ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MANUEL DEJESUS PEGUERO, Petitioner v. UNITED STATES.

CASE NO: No. 97-9217 c.1

PLACE: Washington, D.C.

DATE: Monday, January 11, 1999

PAGES: 1-40

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IN THE SUPREME COURT OF THE UNITED STATES

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MANUEL DeJESUS PEGUERO, :

Petitioner :

v. : No. 97-9217

UNITED STATES. :

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Washington, D.C.

Monday, January 11, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

DANIEL I. SIEGEL, ESQ., Assistant to the Federal Public Defender, Harrisburg, Pennsylvania; on behalf of the Petitioner.

ROY W. McLEESE, III, ESQ., Assistant to the Solicitor General, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 97-9217, Manuel DeJesus Peguero v. the United States.

Mr. Siegel.

ORAL ARGUMENT OF DANIEL I. SIEGEL

ON BEHALF OF THE PETITIONER

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

There are three reasons why the failure to warn of appellate rights is a structural error which justifies relief as a matter of law.

First, there is no substitute for a warning that comes directly from the judge.

Second, there is no way to correct the error on direct appeal.

And third, a judicial warning has been deemed necessary both by this Court and by the Congress.

Turning to the first point, there is no substitute for a --

QUESTION: You -- you state these three reasons. I think Fulminante was where we talked -- talked about structural error and what it took. Those don't -- the reasons you cite don't come out of that opinion, do they?

MR. SIEGEL: This Court has never dealt with a structural error regarding access to an appeal. All the structural errors discussed by this Court have been trial errors.

But I'd like to analogize this case to a structural error to explain why, using the terms of Hill, the failure to warn by a judge is a rudimentary demand of fair procedure.

Why is it there's no substitute for a warning that comes directly from the judge? Because rule 32 anticipates that when the defendant hears the warning that comes from the judge, he may at that moment on the record state at the sentencing hearing, yes, I want an appeal. And, indeed, the rule takes account of that possibility because the clerk is empowered to immediately file a notice of appeal on behalf of the defendant who spontaneously requests a notice of appeal after being warned by the district court judge.

For that mechanism to work, the warning has to come from the district court judge, and the failure to follow the rule we submit should, therefore, be akin to a structural error which is remedied as a matter of law.

QUESTION: Is -- is it true that -- that if you are right, the same thing would be said for the rule 11 warnings in the plea colloquy, that -- that failure to

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give any one of them or to give one of them accurately would also be structural error with the same result?

MR. SIEGEL: No, for a very important reason. When a defendant doesn't get his full rule 11 warnings, his attorney, assuming that there's a warning of the right to appeal and it's properly preserved -- his attorney can raise those errors on direct appeal in the court of appeals.

You can do that with virtually any error under the Rules of Criminal Procedure except this rule because if a defendant doesn't get the warning from the judge of his right to a direct appeal, that may effectively block the defendant's access to a direct appeal. And that kind of an issue is a structural error which we submit should be --

QUESTION: Well, it may or may not, and -- and with other structural errors, you can't tell whether it does or not. But in this situation you can tell whether it did or not. If, in fact, he knew of his entitlement to an appeal, it did not.

MR. SIEGEL: We know from the record as a finding of fact from the district court judge, and the defense attorney testified that he discussed the appellate rights with the defendant and that the defendant agreed not to go on with an appeal and to, instead, cooperate.

But we will never know, despite that warning, what would have happened if the judge had then warned the defendant of his appellate rights. It's very possible --

QUESTION: Why do we need to know? Why do we care? What we do know is that he understood that he had a right to appeal. What more do we need to know than that?

MR. SIEGEL: We have no indication from the record what his response would have been if the judge had told him. For example, I can tell you from experience that the sentencing hearing is often the low point in the attorney/client relationship, and sometimes defendants do not trust their attorneys, especially if it is an appointed attorney. Sometimes a defendant can be confused and have in his mind the thought, oh, I'm going to get in trouble if I file an appeal or my cooperation won't work out if I file an appeal.

But if the defendant hears it from the district court judge on the record at the sentencing hearing, first he knows it's legitimate. Second, the district court judge tells him under the rule, Mr. Defendant, you have a right to proceed in forma pauperis, to have a free appeal. The structure of the rule then anticipates that in response to what the judge says, the defendant may make a spontaneous statement on the record saying, yes, please file the appeal, and it happens immediately. Now, that's

a little different -- a lot different than the rest of the structure of the Rules of Criminal Procedure.

QUESTION: Well, Mr. Siegel, if your position is correct, that it is a structural error if -- if the defendant were not advised by the judge of the right to appeal but subsequently perfected an appeal, he'd still be entitled to relief under your theory because there's been a structural error I guess.

MR. SIEGEL: Well, I would say that in that case there --

QUESTION: That's the consequence of labeling it as you would have us label it.

MR. SIEGEL: There would be no -- the rule wouldn't apply where the defendant had actually filed his appeal. I think this rule, fairly read, is a way to make sure the defendant gets his appeal, and if gets his appeal, there's -- there's no reason to apply the rule.

The same for the exception --

QUESTION: How about -- is there ever a plea agreement in which a defendant agrees to give up any right to appeal?

MR. SIEGEL: Yes, Your Honor, and --

QUESTION: And suppose that were the case. And again, if it's a structural error, then we ignore that I guess.

MR. SIEGEL: Well, no. In -- in the case of a defendant who pleads guilty, pursuant to a plea agreement, and then waives his right to appeal, there's a colloquy on the record at the guilty plea hearing where the judge has to explain to the defendant what he's giving up in his rights. If there's a knowing and voluntary waiver, you can always make a knowing and voluntary waiver on the record of -- of a procedural right, or any right indeed. But it is different where there is no appeal filed and there is no plea agreement waiving the right to appeal.

Now, the Third Circuit has recognized another exception which is that if the defendant gets the warning at the guilty plea hearing a few weeks earlier, then that's enough to meet the rule.

QUESTION: But as soon as you start getting exceptions, it seems to me you're strongly cutting against your argument, this is so-called structural error, that it's much like any other kind of error that you evaluate for harmlessness.

MR. SIEGEL: Well, I would have to disagree with that, going back to the fundamental point that you never know what the defendant would have said if he had been told by the judge.

Now, if there was a colloquy between the defendant and the judge giving up his appeal rights, then

you know. If the appeal was filed, then it's clear that the rule is not applicable.

QUESTION: If -- if we applied that test to all harmless error determinations, that is to say, you can only say there is harmless area -- error when you know -- I mean, you never know for 100 percent certainty. In harmless error determinations, you -- you -- you make an assessment which is, you know, always -- there's always some scintilla of a doubt left in it.

MR. SIEGEL: Well, Your Honor, we don't dispute the general applicability of the harmless error rule or that there are no broad exceptions to it. But this rule is so unique and unusual --

QUESTION: I just think it's unrealistic to say he knew about this right to appeal, but if the judge told him what he already knew, there might have been a different outcome.

MR. SIEGEL: The --

QUESTION: I mean, I can't say no. I can't say it's impossible. It just seems to me very, very, very unlikely.

MR. SIEGEL: Well, in this case, Your Honor, we submit that the structure of the rule shows that it is likely because this is a rule where the people who put together the rule, which was approved by this Court,

specifically created a structure where the defendant could spontaneously request it on the record.

QUESTION: The rule is there so that we don't have to inquire into whether he knew about it all the time.

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

QUESTION: We may have to in some exceptional case such as this, but 99 percent of the cases are taken out of that situation by the fact that on the record the judge asked him and he says no.

But that doesn't speak to the fact of when the judge makes a mistake, do we have to assume, even when he knew about that same thing, that somehow this -- this impaired his right to appeal.

MR. SIEGEL: Because the right to appeal is so important and because you can never really know what would have happened if the structure or the rule had been followed, I would say, yes, in this unusual circumstance, just --

QUESTION: Mr. Siegel, can we back up for a bit?

MR. SIEGEL: Yes. Yes, Your Honor.

QUESTION: Is it clear that defendant knew? I mean, the lawyer testified that the lawyer told him. Did defendant, who also testified, say, yes, he knew?

MR. SIEGEL: The district court made the finding

in -- in favor of the Government, that the defendant was warned of his right to appeal.

QUESTION: That was by crediting the attorney.

MR. SIEGEL: That was by crediting the attorney. Now, the attorney didn't have a letter to the defendant. He didn't have a memorandum to his file. He didn't have a notation on the file. He was testifying solely from memory. So, it is --

QUESTION: But why do we have to go beyond the fact that there is a -- there's a second claim here, and the second claim was ineffective assistance of counsel for failure to take the appeal that the defendant requested him to take. So, at some point in the relevant period, on the defendant's own claim, we have to determine -- we can only conclude that he knew.

MR. SIEGEL: Well, the district court made a factual finding that there was a discussion between the defendant and his attorney --

QUESTION: Why do we need a finding? We've got this -- we've got the defendant's claim of ineffective assistance, which is predicated on the fact that he knew he had a right of appeal and told his lawyer to take it and his lawyer didn't. Why do we have to go beyond that?

MR. SIEGEL: The whole purpose of a per se rule which has been adopted --

QUESTION: Well, let's leave per se rules aside for a minute. Just as a factual matter in determining what facts should be the predicate for our decision, why do we have to go beyond the -- the second claim here of ineffective assistance in -- in which he -- in which the -- the petitioner himself states that he -- he knew that he had a right to appeal.

MR. SIEGEL: Because no matter what was stated by the petitioner, there is always the possibility that if the defendant had been properly warned by the judge, as contemplated by the rule, that he would have --

QUESTION: No, but that's -- you're answering a different question. The question before us now is, can -- can we make the assumption that he in fact knew? And it seems to me, of course, we've got to make the assumption because that is precisely what he claimed in the ineffective assistance claim. Isn't that correct?

MR. SIEGEL: It is a fact established for the record, Your Honor, yes.

QUESTION: Okay.

MR. SIEGEL: Yes.

The --

QUESTION: Well, if you -- you have already recognized that there would be some exceptions. Even if you're right about this being a structural whatever, why

not say, but it took him 4 years to bring this forward, so at least we're going to limit this automatic operation to the diligent defendant, not someone who waits 4 years to say, oh, I should have been told I had a right to a lawyer?

MR. SIEGEL: Well, there's no question about the 4-year delay, but under cases that will be arising under the current law, there is now a 1-year limitations period under the AEDPA, Anti-terrorism and Effective Death Penalty Act. So, the practical effect of the Court's ruling today is going to be this.

If a judge, say, here in the District of Columbia Federal District Court goes through a sentencing hearing and neglects to inform the defendant of his appellate rights, and 4 or 5 months later, the defendant is taken to another State and placed in a penitentiary and meets a jailhouse lawyer who says, hey, you -- you had a right to an appeal, you had a right to be informed, when the defendant files that motion within the 1-year period, the outcome of this case is going to decide whether the judge can do one of two things.

On one hand, you can do what happened in the Gaeta case in Massachusetts, Judge Tauro's rule, which is simply say, well, I've reviewed the transcript of the sentencing hearing, I see there was an error here. We're

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going to reinstate the sentence, and we're going to reinstate the appellate rights and have the clerk file a pro se notice of appeal on behalf of the defendant.

If you adopt the Government's position that the Timmreck and Hill standards requires proof of prejudice in this particular instance, then the judge has got to ask the marshall to bring the defendant back from the prison. You have to appoint a new attorney because there's going to be testimony regarding whether or not he was discussing it with counsel. You've got to have an evidentiary hearing. The district court has to make findings of fact and conclusions of law.

It seems to me that judicial efficiency in the interests of the Federal courts cut in favor of a rule which, within that 1-year period, gives the district court discretion to simply correct the error in an expeditious manner.

QUESTION: What -- what was the alleged error here? I thought that the sentence was within the guidelines for the offense to which defendant pled.

MR. SIEGEL: That is correct. The error was the district court's failure to comply with then existing rule 32(a)(2).

QUESTION: Yes, but -- but the object of it would be to get a new sentencing and a --

MR. SIEGEL: The object of it would be to get a new appeal. The sentencing was always considered necessary --

QUESTION: It's an appeal from the sentence.

MR. SIEGEL: It's an appeal from the judgment, both the sentence and the judgment of conviction.

QUESTION: I thought he entered a guilty plea.

MR. SIEGEL: That is true, Your Honor. But the question of a voluntarily and knowing guilty plea is always one that could be raised on a direct appeal.

QUESTION: So -- so, are we just discussing this in the abstract, or did this defendant have something appealable? And if so, what?

MR. SIEGEL: I think that Mr. Peguero has a good direct appeal claim regarding the conduct of the guilty plea colloquy under rule 11.

QUESTION: But he didn't raise that at any point, did he? He's -- he's raised two claims. He said he didn't tell me about the appeal, and my lawyer was ineffective assistance. That's all -- ineffectively assisting me. That's the only -- those are the only two claims he's raised.

MR. SIEGEL: That's true, but on direct appeal, the defendant will always have an opportunity to argue in the court of appeals, one, that the guilty plea was not

knowingly and voluntarily entered or, number two, that there was a violation of rule 11.

QUESTION: Sure.

MR. SIEGEL: Now --

QUESTION: Sure, and -- and -- but whether he could have done that or not, he hasn't done it. The only two claims we've got are -- are the claim under this rule and the ineffective assistance claim.

MR. SIEGEL: To respond to your question, there's one point where I agree with the Government.

QUESTION: Is -- is that correct, that -- that the only two claims that he's raised are those?

MR. SIEGEL: The only claim that is active now in the 2255 petition is the failure of the judge to inform the defendant of his appellate rights.

QUESTION: And the only two claims that were ever raised were -- were this one and the ineffective assistance claim. Is that correct?

MR. SIEGEL: Yes, in the 2255 petition.

On this point, however, I'd point out an agreement with the Government at page 25 of their brief where they point out that proving a meritorious issue on appeal is not a prerequisite to getting the appeal back. Certainly we're going to review the record to see if there are any sentencing issues that we can raise in the court

of appeal under the clear -- under the clearly erroneous standard. But that's how I see the appeal at this point.

QUESTION: If this were a -- an omission inconsistent with the rudimentary demands of fair procedure, well, then how could Congress cut it off at a year?

MR. SIEGEL: Excuse me?

QUESTION: I mean, how could Congress limit the time to raise it if it were -- if this were something -- if the omission to tell him about this were inconsistent with the rudimentary demands of fair procedure?

MR. SIEGEL: I understand the question.

QUESTION: How could Congress cut it off at a year?

MR. SIEGEL: The Congress is not cutting off the defendant's right to raise it, but it is regulating the way in which the defendant --

QUESTION: No, no. You said he could only raise it in a year.

MR. SIEGEL: That is correct.

QUESTION: All right. So, would that be constitutional if -- if in fact this is a right that's rudimentary and so forth?

MR. SIEGEL: It -- it is a little beyond. I would -- I would argue, however, that the Congress in

regulating these matters always has the right to put some reasonable time limits on. Indeed, the current rules for post-conviction petitions contain an objection that can be made by the Government if they think the petition has been delayed a long time and they're prejudiced in responding to it under the rules for 2255 petitions. They can say, dismiss this petition because we can't respond to it because it's come too late. So, even under the preexisting law, it was possible to make an argument based upon essentially a laches argument.

The third point I -- I wanted to make to the Court is that a warning from the judge, the district court judge, has been deemed necessary not only by this Court through its rules, but by the Congress. In 1984 Congress passed the Sentencing Reform Act, and Congress specifically required judges to warn defendants that they had a right to appeal from the sentence. So --

QUESTION: But the one flaw in this -- I'm just -- think it through with you a minute. Congress did not provide, however, that the failure to give the warning shall automatically result in the reinstatement of the appeal right, which presumably they could have done that.

MR. SIEGEL: That is correct. They didn't discuss that.

However, I would point out that in 1984 when

they passed the act, all of the case law on this subject, without exception, supported the per se rule.

So, to just summarize again on the three points that we had raised, we submit, first, that there is no substitute for a warning --

QUESTION: Refresh my recollection. Exactly what did they do in 1984?

MR. SIEGEL: In 1984, when they passed the sentencing guidelines, they by statute amended rule 32(a) to insert a requirement that the district court judge must also inform the defendant that he has a right to appeal from the sentence because prior to 19 --

QUESTION: But -- but then what was the preexisting law that they presumably adopted if they first put it in in 1984? I --

MR. SIEGEL: Well, the question was -- Your Honor has posed to me a question and says --

QUESTION: Yes.

MR. SIEGEL: -- well, the statute doesn't say anything about a per se rule. So -- so, maybe we should assume that they didn't intend --

QUESTION: It doesn't say anything about a per se remedy. It has a per se rule.

MR. SIEGEL: Okay. They didn't say anything about a per se remedy.

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QUESTION: Right.

MR. SIEGEL: However, if you want to try to find some indication of what Congress might have been thinking, if you're inclined to look for the -- the background of what was in the law at that time, in 1984, you'll see that all of the appellate court cases dealing with this issue before 1984 adopted the per se rule --

QUESTION: But I thought Congress changed the rule in 1984.

MR. SIEGEL: They added to the rule to require not only a -- an advising of the defendant after trial of his right to appeal from the conviction, but also requiring now under the guidelines that defendants be specifically told that they had the right to appeal from the sentence.

Justice Scalia, I think you had a question.

QUESTION: Yes. I'm not sure what cases. These cases presumably are cases that held that even without a rule that said so, if you did not advise the defendant of his right to appeal --

MR. SIEGEL: These are -- these are cases arising after the 1966 amendment to the guideline which first said in all cases where the defendant has gone to trial, the district court judge must warn the defendant on the record that he has a right to an appeal.

QUESTION: Right.

MR. SIEGEL: These cases -- this is nothing new, which is what has -- what has happened in this case. These cases came up under the old rule before the sentencing guidelines also, and the consistent ruling of the courts of appeal, even after Timmreck, by the way --

QUESTION: That's what I was going to ask. Those are after Timmreck.

MR. SIEGEL: Yes.

QUESTION: Timmreck would have changed it as to the colloquy at the rule 11 stage.

MR. SIEGEL: Some were before but some were after. But all of them prior to 1984 held that where the district court fails to inform the defendant that he has a right to appeal, the automatic remedy simply to reinstate his appellate rights.

QUESTION: Were those -- were those cases in which the defendant knew of his right by advice from counsel?

MR. SIEGEL: Some of those cases indicate the defendant did, yes. Yes.

Are there any -- if there are no other questions, I will sum up.

To summarize on this point, Your Honor, we again submit that a failure to advise a defendant of his

appellate rights coming from the district court judge is akin to a structural error which should be remedied as a matter of law. We submit that there is no substitute for a warning that comes directly from the judge. We submit that there is no way to correct it on direct appeal, and we submit that it has been deemed necessary both by this Court and by this Congress.

So, we would ask this Court, consistent with the majority opinion of justices -- judges who have considered it in the court of appeals, to reverse the judgment of the court of appeals and to reinstate defendant's right to take a direct appeal.

Thank you.

QUESTION: Thank you, Mr. Siegel.

Mr. McLeese, we'll hear from you.

ORAL ARGUMENT OF ROY W. McLEESE, III

ON BEHALF OF THE RESPONDENT

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

Under rule 32, the district court should have informed petitioner at sentencing that he had a right to appeal, but petitioner knew he had a right to appeal and so he was not prejudiced by the district court's failure to tell him what he independently knew. Petitioner is, therefore, not entitled to collateral relief.

To obtain collateral relief, petitioner would have to establish a fundamental defect which inherently results in a complete miscarriage of justice.

QUESTION: In other words, he's got to negate the possibility of harmless error? The burden is on him?

MR. McLEESE: Yes, in the context of --

QUESTION: Now, why -- why is the burden on him here, whereas the burden, I take it, is on the Government if there's a rule 11 failure?

MR. McLEESE: No, Justice Souter. In the context of rule 11, as well in this Court's decision in Timmreck, the burden upon a defendant who is alleging the violation of a Rule of Criminal Procedure, as a basis for collateral relief, is on the petitioner to establish that that violation was prejudicial to him.

QUESTION: Is -- is that true under 11(h)?

MR. McLEESE: 11(h) is a provision which relates to direct appeal, and in circumstances when a defendant is noting a direct appeal from his -- the adjudication of guilt and ensuing sentence on the ground that there was a deviation from the requirements of rule 11, the burden is on the Government to show the harmlessness of the error.

But when we move over into a collateral proceeding, the burdens shift. For example, this Court's decision in Brecht v. Abrahamson imposed -- held that the

Chapman standard, which normally applies to determine the harmlessness of a constitutional error --

QUESTION: Well, it's a different standard, yes.

MR. McLEESE: Yes. So, the burdens alter in the collateral context, and this Court's decisions beginning as far back as Hill and carrying through up to Reed v. Farley have made clear that when a defendant is seeking collateral relief on the ground not of a constitutional violation or even of a statute, but a violation of a rule of procedure, that the burden is on the defendant to establish that he was prejudiced by that --

QUESTION: And that has been, in effect, uniformly accepted as -- as the -- the basis to interpret 11(h)?

MR. McLEESE: Yes. The -- the lower courts who have -- there are a myriad of cases in which courts of appeals have confronted collateral claims, 2255 motions, in which defendants have alleged deviations from the -- the very complex and numerous requirements of rule 11. And in that context, the courts of appeals have consistently held that the burden is on the defendant to establish prejudice, and they frequently hold hearings where the defendant --

QUESTION: How would that work of showing prejudice where the defendant makes a credible case that

he didn't find out that he had a right to appeal until after -- how many days does he have?

MR. McLEESE: He has 10 days.

QUESTION: 10 days? He didn't find out until it was too late, till day 15. Suppose that's the fact. Would it make any difference? And we're -- we're assuming the defendant knew and that that's a significant factor. But is it? Would your position be any different if defendant -- if the judge says, yes, I believe the defendant when he says he didn't know till day 15. What would then happen?

MR. McLEESE: Two responses. If a defendant brings the matter to the court's attention within a very brief time after sentencing, the rules provide for the noting of an appeal somewhat out of time --

QUESTION: No. I mean on a 2255.

MR. McLEESE: In a 2255 proceeding, if the -- the defendant alleged that he was unaware of his right to appeal because the judge failed to comply with the requirements of rule 32 and because the defense attorney failed to provide that information as well, and that allegation was not factually disputed by the Government or it was taken up at a hearing and determined adversely to the Government or in favor of the defendant, our position is that a defendant would be entitled to relief --

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QUESTION: He would be and he wouldn't have to show that he had a probable chance of prevailing on the appeal.

MR. McLEESE: No. This Court's decision in Rodriquez and subsequent decisions as well of this Court I think make clear that the complete loss of the right to appeal is a form of prejudice that will entitle you to relief, collateral or otherwise, without regard to whether you in fact have presently established that you have meritorious claims.

QUESTION: So, this case would have come out the other way appropriately in your view if the defendant in fact did not know within the 10 days that he had a right to appeal.

MR. McLEESE: I should add the qualification derived from this Court's decision in Timmreck that in some cases there might be a question as to whether the defendant would have wanted to or would otherwise have been able to appeal. There are the situations where a defendant has waived appeal by way of a valid plea agreement. There are situations, as this case was, where a defendant might not have known that he had a right to appeal, but might have, for reasons that a district court would find later, be unable to establish that he would have wanted to appeal or have had any reason to appeal.

So, those are -- subject to those caveats --

QUESTION: Mr. McLeese, what if rule 32 amendment had not been adopted and there were nothing in the rule telling the judge that he had to inform the defendant of his right to appeal? And let's assume further that the defendant did not, in fact, inform the defendant of his right to appeal at sentencing. What -- what were the holdings of the courts before the adoption of these amendments to rule 32?

MR. McLEESE: The way those cases typically played out and the way they would continue to play out with respect to -- the way they typically played out was for a defendant to raise the claim in the form of an ineffective assistance of counsel claim where the defendant would say -- wouldn't be able to rely on rule 32, but would say, I was convicted. My attorney was there with me. My attorney -- either I requested that he note an appeal for me and he incompetently failed to note the appeal. I was thereby completely deprived of my opportunity to appeal. And when those predicates were established, the courts of appeals would grant relief --

QUESTION: Mr. McLeese, I don't think that's right. It seems to me that the Rodriquez case came before the real development of the challenge to the competency of counsel, and in the Rodriquez case, they did allow the

reinstatement of the appeal, notwithstanding the fact that there had been a lawyer there.

And I'm not sure. The problem I have with your position is do you think the Rodriquez case was, in effect, overruled by Timmreck, or do you think this case is distinguishable from Rodriquez?

MR. McLEESE: I think this case is distinguishable from Rodriquez. What the -- if Rodriquez had supported the idea that it was appropriate to impose a rule of per se collateral relief, the Court's opinion would have been quite different. The Court would have said, we note that there was a violation of rule 32 here. That entitles the defendant to relief without more, and we therefore direct --

QUESTION: Except for the fact Justice Harlan said that there should be an inquiry into prejudice, and the court did not do that. It sent it back automatically to reinstate the appeal.

MR. McLEESE: I think the debate between the majority and Justice Harlan in Rodriquez was not about whether there should be an inquiry into prejudice. It was about whether the majority had properly conducted what everyone agreed needed to take place, which was an inquiry into prejudice. What the majority in Rodriquez said was, this defendant -- they did not say there was a rule 32

violation and therefore we grant the defendant relief.

QUESTION: They said --

MR. McLEESE: What they said was, he has been effectively denied his right to appeal.

QUESTION: Correct.

MR. McLEESE: And it reached that conclusion based not solely on the rule 32 violation, but on two other features of the case that supported a conclusion of prejudice.

One was that the defendant who had up to that point been represented by an attorney had his attorney withdraw at the sentencing proceeding, and therefore there was no attorney around to give the advice that it's undisputed occurred here.

And second, that the defendant at the sentencing proceeding indicated to the judge that he wished to pursue an appeal by, the court held, saying he wanted to proceed further in forma pauperis. And the Court pointed out that there would be no reason to make that request unless he wished to appeal.

And the Court went on in Rodriquez to say that the -- the district court's failure to properly follow up on the defendant's articulated desire to appeal, coupled with the other two failings, the failure to comply with rule 32 and -- I guess it's not correctly described as a

failing, but the withdrawal of an attorney so that the defendant was unrepresented, combined to deprive the defendant of the right to appeal.

And that case is completely different from the present case where all you have is a rule 32 violation, and that rule 32 violation is, without dispute, treated as playing no causal role in -- in interfering with the defendant's ability to appeal at all because the defendant knew he had a right to appeal.

QUESTION: Did he know he had the right to have the clerk file the notice for him? Because that's -- doesn't rule 32 say two things? One, the judge should tell the defendant you have a right to appeal from the sentence, and two, if you want, the clerk will file the notice for you.

MR. McLEESE: Rule 32 says that if a request of that kind is made by the defendant, the clerk needs to enter the notice of appeal. It does not say and has never been interpreted to say that that's information that the court, the district court, should give the defendant or is obliged by rule to give the defendant.

QUESTION: Do you know what the practice is for district judges when they warn the defendant about the appeal rights, say, and they want the clerk to file the notice?

MR. McLEESE: My -- my trial practice is a few years out of date, but I never heard a district court communicate that information, and my understanding is that it is not communicated. I've never seen an appellate or trial decision suggesting that the rule would be interpreted that way. I don't think defendant -- petitioner is arguing that it should be interpreted that way.

With respect to whether the defendant knew about that, the record is silent. I will say that the defendant -- the petitioner has never alleged that he was prejudiced in that way.

And I would like to address the suggestion that it is critical that the advice come from the district court judge. In some of the remarks about that today, petitioner has I think suggested the possibility that he himself was prejudiced because the advice came through his attorney rather than through the district court judge. And that suggestion, I think, is not supported by the record, and it is not -- is not properly presented in the case. The defendant has never alleged that although he was aware of his right to appeal, the fact that the district court didn't clear that up with him somehow made his knowledge less reliable or deterred him from -- from seeking an appeal. That's an allegation that's never been

in the case and is -- you know, is not a -- not supported by the record --

QUESTION: Of course, Mr. McLeese --

QUESTION: I suppose the inference was that when it comes from the judge, this -- this defendant is reluctant to antagonize a judge. He's going to move to modify the sentence, to reduce. And the judge said, now -- now, you have a right to appeal, and maybe ideally, and the clerk can enter the notice of appeal. It just has a different weight and a different meaning. I think that's what the petitioner is telling us.

MR. McLEESE: And I don't think that was the principal purpose of the rule. I think the principal purpose of the rule was simply to make sure that on the record that advice was given. The hope is that counsel will have done it too.

But it might well be possible, although I think it would be difficult for a defendant, to make a record saying, the judge didn't comply with rule 32. My attorney talked to me about an appeal, but for various reasons I was afraid to pursue one, and had the judge advised me, things would have been different and I would have. That's a kind of a claim that perhaps could succeed. My point is more that that's -- the record doesn't support that -- that claim here --

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QUESTION: I don't think he's making that as a -- as a factual claim here. I think --

QUESTION: No.

QUESTION: I think that's one of the grounds on which he says you should have a categorical rule because this is one of the things that might happen. It's one of the reasons for it.

QUESTION: Yes. In the facts of this case, you're dead right. I mean, the equities are all with the Government in this case, but we're trying to decide what should be the rule in the generality of cases.

And I think it is true that at that particular time in the proceeding, there is a greater likelihood of a lawyer making this particular error than is true of most situations where a lawyer may fail to give advice because of the emotional situation at that particular point in the proceeding. And the lawyer is going to -- always it seems to me, when asked later, he's assumed he followed a standard practice. So, I think in all truthfulness, the normal lawyer in the normal case would say, oh, I'm sure I gave him that advice. I always do. But there's always the possibility of error.

MR. McLEESE: And all of that is true in the rule 11 context that the Court addressed in Timmreck where there later on may well need to be collateral

litigation --

QUESTION: Right.

MR. McLEESE: -- in which the defense attorney is going to be testifying about his recollection about what he told the defendant about the nature of the charges or the possible sentence. And I don't think there is any way that the court could adopt a rule of per se collateral relief here without carrying over into a context that I think is essentially indistinguishable.

QUESTION: Well, except there is this one difference, that in the rule 11 context, you set aside a guilty plea, which means you then open the matter up for trial. Here what you do is you reinstate a right to appeal from a guilty plea, which is a pretty long shot anyway. So, your chances that the defendant will actually walk are quite remote in this context, whereas they're more likely in the other situation.

MR. McLEESE: I think there is a difference of degree, but this Court's application of the fundamental defect of miscarriage of justice standard has never been calibrated in that way. In Addonizio, for example --

QUESTION: The odd thing about it is the courts of appeals so uniformly come out -- not uniform, but most of them seem to come out the other way, which is puzzling given the -- the clarity of the Timmreck opinion.

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MR. McLEESE: I -- I think that the -- the weight of authority is not as disproportionate as petitioner would suggest, but I think the principal explanation for that is that the case law in this area evolved before much of this Court's collateral relief jurisprudence, and it -- there is not a single court of appeals that has applied a rule of per se collateral relief when it considered the applicability of Timmreck. None of the cases that apply a rule of per se collateral relief have confronted Timmreck. Every court of appeals that has considered Timmreck has concluded that Timmreck forecloses this claim.

If the Court has no further questions, I would waive the rest of my time.

QUESTION: Thank you, Mr. McLeese.

Mr. Siegel, do you have something further?

REBUTTAL ARGUMENT OF DANIEL I. SIEGEL

ON BEHALF OF THE PETITIONER

MR. SIEGEL: Yes, Your Honor.

QUESTION: You have 5 minutes.

MR. SIEGEL: Thank you.

I would briefly like to respond to some comments and questions, first a comment and question made by Justice Ginsburg regarding the amount of time that a defendant has to make up any error in meeting the 10-day

limit.

The Government suggested that if the defendant doesn't meet the 10-day limit, that it can be corrected if he acts promptly. The defense counsel can ask the court to file a late notice of appeal if he shows good cause for doing it, but that's only a 30-day window of opportunity. And what happens as a practical matter is that the defendant gets moved quickly by the United States marshall. Sometimes defense counsel doesn't get to him. The defendant could be moved across State lines to a Federal penitentiary or can be in transit to a Federal penitentiary and not be able to get in touch with him.

So, that 30-day limit at the -- at the maximum -- and it's a 10-day limit with the 30 days for good cause -- is a very short limit. And I suggest to you that that might be one of the reasons why that the courts of appeals are adopting this per se rule even after the Timmreck case.

In fact, in the Sanchez decision --

QUESTION: Do you agree with your opponent that none of the courts that adopted it distinguished Timmreck or discussed Timmreck?

MR. SIEGEL: It is true. None of the courts that have spoken about the per se rule discussed Timmreck.

Now, Sanchez, Judge Buckley's decision for the

District of Columbia Circuit, discussed the Tress opinion from the Seventh Circuit which adopted their view of the Timmreck standard. So, you could say that they took account of it, but that court still stood by the -- the per se rule.

And I think -- I think it shows something about the severity of the problem. We were able to find 31 cases since 1989 on Westlaw where a defendant had not been warned of his appellate rights and it was necessary to use a 2255 proceeding to get his direct appeal right back. I submit to you that that probably represents the tip of the iceberg because normally the way you would expect a case like this to be resolved is that it comes down to the district court judge, he or she takes a look at the record and says, oh, we -- we made a mistake at the sentencing hearing. Let's reinstate the defendant's appellate rights.

And now that there is a 1-year limitation on bringing this sort of petition, it seems to me that the interests of -- of the courts, in addition to the defendants, in a fair rule is -- is served by recognizing this is as an unusual structural type of error.

The -- there was a question, I believe from Justice Ginsburg, regarding the warning about the clerk being able to file a notice of appeal. Under the rule,

the district court judge is under absolutely no obligation to tell a defendant that the clerk can immediately file a notice of appeal on his behalf. The way the rule is written it says that on the request of a defendant, the clerk can immediately file a notice of appeal on defendant's behalf.

What that suggests to me is that the drafters of the rule anticipated that in response to the warning from the judge, the defendant might spontaneously on the record of the sentencing hearing ask for the reinstitution -- ask for his direct appeal. And that, it seems to me, is a structural error that -- that should be remedied as a matter of law.

Turning to the final point, there were questions --

QUESTION: May I ask, before you do that --

MR. SIEGEL: Yes, Your Honor.

QUESTION: -- about the -- the practice that -- that you have experienced. This is something basic that judges would have no reason not to tell a defendant. Does the U.S. Attorney ever prompt a judge when he forgets?

MR. SIEGEL: I haven't -- I don't know whether judges tend to be sensitive when I'm around, but I doubt it. But I've never seen this happen in a case where I was doing a sentencing hearing. We have a few cases in our

office where we've had this problem. So, I would submit to you that it is something that recurs.

Did I answer your question fully?

QUESTION: Yes.

MR. SIEGEL: Okay.

The -- the final point I wanted to make was reference to the Rodriquez case. And Rodriquez does have a different factual situation, and it is not on point for this case because of the additional facts that were involved. But I -- I'd like to read to you just a couple of quotes from this Court's opinion at 395 United States Reports 331 and 332 where the Court observed first, it appears from the trial transcript in this case that the trial judge erroneously failed to advise petitioner of his right to appeal.

Then the Court went on to make an argument, which is very similar to the argument I've made today. Had he known that the clerk would file a notice of appeal for him, he could easily have avoided the difficulties he has faced. At the very least, the trial judge should have inquired into the circumstances surrounding the attempt to make the in forma pauperis motion. His failure -- and we're talking about the district judge's failure. His failure to do so effectively deprived petitioner of his right to appeal.

And so I would submit that the rule, which recognizes the value of direct appeal, is a rule which would most -- go furthest in honoring the defendant's right to choose that appeal under all circumstances. Given the new limitation of 1 year, I would state that this rule creates an unusual structural error which should justify relief as a matter of law.

If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Siegel. The case is submitted.

(Whereupon, at 11:47 a.m., the case in the above-entitled matter was submitted.)

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BY: Ilona M. May
(REPORTER)