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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

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

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

10 We know not only from Dolan that this should
11 be the case, but we know it also by looking at the
12 criminal appellate rules as they relate to criminal
13 cases. If we go down one by one each of the sections of
14 4(b), each section leads to a single conclusion. Only
15 one notice of appeal is required.

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

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

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

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

12 If we look at the balance of --

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

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

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

25 JUSTICE SOTOMAYOR: So what happens if your

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

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

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

13 JUSTICE KENNEDY: At the outset right after
14 sentencing?

15 MR. RASHKIND: Yes, Your Honor.

16 JUSTICE KENNEDY: Okay.

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

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

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

4 JUSTICE KAGAN: Mr. Rashkind --

5 MR. RASHKIND: Well -- go ahead.

6 JUSTICE KAGAN: Mr. Rashkind, as I hear you
7 now, you're saying something different from what I
8 understood your brief to be saying, so maybe I just -- I
9 understood your brief to be principally arguing that
10 this was a consequence of Rule 4(b)(2), and so far, I
11 haven't heard you mention Rule 4(b)(2). Instead, what
12 you seem to be saying is that regardless of Rule
13 4(b)(2), we should treat the initial judgment and the
14 later judgment as though they are the same judgment.
15 And 4(b)(2) doesn't have to exist for that argument to
16 be correct. I'm not saying that argument is correct,
17 but it's a different argument than the argument I
18 understood you to be making in your brief.

19 So which are you making?

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

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

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

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

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

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

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

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

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

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

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

25 MR. RASHKIND: Yes. And the answer to that

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

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

9 MR. RASHKIND: Right.

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

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

1 the language of Corey for it to be obtained upfront.

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

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

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

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

1 of appeals: Well, is he going to file another notice of
2 appeal? I guess we have to hold this in abeyance. And
3 then you hold it in abeyance, and who knows for how
4 long, because it doesn't actually have to be within the
5 90 days. It just seems to me a very confusing system.

6 MR. RASHKIND: As a practical matter, it has
7 not been confusing at all to the courts of appeal, which
8 have been -- who have been struggling with this, both
9 before Dolan and after. We have identified in our brief
10 17 post-Dolan appeals, and the government has identified
11 another 15 post-Dolan appeals. In every single one of
12 those cases, some of which took five and a half years
13 for the restitution to be resolved, three and a half
14 years, two and a half years, many cases go by where they
15 are resolved within the 90-day limit and -- and they are
16 not --

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

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

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

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

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

10 So what do they do now?

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

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

18 MR. RASHKIND: That's correct.

19 JUSTICE SOTOMAYOR: But they're holding it
20 anyway.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. RASHKIND: That is our argument, Your

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

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

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

13 MR. RASHKIND: It --

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

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

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

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

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

11 MR. RASHKIND: He has --

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

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

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

25 When he says, I'm going to grant summary

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

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

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

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

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

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

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

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

6 MR. RASHKIND: Yes.

7 JUSTICE KAGAN: -- or is it dependent on
8 4(b)(2)?

9 MR. RASHKIND: Yes, we do.

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

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

17 Every single time the rules drafted
18 encountered the possibility that two notices of appeal
19 might be required, they immediately rewrote the rules to
20 avoid that possibility. Part of that is 4(b)(2). Part
21 of that is further down the rule. Part of that is
22 4(b)(5) where there's a -- a rule 35(a) correction of a
23 sentence. At every turn, the drafters of the rules have
24 made it clear that one notice of appeal is all that is
25 required as to the one judgment and sentence in a

1 criminal case.

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

6 MR. RASHKIND: It has not.

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

11 MR. RASHKIND: Part of that --

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

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

20 For example, in the Eleventh Circuit Court
21 of --

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

24 MR. RASHKIND: Well, the rule --

25 JUSTICE KAGAN: Presumably, Congress sees

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 JUSTICE BREYER: Yeah.

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

24 JUSTICE BREYER: But the rule says --

25 MR. RASHKIND: The rule says to follow the

1 rules.

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

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

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

17 Now, what's your response to that?

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

21 JUSTICE BREYER: Dolan didn't --

22 MR. RASHKIND: -- wrestled with --

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

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

3 But do you have any answer other than that?

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

12 If I may reserve the balance of my time.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Kedem.

15 ORAL ARGUMENT OF ALLON KEDEM

16 ON BEHALF OF THE RESPONDENT

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

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

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

3 If I could begin --

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

9 MR. KEDEM: That's correct.

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

14 MR. KEDEM: That's correct.

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

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

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

24 MR. KEDEM: That's correct.

25 JUSTICE GINSBURG: So the Court committed an

1 error and it wasn't harmless.

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

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

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

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

1 appeal.

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

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

9 MR. KEDEM: Pardon?

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

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

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

18 MR. KEDEM: I see.

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

25 JUSTICE SOTOMAYOR: Other than making a

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

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

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

15 JUSTICE SOTOMAYOR: It's just --

16 MR. KEDEM: And I can't --

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

22 MR. KEDEM: Well --

23 JUSTICE SOTOMAYOR: So why in this case?

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

1 happened in -- I believe it was July of 2014, so before
2 the restitution hearing, but not much before it -- that
3 a criminal defendant in Petitioner's situation had two
4 options: They could either file a notice of appeal
5 after the initial sentencing and then a second notice of
6 appeal after restitution was ordered, or they could wait
7 until the end and file one notice of appeal after
8 restitution. And so that decision came down in July of
9 2014.

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

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

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

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

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

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

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

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

25 MR. KEDEM: So the Court addressed this in

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

8 But if I could, more directly --

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

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

19 If I could --

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

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

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

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

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

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

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

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

1 the defendant has to file a second notice of appeal.

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

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

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

21 JUSTICE KENNEDY: That's my hypothetical.

22 MR. KEDEM: Sure. I understand.

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

1 one notice of appeal.

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

6 And keep in mind the nature of Petitioner's
7 challenge here, which is not to the fact of restitution,
8 which he acknowledges was mandatory under the statute.
9 He objected to the amount of restitution, and
10 specifically, to the sufficiency of the evidence that
11 the government put forward at the hearing to justify the
12 \$4500 that was awarded in restitution. And there's
13 simply no way that Petitioner at the time he filed his
14 notice of appeal could have had any idea about the basis
15 for that.

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

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

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

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

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

12 We also think that --

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

16 MR. KEDEM: That's correct.

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Counsel, the Peguero

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

5 MR. KEDEM: I do read it that way.

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

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

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

17 4(b)(2) refers to entry -- announcement of a
18 sentence followed by entry of the judgment, which I
19 think makes clear that you're talking about precisely
20 the same judgment that was just announced. And that's a
21 pretty familiar pattern in criminal cases where
22 sentences get announced and then they get entered into
23 the docket. It's sort of like opening and closing a
24 pair of parentheses, and usually that happens within a
25 few days of one another, if not a few hours.

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

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

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

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

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

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

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

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

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

1 reduce the sentence based on new information.

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

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

20 If there are no further questions about
21 this --

22 JUSTICE KAGAN: Mr. --

23 MR. KEDEM: Yep.

24 JUSTICE KAGAN: Where were you going?

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

1 happy to --

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

7 MR. KEDEM: Not in the criminal context.

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

10 MR. KEDEM: That's right.

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

14 MR. KEDEM: That's right.

15 JUSTICE KAGAN: Is that correct?

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

21 MR. KEDEM: Uh-huh.

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

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

1 appeal.

2 JUSTICE KAGAN: In certain situations?

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

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

13 MR. KEDEM: That's correct.

14 JUSTICE KAGAN: Okay.

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

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

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

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

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

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

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

25 There are a number of Federal rules that

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

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

15 If the Court has no further questions.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Rashkind, you have three minutes
18 remaining.

19 REBUTTAL ARGUMENT OF PAUL M. RASHKIND

20 ON BEHALF OF THE PETITIONER

21 MR. RASHKIND: Thank you, Your Honor.

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

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

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

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

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

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

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

7 CHIEF JUSTICE ROBERTS: What is the --

8 MR. RASHKIND: The point of the rule --

9 CHIEF JUSTICE ROBERTS: Sorry to interrupt
10 you.

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

13 (Laughter.)

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

17 CHIEF JUSTICE ROBERTS: Okay.

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

19 CHIEF JUSTICE ROBERTS: Okay. Thank you.

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

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

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

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

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

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

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A				
abeyance 9:18 12:2,3 13:6	affect 47:11	33:18	42:2,5,8,15	27:25 30:23
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