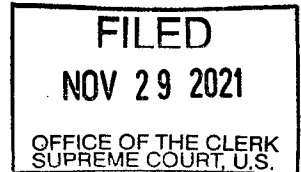


21-6732
No. _____

ORIGINAL

No. 18-40790 _____



IN THE
SUPREME COURT OF THE UNITED STATES

JULIO CESAR CARDENAS — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JULIO CESAR CARDENAS #22586-379
(Your Name)

P.O. Box 26040
(Address)

Beaumont, TX 77720
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. HAS THE FIFTH CIRCUIT COURT OF APPEALS EFFECTIVELY ESTABLISHED A PROCEDURAL RULE TO EFFACE, AND ABRIDGE, OR ABROGATE THE SUPREME COURT'S MANDATE[S], "NOTICE, WARNING, AND OPPORTUNITY," OF CASTRO V. UNITED STATES, 540 U.S. 375(2003); AND RATIONALES ON NONFRIVOLOUS CLAIMS IN SLACK V. MCDANIEL, 529 U.S. 473(1983);

LIST OF PARTIES

- [] All parties appear in the caption of the case on the cover page.
- [x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

CIRCUIT JUDGE JOLLY
CIRCUIT JUDGE DUNCAN
CIRCUIT JUDGE OLDHAM
DISTRICT JUDGE OLVERA
DISTRICT JUDGE TAGLE
MAGISTRATE JUDGE MORGAN
ATTORNEY GORDON
ATTORNEY KENT
AUSA CASTILLO MITCHELL
AUSA SMITH
AUSA TURNER
AUSA YOUNG
AUSA CASTRO

RELATED CASES

UNITED STATES V. JULIO CESAR CARDENAS, 606 Fed. Appx. 246(5th cir 2015)
UNITED STATES V. JULIO CESAR CARDENAS, 577 U.S. 945 (OCT. 19,2015)
UNITED STATES V. JULIO CESAR CARDENAS, 577 U.S. 1045 (DEC.07,2015)
UNITED STATES V. JULIO CESAR CARDENAS, 2018 US DIST. LEXIS 139885
UNITED STATES V. JULIO CESAR CARDENAS, 2021 US APP. LEXIS 26910

TABLE OF AUTHORITIES CITED

CASES

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ERICKSON V. PARDUS, 551 U.S. 89 (2007)	
HAINES V. KERNER, 404 U.S. 519 (1972)	
IN RE YOUNG, 789 F3D 518 (5TH CIR 2015)	
JOHNSON V. UNITED STATES, 135 S. CT. 2551 (2015)	
MALDONADO V. THALER, 662 F. SUPP. 2D 648 (S.D. TEX. 2009)	
MAYLE V. FELIX, 545 U.S. 644 (2005)	
SLACK V. MCDANIEL, 529 U.S. 473 (1983)	
ZACK V. TUCKER, 704 F3D 917 (11TH CIR 2013)(EN BANC)	
UNITED STATES V. BOTELLO, 2016 US DIST LEXIS 78403	
UNITED STATES V. CISNEROS, 2020 US DIST LEXIS 255639	
UNITED STATES V. ELAM, 930 F3D 406 (5TH CIR 2019)	
UNITED STATES V. FIGUERO-SANCHEZ, 678 F3D 1203 (5TH CIR 2012)	
UNITED STATES V. GONZALEZ, 592 F3D 675 (5TH CIR 2009)	
UNITED STATES V. HERNANDEZ, 630 F3D	
UNITED STATES V. MILLENDER, 2018 US DIST LEXIS 40096	
United STATES V. OUTER, 485 E3DL1273 (11TH CIR 2007)	
UNITED STATES V. RAZO, 2016 US DIST LEXIS 87249	
UNITED STATES V. RAKESTRAW, 2021 US DIST LEXIS 138241	
UNITED STATES V. WILLIAM, 2021 US DIST LEXIS 74246	
UNITED STATES V. VALLES-VELASQUEZ, 2014 US DIST LEXIS 198126	
UNITED STATES V. YOUNG, 2021 US DIST LEXIS 39026	

STATUTES AND RULES

28 USC §2254(f)(1)	
28 USC §2255(f)(1)	
RULE 15(a)	
RULE 15(c)	

OTHER

FIFTH AMENDMENT	
SECTION 101 of ("AEDPA")	
USSG §4B1.2	

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was SEPTEMBER 07, 2021.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: NOVEMBER, 2021, and a copy of the order denying rehearing appears at Appendix A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

☐ reported at 2021 U.S. APP. LEXIS 26910; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

☐ reported at 2018 DIST. LEXIS 139885; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented implicate the following provisions of the Constitution of the United States and the United States Code.

The Fifth Amendment: No person shall be held to answer for a Capital, or otherwise crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. §2255(a): "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be release upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence."

STATEMENT OF THE CASE

This case seeks relief for thou[sands]of past, present, and future criminal defendant[s] in State and Federal habeas cases...In this case as an alternative timeliness argument at the District Court, Cardenas submitted that the court was required to liberally construe his Pro Se filings as a timely 28 U.S.C. §2255 motion.

Cardenas filed numerous Pro Se letters and motions with the district court, within the statutory limitation period, requesting various forms of relief. In addition, Cardenas submitted multiple request for appointment of counsel and application of the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551(2015).

Cardenas submitted all these Pro Se filings prior to the one-year statute of limitation, under 28 USC §2255(f), of October 19, 2016. Cardenas argued at the district level that these filings should be liberally construed as §2255 "claims" for relief.

In its order of dismissal, the district court simply concluded that "[a]fter considering the record, and the substance of the Pro Se documentation filed before the necessary deadline, the court finds the relevant Pro Se filings cannot be characterized as a §2255 motion."

In the Fifth Circuit, Cardenas contended that the district court's conclusion was clearly erroneous. Accordingly, the district court erred in failing to construe Cardenas' prior Pro Se pleadings as a timely §2255 motion. The government claimed that "[n]one of Cardenas' filings requested substantive relief based on ineffective assistance of counsel related to his purported conflict of interest (physical fight) with the trial AUSA." However, the government ignored the fact that Cardenas did not have to make a claim

of ineffective assistance of counsel for his prior Pro Se pleading to be construed as a §2255 motion...Cardenas needed only to make constitutional challenges to his case to invoke the requirement that Cardenas pro Se pleadings be recharacterized as a §2255 motion.

Cardenas claimed that his multiple motions to the district court for appointment of counsel based on Johnson v. United States, 135 S. CT. 2551 (2015) should have reasonably been construed and recharacterized as a §2255 motion. Cardenas motions raised Fifth Amendment claims of a violation of Due Process.

Furthermore, Cardenas claimed had his prior Pro Se pleadings been construed as a timely §2255 motion, the district court would have been required to give notice to Cardenas allow him to withdraw or amend his §2255 motion under Castro v. United States, 540 US 375(2003). Additionally, Cardenas could have moved to amend his §2255 motion prior to the October 2016 limitation date.

The Fifth Circuit held, "There are two fundamental defects with Cardenas' argument. First, the "substance of relief" sought in most of the Pro Se filings was not habeas relief-that is, Cardenas did not challenge his custody by seeking vacatur of his conviction or sentence." Citing Hernandez, 630 f3d at 426.

"Second, Cardenas' filings that do seek relief from his sentence assert an entirely different basis for relief from the one asserted here. In his motion for appointment of counsel, Cardenas argued his sentence violated Johnson because the district court treated his prior attempted murder conviction as a predicate "crime of violence" for the §4B1.2 Career Offender enhancement. Even if we characterized that filing as a §2255 motion, it would not help Cardenas. That's because Cardenas would still have to show his current §2255 motion is an amendment that "relates back" to the original filing. See, Fed. R. Civ. P. 15(c); United

States v. Gonzalez, 592 f3d 675(5th cir 2009)."

The Fifth Circuit also held that Cardenas misreads both Castro and Elam, 930 f3d 406 (5th cir 2019). "Castro does not purport to create a remedy for situation in which a district court fail[ed] to recharacterized a pro se litigant's filings. Castro is thus a shield, not an appellate sword."

"Taken out of context, our decision in Elam could be read to suggest otherwise. We directed the district court on remand to "give Elam notice that his special discovery motion is being construed as a §2255 motion and... allow a reasonable opportunity to amend or withdraw it." Cardenas takes that quote to mean the Casto procedure is required every time a district court should have recharacterized a pro se filing, and that a litigate may amend his recharacterized pleading to assert any claim.

In closing, the Fifth Circuit proclaimed "we decline Cardenas' invitation to rewrite Gonzalez. Instead, we see Gonzalez and Elam as entirely consistent: when a district court recharacterizes a filing as a §2255 motion, the movant must have the opportunity to amend his now recharacterized motion (Elam) to include any claims that relate back to the original pleading under Rule 15(c)(Gonzalez)...Cardenas is not entitled to recharacterization of anything."

REASONS FOR GRANTING THE PETITION

I. [QUESTION ONE] Has the Fifth Circuit Court of Appeals effectively established a procedural rule to efface and abridge or abrogate the commands, "NOTICE, WARNING, and, OPPORTUNITY," of *Castro v. United States*, 540 US 375(2003); and "RATIONALES ON NONFRIVOLOUS" claims in *Slack v. McDaniel*, 529 U.S. 473(1983)?

A. The Fifth Circuit Panel misinterpret what constitutes ["all claims"] under *Castro* and *Slack* and misfeasance applied that interpretation under Fed. R. Civ. P. Rule 15(c) and *Gonzalez*.

Cardenas suffered injury and respectfully request that the Court grant a writ of certiorari. He seeks review of the decision of the district and court of appeals denying his 28 USC §2255 appeal and motion.

In reviewing the facts and circumstances of Cardenas' case, the Fifth Circuit panel arbitrarily paid lip service to the mandate and guidance of recharacterization of Pro Se filings. *Castro v. United States*, 540 US 375 (2003); *Haines v. Kerner*, 404 US 519(1972); *Erickson v. Pardus*, 511 US 89, and held Cardenas to a far more stringent standard. Specifically, the Fifth Circuit panel "side-stepped the Liberal Construction Doctrine and gave district court's carte blanche to ignore and not address pro se litigants motions file within the statutory limitation period, and to efface, and abridge or abrogate the principles guiding recharacterization.

The disingenuous rule affects thousand of past, present, and future state and federal defendant[s] in habeas cases...These cases involve application under both §2255 and §2254, though court do not distinguish between those sections for purposes of liberal construction and the rulings in *Castro*. In this case, two colossal issues concerning the proper interpretation of ["claims"] under 28 USC §2254 and §2255 motions; and the appropriate application of the *Castro* and *Slack* rules on claim[s].

Since this Court's decision in *Castro v. United States*, 540 US 375 (2003) which held, "The district court must notify the pro se litigant that it intends to recharacterize the pleading [as a §2255 motion], warn the litigant that this recharacterization means that any subsequent §2255 motion will be subjected to the restrictions on 'second or successive' motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the §2255 claims he believes he has." Circuit courts and their district courts have issued published decisions pursuant to the Castro Rules...Allowing pro se litigants to contest, the recharacterization, withdraw the motion or amend it to include all claims.

Across the judicial spectrum, courts have been consistent in following this court's mandate. However, the Fifth Circuit panel has redefined this court's mandate: "to provide a pro se litigant an opportunity to withdraw the motion or amend it so it contains ["all the §2255 claims"]. Cardenas contends that the district court abused its discretion by not liberally construing and recharacterizing none of Cardenas' pro se motion[s]. Had the district court done so, a Castro notice and warning was forthcoming. See, *United States v. Botello*, 2016 U.S. Dist. Lexis 78403(S. Dist. of Tex., Corpus Christi Division). Moreover, the panel did confirm that Cardenas did in fact challenged his custody with his pro se Johnson motion[s]. However, the panel held that *Gonzalez*, 592 f3d 675(5th cir 2009) and Rule 15(c) control Cardenas' case.

The Fifth Circuit panel has weaponized Rule 15(c) and *Gonzalez* to deny Cardenas' section 2255 appeal. Cardenas argues "it is the order of operation(modus operandi) that controls the outcome of his case." This is so because section 2255 or 2254 provides "a prisoner a full opportunity to seek collateral review, which means s/he receives one complete round of litigation. See, Section 101 of the Antiterrorism and Effective Death

Penalty Act("AEDPA")), which amended, 28 USC §2255 to establish a one-year period of limitation for the filing of a §2255 motion. 28 USC §2255(f)(1). Cardenas's one-year statute of limitation had not expired when he filed his last, August 2016, Johnson motion...Cardenas had a right to a full one-year limitation period.

Like in *Slack v. McDaniel*, Cardenas' claims were [un]ripe because the district court fail to address Cardenas pro se motion[s]...In *Slack* the Supreme Court reversed the district and appeal courts' decisions. "pre-AEDPA law govern[ed]" that case, though it hastened to add that "we do not suggest the definition of second or successive would be different under AEDPA." *Id.* at 486. The Court's decision:

"The State contends that the prisoner, upon his return to federal court, should be restricted to the claims made in his initial petition. Neither *Rose v. Lundy*[, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed.2d 379(1982)] nor *Martinez-Villareal* requires this result, which would limit a prisoner to claims made in a pleading that is often uncounseled, handwritten, and pending in federal court only until the state identifies one unexhausted claim. The proposed rule would bar the prisoner from raising nonfrivolous claims developed in the subsequent state exhaustion proceedings contemplated by the *Rose* dismissal, even though a federal court had yet to review a single constitutional claim, *Slack*, 529 U.S. at 487."

Section 2255's limitation period applies on a "claim-by-claim basis," not to the motion as a whole. See, e.g., *Maldonado v. Thaler*, 662 f. supp. 2d at 700(quoted *Mayle v. Felix*, 545 US at 662)(barring claims raised in an amended petition filed after the expiration of the limitation period

because, otherwise, "AEDPA's limitation period would have slim significance"); Zack v. Tucker, 704 f3d at 926; In re Young, 789 f3d 518 n.3 (5th cir 2015); United States v. Valles-Velasquez, 2014 US Dist. Lexis 198126(S. Dist. of Tex.); United States v. Spencer, 727 f3d 1076(11th cir 2013); United States v. William, 2021 US Dist. Lexis 74246(M. Dist. of Fl.). See also, Cisneros, 2020 US Dist. Lexis 255639(S. Dist. of Tex.)("The Fifth Circuit and the Supreme Court have never definitively address whether the timeliness of a petitioner's habeas petition is done in toto or on a claim-by-claim basis.") Moreover, Sec. 2255 proceedings are civil in nature and, therefore, governed by the federal rules of civil procedure. See, e.g. Mandacina v. United States, 540 US 1018(2003).

In this case, had the district court recharacterized the last "letter-motion" requesting Johnson relief, and given Cardenas a Castro Notice-Warning, Cardenas would of had an opportunity to either oppose the recharacterization, withdraw, or amend the motion, to include all claims Cardenas believed he had...Had Cardenas oppose the recharacterization and withdraw the motion, the district court was required to dismiss the case "without prejudice," because Cardenas was still within the one-year limitation period. It would be counter intuitive to think that a prisoner who tries to amend would loose his §2255 rights, but not one who withdraws.

The Fifth Circuit panel's decision means that once a Pro Se Litigant's motion is file and recharacterized by the district court, the one-year statutory limitation period catastrophically cease to exist for additional claims even under Castro and Slack. But the panel's interpretation is erroneous...because the "statute of limitation" in §2255(f) is not jurisdictional. [A] §2254 or §2255 motion can be amended under Rule 15(a) and the limitation period can be equitably tolled.

Furthermore, the Fifth Circuit panel erred in minimizing the Castro and

Slack mandates and expanding Rule 15(c) and Gonzalez to confine the issues of this case. The court held, "When a district court recharacterized a filing as a §2255 motion, the movant must have the opportunity to amend his now recharacterized motion (Elam) to include any claims that relate back to the original pleading under Rule 15(c)(Gonzalez). [REDACTED]

Cardenas contends that the panel's decision conflicts with decisions of the Supreme Court, and other court of appeals, including the Fifth Circuit and its district court[s]. See, e.g. United States v. Young, 2021 US Dist. Lexis 3902; Rakestraw v. United States, 2021 US Dist Lexis 138241 (N. Dist. Tex); Le'Edward v. Walker, 2021 US Dist. Lexis 38928; United States v. Millender, 2018 US Dist. Lexis 40096; United States v. Razo, 2016 US Dist Lexis 87249; Outler v. United States, 485 f3d 1273(11th cir2007); United States v. Figuero-Sanchez, 678 f3d 1203(5th cir 2012).

CONCLUSION

Because of the Supreme Court's supervisory control, Cardenas asks the court to clarify what it means to give pro se litigant[s] an opportunity to amend the now recharacterized pro se motion so it contains ["all"] the §2255 claims...he believes he has.

Does an amended motion have to "relate back" under Rule 15(c) to the original filing if the original filing is within the one-year limitation period?


Does a §2254 or §2255 statute of limitation apply on a claim-by-claim basis, and not to the motion as a whole?

Cardenas respectfully plead that this court GRANT this reasonable petition for writ of certiorari and permit briefing and argument on the issues contain herein.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: November 26, 2021