he had, the district court initiated, entertained and considered the pro se motion as one brought pursuant to §2255.

Thereafter, Cisneros filed a motion to reconsider the district court's order and on October 30, and December 9, 1998, the district court denied the motions for reconsideration.

Cisneros then requested a certificate of appealability in the Fifth Circuit and on March 8, 2000, the Court denied the request and stated that Cisneros "current § 2255 motion is successive."

For all these reasons, Cisneros case is extraordinary under any conceivable understanding of the word and the panel's decision to the contrary is wrong under any standard of review. Further, in denying Cisneros a COA, the decision below continues the Fifth Circuit's "troubling" pattern of failing to follow this Court's precedent. *Jordan v. Fisher*, 135 S.Ct. at 2652 n. 2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, J.J. dissenting from denial of certiorari).

For all these reasons, and those discussed more fully herein, certiorari should be granted.

CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT FAILED TO UNDERTAKE THE NOTICE-AND-WARNING REQUIREMENT (UNDER CASTRO) OF A PRO SE FILING AS A § 2255 MOTION MANDATED BY THIS COURT'S PRECENT

This Court's precedent is clear: a pro se filing the district court has recharacterized as a 28 U.S.C. § 2255 motion cannot be considered a litigant's first such motion unless the

the district court provides the litigant with certain specific warnings. Under *Castro*, when a district court "recharacterizes a pro se litigant's motion as a first § 2255 motion," it (1) "must notify the pro se litigant that it intends to recharacterize the pleading," (2) "warn the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on 'second or successive' motions," and (3) "provide the litigant an opportunity to withdraw the motion or to amend it so it contains all the § 2255 claims he believes he has." *Castro v. United States*, 540 U.S. 375, 124 S. Ct. 786 (2003). *Id.* at 383, 124 S. Ct. at 792. If the district court fails to comply with any of these three requirements, the original filing "cannot be considered to have become a § 2255 motion for purpose of applying to later motions the law's 'second or successive' restrictions." *Id.* at 383, 124 S. Ct. at 792.

The district court erred in denying/dismissing Cisneros's 28 U.S.C. § 2255 motion in the instant matter as an Rule 60(b)(4) Motion for reconsideration and/or as an unauthorized "second or successive" based on its determination that Cisneros's pro se filing in Civil Case No. 1:97-003 was his first § 2255 motion. However, when the district court construed the filing in Civil Case No. 1:97-003 to be a § 2255 motion, it did so without providing the warnings required by *Castro*. Without the *Castro* warnings, the filing in Civil Case No. 1:97-003 cannot be considered to have become a § 2255 motion for purpose of applying to Cisneros's instant motion § 2244(b)'s "second or successive"

restrictions. Moreover, none of Cisneros's motions for reconsiderations filings provide a basis for the district and appeals court dismissal of his instant §2255 motion as "second or successive." As such, the district court erred in dismissing/denying the §2255 motion in the instant manner as a Rule 60(b)(4) motion for reconsideration and/or as an unauthorized "second or successive" motion.

The Fifth Circuit's panel being presented with this error by the district court, failed to undertake this Court's precedent in *Castro* when it stated: "The district court may have erred in treating Rojas-Cisneros's section 2255 motion as a Rule 60 motion. The 2016 motion also should not be treated as a successive motion for postconviction relief because the district court did not notify him that it was treating his 1996 filing as a section 2255 motion. See *Castro v. United States*, 540 U.S. 375 (2003). Nonetheless, there is no arguable basis for allowing Rojas-Cisneros to proceed with his recent motion." See App. A.

The panel's contrary conclusion its a direct product of its failure to adhere to this Court's precedent. Instead of acknowledging the district court's improper ruling of the disastrous deprivation of the only opportunity to have a writ of habeas corpus under §2255 petition adjudicated on the merits, the panel ignored it. Certiorari is warranted.

CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT IMPROPERLY SIDESTEPED THE DISTRICT COURT'S SUA SPONTE INDICATIVE RULING ORDER ACKNOWLEDGING ITS MISTAKE AND

WILLINGNESS TO CORRECT ITS ERROR BY PAYING LIPSERVICE
TO THE NOTICE-AND-WARNING REQUIREMENT MANDATED BY
THIS COURT'S PRECEDENT AND JUSTIFYING ITS DENIAL OF A
COA BASED ON ITS MISUNDERSTANDING OF CISNEROS ACTUAL
COURT SUPERVISION AND UNTIMELINESS

The Fifth Circuit disregarded the special harm caused by the recharacterization as a first §2255 motion a pro se litigant's filing that did not bear that label.

In its decision denying Cisneros a COA, the panel repeated an error that this Court corrected in *Castro*, viz., *Castro's* first pleading (filed in 1994) was recharacterized without notice as a §2255 motion and denied on the merits, his second §2255 motion was dismissed as an unauthorized second or successive motion, and this Court held that the first pleading could not count as a first §2255 motion for second or successive purposes. *Castro*, 540 U.S. at 377-79, 383-84, 124 S.Ct. at 789-90, 793.

That is the same situation Cisneros is in: His 1996 pre-*Castro* pleading was recharacterized without warning and decided/denied on the merits, his current 2016 petition was dismissed/denied as a Rule 60(b)(4)/Motion for Reconsideration and/or as an unauthorized second or successive petition based on that 1996 denial, and Cisneros argues that his 1996 pleading does not count as a first petition. Just as this Court applied the notice-and-warning requirement to *Castro's* 1994 pleading, the Fifth Circuit should have applied the notice-

and-warning requirement to Cisneros's 1996 pleading. See *Griffith v. Kentucky*, 479 U.S. 314 at 323, 107 S.Ct. 708 at 713 (1987) (noting the principle that "similarly situated defendant" must be treated the same); see also *Powell v. Nevada*, 511 U.S. 79, 84, 114 S.Ct. 1280, 1283 (1994) ("[5] elective application of new rules violates the principle of treating similarly situated defendants the same") (quotation marks omitted). This Court also formulated the Castro notice-and-warning requirement under its "supervisory powers over the Federal Judiciary" and stated that its "supervisory power determinations normally apply, like other judicial decisions, retroactively" 540 U.S. at 382-383, 124 S.Ct. at 792 (quotation marks omitted).

In the instant case, due to a previous re-characterization by the district court, without notice or warnings, resulted in a disastrous deprivation of the only opportunity Cisneros has to challenge the unconstitutionality of his conviction and sentence through a well-justified § 2255 motion.

The district court recognized its error and willing to correct its error issued a sua sponte indicative ruling order to the Fifth Circuit stating: "On November 7, 2016, Petitioner Javier Rojas Cisneros filed what the Court construed to be a "Motion for Relief from Final Judgment" pursuant to Fed. R. Civ. P. 60(b)(4), Dkt. No. 1. Due to an internal reference to Rule 60, the Court ruled on that basis; however, after further review, the Court now finds that it should have been considered a § 2255 petition. If the Court had jurisdiction, it would correct this error. Cisneros objected to the prior

construction of his petition as well as to the Court's decision not to hold an evidentiary hearing on his claim of ineffective assistance of counsel. Dkt. No. 9.

Cisneros has appealed this Court's denial of his motion, Dkt. No. 14. The appeal divests this Court of the jurisdiction to correct its error." See App. B.

The panel improperly sidestepped the district court's sua sponte indicative ruling order acknowledging its mistake and willingness to correct its error by paying lipservice to the notice-and-warning requirement mandated by this Court's precedent and justifying its denial of a COA based on its misunderstanding of Cisneros' actual court supervision and untimeliness.

In its denial order the Fifth Circuit erroneously states that Cisneros is no longer in custody or under court supervision. Cisneros was sentenced to 262 months of incarceration on his drug and money laundering convictions, with an additional eight (8) years of court supervision. Cisneros was sentenced to an additional 12 months for the escape conviction, with an additional two years of court supervision, to run consecutive to the sentence and court supervision imposed on the drug and money laundering convictions, to a total of 274 months imprisonment and 10 (ten) years of court supervision. Cisneros was released from custody after completing his 274 months of incarceration on April 2015. Cisneros' court supervision term does not end until the year 2025, therefore, the Fifth Circuit is wrong on its determination that Cisneros is ~~is~~ no longer on court supervision.

In reviewing the facts and circumstances of Cisneros's case and having the COA application for almost a year-and-a-half, the Fifth Circuit panel sidestepped the district court's willingness to correct its error by justifying its denial of a COA based on its improper assessment of timeliness. The panel paying lipservice to the mandate of this Court in *Castro* stated: "The district court may have erred in treating Rojas-Cisneros's section 2255 motion as a Rule 60 motion. The 2016 motion also should not be treated as a successive motion for postconviction relief because the district court did not notify him that it was treating his 1996 filing as a section 2255 motion. See *Castro v. United States*, 540 U.S. 375 (2003). Nonetheless, there is no arguable basis for allowing Rojas-Cisneros to proceed with his recent motion. It was filed twenty years after his conviction (the one-year sentence for the escape conviction was tacked on to a lengthy drug and money laundering sentence, which is why this still mattered). So the new motion was timely only if it relied on new evidence or a right recently recognized by the Supreme Court and made retroactive to cases on collateral review. 28 U.S.C. § 2255 (f)(3), (4). Rojas-Cisneros did not attempt to meet either of these avenues for seeking postconviction relief more than a year after his judgment became final." See App. A.

As this Court stressed in *Castro*, if a district court fails to provide certain warnings before recharacterizing a pro se filing as a 28 U.S.C. § 2255 habeas corpus petition, then later petitions are not subject to the restrictions on second or successive petitions.

Castro, 540 U.S. at 383. Yet that is precisely what the panel failed to do here.

If the district court would have provided Cisneros with the notice-and-warning requirement at the time he filed his Rule 60(b) motion, that is, December 24, 1996 (four (4) months prior to the expiration of the one-year grace period, that is, April 23, 1997) and would have provided him with an opportunity to withdraw the motion or amend it so it can contain all the claims he believed he had, he would have amended his pleading to include his Ineffective Assistance of Counsel and Defective Indictment claims he is now raising in this his recent § 2255 motion.

Rather than consider whether reasonable jurists could disagree with the district court (the district court on its own acknowledge its error) and conclude that Cisneros's allegations "set up an extraordinary situation," *Ackermann v. United States*, 340 U.S. 193, 199 (1950), the panel failed to apply the proper COA standard and this Court's mandate in *Castro* in this case, which is not an isolated error. This Court has on several occasions corrected the Fifth Circuit's unduly restrictive approach to granting COA's. See *Tennard*, 542 U.S. at 283; *Miller-El*, 537 U.S. at 327; and *Jordan*, 135 S.Ct. at 2652 n.2 (2015).

The Fifth Circuit's troubling pattern has resulted in a demonstrable circuit split with respect to the *Castro* notice-and-warning requirement and application of the COA

standard. Indeed, a review of the Fifth Circuit's § 2255 case dealing with the Castro notice-and-warning requirement, it will show that there is no published opinion, in contrast to cases arising out of the Eleventh, Fourth, Third and Second Circuits. The same is true with respect to the application of the COA standard on § 2255 cases, which will show upon a review of the Fifth Circuit's COA applications, that in the majority of the cases, a COA was denied by both the district court and Court of Appeals on all claims, in contrast to cases arising out of the Eleventh and Fourth Circuits, that have less denials of COA's application in § 2255 cases. This stark disparity quantifiably demonstrates that the Fifth Circuit's application of the Castro notice-and-warning requirement and the COA standard is significantly different from, and more burdensome than, that of the Circuit Courts mentioned above, which are more consistent with one another.

Therefore, the panel disregarded the Castro notice-and-warning mandate and failed to apply the proper COA standard in this case. Certiorari is Warranted.

DOES A DISMISSAL OF A § 2255 MOTION AS SUCCESSIVE
REQUIRES THE ISSUANCE OF A COA UNDER § 2253(C)
FROM THE COURT OF APPEALS WHEN THE DISMISSAL
WAS FOR LACK OF JURISDICTION

The district court had jurisdiction of this case

pursuant to 28 U.S.C. § 2255 because Cisneros, a person in federal custody, filed a petition for a writ of habeas corpus in the district court claiming that he was being held in custody in violation of the Constitution.

On November 7, 2016, Cisneros filed his petition pursuant to 28 U.S.C. § 2255, seeking habeas relief under Ineffective Assistance of Counsel grounds.

However, right after Cisneros filed his pro se § 2255 petition, and without calling for a response from the government, the magistrate judge issued a report recharacterizing Cisneros pro se § 2255 into a Rule 60(b)(4) / motion for reconsideration and an unauthorized second or successive § 2255 motion.

On March 7, 2017, the district court adopted the report and recommendation issued by the magistrate judge and dismissed the petition as a motion for reconsideration. Cisneros timely appealed the dismissal / denial of his habeas corpus petition.

On September 17, 2018, the Fifth Circuit denied Cisneros a COA.

Did the Fifth Circuit erred when it requested and denied Cisneros a COA when pursuant to 28 U.S.C. § 2253(c) is unnecessary because the dismissal / denial of a § 2255 petition as successive is a

dismissal/denial for lack of jurisdiction, and therefore no COA is required.

Rather, the Fifth Circuit had jurisdiction over Cisneros's appeal under § 1291.

CERTIORARI SHOULD BE GRANTED BECAUSE THE ONE-YEAR REQUIREMENT TO FILE A § 2255 MOTION SHOULD NOT APPLY TO A SUBSEQUENT § 2255 MOTION THAT WAS FILED AFTERWARDS DUE TO THE DISTRICT COURT'S FAILURE TO GIVE THE REQUIRED CASTRO WARNINGS WHEN IT RECHARACTERIZED THE INITIAL PLEADING THAT WAS FILED BEFORE THE ONE YEAR REQUIREMENT UNDER THE AEDPA EXPIRED

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214 (1996). Among its other provisions, the AEDPA placed new restrictions on "second or successive" § 2255 habeas corpus petitions. See 28 U.S.C. § 2244(b). Relevant here, 28 U.S.C. § 2244(b) now provides that "[b]efore a second or successive" § 2255 petition "is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the" petition. § 2244(b)(3)(A). Unless the circuit court of appeals has issued an order authorizing the district court to consider the merits of "second or

successive" §2255 habeas petition, a district court lacks jurisdiction to do so.

On December 15, 2003, this Court held in *Castro v. United States*, 540 U.S. 375 (2003), that if a district court recharacterizes a pro se litigant's pleading as a §2255 motion to vacate sentence, but does not provide the litigant with certain specific warnings, that motion does not count as the litigant's "first" motion when determining whether a subsequent pleading is "second or successive" for purposes of 28 U.S.C. §2244(b). Specifically, the Court held that when a district court "recharacterizes a pro se litigant's motion as a first §2255 motion," the court "must notify the pro se litigant that it intends to recharacterize the pleading," as well as "warn the litigant that this recharacterization means that any subsequent §2255 motion will be subject to the restrictions on 'second or successive' motions, and provide the litigant an opportunity to withdraw the motion or amend it so that it contains all the §2255 claims he believes he has. *Id.* at 383.

If the Court fails to give the warnings required by *Castro*, "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." *Id.* at 383. This is true even if the prisoner failed to appeal the recharacterization of the earlier filing. *Id.* at 384.

At the time when Cisneros was convicted, there

was a longstanding practice in which the courts treated as a request for habeas relief under § 2255 a pleading that a pro se prisoner has labeled differently.

The AEDPA did not went into effect until after Cisneros was convicted, so under the one-year grace period, Cisneros had until April 23, 1997, to file his § 2255 petition.

On December 24, 1996, four (4) months prior to the deadline to file his § 2255 petition, Cisneros filed in the district court a motion pursuant to Fed. R. Civ. P. 60(b)(6), and clearly stated it was not a § 2255 motion.

Without any notice of its intention to recharacterize the Rule 60(b)(6) into a section 2255 motion or any warning that the recharacterization meant that any subsequent § 2255 motion would be subjected to the restrictions on second or successive motions and, without providing Cisneros with an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believed he had, the district court entertained, considered and on May 28, 1998, dismissed the pleading as one brought under 28 U.S.C. § 2255 motion.

Thereafter, Cisneros filed several motions for reconsideration which were denied by the district court. Cisneros appealed the denial to the Fifth Circuit which concluded that his (my) motions were successive.

On November 7, 2016, Cisneros filed in the

district court the §2255 habeas corpus petition at issue in this petition for writ of certiorari.

However, right after Cisneros filed his pro se §2255 petition, without calling for a response from the government the magistrate judge issued a report recharacterizing Cisneros's pro se §2255 motion into a Rule 60(b)(4) motion / motion for reconsideration / and an unauthorized second §2255 motion and recommending that the motion be dismissed / denied as meritless / as an unauthorized §2255 motion. In its report, the magistrate judge noted Cisneros's 1996 petition in Civil Case No. 1:97-003. The report noted further that Cisneros had appealed the denial / dismissal and that the Fifth Circuit had upheld the district court's dismissal and had concluded that Cisneros's §2255 motion was successive.

On March 7, 2017, the district court entered an order in which it adopted the magistrate's report in full and denied Cisneros's §2255 petition as a motion for reconsideration.

On May 1, 2017, Cisneros filed his application for a COA in the Fifth Circuit and on September 17, 2018, the Fifth Circuit issued an order denying a COA.

In its denial order the panel concluded that "The district court may have erred in treating Rojas-Cisneros's section 2255 motion as a Rule 60 motion.

The 2016 motion also should not be treated as a successive motion for postconviction relief because the district court did not notify him that it was treating his 1996 filing as a section 2255 motion. See *Castro v. United States*, 540 U.S. 375 (2003). Nonetheless, there is no arguable basis for allowing Rojas-Cisneros to proceed with his recent motion. It was filed twenty years after his conviction (the one-year sentence for the escape conviction was tacked on to a lengthy drug and money laundering sentence, which is why this still mattered). So the new motion was timely only if it relied on new evidence or a right recently recognized by the Supreme Court and made retroactive to cases on collateral review. 28 U.S.C. 2255(f)(3),(4). Rojas-Cisneros did not attempt to meet either of these avenues for seeking postconviction relief more than a year after his judgment became final.

The request for a COA is DENIED."

The Fifth Circuit disregarded this Court's precedent in *Castro*, establishing that if a district court fails to give a pro se litigant the warnings required by *Castro* when it recharacterized his pleading as a § 2255 petition, any subsequent petition is going to be held/subjected to the limitations on second or successive § 2255 petitions, *Castro*, 540 U.S. at 383, and instead of following this Court's precedent in *Castro*, the panel in this case subjected

Cisneros to the limitations on second or successive §2255 petitions when it stated/concluded: "So the new motion was timely only if it relied on new evidence or a right recently recognized by the Supreme Court and made retroactive to cases on collateral review. 28 U.S.C. §2255(f)(3), (4).

Rojas-Cisneros did not attempt to meet either of these avenues for seeking postconviction relief more than a year after his judgment became final." See App. A.

The panel's contrary conclusion deprived Cisneros of the only opportunity to contest the legality and constitutionality of his conviction under a writ of habeas corpus pursuant to §2255. Moreover, Cisneros ineffective assistance of counsel claims are not an ordinary claim but, a claim of constitutional magnitude.

Therefore, the question(s) before this Court is: Whether the one-year limitation to file a §2255 motion after the conviction is final applies to a subsequent §2255 motion that was filed afterwards due to the district court's failure to give Castro warnings when it recharacterized the initial pleading as a §2255 petition;

whether the one-year limitation to file a §2255 motion after the conviction is final is included under the limitations on second or successive restrictions;

and

Whether the one-year time limit to file a § 2255 motion after the conviction becomes final applies to Cisneros, who filed his recharacterized § 2255 motion four (4) months prior to the expiration of the one-year grace period.

Therefore, the panel disregarded this Court's precedent and the critical aspects of Cisneros's extraordinary case, and certiorari is warranted.

CONCLUSION

For all the foregoing reasons, Cisneros's case is extraordinary. This Court's review is warranted not only to resolve a circuit split, but to maintain public confidence that court's will not permit a 6th Amendment right violation, without due process of law.

The petition for a writ of certiorari should be granted.

Executed on this the 10th day of December, 2018.

Respectfully Submitted
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BR 40178079

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