

IN THE
Supreme Court of the United States

CARL RAY MCNEIL, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a notice of appeal filed after a district court enters its judgment, but before the court amends the judgment to correct clerical error, automatically matures to perfect an appeal of the corrected judgment.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
OPINION BELOW	1
JURISDICTION	1
RULES PROVISIONS INVOLVED.....	1
INTRODUCTION.....	4
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6
THE COURT SHOULD GRANT THE PETITION TO CONSIDER THE APPLICABILITY OF <i>MANRIQUE V. UNITED STATES</i> TO CASES THAT DO NOT INVOLVE DEFERRED RESTITUTION	
CONCLUSION	21
APPENDIX A: Opinion of the U.S. Court of Appeals for the Fourth Circuit (September 8, 2017)	1a

TABLE OF AUTHORITIES

CASES

<i>Bowles v. Russell</i> , 551 U.S. 205 (2007)	14
<i>Dolan v. United States</i> , 560 U.S. 605 (2010)	12
<i>Griggs v. Provident Consumer Discount Co.</i> , 459 U.S. 56 (1982)	19
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015)	4
<i>Lemke v. United States</i> , 346 U.S. 325 (1953) (per curiam)	7-8
<i>Manrique v. United States</i> , 137 S. Ct. 1266 (2017)	<i>passim</i>
<i>Mullaney v. Wilbur</i> , 421 U.S. 684 (1975)	6
<i>Rodriguez v. United States</i> , 395 U.S. 327 (1969)	17
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470 (2000)	16
<i>United States v. Barry</i> , 647 F. App'x 519 (6th Cir. 2016)	20
<i>United States v. Barwig</i> , 568 F.3d 852 (10th Cir. 2009)	12
<i>United States v. Bly</i> , 510 F.3d 453 (4th Cir. 2007)	14
<i>United States v. Booker</i> , 436 F.3d 238 (D.C. Cir. 2006)	15

<i>United States v. Daddino</i> , 5 F.3d 262 (7th Cir. 1993)	12
<i>United States v. Fields</i> , 552 F.3d 401 (4th Cir. 2009)	13
<i>United States v. Gardner</i> , 823 F.3d 793 (4th Cir. 2016)	4
<i>United States v. Grant</i> , 715 F.3d 552 (4th Cir. 2013)	13
<i>United States v. Hamby</i> , 215 F.3d 1322 (4th Cir. 2000)	12
<i>United States v. Lansing</i> , 71 F. App'x 84 (2d Cir. 2003)	13
<i>United States v. Makres</i> , 851 F.2d 1016 (7th Cir. 1988)	12
<i>United States v. Malcolm</i> , 114 F.3d 1190 (6th Cir. 1997)	8
<i>United States v. McNeil</i> , 129 F. App'x 849 (4th Cir. 2005)	3
<i>United States v. Morse</i> , 344 F.2d 27 (4th Cir. 1965)	12
<i>United States v. Osborne</i> , 345 F.3d 281 (4th Cir. 2003)	12
<i>United States v. Pease</i> , 331 F.3d 809 (11th Cir. 2003)	12-13
<i>United States v. Thornton</i> , 1 F.3d 149 (3d Cir. 1993)	16
<i>United States v. Torres-Aguilar</i> , 352 F.3d 934 (5th Cir. 2003)	12
<i>United States v. Walker</i> , 915 F.2d 1463 (10th Cir. 1990)	16

<i>United States v. Werber</i> , 51 F.3d 342 (2d Cir. 1995)	12
--	----

<i>United States v. Winn</i> , 948 F.2d 145 (5th Cir. 1991)	16
--	----

STATUTES

18 U.S.C. § 924(e)	4
--------------------------	---

28 U.S.C. § 2255	4, 20
------------------------	-------

28 U.S.C. § 2255(f)(1)	20
------------------------------	----

FEDERAL RULES OF APPELLATE PROCEDURE

Fed. R. App. P. 1(a)(2)	18
-------------------------------	----

Fed. R. App. P. 3(a)(1)	14, 17
-------------------------------	--------

Fed. R. App. P. 4	<i>passim</i>
-------------------------	---------------

Fed. R. App. P. 4(a)(4)(1979)	19
-------------------------------------	----

Fed. R. App. P. 4(a)(4)(1993)	19
-------------------------------------	----

Fed. R. App. P. 4(a)(4)(B)(ii)	16, 19
--------------------------------------	--------

Fed. R. App. P. 4(b)(2)	<i>passim</i>
-------------------------------	---------------

Fed. R. App. P. 4(b)(3)(C)	16-17
----------------------------------	-------

FEDERAL RULES OF CRIMINAL PROCEDURE

Fed. R. Crim. P. 2	18
--------------------------	----

Fed. R. Crim. P. 32(j)(1)(B)	10-11, 15
------------------------------------	-----------

Fed. R. Crim. P. 36	<i>passim</i>
---------------------------	---------------

Fed. R. Crim. P. 37	8
---------------------------	---

Fed. R. Crim. P. 52(a)	2
------------------------------	---

OTHER SOURCES

16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, <i>et al.</i> , <i>Federal Practice & Procedure Jurisdiction</i> § 3950.11 (4th ed. 2015)	8
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PETITION FOR WRIT OF CERTIORARI

Petitioner Carl Ray McNeil, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Fourth Circuit's opinion is unreported, but is available at ___ F. App'x ___, No. 16-4863, 2017 U.S. App. LEXIS 17394, 2017 WL 3971417 (4th Cir. Sept. 8, 2017). Pet. App. 1a-3a.

JURISDICTION

The Fourth Circuit issued its opinion on September 8, 2017. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RULES PROVISIONS INVOLVED

Rule 4 of the Federal Rules of Appellate Procedure provides:

Rule 4, Federal Rules of Appellate Procedure Appeal as of Right--When Taken

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal. (A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order -- but before the entry of the judgment or order -- is treated as filed on the date of and after the entry.

Rule 36 of the Federal Rules of Criminal Procedure provides:

Rule 36. Clerical Error

After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

Rule 52. Harmless and Plain Error.

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT OF THE CASE

A. District Court Proceedings

On August 13, 2002, a grand jury in the Eastern District of North Carolina indicted the Petitioner, Carl Ray McNeil, Jr., for (1) armed robbery of a post office (Count One); (2) use of a firearm during and in relation to a crime of violence (Count

Two); and (3) possession of a firearm by a felon (Count Three). (Joint Appendix 5, 99; hereinafter "J.A."). Petitioner pled guilty on January 21, 2003 to Counts Two and Three. (J.A. 8, 86-95, 99).

In preparation for sentencing, the probation officer submitted a presentence report asserting that Petitioner was an armed career criminal based on his prior convictions for common law robbery. (J.A. 112). In addition, the presentence report stated that "an order of restitution in this case would be inappropriate." (J.A. 102).

At sentencing on June 2, 2003, the district court sentenced Petitioner to 120 months of imprisonment on Count Two, to be served consecutively to a 327-month term of imprisonment on Count Three, for a total term of imprisonment of 447 months. (J.A. 19-24). With respect to Count Three, the court found that Petitioner was an armed career criminal based on his prior North Carolina convictions for common law robbery. The court specifically held open the issue of whether restitution was appropriate. (J.A. 23). Petitioner filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit. (J.A. 9).

On July 7, 2003, the court held a hearing and determined that restitution could be imposed. The court thereafter entered an amended judgment ordering restitution in the amount of \$92,568.73. (J.A. 10). Petitioner filed a second notice of appeal regarding the amended judgment. (J.A. 10). On appeal, the Fourth Circuit affirmed the judgment of the district court. *United States v. McNeil*, 129 F. App'x 849 (4th Cir. 2005).

Ten years later, on June 26, 2015, this Court issued its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e) (“ACCA”), is void for vagueness. Petitioner moved for sentencing relief under 28 U.S.C. § 2255, arguing that absent the residual clause, his prior North Carolina convictions for common law robbery did not qualify as violent felonies under ACCA. (J.A. 25-37). The district court denied the motion, but the Fourth Circuit vacated the district court’s order and remanded the case for reconsideration in light of its decision in *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016) (holding that North Carolina common law robbery does not qualify as a violent felony under ACCA). (J.A. 38-40). The district court subsequently granted the motion to vacate and ordered Petitioner to be resentenced without the § 924(e) enhancement. (J.A. 41).

Prior to the new sentencing hearing, the probation officer submitted a modification to the original presentence report. (J.A. 16; 118-119). The probation officer noted that Petitioner had served approximately fourteen years and five months in custody. (J.A. 119). The modified presentence report did not address the issue of restitution. Neither party objected to the modified presentence report.

At sentencing, the court sentenced Petitioner to the statutory maximum of 120 months on Count Two and to a consecutive sentence of 262 months on Count Three, for a total of 382 months. (J.A. 62-63). The court also announced that “restitution is waived.” (J.A. 65). Consistent with this oral pronouncement, the court entered a written judgment sentencing Petitioner to 382 months of imprisonment on

December 22, 2016. (J.A. 69). The written judgment imposed no restitution but fined Petitioner in the amount of \$18,000.00. (J.A. 73). Petitioner filed a notice of appeal with the Fourth Circuit. (J.A. 75).

On January 12, 2017, the district court *sua sponte* entered an order purporting to amend the judgment under Rule 36 of the Rules of Criminal Procedure to correct an alleged “clerical error.” (J.A. 77-78). The “clerical error” identified by the court was its failure to impose restitution. The order directed entry of an amended judgment imposing restitution in the amount of \$92,568.73 and no fine. (J.A. 78). The court thereafter entered an amended judgment accordingly. (J.A. 79-85). Because a notice of appeal had already been filed, the district court immediately transferred the amended judgment to the Fourth Circuit. (J.A. 17). Petitioner did not file a second notice of appeal.

B. Court of Appeals Proceedings

On appeal to the Fourth Circuit, Petitioner argued that the district court lacked authority under Rule 36 of the Federal Rules of Criminal Procedure to substantively amend its judgment to impose restitution. In response, the government maintained that because Petitioner had not filed a second notice of appeal after the district court corrected its judgment, Petitioner’s challenge to the corrected judgment should be dismissed in accordance with this Court’s decision in *Manrique v. United States*, 137 S. Ct. 1266 (2017). Petitioner argued in reply that because his case was not a deferred restitution case, *Manrique* was inapplicable.

In an unpublished decision issued on September 8, 2017, the Fourth Circuit dismissed the challenge to the corrected judgment because Petitioner had failed to file a second notice of appeal. Although the Fourth Circuit expressly acknowledged that Petitioner's case was "not a deferred restitution case," the Court of Appeals nonetheless determined that *Manrique* required dismissal of Petitioner's appeal in part. *United States v. McNeil*, No. 16-4863, __ F. App'x __, 2017 U.S. App. LEXIS 17394, 2017 WL 3971417, *2 (4th Cir. Sept. 8, 2017). Accordingly, the Fourth Circuit dismissed that portion of Petitioner's appeal challenging the corrected judgment awarding restitution and otherwise affirmed the judgment of the district court. This petition followed.

THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question of whether a second notice of appeal is required where the district court amends its judgment under Rule 36 to correct clerical error was presented to the Fourth Circuit. The Fourth Circuit held that a second notice of appeal is required in all cases under this Court's decision in *Manrique*. Thus, the federal claim was properly presented and reviewed below and is appropriate for this Court's consideration. *See generally Mullaney v. Wilbur*, 421 U.S. 684 (1975).

REASONS FOR GRANTING THE PETITION

Mr. McNeil's petition involves the common practice of amending judgments to correct clerical error, as permitted under Rule 36 of the Federal Rules of Criminal Procedure; the interaction of such judgments with rules of appellate procedure; and this Court's decision in *Manrique v. United States*, 137 S. Ct. 1266 (2017). The

Fourth Circuit's decision in *McNeil* conflicts with the rules of criminal procedure, the rules of appellate procedure, and *Manrique*. Accordingly, this Court should grant review.

THIS COURT SHOULD GRANT THE PETITION TO CONSIDER THE APPLICABILITY OF *MANRIQUE V. UNITED STATES* TO CASES THAT DO NOT INVOLVE DEFERRED RESTITUTION

A. Premature notices of appeal in criminal cases mature pursuant to Rule 4(b)(2) of the Federal Rules of Appellate Procedure

Rule 4(b)(2) of the Federal Rules of Appellate Procedure states that “[a] notice of appeal filed after the court announces a decision, sentence or order-- but before entry of the judgment -- is treated as filed on the date of and after entry.” The rule codifies this Court’s decision in *Lemke v. United States*, 346 U.S. 325 (1953) (per curiam) and decisions of the circuits that a premature notice of appeal matures or springs forward when the judgment under review is entered.

In *Lemke v. United States*, the Court considered the jurisdictional significance of Fed. R. Crim. P. 37, the predecessor to Fed. R. App. P. 4(b)(2). Lemke filed his notice of appeal after sentencing, but three days before the judgment in a criminal case was entered. No notice of appeal was filed after that time. In a divided decision, the Court of Appeals dismissed the appeal due to the premature notice of appeal. One judge dissented, concluding that “the notice of appeal, though premature, was not a nullity. I think the defect and irregularity here is of the sort we are required to disregard by Criminal Rule 52(a).” *Lemke v. United States*, 203 F.2d 406, 407 (9th Cir. 1953) (Pope, J., dissenting), *cert. granted and remanded*, 346 U.S. 325 (1953). This Court granted certiorari and remanded, noting that the notice

of appeal was still on file when the judgment was entered, and holding—consistent with Judge Pope’s dissent—that the “irregularity is governed by Rule 52(a) which reads ‘Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.’” 346 U.S. at 325.

“The holding of *Lemke* was incorporated into Rule 37’s successor, Fed. R. App. P. 4(b).” *United States v. Malcom*, 114 F.3d 1190 (6th Cir. 1997) (unpublished) (holding premature notice of appeal in criminal case is valid and matures to cover later-filed judgment, absent prejudice to the government) (citing 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *et al. Federal Practice & Procedure Jurisdiction* § 3950.11 (4th ed. 2015)). Wright & Miller recounts the direct connection between Rule 37 and Rule 4(b)(2):

The predecessor to Rule 4(b)(2) entered the Criminal Rules in the 1966 amendments to Criminal Rule 37(a)(2). When the Appellate Rules took effect in 1968, Rule 37(a)(2)’s premature-notice provision was incorporated into Rule 4(b) without any change in substance. The provision was re-worded in 1993. As part of the 1998 restyling of the Appellate Rules, the provision was placed in subdivision (b)(2). As of 2008, Rule 4(b)(2) provides that “[a] notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

Id. at § 3950.11 (footnote omitted); *accord Manrique*, 137 S. Ct. at 1274 (noting that “the Lemke petitioner’s notice of appeal would now be timely under Rule 4(b)(2)”).

B. *Manrique applies only to deferred restitution cases*

In *Manrique*, this Court considered whether a single notice of appeal is sufficient in cases where, unlike here, the district court enters “an initial judgment imposing certain aspects of a defendant’s sentence, such as a term of imprisonment, while

deferring a determination of the amount of restitution until entry of a later, amended judgment.” 137 S. Ct. at 1270. The Court took up *Manrique* to resolve a split among the circuit courts in deferred restitution cases. Explaining that “deferred restitution cases involve two appealable judgments, not one,” *id.* at 1273, the Court determined that in cases of deferred restitution, “a single notice of appeal, filed between the initial judgment and the amended judgment” is insufficient “to invoke appellate review of the later-determined restitution amount” if the government objects to the defendant’s failure to file a notice of appeal following the second judgment. *Manrique*, 137 S. Ct. at 1270. Thus, where a defendant in a deferred restitution case seeks to appeal from both the initial judgment imposing imprisonment and the second judgment imposing restitution, the defendant must file two separate notices of appeal. *Id.* at 1274 (holding that “a defendant who wishes to appeal an order imposing restitution in a deferred restitution case must file a notice of appeal from that order”).

Although Petitioner filed only a single notice of appeal, *Manrique* does not require dismissal, because as the Fourth Circuit expressly acknowledged, Petitioner’s case is “not a deferred restitution case.” *United States v. McNeil*, No. 16-4863, 2017 U.S. App. LEXIS 17394, *2 (4th Cir. Sept. 8, 2017). Indeed, Petitioner’s original sentencing demonstrates the difference between a deferred restitution case requiring two notices of appeal and an ordinary case requiring only a single notice of appeal. At Petitioner’s original sentencing, the district court imposed judgment but expressly deferred the issue of restitution for a separate

hearing at a later date. (J.A. 9). After judgment was entered on June 5, 2003, Petitioner filed a notice of appeal. (J.A. 9). The district court held a hearing on the issue of restitution on July 7, 2003 and entered an amended judgment ordering restitution in the amount of \$92,568.73. (J.A. 10). Petitioner thereafter filed a second notice of appeal, a procedural step that *Manrique* confirmed was appropriate. (J.A. 10).

In contrast to Petitioner's original sentencing, the district court in the instant case did not defer restitution or otherwise decline to announce its sentence. *See Manrique*, 137 S. Ct. at 607 ("By deferring restitution, the court is declining to announce a sentence."). On the contrary, the district court affirmatively indicated at sentencing on December 14, 2016 that "restitution is waived." (J.A. 65). The court thereafter entered a written judgment consistent with its oral judgment on December 22, 2016. The written judgment imposed a fine of \$18,000.00 but ordered no restitution. (J.A. 73). Petitioner promptly filed a notice of appeal on December 29, 2016. (J.A. 75). This notice of appeal conferred jurisdiction over Petitioner's case to the Fourth Circuit.

On January 12, 2017, the district court amended its judgment and, contrary to its oral and written imposition of Petitioner's sentence in December, imposed restitution in the amount of \$92,568.73. (J.A. 17). The district court did not hold a separate sentencing hearing or notify Petitioner that the court intended to substantively alter the sentence. Instead, the district court claimed that it was merely correcting a "clerical" error under Fed. R. Crim. P. 36. Nor did the court

advise Petitioner that a second notice of appeal was necessary to preserve his rights. *See* Fed. R. Crim. P. 32(j)(1)(B) (providing that, “[a]fter sentencing,” a court must advise a defendant of any right to appeal the sentence). Because a notice of appeal had already been filed, the district court immediately transferred the corrected judgment to the Fourth Circuit. (J.A. 17). Thus, unlike the deferred restitution at issue in *Manrique*, the question presented here is whether a notice of appeal filed after a district court enters its judgment, but before the court amends the sentence to correct clerical error, automatically matures to perfect an appeal of the corrected judgment. Because this is not a deferred restitution case, the narrow rule of *Manrique* requiring a second notice of appeal does not apply.

C. McNeil’s incorrect interpretation of Manrique conflicts with the Rules of Appellate and Criminal Procedure

Under *McNeil*’s reasoning, *Manrique* applies to *every case* in which the district court enters a corrected judgment, such that multiple notices of appeal would be required to preserve an appellant’s rights, even where the amended judgment does nothing other than correct legitimate clerical error. The Fourth Circuit’s dramatic expansion of the narrow rule in *Manrique* ignores the Federal Rules of Appellate and Criminal Procedure, as well as the practical realities of modern appellate and trial court practice.

(1) The district court had no authority under Rule 36 to substantively alter the judgment after notice of appeal had been filed

Under Rule 36 of the Federal Rules of Criminal Procedure, “the court may at any time correct a clerical error in a judgment, order, or other part of the record, or

correct an error in the record arising from oversight or omission.” Fed. R. Crim. P. 36. Such an error, however, must be purely clerical; Rule 36 may not be used “to make a substantive alteration to a criminal sentence.” *United States v. Pease*, 331 F.3d 809, 816 (11th Cir. 2003); *accord United States v. Hamby*, 215 F.3d 1322 (4th Cir. 2000) (“Rule 36 authorizes a court to correct only clerical errors in the transcription of judgments.”); *United States v. Werber*, 51 F.3d 342, 347 (2d Cir. 1995) (“Rule 36 is not a vehicle for the vindication of the court’s unexpressed sentencing expectations, or for the correction of errors made by the court itself.”) (internal quotation marks omitted); *United States v. Daddino*, 5 F.3d 262, 264 (7th Cir. 1993) (“[R]ecent cases and commentary flesh out the parameters of Rule 36 and demonstrate that this exception does not apply to errors made by the court itself.”); *cf. Dolan v. United States*, 560 U.S. 605, 620 (2010) (“Since the sentencing judge’s later order did not ‘correct’ an ‘error’ in the sentence, Rule 35 does not apply.”).

Where a conflict exists between an unambiguous, orally pronounced sentence and the written judgment, the oral sentence controls. *See, e.g., United States v. Barwig*, 568 F.3d 852, 855 (10th Cir. 2009); *United States v. Osborne*, 345 F.3d 281, 283 n.1 (4th Cir. 2003); *United States v. Torres-Aguilar*, 352 F.3d 934, 935 (5th Cir. 2003); *United States v. Makres*, 851 F.2d 1016, 1019 (7th Cir. 1988). In such instances, the remedy is to vacate the judgment and remand to the district court for the purpose of correcting the written judgment to conform to the oral sentence. *United States v. Morse*, 344 F.2d 27, 30-31 n.1 (4th Cir. 1965).

Here, the court announced at sentencing that “restitution is waived.” (J.A. 65). In conformity with this oral pronouncement, the judgment entered on December 22, 2016 imposed no restitution. (J.A. 73). Petitioner filed a timely notice of appeal from this judgment. On January 12, 2017, the district court *sua sponte* entered an order directing the clerk of court to amend the judgment “to reflect . . . restitution in the amount of \$92,568.73 and no fine.” (J.A. 77). The court explained that “amending the amended judgment is necessary to correct a clerical error.” (J.A. 77-78).

The court’s failure to impose restitution cannot be described as mere “clerical error.” Imposition of restitution represents a substantive alteration to Petitioner’s criminal sentence. *See generally United States v. Grant*, 715 F.3d 552, 554-560 (4th Cir. 2013). Accordingly, the district court had no authority to amend the judgment under Rule 36. *See Pease*, 331 F.3d at 816 (holding that the district court erred when it used Rule 36 to amend the defendant’s sentence to include an order of forfeiture that had been agreed to in the plea agreement, but which the court failed to make a part of its judgment at sentencing); *cf. United States v. Fields*, 552 F.3d 401, 405 (4th Cir. 2009) (vacating and remanding with instructions for reinstatement of the sentence imposed at the first resentencing where the district court lacked authority under Rule 35(a) to correct a judgment to include a fine: “Failure to impose a fine may well have been an understandable oversight during a busy schedule. But it is not an oversight that is correctable under the narrow scope of Rule 35(a).”); *accord United States v. Lansing*, 71 F. App’x 84, 88 (2d Cir. 2003)

(vacating amended judgment of conviction and remanding for reinstatement of earlier judgment where the district court lacked authority to amend the judgment under Rule 36).

(2) Petitioner satisfied the rule-based limits for perfecting a criminal appeal

A criminal appeal is perfected by filing a notice of appeal that is timely under Rule 4 of the Federal Rules of Appellate Procedure. *See* Fed. R. App. P. 3(a)(1); *accord Bowles v. Russell*, 551 U.S. 205, 212 (2007) (the time for perfecting a criminal appeal is “rule-based,” not “statute-based” as in civil cases). Rule 4(b)(1)(A)(i)-(ii) requires the defendant’s notice of appeal in a criminal case to be filed “within 14 days after the later of . . . the entry of either the judgment or the order being appealed . . . or . . . the filing of the government’s notice of appeal.” Rule 4(b)(2) activates a premature notice of appeal. Rule 4(b)(2) states:

Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

The rule provides that a notice of appeal filed after a decision is announced, but before judgment is entered on the decision, matures or springs forward to embrace a later-filed judgment. *United States v. Bly*, 510 F.3d 453, 457 n.6 (4th Cir. 2007) (noting that premature notice of appeal “is deemed to be ‘filed on the date of and after entry’”) (quoting Fed. R. App. P. 4(b)(2)).

Petitioner complied with Rule 3(a) & (c) by timely filing a notice of appeal on December 29, 2016. (J.A. 75). The notice of appeal identified Petitioner as the appellant and specified that the appeal was from the “judgment of conviction and

sentence entered . . . by [the] Honorable Senior United States District Judge James C. Fox on December 22, 2016,” and was taken to the United States Court of Appeals for the Fourth Circuit. (J.A. 75). Petitioner thus satisfied Rule 3’s requirements for invoking appellate jurisdiction. Within 30 days of the original sentencing—while the appeal was pending, but before any briefing had taken place—the district court entered an amended judgment purporting to correct clerical error. The district court immediately transferred the amended judgment to the Fourth Circuit. (J.A. 17). Under Rule 4(b)(2), Petitioner’s notice of appeal from the original judgment encompassed the later-filed judgment as amended by the district court. Because there were not two separate judgments, but only a single corrected judgment, a second notice of appeal was not necessary. *See United States v. Booker*, 436 F.3d 238, 246 (D.C. Cir. 2006) (explaining that any changes to a judgment under Rule 35 or Rule 36 “require the District Court to incorporate those changes into a single, preexisting judgment”).

Notably, the district court did not again advise Petitioner of his right to appeal after imposing restitution, as Fed. R. Crim. P. 32(j)(1)(B) would require following a separate sentencing. The absence of Rule 32’s mandatory advisory indicates that the district court knew that the judgment was already on appeal. If the district court believed that Petitioner’s appeal had not yet been perfected, Rule 32(j)(1)(B) required a new advisory “after sentencing,” because there was no reason to believe Petitioner was aware he needed to file a second notice in his pending appeal.

(3) *The rules governing civil appeals support Petitioner's interpretation*

Unlike the rules governing criminal appeals, the rules governing civil appeals specifically contemplate that an amended notice of appeal will be filed after an amended judgment. See Fed. R. App. P. 4(a)(4)(B)(ii). Rule 4(a)(4)(B)(ii), applicable only to civil appeals, requires a civil appellant to file a second notice of appeal to challenge “a judgment’s alteration or amendment.” *Id.* In recognition that such additional notices are required, Rule 4(a)(4)(B)(iii) exempts the additional notices from multiple filing fees in civil cases.

These provisions have no counterpart in the subsections of Rule 4 relating to criminal appeals. The requirement for multiple notices is absent from the rules governing criminal appeals, as is the fee exemption for such notices. The absence of parallel provisions for criminal appeals confirms that a second notice of appeal is not required for an amended criminal judgment entered during the pendency of an appeal of the initial judgment. Indeed, before the rules were amended in 1993, several circuits reasoned that the differing provisions for civil and criminal appeals indicated that an appellant in a criminal case was under no duty to file a second notice of appeal to bring a post-judgment motion within the scope of the appeal, so long as the government was not prejudiced by the filing of only one notice. *United States v. Thornton*, 1 F.3d 149, 157-58 (3d Cir. 1993); *United States v. Winn*, 948 F.2d 145, 155 (5th Cir. 1991); *United States v. Walker*, 915 F.2d 1463, 1465 (10th Cir. 1990). In 1993, this reasoning was codified into Rule 4(b), which now specifies that no amendment to the notice of appeal is necessary after the denial of a post-

judgment motion in a criminal case. *See* Fed. R. App. P. 4(b)(3)(C)(providing that, for criminal appeals, “[a] valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A)”); *see also* Fed. R. App. P. 4(b)(3) advisory committee’s note (1993 amendment).

(4) McNeil’s expansion of Manrique ignores the realities of trial and appellate practice and creates a notice trap for unsuspecting litigants

In criminal cases, counsel for the defendant is required to file a notice of appeal, if the client requests one, whether meritorious issues are apparent or not. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (citing *Rodriguez v. United States*, 395 U.S. 327 (1969)). After filing a notice of appeal on behalf of the defendant, district court counsel typically withdraws from the case, and new counsel is appointed for the appeal. The newly-appointed appellate counsel rarely knows any bases for appeal before reviewing the record and the transcripts that are prepared much later. For this reason, appellate counsel does not generally review a case until the transcripts are ready. In addition, the antiquated practice of assignment of errors was abolished as “obsolete” by the middle of the last century. Fed. R. App. P. 3(a), advisory committee’s note (1967 Adoption). Rules of practice since then “requir[e] nothing other than the filing of the notice of appeal in the district court for the perfection of the appeal.” *Id.* Thus, as a practical matter, identification of appellate issues by counsel, and disclosure of those issues to opposing parties, occur for the first time in the initial brief, and there is no requirement that a party designate errors any earlier. Consequently, a notice of appeal that matures under Rule 4(b)(2) provides the same notice that the rules of practice contemplate. To be sure, the

government has never claimed that it lacked notice of Petitioner's appeal, or that it has been prejudiced in any manner by the absence of a second notice of appeal.

Conversely, the Fourth Circuit's decision in *McNeil* presents a significant risk of lack of notice and resulting prejudice to criminal appellants who, like Petitioner, have filed a single notice of appeal. If a district court corrects its judgment after the notice of appeal has been filed, appellate counsel will not be alerted to that fact until well after the time for filing a second notice of appeal has expired. Likewise, trial counsel for the defendant, having filed a notice of appeal and withdrawn from the case, will be equally unaware of the need to file a second notice of appeal.

The Fourth Circuit's decision in *McNeil* also conflicts with the Federal Rules of Criminal Procedure's overriding principle that the rules are to be interpreted "to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay." Fed. R. Crim. P. 2; *cf.* Fed. R. App. P. 1(a)(2). A district court may correct or amend a judgment multiple times after a defendant files a notice of appeal. The Fourth Circuit's expansion of *Manrique* requires multiple notices of appeal, additional docketing notices, and duplicate filing fees. Of course, for indigent defendants like Petitioner, the filing fees are waived, but the duplicated administrative costs associated with multiple notices of appeal are nonetheless borne by the public and needlessly burden court clerks with additional paperwork.

Not only is the Fourth Circuit's interpretation impractical and cumbersome, but it also creates for criminal appeals the type of "notice trap" that once existed in civil

appeals, but was abolished by the 1993 appellate rules amendments. The notice trap in civil cases was caused by a former rule of appellate procedure and this Court's interpretation of that rule. Prior to the 1993 amendments, Rule 4(b)(1) governing civil appeals provided that "[a] notice of appeal filed before the disposition of any of the [designated post-trial] motions shall have no effect." Fed. R. App. P. 4(a)(4) (1979). This Court interpreted that provision in a civil case as rendering such a notice of appeal a "nullity . . . as if no notice of appeal were filed at all." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982). The 1993 amendments to Rule 4 replaced the "nullity" rule in civil appeals with a rule that recognizes the ripening of a premature notice of appeal. *See* Fed. R. App. P. 4(a)(4) advisory committee's note (1993 amendment). The Advisory Committee explained that the provision was written to eliminate the "trap" that previously occurred in a civil appeal if "an unsuspecting litigant" did not file a second notice of appeal in the event an amended judgment was entered while the appeal was pending under the original notice of appeal. *Id.* The rules were rewritten to clarify when an amended notice of appeal is required. As a result of the 1993 amendments, Fed. R. App. P. 4(a)(4)(B)(ii) now specifies precisely when a second notice of appeal is required in the case of an amended judgment in a civil case.

Although this eliminated the trap in civil cases, the trap never existed in criminal appeals. But if Rule 4(b)(2)'s premature notice provision is not interpreted to cover corrected judgments, as the Fourth Circuit has now held, it creates a trap where there never has been one before. The rules governing criminal appeals are

silent on the need to file a second or amended notice of appeal following an amended or corrected judgment. The potential for confusion for the unsuspecting litigant, despite diligently following the written rules, recreates the type of notice trap abolished by the Advisory Committee's redrafting over two decades ago.

Finally, the Fourth Circuit's approach undermines the certainty of time limits for collateral review under 28 U.S.C. § 2255. *See, e.g., United States v. Barry*, 647 F. App'x 519 (6th Cir. 2016) (noting that a § 2255 motion is the appropriate forum to address an ineffective assistance of counsel claim regarding restitution). If the final judgment and later-entered corrected judgment are different final judgments requiring separate notices of appeal, as the Fourth Circuit has concluded, their different dates of entry give rise to different deadlines to file for collateral review. See 28 U.S.C. § 2255(f)(1). If neither the original judgment nor the corrected judgment is appealed, the petitions under § 2255 are due within a year after their respective entry dates—which will be different dates, sometimes months apart. If one is appealed, but not the other, one is due when the appeal ends (plus 90 days if no certiorari petition is filed), but the other is due based on the date it was originally entered—a date that may be before or after the appeal ends. If both are appealed unsuccessfully, but a petition for writ of certiorari is filed as to the issues in only one judgment, the due dates run from the date the appeal ends for one, but as of the date certiorari proceedings end as to the other—again, usually months apart. This complicated consequence only results from the Fourth Circuit's unwarranted expansion of *Manrique*, and counsels against that interpretation.

For all of these reasons, this Court should reject the Fourth Circuit's expansion of *Manrique*. Because this is not a deferred restitution case, the narrow rule in *Manrique* does not apply. Petitioner perfected his appeal by timely filing a notice of appeal on December 29, 2016. Petitioner thus satisfied Rule 3's requirements for invoking the Fourth Circuit's jurisdiction. Once the case was docketed with the Fourth Circuit, the district court no longer had jurisdiction to substantively alter Petitioner's sentence. As a result, the district court's January 12, 2017 judgment is a legal nullity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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