OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: SANDRA K. FORNEY, Petitioner v. KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

CASE NO: 97-5737 c.4

PLACE: Washington, D.C.

DATE: Wednesday, April 22, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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SANDRA K. FORNEY, :

Petitioner :

v. : No. 97-5737

KENNETH S. APFEL, COMMISSIONER :

OF SOCIAL SECURITY :

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Washington, D.C.

Wednesday, April 22, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:24 a.m.

APPEARANCES:

RALPH WILBORN, ESQ., Eugene, Oregon; on behalf of the Petitioner.

LISA S. BLATT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent in support of the Petitioner.

ALLEN R. SNYDER, ESQ., Washington, D.C.; as amicus curiae by invitation of the Court in support of the judgment below.

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PROCEEDINGS

(11:24 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 97-5737, Sandra Forney v. Kenneth Apfel.

Mr. Wilborn.

ORAL ARGUMENT OF RALPH WILBORN

ON BEHALF OF THE PETITIONER

MR. WILBORN: Thank you, Mr. Chief Justice, and may it please the Court:

This case raises the issue of whether or not a Social Security benefits claimant may appeal a final judgment entered under the fourth sentence of 42 U.S. Code 405(g) when that final judgment is accompanied by an order of remand.

Now, in Finkelstein, which is cited in the briefs, this Court held that such a judgment is a final judgment which terminates the civil action, and that the agency, not the claimant, may appeal therefrom.

In fact, in a footnote in Finkelstein this Court expressly reserved addressing whether or not the claimant had the right to appeal from such a judgment. This case squarely presents that issue.

Apart from Finkelstein, in Schaefer, also cited in the briefs, this Court construed, in the context of an Equal Access to Justice Act claim, the same statute

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without qualifying it in terms of whether the petitioner -- the judgment was final for the Social Security Administration only.

We believe that the plain language of the statute and the text and structure of the statute established that either party may appeal. In fact, if you look at amicus' brief which was invited by the Court their entire argument, or all of their arguments ultimately loop back to the point or the misconception that petitioner can later appeal any aspect of the instant district court case following the remand proceedings.

In other words, they're trying to tie that into the idea that the petitioner is not aggrieved currently.

QUESTION: Well, is it your position that they could not appeal after the result of the remand?

MR. WILBORN: Mr. Chief Justice, yes, that is exactly my position. I do not believe that, under the way the statute is worded that we would have, the petitioner would have the right to appeal the current civil -- or the current administrative finding.

QUESTION: Suppose we think you're wrong about that. Do you lose? Suppose we think this would work in -- just in the way -- you have a new trial, and so you're not able to bring up -- let's say you're the verdict winner. You're not able to bring up the errors in

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your favor. All the interlocutory rulings of the district court are preserved when you can't appeal them immediately. Either -- if you can't appeal them, isn't that the ordinary rule in civil procedure? It's a question of not never, but later.

MR. WILBORN: Justice Ginsburg, yes, that is absolutely correct as far as ordinary civil procedure as it applies to interlocutory orders of remand. In this case, however, the statute gives us a final judgment, and it then -- sentence 8 of the statute -- by the way, the statute is set out in full --

QUESTION: Well, it actually doesn't quite do that. It says, shall be final except that it shall be appealable as normal judgments are, so you might say, well -- if it hadn't been for Finkelstein, at least, you might say, well, it's final for purposes of attorney's fees.

MR. WILBORN: Yes.

QUESTION: But with reference to appeal it's subject to the same rule as any other judgment. That's a possible interpretation of the statute.

Finkelstein runs against that.

MR. WILBORN: Yes, that's absolutely right, Justice Kennedy. Finkelstein does run against that, and it's interesting and I think significant that in

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Finkelstein this Court chose not to adopt the collateral doctrine rule set out in the Cohen case. Instead, it directly interpreted the language of the statute as giving it final --

QUESTION: But Mr. Wilborn, Finkelstein could have been a now or never, as the Court pointed out. That is, if the Commissioner the next time around, in this proceeding where he's hemmed in, makes a determination in the claimant's favor, then he can't appeal from his own order.

MR. WILBORN: That is correct, Justice Ginsburg, and we believe we are in a similarly situated profile here. Just as it was possible that the Secretary in Finkelstein might never have the opportunity to appeal that, or would lack standing if they paid benefits on remand, it is possible.

Now, it was also possible that the Secretary could have actually denied benefits on remand and then come up to Federal court to relitigate that issue, so it was possible that the Secretary --

QUESTION: That I don't understand, because if the court says, Secretary, remodify and remand, that's a marching order for the Secretary. The Secretary has no choice. You're suggesting that the Secretary should not do what the court said the first time around?

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MR. WILBORN: No, Justice Ginsburg. What I'm suggesting is that even had the Secretary complied with the district court's order in Finkelstein, it is possible that the facts could have still allowed the Secretary, even construing the regulations against their wishes, to have denied the case, and if they had denied the claim in Finkelstein, that would have preserved the issue to come back --

QUESTION: Yes, but if, being faithful to what the court says, it comes out that the claimant wins, then the Secretary is stuck and can't appeal.

MR. WILBORN: That's the possibility, and I believe that's why we have a similar situation here. It is possible --

QUESTION: Why is it that you think you cannot appeal from an adverse decision after the remand?

MR. WILBORN: Mr. Chief Justice, the reason we believe we cannot appeal from an adverse decision following remand is because this section, 405(g), sentence 1, which grants jurisdiction to the district court to review the final judgment of the Secretary, or the Commissioner now, expressly limits the subsequent review in light of Finkelstein saying, this civil action, the judgment, the sentence 4 judgment terminates the civil action. It goes back on remand, and we must then file a

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new civil action.

The findings change on remand, the law applicable to that finding, to those findings changes on remand, so when we come back up with a second final agency decision under sentence 1 of 405(g) we are not permitted to appeal anything except the new Secretary's, or Commissioner's final decision.

QUESTION: That's by no means self-evident, at least to me from the statute.

QUESTION: Why -- let me ask you the question this way. Why might it not be that your appeal from the district court action in the first appeal might simply in effect be held in abeyance till you go through your second civil action and appeal and if you're not satisfied there, at that point you can take everything up.

If you win on your first claim, then we forget what happens in the second civil action. If you lose on your first claim, then we go to see whether there's any error, the court of appeals goes to see whether there's any error in effect based on what happened on remand.

Would that be possible, or does Finkelstein stand in the way of that? Perhaps it does.

MR. WILBORN: Justice Souter, I think if I answer your question, I will also answer Mr. Chief Justice's question.

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QUESTION: That's what I think, too.

MR. WILBORN: So if we take -- take as an example the case we have before us, Forney. We believe that she stood in the posture under the facts of her case, that the facts justified the district court taking the grant of jurisdiction under section 405(g) to reverse without a remand.

QUESTION: Right.

MR. WILBORN: From a legal -- based upon the law of the circuit. If that is true, but she goes back on remand to do whatever the administrative agency does on remand, which was not specifically defined by the district court's remand --

QUESTION: It's a new action --

MR. WILBORN: It is a new action.

QUESTION: Okay.

MR. WILBORN: So the current civil action terminates. We then go back, we perhaps introduce -- we and the Commissioner both, or one or either of us, introduce new medical evidence, new vocational evidence. That changes the entire factual posture of the case.

Suppose we lose on remand. Then we come back up through the appellate -- the administrative agency to district court under sentence 1 of 405(g), which is set out at page 2 of our opening brief. Sentence 1 grants

jurisdiction to the district court to review such decision, the new decision.

We have to file a brand new civil action. Unlike --

QUESTION: Okay, but is the reason that the old decision is not then also still subject to review a timing question, that the time for taking the appeal on the first one has simply run so that we can't think of it as just sort of sitting out there in abeyance? Is that the reason?

MR. WILBORN: I don't believe that is the reason, Justice Souter. I think the reason is that because we have a final judgment which terminates the civil action, if we don't appeal that and we go back to -- for additional proceedings on remand, what we end up with is a brand-new case that comes up.

QUESTION: Okay, but it's Finkelstein that says definitively this is a final action.

MR. WILBORN: Yes.

QUESTION: So basically your argument comes down -- I think comes down to the fact, look, you, Supreme Court, decided Finkelstein. That's all I'm asking you to do, is to follow through consistently on it and, if you do, I win. That's basically -- is that right?

QUESTION: He couldn't have put it better.

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Right?

QUESTION: That's your argument?

MR. WILBORN: That's absolutely correct.

QUESTION: Yes, okay.

(Laughter.)

QUESTION: Could I ask you this: if I recollect correctly the Government takes the position in this case that although you're entitled to appeal, you need not appeal.

MR. WILBORN: That is how I understand the Government's position as well --

QUESTION: That is not your position.

MR. WILBORN: -- Justice Scalia.

QUESTION: From what you've just said, I gather it's now or never.

MR. WILBORN: That is under the current state of the law, because under sentence 8 it says that our judgment is appealable, as in any other civil action, and in any other civil action if we don't appeal --

QUESTION: You lose it. You lose it.

MR. WILBORN: -- collateral estoppel does come into play.

However, we certainly wouldn't object to the Government fashioning a rule where -- which favors claimants that they would apply --

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QUESTION: Which lets you appeal now, if you want, or later, if you prefer that?

MR. WILBORN: Absolutely.

QUESTION: But you don't think it's very logical, if I understood your colloquy with --

MR. WILBORN: Not if we stay with the strict language of the statute. It's --

QUESTION: Well, if there are in fact two reasonably plausible ways of interpreting this statute, it seems to me that, as the amicus points out, the result of your approach is going to produce a lot of appeals to courts of appeals that are very fact-specific and might result in no better for your client than going back to the agency and perhaps getting the relief there on the basis of the remand order.

MR. WILBORN: Mr. Chief Justice, I don't believe that that likelihood is very probable, for the reasons set out in the brief. But in addition, if the Government does as they have extended the offer they simply don't hold against the claimant who chooses not to appeal.

If they don't hold collateral estoppel in an offensive fashion against the claimant, then the claimant has a freer mind to make the rational choice, do I appeal or do I not.

QUESTION: Well then, that -- I understand your

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point now. I didn't get it earlier. I must say that preclusion doctrine is not something the court ever interjects on its own. It's something that you can plead or not plead.

MR. WILBORN: That's correct.

QUESTION: So that the Government is kind of saying, we're not going to plead it because we don't want all these appeals.

MR. WILBORN: That is correct, Justice Ginsburg. It is an affirmative defense that if the Government chooses to waive, as apparently they have done, that only benefits claimants, and it would -- if there is any danger of this opening the floodgates after Finkelstein nearly 8 years ago said this was a possibility, and then after Schaefer pretty much affirmed that, and then in the Tenth Circuit in the Nguyen case cited in the briefs, no one in the Tenth Circuit has done this again. Apparently I'm a sole practitioner who does this.

QUESTION: Why have you? Why -- you said in your brief -- I took it from the brief -- I want to be sure I understand your answer to the Chief Justice's question.

MR. WILBORN: Yes.

QUESTION: I take it that a person who gets a remand out of the court is probably going to get his

benefits.

I mean, you know, they have a lot to do over there, so probably -- it would be an unusual case that you go up to the circuit not just to get -- you know, to get the remand but actually force the circuit to tell them to award you benefits. That's an unusual case.

Now, if you do that you might lose the whole thing, because I take it if you go up they're going to say, it wasn't even right to remand it. This is well within the discretion.

Now, I take it this is well within the agency's discretion. Most of these things involve bad backs or pain and that kind of stuff, and most of them are within the agency's discretion. So if you win your case here, I take it your client may end up with nothing.

MR. WILBORN: Justice Breyer, that's exactly correct. That's exactly what happened in the Tenth Circuit Nguyen case.

QUESTION: So why are you bringing it then?

MR. WILBORN: It's a major risk.

QUESTION: Why do you think you'll get the money from the agency?

MR. WILBORN: Because I am concerned that if we don't appeal now -- the facts are so favorable for us, and she is a younger individual with an unpopular illness,

that if she doesn't take it up now, the facts on remand will be even worse for her.

If I have any time left, Mr. Chief Justice, I'd like to reserve for rebuttal.

QUESTION: Very well, Mr. Wilborn.

Ms. Blatt, we'll hear from you.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE RESPONDENT

IN SUPPORT OF THE PETITIONER

MS. BLATT: Mr. Chief Justice, and may it please the Court:

There are two requirements that must be met for a party to appeal a district court's judgment under section 1291. First, the judgment must be final and, second, the party must be aggrieved by the judgment.

As to finality, this Court concluded in both Schaefer and Finkelstein that under the fourth and eighth sentences of section 405(g) a district court's order of remand is a final judgment.

As to aggrievement, the district court's decision is partially favorable to petitioner to the extent that it sets aside the Commissioner's decision and it remands for further proceedings, but that judgment is unfavorable to petitioner to the extent that it denies her the outright reversal that she seeks, and that's a greater

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form of relief.

Therefore, because petitioner is not a fully prevailing party she's aggrieved by the district court's judgment and has a statutory right of appeal.

QUESTION: Is there on that question -- just remind me of what is basic civil procedure.

Imagine there were no agency involved in this case. I go into court as a plaintiff and I say, judge, I would like an injunction and damages, but by the way, if you don't give me the injunction, at least give me the damages. I'd like an injunction that tells him not to have that nuisance all day and all night, but if you don't say all day and all night, at least make it all night.

So what the judge says is, only damages, and in the day, so I got some but not all. Is there any doubt that I could appeal this on the ground I didn't get everything I wanted?

MS. BLATT: No.

QUESTION: No. Nobody contests that.

MS. BLATT: No. The --

QUESTION: So the only question in this case is whether the relationship of court to agency makes it special and is like the relationship, court to bankruptcy court, i.e., so you didn't have a final order.

I mean, the only issue in this case is whether

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the order is final, is that right?

MS. BLATT: In our view the -- it had to have been --

QUESTION: In other words, if there were no agency in this case --

MS. BLATT: Right --

QUESTION: And we had a virtually -- a judgment that gave one thing out of two, it certainly was appealable.

MS. BLATT: Yes.

QUESTION: Here we do have a judgment, one thing out of two. However, one of the things happened to be a word called remand instead of damages.

MS. BLATT: That's correct. In our view, the general understanding is, when you talk about the word aggrievement you compare the judgment entered with the judgment that was sought, and in this case petitioner pled in the alternative as a greater form of relief. She wanted a outright reversal and a remand for the immediate payment of benefits.

In the alternative, as a lesser relief, she wanted a remand for further rehearing for the proceedings before the Commissioner on her claim for benefits.

QUESTION: You see, what I'd thought is -- well, I was thinking bankruptcy judges, I think, and here I

might be wrong, but if a district judge has an appeal from the bankruptcy judge and it has five parts to it and one part involves a remand back to the bankruptcy judge, I'm guessing but I think that that's not appealable on the ground that it isn't final in respect to all of the aspects of the judgment.

Maybe I'm not right about that.

MS. BLATT: I don't know enough about bankruptcy law.

QUESTION: Okay. Well --

MS. BLATT: But I do know that under --

QUESTION: I might be wrong.

MS. BLATT: At least if you certify an issue for appeal under 1292(b) -- in other words, you take the finality consideration out of the picture.

All you have at question is whether the defendant was denied summary judgment and there's no question that the defendant would be aggrieved even though that there's a further proceeding in which he may not be found liable or, if it's the plaintiff, on which the plaintiff may win on the merits.

And in this case we have a final judgment that the Court has -- this Court has held clearly in Schaefer that the Court was prohibited from retaining jurisdiction, so there was nothing left in the district court. It was

final.

QUESTION: Ms. Blatt, you think, though, that an appeal could also be taken if the claimant waits until the end of remand?

MS. BLATT: The claimant would appeal the second decision if she lost. If she was again denied benefits, you would have a final decision of the Commissioner, the claimant would have a right to judicial review under the first and fourth sentences of section 405(g) --

QUESTION: And you think that -- suppose she chooses not to appeal now, let's it go back on remand, litigates it, and then is not fully satisfied that she can appeal without having lost anything, as the claimant says she might do.

MS. BLATT: That's correct.

QUESTION: That's -- that couldn't possibly be right. That's the -- when she goes back -- if I understand this. I may not, but I thought the answer to Justice O'Connor might have -- what was said so far is, it's now remanded.

MS. BLATT: Right.

QUESTION: She now has a new proceeding. At the end of the new proceeding she gets nothing. She now appeals on two grounds. The first ground is, of course, in the second when I should have gotten something.

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MS. BLATT: Correct.

QUESTION: The first ground is, even if they're right about the second proceeding, I deserved to win the first time.

I deserved to win the first time, and that claim I think is the claim that's lost, just as you cannot appeal a denial of a summary judgment when you have had a final judgment against you on the merits. You can't appeal on the ground I should have won the summary judgment even if I lost the trial.

MS. BLATT: As a --

QUESTION: I think that's his complaint.

MS. BLATT: Well, as a practical matter I don't know that it would seem logical to work like that. If this petitioner is denied benefits on remand it will be because the Commissioner thought that there were other jobs, and the claimant will have every opportunity to raise the rejection of her pain testimony and the rejection of her treating physicians --

QUESTION: No, but he will -- he wants to say one thing. Judge, even if the fall of 1998 there are adequate jobs, there were not adequate jobs, and that was clear in 1996, or 1995, whenever that first proceeding took place.

MS. BLATT: Right.

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QUESTION: And that's the claim he's worried about losing.

MS. BLATT: Right. Well, in our -- and it is our position, although it's the second decision that's being reviewed, collateral estoppel would not be applied and the claimant will have not lost the opportunity to challenge previous errors in the district court --

QUESTION: Well, if Finkelstein is going to be followed, and it is final, then why wouldn't collateral estoppel attach, and why would anyone be able to say, look, I should have won the first time around, if, following the entry of a final judgment in that proceeding, one then goes in -- through a new series of litigation, what is a new case by definition?

MS. BLATT: Right. Although collateral estoppel normally applies when review is available and not sought, it simply would not make any sense. It would defeat the whole point of collateral estoppel to apply it.

QUESTION: Ms. Blatt, wouldn't there be some doctrine other than collateral estoppel?

I brought up before, and I think that Mr. Wilborn agreed with me, collateral estoppel, res judicata, claim preclusion, issue preclusion, these are not things that a court brings up on its own. These are affirmative defenses that you can raise or not, so if

we're simply talking about preclusion doctrine, it's in the Government's control.

The question I think Justice Breyer meant to raise was not issue preclusion or claim preclusion, but is there something in the finality doctrine, once you give it this final label, that gets the court into the act, something that the court would raise on its own, where a court would not raise preclusion doctrine on its own?

MS. BLATT: Well, courts have raised preclusion doctrines on their own, and it may be they're concerned about finality.

But what I'm trying to communicate as a practical matter, if the claimant simply goes back on remand and loses, the four issues that are right now on appeal in the Ninth Circuit could be raised again in the district court and the district court might reject them saying, well, I already considered that and I'm not going to change my mind, and that's probably what's going to happen, but petitioner would have every opportunity on appeal to the Ninth Circuit after remand to reargue the merits of this that were rejected by the district court.

QUESTION: But what wouldn't -- I think the way the court would get into it, willy nilly, the Government, is that I certainly would be disposed to say the issue that you're raising pertains to a prior decision of the

Secretary.

What you're seeking to review this time is a totally different decision. The prior decision was set aside. There's been a new proceeding below. It is this new proceeding that I'm reviewing now, and the point you're trying to raise pertained to an old decision that's gone. I'm not sure that's a --

QUESTION: That's the point.

QUESTION: Right.

QUESTION: And it's not claim preclusion or issue preclusion.

MS. BLATT: Right, but the second decision, the claimant in the second hearing is going to argue, I'm credible, I have too much pain, I can't work, my treating -- that's all the evidence she has, is that I'm in pain and my treating physician thinks I'm in pain and I can't work. That's her evidence, and the Commissioner is going to reject it again, most likely.

He's free to change his mind in her favor, but he's also free not to because the district court found that there was substantial evidence.

So the issue about whether she has any evidence, whether there's any evidence of her disability and whether the Commissioner met his burden is going to be on -- at issue in the review of the second decision.

QUESTION: No, but there's -- she wants to raise a different issue. She wants to say, regardless of what happened in the second proceeding, at the end of the first proceeding I was entitled as a matter of law to prevail because there was this one issue, as litigated in the first proceeding, upon which I was entitled to win.

The court I suppose at that point is going to say, no, you can't do that, because Finkelstein says the first proceeding was final and you did not appeal it.

Now, that can be raised by the court, and why wouldn't the court say that?

MS. BLATT: Well, I guess my -- our position is, as to whether -- in terms of whether she waits, she's not going to get interest on this money. The ultimate question at the end of the day is whether the Commissioner met his burden of finding that she was not disabled, and she's either going to get her benefits on appeal or she's going to get them back on remand, but in terms of what she recovers --

QUESTION: Yes, but let me ask the question another way. If, in fact, following the second proceeding, she may then litigate what she believes -- if she chooses to go through the second proceeding without appealing, if she may then litigate what she believes is the error in the first proceeding, what's left of

Finkelstein? It doesn't look very final to me.

MS. BLATT: No, it's a final judgment in the sense that it's immediately appealable. The district court lost jurisdiction over the case.

I mean, that's what FInkelstein held, that the court didn't have the power to retain jurisdiction and later in Schaefer it repeated that it terminated the action and it became immediately appealable, and that's why this is a final judgment that petitioner -- this is why the Ninth Circuit had jurisdiction and she was otherwise aggrieved.

QUESTION: Yes.

MS. BLATT: The issue as to what happens on -- not this case --

QUESTION: Well, if it's final, she can appeal, she doesn't appeal, why doesn't she waive her appeal?

MS. BLATT: She waived her right to appeal the first action, but for purposes of whether she's entitled to disability benefits and whether the Commissioner had substantial evidence in denying --

QUESTION: Oh, well then, maybe I misunderstood you. I thought you were saying that at the end of the second proceeding she could still appeal what she thought was the error in the first proceeding, and the point upon which she didn't prevail. Is that your position?

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MS. BLATT: Yes, because --

QUESTION: Yes.

MS. BLATT: -- the legal position in petitioner's brief is going to be the same whether she appeals now or appeals later.

QUESTION: Well, it may not be, because there may -- Justice Breyer's example. There may be evidence in the second proceeding of job opportunities that were not there, the evidence that was not there in the first proceeding. She still wants to say, regardless of what happened in the second proceeding, on the record in the first proceeding I was entitled to prevail and you're saying, yes, she can do that.

MS. BLATT: Well, maybe this is a question of when -- at what point she became disabled, but she claims her onset date was back in November of 1991 and so for purposes of whether there were jobs, I think that's what you'd be looking at. The only thing that changes with time is basically her age. I mean, she gets older, and therefore it's more likely she becomes disabled as she gets older.

QUESTION: Well, what you're saying is that necessarily in the second appeal everything that was subsumed in the first appeal is going to be presented.

MS. BLATT: As a practical matter --

QUESTION: No harm, no foul.

Let's assume that that's not right. Let's assume that there was a theory presented in case number 1, and the district court said, you cannot proceed on this theory, and she then proceeds on a second theory.

If she does not appeal the first judgment, may she still in the second proceeding complain about the error of the district court on the first go-around?

MS. BLATT: I'm not sure how that would work out in practicality, but what you may be describing is a situation where a claimant has an interest in taking an immediate appeal and doesn't want to wait. If the claimant feels as a practical matter --

QUESTION: I'm asking, suppose she does wait. Can she still -- does she still preserve the issue that was resolved against her in the district court on round 1?

MS. BLATT: I think it is preserved, but it's --

QUESTION: But why, if it's final, other than just the Government is not going to raise it? I was going to say it's the law of the case, but then you'd say, well, it's a different case, so --

MS. BLATT: It's final, and the first decision is no longer -- maybe it's a question of semantics. The Commissioner's first decision is no longer subject to appeal, and so what is on appeal is the second decision,

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but in --

QUESTION: So that she can lose the right to raise the specific theory, to advance this theory, because she's not appealed it.

MS. BLATT: The reason why it's difficult for me to answer that question is, I'm not sure there is such an example as a factual matter, where the evidence wouldn't be present in the second hearing.

QUESTION: Well, let's take this case. She -- there was an expert that the -- was not credited, and there was some of her testimony that wasn't credited, and she wants at the end of the line to say, I didn't get as much as I should have, or I didn't get anything, but if they had only believed me, if they had only accepted my first expert.

That's a case that you can -- it's a concrete case, so --

MS. BLATT: That is what she's arguing now, and it's what she could argue later, because --

QUESTION: The question is, if she did not take this first appeal, she goes back, she does what they allow her to do, still her expert doesn't come in and they still disbelieve her. Then can she raise those alleged errors the second time around, although she didn't take a first appeal?

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MS. BLATT: Yes. Oh, I see my time's expired.

QUESTION: Yes. You've answered the question, I think.

Mr. Snyder.

ORAL ARGUMENT OF ALLEN R. SNYDER

AS AMICUS CURIAE BY INVITATION OF THE COURT

IN SUPPORT OF THE JUDGMENT BELOW

MR. SNYDER: Mr. Chief Justice, and may it please the Court:

The petitioner here won a judgment in the district court that remanded the case back to the agency, where she has the opportunity to obtain all of the relief that she originally sought.

We believe that under those circumstances, where the district court granted her, in fact, the relief that was one of the alternative prayers for relief in her complaint, that under those circumstances she is not aggrieved by the district court judgment.

QUESTION: How is it any different than the run-of-the-mill case where a person goes into court and he says, I want damages and an injunction? You know, my example that I gave. I want a big injunction. If you don't give me that, give me a little injunction. If you don't give me the little injunction, give me damages. I want all three. Give me one, two, or three. I'd like the

most possible.

He gets one, he doesn't get two or three, he can appeal.

MR. SNYDER: The key difference, Justice Breyer, we believe is that in the normal case that you posit there has been a final decision from which there is no further proceedings, other than in the court of appeals.

QUESTION: Right. That's what I thought, too, but now we have a holding that this remand business, when you remand to an agency, unlike maybe some other remands, it does count as a final decision of the district court for purposes of an appeal, and once you have that holding which, I take it, is a holding of this Court, isn't that -- though your brief is very good, and you're an amicus, and I appreciate your work, but isn't that the end of it?

MR. SNYDER: We do not believe it is the end, Justice Breyer, because while the judgment is arguably final, and we can talk about the meaning of Finkelstein further, that accepting Finkelstein as requiring that this be viewed as a final judgment, that does not, we believe, resolve the question of whether under this statute, which opposes an additional limit on appealability -- the statute says that the judgments under 405(g) are final, except that they shall be subject to review in the same

manner as other judgments in other civil actions, and those standards that are applicable to other civil actions include, we submit, the appellate standing doctrine for which we've cited --

QUESTION: But Mr. Snyder, why couldn't in the same manner mean in the same mode, like, I have 30 days to file a notice of appeal, or 60 days, or whatever it is? Why doesn't manner just refer to the procedural thing?

MR. SNYDER: Well, we certainly agree that it includes the examples that you gave, Justice Ginsburg, but it doesn't seem by its language to limit it to particular procedural requirements.

It says it's subject to review in the same manner as other judgments, and we think that the Roper case that was cited from this Court and numerous other cases have made clear that the appellate standing doctrine is one of the doctrines that is looked at in all cases to be sure that an appellant in fact is aggrieved, and that someone should not be appealing a decision, whether it's a final decision or a nonfinal decision, unless they are aggrieved.

And here, what is perhaps unique about this case is that under this statutory scheme you have a judgment that is labeled final, but in this situation, which is a very common situation under this statute -- we understand

from the Government that there are literally thousands of remands like this per year.

In this situation, while it is labeled a final judgment, it is nevertheless a matter that will proceed on a remand where, unlike Justice Breyer's hypothetical, where the claimant has the opportunity to obtain every bit of the relief they seek. They can't obtain it today. They can only obtain it after the remand.

QUESTION: Mr. Snyder, suppose we had a Finkelstein-type appeal, so the Government, after the remand order the Government wants to appeal, we know it can. The Government's position is, we were right. This person's not entitled to any benefits, period. No remand. The Government could appeal, right?

MR. SNYDER: Yes, ma'am.

QUESTION: Could she cross-appeal, then?

MR. SNYDER: Not under the circumstances of this case, where we think she lacks standing, and we think that that's not such an anomalous result as suggested by the Solicitor General's brief, because, for example, in cases dealing with remands to agencies in a typical APA-type case, that is normally not a final, reviewable decision.

But there is a line of cases such as Occidental Petroleum v. SEC, and some other cases we've cited, that provide an exception where the Government can appeal the

remand if the matter is otherwise not susceptible to review by the Government, and that is actually the Finkelstein holding in an analogous situation.

So a so-called one-way right of appeal, where only the Government can appeal today, but the claimant has to wait and appeal after the remand, is a rule that is in place today with regard to administrative agency cases generally.

QUESTION: Not a very efficient way to run a show, is it? I mean, if it's up there for one purpose, you might as well hear everything.

MR. SNYDER: Well, I think that the alternative, which is suggested by both the petitioner and the respondent, is extremely inefficient in the sense that there are 4,000-and-some remand decisions every year from this agency.

We know that as a statistical matter, 60 to 65 percent of those cases results ultimately in a decision after the remand in favor of the claimant. To allow the claimants to appeal and clog the Federal courts with potentially thousands of additional appeals when the claimants can get the same relief faster, we submit, by simply going through the remand process --

QUESTION: Well, this isn't just limited to Social Security cases. I was surprised that your brief,

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or for that matter the Government's brief didn't cite a lot of cases involving other agencies.

I mean, we've had judicial review of administrative action for a long time with respect to hundreds of agencies and, in fact, those proceedings often result in a remand to the agency which does not give the claimant as much of a correction of the agency's action as the claimant would like. Do you have --

MR. SNYDER: The main difference --

QUESTION: -- would you expect a whole bunch of cases involving this issue.

MR. SNYDER: Well, I don't believe that a decision here is likely to affect the broad array of such cases, Justice Scalia.

QUESTION: Why?

MR. SNYDER: Because in the Administrative Procedure Act in the normal situation of a review of an agency decision I don't believe that you have the finality ruling that you have in this case.

QUESTION: Oh, you think that --

QUESTION: And anyway, most of them go to the court of appeals.

QUESTION: Do you think that in an ordinary case involving -- well, whether it's district court or court of appeals, when they finally get done with that, do you

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think that's not a final judgment?

MR. SNYDER: Absent -- in most cases I think it's not if they remand, Justice Scalia.

QUESTION: Do you have cases to that effect?

MR. SNYDER: Well, the Occidental Petroleum case I mentioned cites scores of cases that say that in a typical review of an agency action the claimant, or the person challenging the agency action cannot appeal when there's been a remand, but there's an exception sometimes for the Government. In other words --

QUESTION: But you're saying that they're not aggrieved, and I'm puzzled, like Justice Scalia is. It seems to me that we hear cases from, say, the D.C. Circuit all the time where they've remanded but the legal theory is contested.

MR. SNYDER: I didn't mean to suggest that they're not aggrieved. We didn't cite those cases for that proposition at all.

I'm simply saying that with regard to the applicability of this decision to typical agency review cases I think it is not likely to be broadly applicable to those because, for separate reasons, those cases are not necessarily viewed as final decisions if they're --

QUESTION: Well, maybe I misunderstood you. I thought in your argument here today you were saying that

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they were not aggrieved.

MR. SNYDER: I am -- our principal argument in today's case, with regard to this claimant, is that she's not aggrieved. We are not arguing today that there's not a final decision, because under 405(g) and under Finkelstein, at least arguably, and the Ninth Circuit held, that this is a final decision.

QUESTION: But sticking with the aggrieved, isn't she aggrieved because the wrong legal theory was adopted, just as in the routine case where we take cert, say, from the D.C. Circuit after it remands to an agency and it comes up here first?

MR. SNYDER: Well, typically the Court -- this Court does not, I believe, typically take review from a circuit court if there's been a remand decision except where the Government seeks review because it otherwise would not be able to obtain review of the issue.

In other words, if a claimant wins in a court of appeals and wins a remand for a new agency action, I do not believe this Court has -- I'm not aware this Court has ever accepted a cert petition from a winning petitioner, someone who challenged an agency action and won.

QUESTION: How about if the person just wins partially and it's remanded? That would be more equivalent to this.

MR. SNYDER: Well, if the remand offered them the opportunity, on remand, to win all of the relief that they were seeking, then I would argue that review would be inappropriate.

But to come back to the issue in this case, we know that here, the Ninth Circuit has held this is a final decision, so you do not have the typical issue that you have on most APA cases.

QUESTION: Why do you say she can still get what she sought? She can still get what she sought from the Social Security Administration. She cannot get what she sought from the district court.

What she sought from the district court was a reversal of the agency -- assume the district court was not about -- she can come to the district court and say, give me money. That's not what she sought. She sought from the district court a reversal of certain action taken by the Social Security Administration, various actions.

They gave her a reversal of some of the actions. They did not give her a reversal of the other actions. She can never get that reversal again, unless she gets it now.

MR. SNYDER: Well, I don't agree with the latter part of that, Justice Scalia, for this reason. What I think the claimant really wants is her Social Security

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disability benefits, whether they're ordered by the agency or ordered by the district court, or ordered by the court of appeals, and we disagree respectfully with the petitioner's suggestion that she is unable later to appeal a subsequent decision on remand.

QUESTION: You agree with the Government on that?

MR. SNYDER: Well, we agree partly with the Government.

We definitely agree she's able to file an appeal, and any issues that she lost in the first go-around which become pertinent in the second proceeding, preclusion principles the Ninth Circuit held, we think correctly, preclusion principles would not prevent her from raising those on the second appeal, given our position that she doesn't have the right to appeal now.

However, the Government takes the view that she does have the right to appeal now and typical preclusion principles we think require that if someone forgoes an available appeal, then they are precluded.

So our position is that applying straightforward preclusion principles and applying the appellate standing doctrine to this case, as the Ninth Circuit did, results in a very simple conclusion and that is, she is not able to appeal now because she's not aggrieved, but she has a

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remand opportunity at which, number 1, she can win everything she wants on remand or, if she doesn't, number 2, she can appeal then the agency decision.

QUESTION: She would lose in the district court.

MR. SNYDER: Yes.

QUESTION: But that doesn't mean she couldn't raise it in the Ninth Circuit, I take it.

MR. SNYDER: That's our position that she -- correct. She could raise it in the Ninth Circuit.

If the district court said we're going to maintain our same position after the second case as we did on the first, there is nothing in preclusion principles that would prevent the Ninth Circuit in the second remand case from then reviewing --

QUESTION: Oh, but I mean, my goodness, if you're talking about mucking -- I mean, I wouldn't think there would be a deluge of litigation if we, you know, adopted the Government's theory, because most people will be satisfied with the remand and won't want to risk losing it.

But if we adopted the theory you've just espoused that says, when there have been several agency proceedings and now finally we reach a final determination, and then it comes up to the court of appeals eventually, the litigant can not only complain of

all the errors in the most recent one, but can go back to the errors that normally wash out -- the summary judgment ones, the earlier proceeding ones, the -- et cetera, that I think might be problematic.

MR. SNYDER: No, I actually meant to say, Justice Breyer, and perhaps I misspoke, that after the second decision from the agency, that any issues from the first case that still affect the decision would be subject to review, because they would then be --

QUESTION: You mean the decision -- that still affect the decision in the second case?

MR. SNYDER: Yes, sir.

QUESTION: Yes.

MR. SNYDER: That's -- Justice Souter, that's --

QUESTION: But not issues that independent -- that are independent of the second case. Those are gone.

MR. SNYDER: If the decision -- yes.

QUESTION: Yes.

MR. SNYDER: If the decision on the remand didn't deal at all with some issue that was dealt with earlier, then in reviewing the second case there would be no issue to review.

QUESTION: Right.

QUESTION: Do you know how this works out? I thought -- I was trying to think of an analogy that I'm

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not positive of the answer to.

Suppose a company A sues company B for a breach of contract, and company A's claim in the district court is, I want $100,000 for the breach, but in the alternative this is the kind of breach that falls within an arbitration clause, so in the alternative, if I don't get the $100,000, send me to arbitration.

So what the district court does is, he sends the person to arbitration. Can company A appeal it on the ground that he wants -- the money?

He'll take the arbitration as his second chance, and it's no answer to him to say the arbitration may work out in your favor, because he's thinking it may not work out in my favor. I mean, maybe it will, maybe it won't.

So how -- I don't know if you -- I purposely picked an example I'm not positive of the answer to.

MR. SNYDER: Our position is that if a party asks a judge for a form of relief as an alternative, and indicating by asking it that this is something that the party is seeking, that it would be inviting the trial judge to make a supposed error if you allowed the party to turn around and appeal when the district judge did exactly what the party asked him to do.

QUESTION: So in my case, if I go look up authority, which I haven't looked up, and then I find that

in my arbitration case the person can appeal -- he says, A, I want $100,000, but if not, send me to arbitration.

They send him to arbitration. If I find out he can appeal that, the $100,000 -- you guess he can't. I guess he can't. If it turns out he can, then that really is a good analogy, and then you'd lose this one, I guess.

MR. SNYDER: Well, our -- we've actually made a couple of alternative arguments. One of our alternative arguments --

QUESTION: But is my analogy good or not? I wonder. I mean, I'm not -- I'm -- get a reaction.

MR. SNYDER: Well, I think it's a good analogy on the issue of whether the fact that you asked for a certain type of relief precludes you from then appealing when the court grants you the relief you asked for. I think it's a good analogy on that.

I don't believe it's applicable to our alternative argument, and really our first argument, which is that she's not aggrieved for the primary reason that she still can obtain all the relief she's ever sought. The Social Security benefits --

QUESTION: Mr. Snyder, is it your position that she could not appeal -- even if the Government appealed, she could not file a cross-appeal?

QUESTION: That was his answer.

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QUESTION: That's the logic of your position, and it is.

MR. SNYDER: I think it is the logic of the position. I agree it's not an ideal solution once a case is before the court. On the other hand, unless the court adopts some notion of pendant appellate jurisdiction, there either is -- there either is an opportunity for the claimant to appeal or there isn't. Then we believe it's --

QUESTION: Mr. Snyder, one of the questions that Justice Scalia asked, mustn't this come up over and over again with review of agency decisions, but we are dealing with a statute, and I'm not aware that the -- it seems to me that 405(g)(4) and (8) are unusual. Usually, when there's a remand you don't get a district court disassociating itself from the case. It keeps the case, so if it comes back again, it comes back again.

But this peculiarity of 405(g), what, (4) and (8), says, district court, you're done. You remand, you're done. If it ever comes back again, it's a new judge, a -- that's what makes this final and that's why, I guess, Congress used the word final. Are there other statutes, judicial review statutes like 405(g)(4) and (8)?

MR. SNYDER: Justice Ginsburg, we agree it's an unusual statute and that's what I was trying to get at

when I referred to the differences between it and the typical agency decision.

We have tried to find comparable statutes, and found some that are somewhat analogous, but I can't say that we found any that are precisely the same.

25 U.S.C. section 1276 governs review of decisions of the Surface Mining -- under the Surface Mining Control and Reclamation Act and it allows review by parties aggrieved by such a decision. It allows for modification of the decision. It doesn't specifically say that the remand is a final judgment, although it could be argued that that's the meaning of the statute.

There are many statutes that allow review by a court of appeals of particular agency decisions and that have provision --

QUESTION: Well, how could it be appealed by the Government? I mean, if it's not final, I assume it can't be appealed by either the winning party or the losing party. It's certain that if it's going to be remanded to the agency and the agency thinks it shouldn't have been remanded at all, the agency can appeal.

MR. SNYDER: That's right.

QUESTION: Right?

MR. SNYDER: The Government or the agency appeals --

QUESTION: Well, how can the agency appeal if it's not a final judgment?

MR. SNYDER: Well, there have been some cases, as I referred to earlier, where the Government appeals from what is admittedly not a final judgment but because there may not be an opportunity for the Government ever to appeal the particular ruling that the lower court has made.

QUESTION: This isn't a weird little exception. The Government appeals all the time --

MR. SNYDER: Well, this case --

QUESTION: -- when it's remanded, and you're telling me it's appealing all of these nonfinal judgments in the ordinary cases? I doubt it.

MR. SNYDER: Well, we certainly are not suggesting that the Government routinely appeals these cases.

I simply was trying to indicate there is an exception to the finality principle under which in some cases the Government has been allowed -- as in Finkelstein, in the Occidental Petroleum-type example, in a typical APA review, sometimes the Government does appeal a nonfinal decision.

QUESTION: Well, certainly in cases like California v. Stewart, where the evidence is thrown out in

a criminal case, we have allowed not only the Federal Government but the State governments to appeal, because if -- they might never have the opportunity to challenge that ruling again.

MR. SNYDER: And the -- Mr. Chief Justice, the key distinction, we think, between that case and all these other cases and the kind of situation we have here is that in this case we believe, under the appellate standing doctrine -- not finality issues, but appellate standing, the claimant is not aggrieved because at this point she has received not only the alternative relief she asked for in her complaint as a matter of pleading, but she also has received an opportunity to get every dollar of benefits she wants.

Unlike hypotheticals where someone gets damages and not an injunction, or vice versa, and there's no further opportunity for them to get the remainder of the relief, she may well -- the odds are she will get every penny she's asked for.

QUESTION: Is that what it depends upon, the odds?

MR. SNYDER: No, I --

QUESTION: I'll give you an opportunity to win a million dollars. Buy a mass lottery ticket. I mean, that's not a great opportunity. So now do we look -- you

know, she didn't get the money, which is what she wants. How do we use this word -- how would we use --

MR. SNYDER: She hasn't gotten it yet, Justice Breyer, and I agree --

QUESTION: Well, will she get it?

MR. SNYDER: Well --

QUESTION: She'd love to have that assurance.

MR. SNYDER: The courts will know whether she gets it, we'll all know whether she gets it after the remand, and if she gets it, there never will need to be an appeal.

There -- to take an appeal today is a waste of time of the already overburdened Federal appellate courts to have an appellate process on a hypothetical issue where she may --

QUESTION: But that's not quite --

MR. SNYDER: I can't quantify it. She may get her full relief without the appeal.

QUESTION: But that's not completely true, is it? Is it not possible that on the present record she might prevail on appeal, but that on remand, additional evidence which comes into the record would make it less clear that she would prevail? I mean, it seems to me the evidence would go against her as well as for her after a remand, when there's more evidence in the record.

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MR. SNYDER: Well, if the subsequent decision were based on legal rulings from this earlier case we think they could be reviewed later, but if -- I understand, Justice Stevens, your question to be, if there's simply a new record --

QUESTION: Right.

MR. SNYDER: -- and the facts are different in the new case, then I agree that the courts would review the new record based on the record as it then stands, and that's not uncommon.

QUESTION: No, but it could be more -- less favorable to her, that's all I'm saying. It could be.

MR. SNYDER: Well --

QUESTION: She might have just exactly what she wants in the record now, and she thinks as a matter of law she's entitled to prevail now, but when more evidence goes in it might not be quite as clear.

QUESTION: Which is what is going on here, if I understood counsel's presentation correctly.

MR. SNYDER: I don't really think it is what's going on here, Justice Scalia. If you review the appellate briefs of petitioner in the court below, as well as looking carefully at what she alleges are the errors as she's filed her papers here, she is arguing basically legal errors by the district court.

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She's saying that as a matter of law there were mistakes in the phrasing of hypothetical questions, in the credibility determinations -- she's not simply saying, lack of substantial evidence. She's raised legal issues.

QUESTION: That's a good point, so why wouldn't we make that same point to the Government? I mean, your basic argument. Why wouldn't we have said to the Government, Government, look -- you know, in a case when they opposed the remand -- Government, what are you complaining about? After all, the case was remanded. You have an opportunity to win. And if, in fact, you lose, well, you can make all your arguments later.

MR. SNYDER: Well, in a case -- this Court's decision in United States v. Jose that we cited, the Court allowed the Government to appeal that nonfinal decision because there were particular provisions in the Court's decree that were binding on the Government in the meantime. It wasn't simply a question of, the matter can be resolved later.

So I think there are some situations where the Government never could get review of the issue that it seeks to raise because the remand proceedings will wash out the legal issue.

That is not this case, we submit, and I also would point out on the issue of cross-appeals that

typically a -- an appellant can defend the judgment on any grounds that would allow for support of the judgment, so even if technically on the appeal of the second decision, even if the claimant can't file a cross-appeal, they in most cases could defend the judgment on other grounds and therefore have their opportunity to raise their issues.

QUESTION: Now, do I -- what you said just before this, do I understand it to be your position that in these cases -- you know, I mean, she's only gotten half of what she wanted, but the Government has only gotten half of what it wanted, and the Government may win when it goes back, just as she may win when it goes back.

Do you assert that the only reason the Government can appeal in these cases is if and when the Government would have no other opportunity to raise the question? We have to look into that in every case?

MR. SNYDER: No, Justice Scalia, because this Court's decision in Finkelstein held to the contrary. This Court held that the Government can appeal these cases and it didn't require a showing of --

QUESTION: Right.

MR. SNYDER: -- particularized need. It simply held --

QUESTION: I thought so, which is -- makes it sort of inconsistent with your theory. I mean, given

Finkelstein it seems to me clear that even though the Government might get what it wanted when it went back down, it could appeal, period.

MR. SNYDER: Finkelstein --

QUESTION: Why should the rule be any different for the other side?

MR. SNYDER: Finkelstein only decided the issue of finality, Justice Scalia, with reference to this statute. It did not address appellate standing.

So we are prepared to assume, for purposes of this argument, as did the Ninth Circuit, that this is a final decision. One could debate the meaning of Finkelstein. It actually could be interpreted differently, but --

QUESTION: Well, you can't have it both ways. Either Finkelstein decided the question I asked you, or it didn't decide the question I asked you.

You told me that Finkelstein decided that the Government can always appeal, despite the fact that it may get what it -- that it may not be aggrieved, that it may get what it wants on remand. You said Finkelstein decided that.

MR. SNYDER: Yes, sir.

QUESTION: But then you go on to say, Finkelstein only decided finality. What is it?

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MR. SNYDER: I -- let me try to be clearer, Justice Scalia. Finkelstein decided, based on finality principles, that the Government can appeal because it's a final decision.

QUESTION: Well --

MR. SNYDER: Finkelstein simply did not address appellate standing.

QUESTION: Oh, it didn't address appellate standing. So you then take the position that in some cases the Government won't be able to appeal either, unless you can show that the Government cannot otherwise raise the point it wants to raise.

MR. SNYDER: Well, we --

QUESTION: That would have to be your position.

MR. SNYDER: It's not a position we've taken up to this moment, Justice Scalia.

QUESTION: No, I know it isn't, because it's not a very attractive one.

(Laughter.)

QUESTION: But it follows from your argument, I think.

QUESTION: Well, the Secretary never appeals to the district court, does he? I mean, he doesn't --

MR. SNYDER: No.

QUESTION: So the only people who appeal to the

district court are the claimants.

MR. SNYDER: That's correct. The Secretary apparently does not have the right to appeal his or her own decision to the district court, but I take Justice Scalia's position to be --

QUESTION: No, but when the Government loses, the Government can still go -- I assume that when the Government loses in the district court, it can always go up, and I don't think you have to look to see, could the point be raised elsewhere. We just say it can go up, even though the Government, if it were remanded, may come up on top -- come out on top anyway.

MR. SNYDER: I agree that the issue of appellate standing has never, to my knowledge, been raised with regard to a Government appeal to a circuit court in this --

QUESTION: But once the decision has been held final for purposes of the Government's dissatisfaction, what other issues might come into a question of whether the Government has appellate standing that have not already been subsumed in whether the decision is final for purposes of the Government's ultimate right to appeal it?

I mean, you're saying there was a decision about finality, so that at some point the Government could appeal it, but I mean, we're -- I assume, for example,

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we're not talking about attorney's fees here, so what else might the Government have to show to provide appellate standing that it had not also shown in order to get the determination that it was final as to the Government?

MR. SNYDER: If someone were arguing that the Government was not aggrieved by the decision, then obviously, if the Government could show that there was an issue of law that couldn't otherwise be reviewed, they would most clearly be aggrieved.

But I take your point, Justice Souter, that one could argue that in any case the Government ultimately might win on the remand, and I think that's an issue that the courts simply haven't addressed.

QUESTION: I guess I come back to the point that Finkelstein is terribly, terribly subtle if it was reserving the point of aggrievement.

MR. SNYDER: I don't believe it was reserving --

QUESTION: It's a rather misleading case, I guess.

MR. SNYDER: Justice Souter, I don't -- I'm not asserting that it reserved that issue. It simply hadn't been raised, wasn't addressed, wasn't considered, I would submit, and obviously one could read Finkelstein as opening up the doors and saying that both sides can appeal every one of these cases.

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We simply submit that would result in hundreds and perhaps thousands of needless appeals where, at least as to the claimant -- I'm not sure as to the Government, but at least as to the claimant we know that she has the opportunity to get complete relief on remand. It is actually less expensive --

QUESTION: But wouldn't claimants' attorneys appreciate that, too? What was the figure in the brief, something like 60 percent of them -- if there's a remand, 60 percent of them end up getting benefits?

MR. SNYDER: Yes, ma'am, between 60 and 65 percent.

QUESTION: So wouldn't -- whether there is that second opportunity or not, wouldn't many attorneys say, look, save the money?

MR. SNYDER: I'm sure many would. On the other hand, many would like two bites at an apple and take the view that, let's try the appeal and we'll get the remand later. It's hard to predict.

QUESTION: Thank you, Mr. Snyder.

MR. SNYDER: Thank you.

QUESTION: You appeared here as an amicus by appointment to the Court, and the Court wishes to express its appreciation to you.

MR. SNYDER: Thank you.

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QUESTION: Mr. Wilborn, you have 1 minute remaining.

REBUTTAL ARGUMENT OF RALPH WILBORN

ON BEHALF OF THE PETITIONER

MR. WILBORN: Thank you, Mr. Chief Justice.

I just wanted to clarify that Justice Scalia's characterization of what's going on here a minute ago is exactly what's going on here. We are concerned that on remand the facts will change and we'll have a different case.

It is also our position that we do waive the right to appeal the instant case if we do -- if we choose to accept the remand proceedings. The nature of the case coming up on remand will be totally different. Res judicata will bar us from subsequently raising -- if we had, for example, three or four remands to the agency, and all of those were preserved so that we could argue one, two, three, four seriatim upon appeal to the circuit courts, that would just swamp the courts. That would not be sensible, and that's not --

QUESTION: Mr. Wilborn, you're an expert in this area, and I'm just -- in listening to this hour's argument I'm wondering, why wasn't the Social Security benefit arrangement ever changed to conform to the railroad retirement by simply cutting out the district courts?

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Then you have only one level of appeal, and you don't have this question. Was that ever proposed?

MR. WILBORN: I'm not aware that it ever was, Justice Ginsburg, although it may be --

QUESTION: Because it's what, five levels now, three inside the agency and two in the courts?

MR. WILBORN: Yes.

QUESTION: Possibly six.

MR. WILBORN: Justice Ginsburg is no longer a court of appeals judge, or she wouldn't --

(Laughter.)

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wilborn.

MR. WILBORN: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 12:24 p.m., the case in the above-entitled matter was submitted.)

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SANDRA K. FORNEY, Petitioner v. KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY
CASE NO: 97-5737

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BY Ann Marie Fedrico

(REPORTER)