























































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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