IN THE SUPREME COURT OF THE UNITED STATES

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MARCELO MANRIQUE, :

Petitioner : No. 15-7250

v. :

UNITED STATES, :

Respondent. :

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Washington, D.C.

Tuesday, October 11, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

PAUL M. RASHKIND, ESQ., Assistant Federal Defender, Miami, Fla.; on behalf of the Petitioner.

ALLON KEDEM, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case No. 15-7250, Manrique v. United States.

Mr. Rashkind.

ORAL ARGUMENT OF PAUL M. RASHKIND

ON BEHALF OF THE PETITIONER

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

A single notice of appeal perfects the criminal -- the appeal of a criminal judgment and sentence even if a part of that sentence is deferred. It doesn't matter whether the appeal is first noticed at the completion, after restitution is decided, or if the appeal is noticed at the outset, after the initial sentencing hearing. In either event, that single notice of appeal perfects appeal of all issues that arise within that judgment and sentence when it is fully completed.

We know this in part because of the Court's decision in Dolan. In Dolan the Court struggled with the mechanics. How was the Court going to evaluate the Mandatory Victims Restitution Act? What does it require a district court to do? And after struggling through those mechanics, the Court said that essentially the

second document fills in an amount-related blank in the original judgment that made clear that restitution was applicable.

It is clear that what happens second, the restitution part, is nothing more than a completion of the original judgment and sentence. It is not a new judgment. It is not a new sentence. It is simply a completion, a fill-in-the-blanks as the Court has phrased it.

We know not only from Dolan that this should be the case, but we know it also by looking at the criminal appellate rules as they relate to criminal cases. If we go down one by one each of the sections of 4(b), each section leads to a single conclusion. Only one notice of appeal is required.

JUSTICE GINSBURG: What about 3(c), which requires the notice of appeal to designate the judgment order or part thereof being appealed? So a notice of appeal can't designate an order that has not yet been made.

MR. RASHKIND: That's correct, yet it's not entirely correct. 3(c) says designate the judgment under review, which we've done here. It was the initial judgment, the June 24 judgment, and that is the one and only that's under review. At the time that it was

entered, it was interim or incomplete, provisional, something that the Court has seen previously in cases like Corey and Firstier Mortgage, judgments that were not completely filled out by the time the notice of appeal was filed. But we are only appealing the June 24 judgment as it was eventually completed by the later restitution proceeding.

We argue -- and I think the rules and Dolan make clear, that there is but one notice of appeal -- but one judgment in these cases and it only has to be noticed the one time.

If we look at the balance of --

JUSTICE SOTOMAYOR: How do you tell the difference between one judgment and an amended judgment? Are you suggesting you don't have to appeal from an amended judgment?

MR. RASHKIND: That's correct. In the case of the deferred restitution, the Court made clear that there was not an additional judgment occurring, an amended judgment or an additional judgment.

Again, to use the Court's words, the second document, if you will, is filling in the blanks of a judgment that was previously entered, leaving clear that those blanks were yet to be filled in. I --

JUSTICE SOTOMAYOR: So what happens if your

initial appeal ends before the restitution order is actually entered? Have you lost your right to appeal that second, that restitution order?

MR. RASHKIND: No, for the following reason, Your Honor. As we indicated at the outset, there are two times to appeal, and this has been recognized by the courts below as well.

There are two times that the defendant may appeal. He may either appeal at the outset right after sentencing -- actually the more logical time to do it would be at the conclusion of the case. There have been exceptions where defendants have wanted their appeals --

JUSTICE KENNEDY: At the outset right after sentencing?

MR. RASHKIND: Yes, Your Honor.

JUSTICE KENNEDY: Okay.

MR. RASHKIND: Right after sentencing, or again after restitution. So that option to appeal after the restitution is completed is always available. It remains available if the initial appeal has ended, if there never was an initial appeal. There is always an opportunity to appeal again. The 14 days commence with the original sentence, and again a window opens after the restitution is completed.

So there are, in fact, two, 14-day windows

for the filing of a notice of appeal. And that's not something we've created. That's something Congress has created.

JUSTICE KAGAN: Mr. Rashkind --

MR. RASHKIND: Well -- go ahead.

JUSTICE KAGAN: Mr. Rashkind, as I hear you now, you're saying something different from what I understood your brief to be saying, so maybe I just -- I understood your brief to be principally arguing that this was a consequence of Rule 4(b)(2), and so far, I haven't heard you mention Rule 4(b)(2). Instead, what you seem to be saying is that regardless of Rule 4(b)(2), we should treat the initial judgment and the later judgment as though they are the same judgment. And 4(b)(2) doesn't have to exist for that argument to be correct. I'm not saying that argument is correct, but it's a different argument than the argument I understood you to be making in your brief.

So which are you making?

MR. RASHKIND: I'm really making both. I'm not saying 4(b)(2) is not part of this equation. I began to say that earlier, when I started to go down the parts of rule 4(b) that I think clearly show we're dealing with a single judgment here. 4(b)(2) is very, very helpful to us, because it incorporates the Court's

decision in Lemke from 1953 in which the Court really looked at the question of what does a premature notice of appeal really mean, if anything, and how much significance does it have, if any.

A theme that the Court -- that case Lemke became Rule 4(b)(2), and the Court revisited this in Firstier Mortgage when it said there is a difference between something that's tardy and something that's early, and that the vice of one is not the same as the other. In the case of something that's tardy, we are talking about the failure to allow a judgment to become final as it should, once the time expires for appeal. And that's why the court is very, very concerned with something that's tardy. But as in Firstier Mortgage, and originally in Lemke, there is a recognition if you file something too early, that's just a technical violation.

JUSTICE KENNEDY: In your view, if you have ordered an entry of a conviction based on jury verdict, fixing sentence, order of restitution, amount to be determined within 60 days, can you wait 60 days to appeal everything? Or must you file the first notice of appeal within 14 days as to the sentence and the order of conviction?

MR. RASHKIND: No, I think you -- certainly,

I believe that that was the natural progression; you waited until the completion of the full judgment in sentencing.

JUSTICE KENNEDY: You -- you can now wait until the order of restitution before you appeal the sentence and the order of conviction?

MR. RASHKIND: You -- you can -- you can wait until restitution is completed to do that.

JUSTICE KENNEDY: Do you understand the government to take that same position? I can ask the government, but...

MR. RASHKIND: I'm not sure that we've -- we've actually briefed it in that very way. I think that it -- before Dolan, most of the circuits actually handled it that way. In the Eleventh Circuit from where this case arises, that was precisely the process. The Eleventh Circuit would hold the notice of appeal in abeyance, would not let it go forward until the restitution judgment was completed.

JUSTICE KENNEDY: No, no. No. I asked, but that's -- but that's when the notice of appeal was timely filed. I'm -- my question is, can you wait to file the notice of appeal until the restitution amount is determined, say 60, 80 days later?

MR. RASHKIND: Yes. And the answer to that

is "yes." And that's because certainly, at that juncture, the -- the judgment is completed, and that window is always naturally open when a judgment is completed.

CHIEF JUSTICE ROBERTS: Well, it -- conceptually, at least, that seems odd. In other words, you're saying you can appeal what looks like a nonfinal judgment. It's got to be blank in it.

MR. RASHKIND: Right.

CHIEF JUSTICE ROBERTS: And you say you can appeal that, even though it's not complete. And then later on, you can appeal either the part that fills it in, or the whole thing. It seems to me that usually if things are -- they're either final or not, and if they are not, you can't appeal; and if they are, you can.

MR. RASHKIND: Although it may seem like that conceptually, that's precisely what the Court confronted in Corey, precisely what the court looked at in Corey. That was a provisional sentence that was to be completed with the actual sentencing hearing much later down the road, up to -- up to six months down the road, than the time the initial appeal would have been allowed. That didn't make -- make the judgment final at the time of appeal. It made it final enough. Because it was freighted with significant indicia of finality in

the language of Corey for it to be obtained upfront.

CHIEF JUSTICE ROBERTS: I'm not challenging your reading of the case, but, I mean, that's a very unusual type of approach when it comes to jurisdictional rules, you know, final enough, you know, and then you get other cases, are they final -- like this one: Is this final enough or not. It just seems to me we would be better served by a simple rule.

And even the rule -- well, if you can do two different things, that means the court gave a notice of appeal from the original judgment and they don't know -- they don't necessarily know if there's going to be anything more, right? The restitution may be insignificant enough that you don't feel it's worth adding that to the appeal issues, any number of things. So I don't see how they know should we hold onto this or not hold onto it.

MR. RASHKIND: Mr. Chief Justice, the -- the court of appeals never knows what the parties will be arguing in their briefs until they are filed.

CHIEF JUSTICE ROBERTS: No, no. I know they can't. Here, the question is whether you're going to add anything at all. I mean, obviously, if the restitution amount hasn't been entered, you can't challenge the amount. But they don't know in the court

of appeals: Well, is he going to file another notice of appeal? I guess we have to hold this in abeyance. And then you hold it in abeyance, and who knows for how long, because it doesn't actually have to be within the 90 days. It just seems to me a very confusing system.

MR. RASHKIND: As a practical matter, it has not been confusing at all to the courts of appeal, which have been -- who have been struggling with this, both before Dolan and after. We have identified in our brief 17 post-Dolan appeals, and the government has identified another 15 post-Dolan appeals. In every single one of those cases, some of which took five and a half years for the restitution to be resolved, three and a half years, two and a half years, many cases go by where they are resolved within the 90-day limit and -- and they are not --

JUSTICE SOTOMAYOR: So does the Eleventh Circuit routinely hold their appeals until the restitution transcript is available?

MR. RASHKIND: At one time, at one time, the Eleventh Circuit actually took the position it had to wait. It had no jurisdiction to proceed. But post-Dolan, post-Dolan, it has modified that position.

JUSTICE SOTOMAYOR: But it waited here. Why did it wait here?

MR. RASHKIND: Because it does wait. And that's the tradition in the Eleventh Circuit. They look at the judgment -- they look at the judgement. They -- the court and the parties all know that there's a restitution matter outstanding, and it's held in abeyance.

JUSTICE SOTOMAYOR: Well, I just asked whether they did it routinely, and you said not post-Dolan.

So what do they do now?

MR. RASHKIND: They do it, but I was saying before, they did it because to them, it was a jurisdictional issue. It's not jurisdictional anymore, but, yes, they still awaited.

JUSTICE SOTOMAYOR: But they still did. So they don't know whether you're going to challenge it until the brief comes in?

MR. RASHKIND: That's correct.

JUSTICE SOTOMAYOR: But they're holding it anyway.

MR. RASHKIND: That's correct, Your Honor.

JUSTICE SOTOMAYOR: Do they give up holding it if you ask them to give it up?

MR. RASHKIND: It -- it doesn't require a true holding, because if we count the days it takes an

appeal to go forward, there's 14 days to file a notice of appeal, 14 more to order the transcript, 30 more for the transcripts to come in and --

JUSTICE SOTOMAYOR: No, no, no. I understand we're in a mine run case. But how about in those cases where restitution orders can take a year, two years, three years? What does the Eleventh Circuit do?

MR. RASHKIND: The Eleventh Circuit, as every other circuit, has awaited the outcome of the restitution orders, the restitution answer, before it goes forward to decide the appeal. In all of the cases that were identified in the Petitioner's brief, and for that matter, in the government's brief -- that's 32 cases. There may be some duplicates there. Post-Dolan cases -- a single panel of a single court of appeals captured all of the issues that were to be heard in one case. They were not concerned or troubled by anything that was still outstanding.

The reason for that really was predicted by the Solicitor General's brief in Dolan itself. It said that in most cases we can expect that the court will resolve it either at sentencing or within 90 days, and that most appeals back then would take 12 months. Now they take 10.6 months. That's plenty of time for the

record to be raised, the new transcript of the restitution hearing to be prepared, as it was in this case, and for the parties to be able to fully brief the issue.

JUSTICE KENNEDY: Well, I'm not so sure. You're adding at least 90 days under your rule. And in the meantime, if there is to be a new trial, we have problems with witnesses being unavailable, the defendant often in custody during this time. Three months is not insubstantial.

MR. RASHKIND: It is not insubstantial, but it is -- it is three months, 7.6 months shorter than the average appeal. I don't believe that there's anything about these cases --

JUSTICE KENNEDY: The average appeal is too long. You're adding the 90 days.

MR. RASHKIND: Well, I don't think -- Your Honor, I would submit you're not adding 90 days. In many cases you may be adding -- in many cases you're adding no time, because it's resolved either at sentencing or -- not necessarily at the 90-day limit, but sometime within that time. That time is, if -- if I'm using an appropriate phrase -- dead time in an appeal anyway. It's when the briefs are being -- it's -- it's when the transcripts are being ordered and the

transcripts are being prepared. It is not time when the parties are yet briefing the case.

The first time under the Federal Rules of Appellate Procedure that a brief is due in most cases is on the 98th day, over three months after the notice -- after the judgment is originally entered. That's three months in the average case. That's if a court reporter does not ask for an extension of time to prepare the transcripts; that's if the parties don't need additional time. That's if the court clerk can prepare the record the day the last transcript arrives, which I think is a rarity too.

CHIEF JUSTICE ROBERTS: Counsel, you've been talking about how it works, or how you think it should have, but not any statutory reasons. You rely heavily on 4(b)(2), but it doesn't even seem to apply by its terms.

It says, "Notice of appeal filed after the court announces a decision, sentence or order, but before the entry of judgment."

And that would not seem to apply to a situation here. This wasn't before the entry of judgment, the appeal of the restitution part. It was -- it was after.

MR. RASHKIND: That is our argument, Your

Honor, that it is. The words "the judgment" in 4(b)(2) are not the -- the interim judgment. It's speaking in terms as the court in rules normally do, to the completed final judgment. And it is not completed until the restitution amount fills in the blanks of the original interim judgment.

Our argument is that it applies for precisely that reason because it is making reference to the completed judgment.

CHIEF JUSTICE ROBERTS: Well, but -- so you're saying the rule doesn't apply, what I understood to be the typical situation when it applies?

MR. RASHKIND: It --

CHIEF JUSTICE ROBERTS: The court announces a decision, you file the -- the notice of appeal, and then they get around to entering it in a couple of days?

MR. RASHKIND: It does apply. It applies in this setting. As the judge did in this case, he announces, because he must by law, and under the Dolan formulation he has to, he says, restitution is mandatory under the Mandatory Victims Restitution Act of 1996. I can't ascertain the amount of damages currently, so I'm going to postpone hearing on that. In this case, he postponed them for 60 days, ultimately decided just under 90 days.

CHIEF JUSTICE ROBERTS: So he hasn't entered a judgment with respect to the amount of restitution.

MR. RASHKIND: That's correct. The judgment he has entered is as to the conviction, as to the other aspects of sentence, which are final. But he has not yet entered a judgment --

CHIEF JUSTICE ROBERTS: But he also hasn't -- he also hasn't announced a decision, and this rule applies to a notice of appeal filed after the court announces a decision.

MR. RASHKIND: He has --

CHIEF JUSTICE ROBERTS: With respect to the subsequent order, that -- nothing about the amount has been announced yet.

MR. RASHKIND: He has announced it in the same way, for example, that the announcement was made in Corey, Behrens, and Firstier.

If I may explain: When he says restitution is mandatory, that's like the judge saying in a -- in a bench statement in Firstier Mortgage, I'm going to grant summary judgment. He doesn't explain any findings of fact or any findings of law, without which you can't each have an appeal. You wouldn't be able to have an appeal without those details.

When he says, I'm going to grant summary

judgment and nothing more, that's exactly like saying I'm going to grant mandatory restitution. It's required by statute.

In Firstier Mortgage, the court explored whether or not that type of a bench announcement, without the fleshed out details, was sufficient enough to initiate an appeal. And the Court said --

JUSTICE GINSBURG: But the bottom line was summary judgment. Here, no -- no amount of restitution has been determined.

MR. RASHKIND: The details, the amount have not been fleshed out. But the order is given that there shall be mandatory restitution.

JUSTICE GINSBURG: But there might not be an appeal when the defendant knows what the amount is. If the amount is small, defendant might not appeal. So we don't -- we don't know at the point where there's just a blank whether the defendant is going to appeal -- appeal the amount.

MR. RASHKIND: I think that's correct, but that's always correct that no one knows for sure what issues will be raised by the appellant until the brief is written.

JUSTICE KAGAN: Did I understand you, Mr. Rashkind, to say earlier that you think you would

have an argument even if 4(b)(2) didn't exist? In other words, and another way to say this is suppose we think that 4(b)(2) deals with a different situation from the situation that you're talking about. Do you still have an argument --

MR. RASHKIND: Yes.

JUSTICE KAGAN: -- or is it dependent on 4(b)(2)?

MR. RASHKIND: Yes, we do.

JUSTICE KAGAN: What's -- what's the argument that's exclusive of 4(b)(2)?

MR. RASHKIND: The argument boils down to this: In reading 4(b), there is not a single instance under the Federal rules regarding criminal appeals in which two notices of appeal are required in a single appeal.

Every single time the rules drafted encountered the possibility that two notices of appeal might be required, they immediately rewrote the rules to avoid that possibility. Part of that is 4(b)(2). Part of that is further down the rule. Part of that is 4(b)(5) where there's a -- a rule 35(a) correction of a sentence. At every turn, the drafters of the rules have made it clear that one notice of appeal is all that is required as to the one judgment and sentence in a

criminal case.

CHIEF JUSTICE ROBERTS: Well, but it's addressed specific instances, as you say, in which the issue may come up. But it hasn't addressed your situation.

MR. RASHKIND: It has not.

CHIEF JUSTICE ROBERTS: So I -- and it's one of those arguments. You're saying whenever they see it, they provide for it, but they haven't seen it yet, at least with respect to the drafting of the rule.

MR. RASHKIND: Part of that --

CHIEF JUSTICE ROBERTS: So maybe it doesn't apply in that situation.

MR. RASHKIND: Part of that I think is a matter of timing. It has only happened since 2010 that the Court interpreted the statute to have the mechanics we speak of today. Before that time, the circuits were split as to how they were handling it, so for -- it wasn't necessary to say more.

For example, in the Eleventh Circuit Court of --

JUSTICE KAGAN: That might be true, but still, aren't we to wait until Congress fixes it?

MR. RASHKIND: Well, the rule --

JUSTICE KAGAN: Presumably, Congress sees

problems; Congress fixes problems. And -- and you might be right that this is the kind of problem that Congress has fixed in the past, but that by itself doesn't seem to give us the ability to go fix it ahead of the time that they do.

MR. RASHKIND: If I may suggest why I think -- I think it would not be Congress so much as the rules' drafters. The Court would recommend these rules and then -- with Congress's approval or disapproval.

And here is why I think the drafters have not gone forward: Because in black and white in the Court's decision in Dolan, it acknowledged that these kinds of issues would arise and that the Court would need to address them. And perhaps they felt it would be presumptuous if the Court says we see that these kinds of problems going -- are going to arise and we'll address them, and instead the rules drafters pretermitted those decisions coming up with their own answers to those questions.

JUSTICE SOTOMAYOR: So what's the legal principle that gives us the authority to create this exception? Let's assume we -- we agree with you that the rules don't cover this particular situation. Let's assume further we don't buy the government's argument that notices of appeal are jurisdictional. And you can

get into that when you're ready, but so let's just deal with it's not jurisdictional. What gives us the power to do this?

MR. RASHKIND: The power is in the rules. The Court decided decades ago that the rules would tell lawyers how to proceed in litigation. The rules are to be clear.

When, for example, one of the rules on the civil side made it possible for a lawyer to make a mistake by not filing a second notice of appeal, something the Court recognized in its Griggs decision, the rules drafters went right back and immediately changed that rule and said in their commentary it was designed to eliminate the trap for the unwary that the previous rule created. The rules are designed so that there is a fair administration of justice without great cost and delay, without confusion.

These rules say that you must notice an appeal from a final judgment. That was done in this case. In fact, the final judgment in this case, and all cases like it, has this anomaly. The notice of appeal is at the same time timely and partially untimely. It's not a notice of appeal filed at a time when the court of appeals would say that's so early; we need to dismiss; we -- we have no jurisdiction, because it's unquestioned

that the court of appeals had jurisdiction over the conviction and all aspects of the sentence, incarceration, the term of supervised release. That it had on the same day that the notice of appeal was filed. And in the anomaly, it perhaps didn't have jurisdiction or it was early to have jurisdiction over the restitution portion. That's --

JUSTICE SOTOMAYOR: So isn't it easy and not a trap for us just to simply say, file two notices of appeal? That's what the government says. File it when you get imprisoned; file another one when the restitution order is in place, and everything will be fine.

MR. RASHKIND: I think a fair answer to that is, of course the court could have such a process. I would urge against it, and it's certainly one that is not in place at the present time. It is not one that governs the proceedings that occurred here and have occurred up --

JUSTICE SOTOMAYOR: No, no. But there are other jurisdictions that actually require that.

MR. RASHKIND: Well, there are -- there's one that requires it. There's one that's so unsure about the answer, it has both accepted a single notice of appeal and yet recommended the safer course is to

file two. There is one jurisdiction has repeatedly just held over -- in two jurisdictions, have held over and over under Rule 4(b)(2), that the original notice of appeal matures.

Now, those cases don't go into the kind of thought that we have here. And --

JUSTICE BREYER: Well, right. But Justice Sotomayor's question was, why not? The virtue of having two notices of appeal, it's definite, a certain time, people know what to do. When you have one notice of appeal and then maybe you're going to add a few arguments later, did you -- did they have a fair chance to answer? What is that later time? It raises a lot of questions.

So the simplest thing with a rule, and it doesn't hurt anybody, is what I think she was suggesting: Just follow what the government says there. You appeal, then you appeal.

MR. RASHKIND: I think my answer to that is, although that may be intuitive --

JUSTICE BREYER: Yeah.

MR. RASHKIND: -- the rules don't require lawyers to use their intuition.

JUSTICE BREYER: But the rule says --

MR. RASHKIND: The rule says to follow the

rules.

JUSTICE BREYER: You're just being literal in the rule. The rule says in a criminal case, a defendant's notice of appeal must be filed within 14 days of the order being appealed from. That's one of the things -- and you're appealing from the order which says, pay so much.

MR. RASHKIND: And in this case, it would be from the judgment, because there really are no appeals of right by a defendant from an order.

JUSTICE BREYER: From the judgment. So we have a judgment which says -- judgment says, and it leaves restitution open. Then we have another judgment which is -- says how much the amount is. I mean, that's so simple, and all the lawyers would understand it, and the other seems more complicated.

Now, what's your response to that?

MR. RASHKIND: My response is that that is not the mechanical formulation that the Court provided in Dolan. It wrestled with that, the majority --

JUSTICE BREYER: Dolan didn't --

MR. RASHKIND: -- wrestled with --

JUSTICE BREYER: I know whether it answered the question. But in one second, I'm going to conclude that you don't have a reason, other than I would read

the text. Your reason is if the text literally requires -- doesn't require it, then it doesn't.

But do you have any answer other than that?

MR. RASHKIND: It would be the first time in which two notices of appeal are required in a criminal case. And that, by itself, confuses the process of what the appeals are trying to accomplish. The appeals are trying to -- the rules are trying to make it possible for lawyers to know what to do and when. They are clear as to the criminal side that there is only one notice of appeal that's required.

If I may reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Kedem.

ORAL ARGUMENT OF ALLON KEDEM

ON BEHALF OF THE RESPONDENT

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

A criminal defendant may appeal an award of restitution by filing a notice of appeal after the amount is determined and entered against him in the form of a criminal judgment. Appellate Rule 4(b)(2) applies to a notice of appeal that's filed after the announcement of a sentence, but before entry of the judgment memorializing the sentence. It does not apply.

Whereas here, the notice of appeal is filed long before the Court even decides the appropriate sentence.

If I could begin --

JUSTICE GINSBURG: May I ask about the criminal rule -- what number is it? -- 32, the provision that says, "Appealing a sentence. After sentence, the Court must advise the defendant of any right to appeal the sentence."

MR. KEDEM: That's correct.

JUSTICE GINSBURG: And Defendant was so advised after the sentence was issued. There was no such instruction, no such advice from the Court when the restitution order was entered.

MR. KEDEM: That's correct.

JUSTICE GINSBURG: So what is your position on whether the Court must advise the defendant of any right to appeal the restitution order?

MR. KEDEM: Absolutely, it must. And I think when courts do that, as they absolutely should, it will prevent cases like this from arising again in the future.

JUSTICE GINSBURG: But it didn't happen in this case.

MR. KEDEM: That's correct.

JUSTICE GINSBURG: So the Court committed an

error and it wasn't harmless.

MR. KEDEM: Well, the way the Court has addressed those sorts of errors -- and this was discussed in the Peguero case, which is cited in a footnote to our brief -- is to ask whether the litigant was aware of their opportunity to appeal. There's been no suggestion here by a Petitioner that the litigant or his attorney were unaware of the opportunity to appeal.

JUSTICE KAGAN: I think in Mr. Rashkind's reply brief, he represents that there was no awareness of the opportunity to appeal. I mean, the only thing that gives you pause in a case like this is just because usually, you only have to file one notice of appeal. You do get worried about, you know, traps for the unwary and a person who just won't understand that there's another stage in this process and needs to file a notice of appeal.

As long as the Court is fulfilling its obligation of saying, okay, now, you know, if you have an objection to this, you need to file another notice of appeal, well, that solves the problem. But if the Court doesn't say it, it doesn't solve the problem.

And apparently, that's what happened in this case. And Mr. Rashkind represents that his client didn't know of his opportunity to, or his need to

appeal.

MR. KEDEM: Well, with respect to this Petitioner, I think that that's true. Once the Court makes unmistakably clear that a second notice of appeal is required, I don't think this is the sort of thing that's likely to arise in the future.

JUSTICE SOTOMAYOR: So would we find this to be a Rule 32 error?

MR. KEDEM: Pardon?

JUSTICE SOTOMAYOR: Why don't we just say this was a Rule 32 error?

MR. KEDEM: If you're talking about harmless error, I think the types of errors that are cognizable under -- I think it's Federal Criminal Rule 52, whether you're talking about harmless errors or --

JUSTICE SOTOMAYOR: I'm talking about a Rule 32 error.

MR. KEDEM: I see.

Rule 32 errors are dealt with in the manner that was discussed in Peguero. And so if there was an error of that sort here, then the proper remedy, assuming one is available, would be to file a 2255 petition, assuming that those apply to restitution orders.

JUSTICE SOTOMAYOR: Other than making a

Supreme Court case of this issue, given the practices in the Eleventh Circuit where the Court automatically appears to wait for the restitution transcript to come and for these issues to be litigated once -- I'm not going to talk about whether that's efficient or not. They've chosen it to be efficient. And virtually in every other case, you've never raised an objection.

Why did you raise an objection here? What was the purpose of doing this? Was it to make a test case?

MR. KEDEM: Not to my knowledge. I think the general principle that you can't appeal a decision that hasn't yet been met is a pretty standard principle in the law generally, not just in criminal cases.

JUSTICE SOTOMAYOR: It's just --

MR. KEDEM: And I can't --

JUSTICE SOTOMAYOR: -- such a hybrid situation. He's absolutely right. In most criminal appeals, it's one criminal appeal from a final judgment. It doesn't appear as if you raised this timeliness objection in the Eleventh Circuit as a matter of course.

MR. KEDEM: Well --

JUSTICE SOTOMAYOR: So why in this case?

MR. KEDEM: Well, in the Eleventh Circuit, the Court had decided in a case called Muzio -- and that

happened in -- I believe it was July of 2014, so before the restitution hearing, but not much before it -- that a criminal defendant in Petitioner's situation had two options: They could either file a notice of appeal after the initial sentencing and then a second notice of appeal after restitution was ordered, or they could wait until the end and file one notice of appeal after restitution. And so that decision came down in July of 2014.

And we cannot verify or dispute the representations that Petitioner has made that in circuits, courts always wait.

But, Justice Kennedy, I think you identified a very troubling implication of Petitioner's argument: Namely, that it would prevent, in many cases, criminal defendants from getting an immediate appeal from their conviction in their terms of imprisonment. Because if Petitioner is correct about Appellate Rule 4(b)(2), it means that the notice of appeal that he filed wouldn't take effect; it wouldn't become effective until after restitution was ordered, which means that the appellate process really shouldn't begin until that point, which is especially troubling for criminal defendants who normally want to get their appeals up and going as soon as possible.

JUSTICE KENNEDY: Either in the rules themselves or in the colloquy that takes place in the criminal system, is the restitution part of the sentence?

MR. KEDEM: Restitution is certainly part of the sentence.

JUSTICE KENNEDY: So that Rule 32(b) that Justice Ginsburg quotes is applicable. There has to be -- there has to be advice of the right to appeal.

MR. KEDEM: That's correct. What many district courts do is they have sentencing scripts which they read at the end of a sentencing. And there's no reason that they couldn't -- for instance, at the end of the script that they used for a restitution hearing -- make sure that they advise a criminal defendant that they have a right to separately appeal restitution.

JUSTICE GINSBURG: Then why -- why -- you -- I think you answered this, but I didn't grasp what the answer was.

The -- the judge makes a mistake. Doesn't advise the defendant, if you want to appeal a restitution order you have to file a notice of appeal. Didn't say that. Isn't it harmful error, that slip that the court made?

MR. KEDEM: So the Court addressed this in

the Peguero case and talked about a situation in which a notice of appeal was not filed, and the Court denied -- advised the defendant to file a notice of appeal and there's a proper procedure that you have to go through and the type of prejudice that you're talking about has to depend in part on the State of knowledge of the criminal defendant and his attorney.

But if I could, more directly --

JUSTICE GINSBURG: Well, but if they don't have knowledge, which is what we're assuming here because that was alleged --

MR. KEDEM: So I'm not sure it actually was alleged. I don't see any place in Petitioner's brief where they represent that they didn't know they had a right to appeal. And with respect to their argument that they didn't know they had to file a second notice of appeal, that was inconsistent with directly applicable case law in the very same circuit.

If I could --

JUSTICE GINSBURG: But here, in fact, when the restitution judgment was entered, the clerk of the district court sent that order to the court of appeals. So it was an amended judgment that was sent.

The -- the clerk of the court treated it as though it were an amendment to the judgment, and it went

to the court of appeals. So it seems to me to be the height of formalism to say that there has to be a second notice. The clerk had already notified the court of appeals that the judgment had been amended to include restitution.

MR. KEDEM: There's certainly some amount of formalism, but let me explain why I don't think that it's just formalism.

The general principle that you can't appeal a decision that hasn't been made I think makes sense and is not only consistent with the rules, but also with the -- the way things normally work in litigation.

Let me give you three examples of cases in which you actually would need a second notice of appeal in a criminal case.

The first is a motion under Rule 35(a) of the criminal rules to correct a sentence. If you file your notice of appeal before making a Rule 35(a) motion, the courts of appeals generally require you to file a second notice of appeal if what you want to challenge is the resolution of the Rule 35(a) motion.

Similarly, Rule 35(b) allows a court to, based on the substantial cooperation of a criminal defendant, alter the sentence. If the sentence is altered and the defendant wants to challenge that, then

the defendant has to file a second notice of appeal.

And the third example relates specifically to restitution, because under the Mandatory Victims Restitution Act you can actually end up with several different restitution awards and therefore several different judgments. And that's because criminal -- victims of criminal offenses have 60 days to bring up new losses which they can raise to the court's attention at any time. And if they do, the court has to award and decide whether there's a new award of restitution. It's not clear how Petitioner's approach either to Rule 4(b)(2) or his approach to judgments would handle that. Whether --

JUSTICE KENNEDY: Under your approach then, if there are four different victims and you -- and the court has seriatim hearings and makes seriatim judgments, there has to be four different notices of appeal?

MR. KEDEM: I'm not aware of any scenario in which a court with respect to --

JUSTICE KENNEDY: That's my hypothetical.

MR. KEDEM: Sure. I understand.

I think that if you're talking about things that were understood to be part of the original sentencing, you can wait until that's complete and file

one notice of appeal.

But if you're talking about completely new losses, there's no reason why the original notice of appeal should suffice to challenge a decision that hasn't yet been made.

And keep in mind the nature of Petitioner's challenge here, which is not to the fact of restitution, which he acknowledges was mandatory under the statute. He objected to the amount of restitution, and specifically, to the sufficiency of the evidence that the government put forward at the hearing to justify the $4500 that was awarded in restitution. And there's simply no way that Petitioner at the time he filed his notice of appeal could have had any idea about the basis for that.

CHIEF JUSTICE ROBERTS: The issue here strikes me as -- as somewhat similar to the issue that arises in the civil context with respect to attorneys' fees.

You have a judgment and you're entitled to attorneys' fees because you've won, but of course they don't know what those are yet. And then they have a hearing down the road.

What is the rule there? One notice of appeal, two notices of appeal?

MR. KEDEM: The rule there is you have to file a second notice of appeal. And I'd point you to a case called Ray Haluch Gravel. That's a good example where you might have a judgment for the defendants on summary judgment and then a notice of appeal. And at the time it grants summary judgment, the district court says, I'm going to determine at a later time the appropriate amount of attorneys' fees.

You cannot, on the basis of the first notice of appeal, challenge the amount of attorneys' fees. You have to file a second notice of appeal.

We also think that --

JUSTICE KAGAN: In the civil context, am I right that sometimes you file a second notice of appeal but you're -- the rules waive fees?

MR. KEDEM: That's correct.

JUSTICE KAGAN: But not here? I mean, it's a little bit odd. In the civil context, fees would be waived for the second notice of appeal and -- and in the criminal context not.

MR. KEDEM: Well, fees would not be raised -- would not be waived in the specific scenario that the Chief Justice posited. There are only certain very limited scenarios in which it would be waived, but if you're talking about a scenario like this one, but a

criminal defendant who unlike Petitioner was not indigent, I don't see any reason why the defendant wouldn't be able to file an amended notice of appeal, and many circuits don't require an additional fee.

And if the fee issue is something that the Court is concerned about, that is the sort of thing that it would be appropriate for the rules committee to address.

JUSTICE GINSBURG: You're recognizing that he could file -- you could treat as an amended notice of appeal, so it's one notice of appeal but it's been amended.

MR. KEDEM: I think you have to take a step to amend the notice of appeal, because, Justice Ginsburg, as you yourself pointed out, Appellate Rule 3(c)(1)(b) requires the notice of appeal to identify the judgment being appealed, and if you want to see the notice of appeal that Petitioner filed, I would direct you to page 42 of the joint appendix where he states very specifically that he is seeking appeal, quote, "From the final judgment and sentence entered in this action on the 24th day of June, 2014."

So the -- he's seeking review of the judgment that did not include restitution.

CHIEF JUSTICE ROBERTS: Counsel, the Peguero

case, I -- do you read that as saying that if there is prejudice to the defendant who wasn't advised of his right to appeal, that defendant is entitled to collateral relief?

MR. KEDEM: I do read it that way.

CHIEF JUSTICE ROBERTS: And I suppose the collateral relief is what, reopening the -- the case so that he can file a notice of appeal?

MR. KEDEM: I think in that case, if you're talking about a case that's cognizable on 2255, I think the remedy could be re-entry of the judgment to give him another opportunity to file his notice of appeal.

If I could briefly return just to the Rule 4(b)(2) argument, because I think the text of that rule explains why it is that it doesn't apply to this case.

4(b)(2) refers to entry -- announcement of a sentence followed by entry of the judgment, which I think makes clear that you're talking about precisely the same judgment that was just announced. And that's a pretty familiar pattern in criminal cases where sentences get announced and then they get entered into the docket. It's sort of like opening and closing a pair of parentheses, and usually that happens within a few days of one another, if not a few hours.

And so when you're talking about Rule 4(b)(2), you're really talking about the notice of appeal that would have been filed, for instance, after the September 17 hearing at which a $4500 award of restitution was announced but before it was entered into the docket the next day. But that's obviously not what we're dealing with here.

JUSTICE GINSBURG: Why couldn't you treat a notice of appeal as adequate to cover modifications of the judgment from which the appeal is taken? Because that's what this is. It's a modification of the judgment.

MR. KEDEM: I think that would be inconsistent with a few existing appellate rules of procedure. And I -- I think you could change the rules, perhaps, to deal with that situation, but it would be a fairly radical change in the way that notices of appeal and jurisdiction normally work, because normally we think of a notice of appeal as transferring to the court of appeals' jurisdiction over all of the elements contained in the judgment that was identified. And instead you would be transferring on a prospective basis decisions that had yet to be made. And I think it would also, for the reasons that the Chief Justice identified, be for a court of appeals very confusing. Because

remember that, in many cases, criminal defendants have a strong incentive to get their appeal up and going as soon as possible. That's especially true if you're a criminal defendant who's got a short prison term or you want to be let out on bail pending appeal.

CHIEF JUSTICE ROBERTS: You said -- I'm not going to get the phrase right -- jurisdiction over all of the elements of the appeal, or something like that?

MR. KEDEM: That's right. Contained in the judgment that you have appealed.

CHIEF JUSTICE ROBERTS: Right. But I thought the basic rule was -- and your friend has emphasized this in his briefs -- that you get the case. You don't get different elements that may have been adjudicated or whatever. If you're filing the appeal, the whole case goes up.

MR. KEDEM: Sure. I -- I don't think that that's accurate. The only authority he can point to for that proposition is the Corey decision. But that actually was a very different scenario that I think actually supports the government.

In Corey you were dealing with a statute in which a district court was authorized to impose a provisional sentence to the statutory maximum, and then within six months it could revisit that sentence and

reduce the sentence based on new information.

And the question in Corey was whether the criminal defendant who filed a notice of appeal only after that later-reduced sentence had waited too long to challenge his conviction. It wasn't a challenge to the sentence or anything that happened at the second sentencing. Instead, it was a challenge to the conviction.

And what this Court said is no, both the original -- the original sentence to the statutory maximum and the later sentence were sufficiently final that they can be appealed, which is consistent with what this Court has said in Dolan, and the government agrees, which is that you can file a notice of appeal either from your initial sentence or from your later sentence. Or you can wait until the very end and file one notice of appeal at the very end that will allow you to challenge all elements of your sentence, including your conviction.

If there are no further questions about this --

JUSTICE KAGAN: Mr. --

MR. KEDEM: Yep.

JUSTICE KAGAN: Where were you going?

MR. KEDEM: I was going to Rule 52, but I'm

happy to --

JUSTICE KAGAN: Well, maybe this would be a good segue. This -- this -- you understand the requirement of a notice of appeal to be jurisdictional. Do you understand the requirement of timeliness to be jurisdictional or not?

MR. KEDEM: Not in the criminal context.

JUSTICE KAGAN: Okay. Now, I understand it doesn't matter in this case --

MR. KEDEM: That's right.

JUSTICE KAGAN: -- because you objected. But in the criminal context, that's a non-jurisdictional rule. That's just a claims processing rule --

MR. KEDEM: That's right.

JUSTICE KAGAN: Is that correct?

And are there requirements as to what counts as a notice of appeal? In other words, suppose I'm a defendant and I miss my 14 days, I don't file a notice of appeal within that time. Actually, I don't file it later; I file a brief.

MR. KEDEM: Uh-huh.

JUSTICE KAGAN: Does the brief count as a notice of appeal?

MR. KEDEM: Yes. A brief, in certain situations, has been deemed to count as a notice of

appeal.

JUSTICE KAGAN: In certain situations?

MR. KEDEM: Well, the case -- there's a specific Supreme Court case, the name of which escapes me at the moment, but the Court dealt with it in a pro se situation. I don't know whether the Court would feel the same way if it were someone who's represented by counsel.

JUSTICE KAGAN: Okay. But assuming that that's not just applicable to pro se situations, I file a brief; I file it late; the government doesn't say anything about it. The appeal goes forward?

MR. KEDEM: That's correct.

JUSTICE KAGAN: Okay.

MR. KEDEM: I would also point out that there's a rule that also allows district courts -- and this is Appellate Rule 4(B)(4) -- to extend by 30 days the deadline for filing a notice of appeal so long as you can show reasonable -- reasonable diligence or good cause. And I think good cause might be shown by a counsel's ineffective assistance. So that would be another way to deal with the same thing.

Turning now, perhaps, to Appellate Rule -- to -- to Rule 52. The types of errors that are cognizable, as I said earlier, are errors in the

district court's proceedings. They are not a party's own failure to comply with the rules necessary to bring the issue up for appellate consideration. And if it were --

JUSTICE GINSBURG: Why -- why isn't the judge's failure to give the necessary advice, why doesn't that come under Rule 52?

MR. KEDEM: Well, I'm not sure that the relief that Petitioner is asking for here is a correction for that error. I think the Court has already conceived of a different mechanism as the proper way to deal with that.

JUSTICE GINSBURG: Well, that seems to -- to have another -- yet another proceeding, a 2255, instead of saying, well, the judge forgot to give them the -- the advice, so that was a harmful error.

MR. KEDEM: I think, Justice Ginsburg, that would be inconsistent with the way the Court has conceived of its mandatory claim processing rules, in which it has said consistently that a party's failure to comply with such a rule, so long as it's invoked by the other side at the appropriate time, means that dismissal of the claim is mandatory. You don't have a separate inquiry into prejudice.

There are a number of Federal rules that

include time limits. And if a party's failure to comply with one of those time limits could be excused absent prejudice to the other side, then I think those time limits would no longer be mandatory in a -- in a meaningful sense.

I think it's also inconsistent with another Federal rule that I would point out, which is Rule 3(a)(2), which you can find at page 6A of the appendix to the government's brief, which states, "An appellant's failure to take any step, other than the timely filing of a notice of appeal, does not affect the validity of the appeal," which again suggests if you don't have a proper notice of appeal, you don't have a valid appeal.

If the Court has no further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Rashkind, you have three minutes remaining.

REBUTTAL ARGUMENT OF PAUL M. RASHKIND

ON BEHALF OF THE PETITIONER

MR. RASHKIND: Thank you, Your Honor.

If I may begin with the last point, the reason Rule 3(a)(2) makes the statement it does is because in the civil context, the timeliness, the temporal limits on a notice of appeal, are

jurisdictional. And so 3(a)(2), which captures both civil and criminal appeals, would need to say that. It does not say, though, that in a criminal case those same issues apply in exactly the same way.

It is perceptive to note that the district court failed to comply with Rule 32(j), because that advice was an important piece of advice in this very case: Not that he had a right to appeal, but that he had a duty to appeal again.

JUSTICE SOTOMAYOR: So is the government right, however, that the Eleventh Circuit had issued a decision telling you to file a second notice of appeal? Telling the public, not you personally.

MR. RASHKIND: Well, I disagree that that's what happened. The Muzio case did not involve a defendant who was appealing restitution. And the battle in the Muzio case, which was issued about the same time as the hearing in this case, the majority judge, Judge Wilson, and the concurring judge, Judge Kugler, both said, we are absolutely not going to decide whether that notice of appeal could have captured the early -- the restitution and the other, because restitution is not at issue.

So a discussion in Footnote 9 of a case that is not on point at all, and does not become final -- so

it was not denied in that case until after the restitution hearing and judgment in this case, and rehearing was denied by this Court in the next year -- I submit that a decision that isn't final, that isn't on point, and makes its reference by a footnote is not telling the lawyers how to proceed on an appeal.

CHIEF JUSTICE ROBERTS: What is the --

MR. RASHKIND: The point of the rule --

CHIEF JUSTICE ROBERTS: Sorry to interrupt you.

What is the citation for the case that's not relevant in --

(Laughter.)

MR. RASHKIND: Muzio is -- Muzio is discussed throughout the Manrique decision. And its citation is --

CHIEF JUSTICE ROBERTS: Okay.

MR. RASHKIND: -- 757 F.3d 1243.

CHIEF JUSTICE ROBERTS: Okay. Thank you.

MR. RASHKIND: So I don't think it's fair to say that lawyers were on notice. That's why I come back to the Court and say that even the Court shouldn't be deciding this in an opinion. It belongs in the rules.

Lawyers are entitled to pick up a book of rules and determine how they should proceed. And what

has been clear in these rules from the beginning as to criminal cases, one notice of appeal is all that is required.

Where Congress legislates in a way that creates this sort of anomaly where there might be two windows to appeal, it shouldn't change the underlying rules. They are that if you file a notice of appeal as to a type -- which is timely as to part of the sentence and judgment, that it remains timely as to all aspects of that as it is completed.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 1:53 p.m., the case in the above-entitled matter was submitted.)

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