NO:

IN THE
SUPREME COURT OF THE UNITED STATES

MARCELO MANRIQUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Fed. R. App. P. 4(b)(2) allows 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 incorporates 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. The interaction of this rule with deferred restitution judgments has become a source of circuit conflict, particularly following this Court's decision in Dolan v. United States, 560 U.S. 605 (2010), which allows a sentencing court to retain jurisdiction after sentencing to award restitution under the Mandatory Victim Restitution Act, 18 U.S.C. § 3664(d)(5). At the time Dolan was decided, the Court acknowledged that "the interaction of [deferred] restitution orders with appellate time limits could have consequences", but it "le[ft] all such matters for another day." 560 U.S. at 618. The Manrique decision, below, exemplifies those consequences and highlights the significant circuit split that exists concerning the jurisdictional prerequisites for appealing a deferred restitution award.

This case mirrors a typical deferred restitution appeal. At Manrique's sentencing hearing, the district judge pronounced terms of imprisonment and supervised release, and announced that "restitution is mandatory." The final judgment imposing sentence deferred entry of the precise restitution amount, stating it would be contained in an amended judgment. Manrique filed a notice of appeal. While the appeal of his sentence was pending, but before any briefing took place, a second final judgment was entered,

identical in all respects to the first, except it detailed the specifics of restitution. Both parties thereafter briefed the appeal, including a challenge to the restitution award. Although the government posited no objection, the Court of Appeals ruled, sua sponte, that it did not have jurisdiction over the restitution award because Manrique did not file a second notice of appeal designating the amended judgment setting forth the restitution amount.

The Eleventh Circuit's decision below in United States v. Manrique, 618 F. App'x 579 (11th Cir. 2015), conflicts with the Court's decision in Lemke, the ripening clause of Rule 4(b)(2), and the jurisdictional determinations of the First, Second, Sixth and Ninth Circuits. Confusing that circuit split, two of the four circuits that acknowledge their jurisdiction over deferred restitution judgments have failed to give effect to the ripening clause of Rule 4(b)(2). Uncertain about the interaction of appellate rules, the First Circuit recommends, prospectively, that a second notice of appeal should be filed as to restitution awards, while the Ninth Circuit will dismiss such an appeal if the government simply objects to the timeliness of the premature notice.

Question presented: Should the Court grant certiorari to resolve the significant division among the circuits concerning the jurisdictional prerequisites for appealing a deferred restitution award made during the pendency of a timely appeal of a criminal judgment imposing sentence, a question left open by the Court's decision in Dolan v. United States, 560 U.S. 605, 618 (2010)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW. i

INTERESTED PARTIES. iii

TABLE OF AUTHORITIES. vii

PETITION FOR WRIT OF CERTIORARI.. 1

OPINIONS BELOW. 2

STATEMENT OF JURISDICTION. 2

STATUTORY AND RULES PROVISIONS INVOLVED. 3

STATEMENT OF THE CASE. 5

REASONS FOR GRANTING THE WRIT. 8

The Court should grant certiorari to resolve the significant division among the circuits concerning the jurisdictional prerequisites for appealing a deferred restitution award made during the pendency of a timely appeal of a criminal judgment imposing sentence, a question left open by the Court's decision in Dolan v. United States, 560 U.S. 605, 618 (2010). 8

A. Premature notices of appeal in criminal cases mature pursuant to Fed. R. App. P. 4(b)(2)... 10

B. Manrique's holding exacerbates a significant circuit split.. 13

C. Manrique's jurisdictional determination is wrong.. 18

D. Manrique incorrectly refused to decide the appeal of a restitution award in a deferred judgment case. 22

E. Manrique is an ideal vehicle to address the problematic interactions between deferred restitution judgments and appellate time limits, questions reserved by the Court's decision in Dolan. . . . 24

CONCLUSION. 25

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit,
United States v. Marcelo Manrique, 618 F. App'x 579 (11th Cir. 2015). . . . . . A

Order of the Court of Appeals for the Eleventh Circuit Denying
Rehearing and Rehearing En Banc (Sept. 11, 2015), ... B

Judgment imposing sentence (June 24, 2014). C

Judgment imposing sentence (Sept. 18, 2014). . . . . D

Information and Waiver of Indictment. . . . . E

Docket of Court of Appeals, Case No. 14-13029. . . . . F

TABLE OF AUTHORITIES

CASES:

Bowles v. Russell,

551 U.S. 205 (2007). 21, 22

Dolan v. United States,

560 U.S. 605 (2010). 8, 16, 18-20, 24

Griggs v. Provident Consumer Discount Co.,

459 U.S. 56 (1982). 13

Hyde v. United States,

556 F. App'x 62 (2d Cir. 2014). 13

Lemke v. United States,

203 F.2d 406 (9th Cir. 1953). 11

cert. granted and remanded, 346 U.S. 325 (1953). 10, 11, 13, 16, 18, 22

United States v. Andrews,

681 F.3d 509 (3rd Cir. 2012). 13

United States v. Baker,

559 F.3d 443 (6th Cir. 2009). 14

United States v. Bly,

510 F.3d 453 (4th Cir. 2007). 14

United States v. Cantero,

995 F.2d 1407 (7th Cir. 1993). 14

United States v. Cartwright,

413 F.3d 1295 (11th Cir. 2005). 21

United States v. Castro,

554 F. App'x 664 (9th Cir. 2014). 8, 16, 17, 23

United States v. Cheal,

389 F.3d 35 (1st Cir. 2004) 8, 13, 17, 23

United States v. Curry,

760 F.2d 1079 (11th Cir. 1985). 15

United States v. Hyde,

556 F. App'x 62 (2d Cir. 2014). 8, 12, 13, 15, 17, 23

United States v. Kapelushnik,

306 F.3d 1090 (11th Cir. 2002). 12-16, 18-20, 22

United States v. Lopez,

562 F.3d 1309 (11th Cir. 2009). 21, 22

United States v. Malcom,

114 F.3d 1190 (6th Cir. 1997) (unpublished). 11, 14, 15

United States v. Manrique,

618 F. App'x 579 (11th Cir. 2015)

reh'g en banc denied (Sept 11, 2015). 1, 9, 13, 15-18, 21, 23, 24

United States v. Muzio,

757 F.3d 1243 (11th Cir. 201. . . . . 16, 18, 19, 20, 21, 22

United States v. Quincoces,

503 F. App'x 800 (11th Cir. 2013). 15, 18

United States v. Stoian,

2015 WL 5036366 (6th Cir. Aug. 12, 2015). 8, 14, 17, 23

United States v. Thornton,

1 F.3d 149 (3rd Cir. 1991). 14, 15

United States v. Walker,

915 F.2d 1463 (10th Cir. 1990). 14, 15

United States v. Winn,

948 F.2d 145 (5th Cir. 1991). 14, 15

Zeno v. Pine Plains Cent. Sch. Dist.,

702 F.3d 655 (2d Cir. 2012). 12

STATUTES, RULES, AND OTHER AUTHORITY:

Sup. Ct. R. 13.1. 2

Sup. Ct. R. Part III 2

18 U.S.C. § 2252(a)(4)(B). 3, 5

18 U.S.C. § 3663A. 4

18 U.S.C. § 3664. 4

18 U.S.C. § 3664(d)(5). 17, 18

18 U.S.C. § 3742. 2

28 U.S.C. § 1254(1). 2

28 U.S.C. § 1291. 2

Fed. R. App. P. 4(a)(4). 15

Fed. R. App. P. 4(a)(4). 12

Fed. R. App. P. 4(b). 11, 12, 17, 21

Fed. R. App. P. 4(b)(1) 12

Fed. R. App. P. 4(b)(2). 9-14, 16-23

Fed. R. Crim. P. 37. . . . . 11, 12

Fed. R. Crim. P. 52(a). 11, 22, 23

16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, et al.

Federal Practice & Procedure Jurisdiction § 3950.11 (4th ed. Apr. 2015)

. . . . 11, 12, 15

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PETITION FOR WRIT OF CERTIORARI

Marcelo Manrique respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 14-13029 in that court on July 15, 2015, United States v. Marcelo Manrique, 618 F. App'x 579 (11th Cir. 2015), reh'g en banc denied on September 11, 2015, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINIONS BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix at A. A copy of the Order denying rehearing en banc is appended at B.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the Court of Appeals, denying a timely-filed petition for rehearing and rehearing en banc, was entered on September 11, 2015. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that Courts of Appeals shall have appellate jurisdiction of all final decisions of United States district courts.

STATUTORY AND RULES PROVISIONS INVOLVED

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 52, Federal Rules of Criminal Procedure
Harmless and Plain Error

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

Title 18 U.S.C. § 2252(a)(4)(B)

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who –

***

(4) . . . (B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

***

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years . . .

Title 18 U.S.C. § 3663A

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

* * *

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense--

***

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

Title 18 U.S.C. § 3664

§ 3664. Procedure for issuance and enforcement of order of restitution

* * *

(d)(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

STATEMENT OF THE CASE

A. District Court Proceedings.

Marcelo Manrique pleaded guilty to violation of 18 U.S.C. § 2252(a)(4)(B), possession of material involving sexual exploitation of minors. On June 23, 2014, the district court sentenced Mr. Manrique to 72 months imprisonment, lifetime supervised release, and announced "restitution is mandatory." DE 61:38.

A Judgment in a Criminal Case was filed the next day, June 24, 2014. It recites the terms of imprisonment and supervised release, and states that, "The determination of restitution is deferred until 8/22/2014. An Amended Judgment in a Criminal Case (AO245C) will be entered after such determination." App. C; DE 53:5. A notice of appeal was filed on July 8, 2014, directed to the final judgment and sentence. DE 55. The appeal was docketed by the Court of Appeals under Case No. 14-13029. App. F.

The district court entered a second Judgment in a Criminal Case, dated September 18, 2014, following a hearing on restitution. The second judgment is the same as the first in all respects except it specifies the dollar amount of restitution – $4,500 – and the manner in which it should be paid. App. D.; DE 67:5. Four days later, on September 23, 2014, the district court clerk transmitted the amended judgment to the Court of Appeals, which filed it on the docket of the appeal already pending in that court. App. F.

B. Court of Appeals Proceedings.

Mr. Manrique's appeal of the judgment was initiated by the filing of a notice of appeal on July 8, 2014, DE 55, following entry of the first judgment. The second judgment including restitution was filed on the docket of the pending appeal on September 23, 2014. See COA Docket Sheet, Case No. 14-13029 (Sept. 23, 2014) ("USDC Restitution Order as to Appellant Marcelo Manrique was filed on 9/18/2014. Docket Entry 67"). All transcripts of proceedings, including the restitution proceeding, were prepared and filed in the Court of Appeals before the Court of Appeals' Clerk issued a first briefing notice, about two months after the second judgment had been entered. App. F.

The parties thereafter briefed the issues on appeal, including a challenge to the restitution portion of the sentence, between December 2014 and February 2015, months after both judgments had been entered and filed in the Court of Appeals under the single case number. At no time did the government challenge the Court of Appeals' jurisdiction over the restitution portion of the sentence, nor did the government allege it suffered any prejudice from a single notice of appeal.

The Court of Appeals addressed and affirmed appellate challenges to the sentence of imprisonment and lifetime term of supervised release, but determined – sua sponte – that it lacked jurisdiction to decide the restitution issue because the appellant did not file a second notice of appeal in the same pending appeal once the second judgment was entered. There was neither briefing nor oral argument on the

jurisdictional issue raised for the first time in the Court of Appeals' opinion. App. A (July 15, 2015).

Mr. Manrique filed a petition for rehearing and rehearing en banc, which challenged the Court of Appeals' sua sponte decision that it lacked jurisdiction over the restitution question. The Court of Appeals denied rehearing and rehearing en banc on September 11, 2015. App. B. This timely petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

Mr. Manrique's petition involves the fairly common practice of deferred restitution judgments, as permitted by the Court's decision in Dolan v. United States, 560 U.S. 605 (2010); the interaction of such judgments with rules of appellate procedure; and the jurisdictional prerequisites to appeal deferred restitution awards. The possibility of these logistical concerns was perceived by the Court in Dolan, but left to be addressed later. The time for resolution has arrived, as this case and a significant circuit split illustrate.

The district judge in Manrique's case pronounced sentence, including terms of imprisonment and lifetime supervised release, and also announced that "restitution is mandatory." DE 61:38. A Judgment in a Criminal Case was filed the next day, reciting the terms of imprisonment and supervised release, but deferring entry of the restitution portion of the sentence. DE 53:5. The judgment states, "The determination of restitution is deferred until 9/22/14. An Amended Judgment in a Criminal Case (AO245C) will be entered after such determination." Id. A notice of appeal as to the final judgment and sentence was timely filed on July 8, 2014. DE 55. These events are typical in a deferred restitution case.[1]

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[1] See e.g., United States v. Cheal, 389 F.3d 35, 46-47 (1st Cir. 2004) (announcing at sentencing that "[y]ou shall pay restitution," including that fact in final judgment, but deferring restitution hearing, then entering deferred amended judgment including restitution amount); United States v. Hyde, 556 F. App'x 62 n.1 (2d Cir. 2014) (entering deferred restitution judgment); United States v. Stoian, 2015 WL 5036366 (6th Cir. Aug. 12, 2015) (same); United States v. Castro, 554 F. App'x 664 (9th Cir. 2014) (same).

After the dollar amount of restitution was decided, the district court entered a second Judgment in a Criminal Case, dated September 18, 2014. The second judgment was the same as the first in all respects except it specified the dollar amount of restitution and the manner in which it should be paid. DE 67:5. Four days later the second judgment was transmitted to the Court of Appeals, which filed it on the docket of the pending appeal initiated by the notice of appeal. In the ensuing months, all transcripts and appellate briefs were filed, including full briefing on the merits of Mr. Manrique's restitution challenge. The government posited no objection to hearing the restitution challenge, nor did it argue any prejudice resulting from hearing the restitution issue in conjunction with the appeal of the term of imprisonment and supervised release.

The Court of Appeals refused to decide Mr. Manrique's appeal of the restitution aspect of his criminal sentence, deciding sua sponte that it lacked jurisdiction to do so.

> We do not have jurisdiction to entertain Manrique's challenge to his restitution amount because he did not file a notice of appeal designating the amended judgment setting forth the restitution amount.

618 F. App'x at 583.

The legal determination that the Court of Appeals lacked jurisdiction is in conflict with decisions of this Court, Fed. R. App. P. 4(b)(2), and most Courts of Appeals. As a result of the decision below in Manrique, there now exists a significant split among the circuits on the jurisdiction of a Court of Appeals to hear an appeal of a deferred restitution judgment entered during the pendency of a criminal appeal.

Eight circuits – the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Tenth – hold, in accordance with Rule 4(b)(2) that a premature notice of appeal in a criminal case matures upon entry of the written judgment. Two circuits hold otherwise, although with different rationales. The Eleventh Circuit holds it lacks jurisdiction unless a second notice of appeal is filed within the same pending appeal. The Ninth Circuit has held that, although it has jurisdiction in an appeal with a prematurely filed notice, it may dismiss the appeal of that issue if the government simply objects. Exacerbating this split, the First Circuit – which recognizes it has jurisdiction to hear such an appeal without a second notice of appeal (joining with eight other circuits) – notes that the timeliness of the notice may be uncertain, so it has prospectively ordered that future restitution awards should be followed by a second notice of appeal.

In the specific context of premature notices of appeal of deferred restitution judgments, the circuits are similarly split, 4-1 in favor of jurisdiction, but due to one circuit's ambivalence, the split may be 3-2, as explained more fully in subsection B, infra. One thing is clear: The jurisdictional and procedural prerequisites relating to the appeal of a restitution award are hopelessly unclear, varying from circuit to circuit.

A. Premature notices of appeal in criminal cases mature pursuant to Fed. R. App. P. 4(b)(2).

Fed. R. App. P. 4(b)(2) allows 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 incorporates the 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. 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. Apr. 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).

Rule 4(b)(2) ripening is applicable to deferred restitution judgments in criminal cases, as explained by the Second Circuit's decision in Hyde v. United States, 556 F. App'x at 62 n.1:

> Hyde filed his notice of appeal on November 9, 2012, after the district court entered its original judgment on November 2, 2012. The district court did not determine the amount of restitution until it entered an amended judgment on February 22, 2013. Hyde did not, however, file a new notice of appeal from the amended judgment. The government does not contest the timeliness of Hyde's appeal. While Hyde's notice of appeal was likely effective with respect to the original judgment, we conclude that it "ripened into an effective notice" of appeal from the amended judgment as well. United States v. Kapelushnik, 306 F.3d 1090, 1093–94 (11th Cir. 2002); see also Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 663 n. 6 (2d Cir. 2012)("Although [appellant] filed a premature notice of appeal, because the district court entered an amended final judgment before the appeal was heard and [appellee] suffered no prejudice, the jurisdictional defect has been cured.").

Hyde at 63 n.1.[2]

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[2] It is important to distinguish between the ripening clause of Fed. R. App. P. 4(b)(2), which relates to criminal appeals, and the similar provision in Rule 4(b)(1), relating solely to civil appeals. The 1993 amendment to Rule 4 effected a substantial change for civil cases, although it simply reiterated the law applying to criminal appeals. Prior to the 1993 rules amendment, Rule 4(b)(1) (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 had interpreted

Hyde relied in part on the Eleventh Circuit's Kapelushnik decision, abrogated below by Manrique, which causes an inherent circuit split. As explained in the next subsection, the Manrique decision forges a significant split in authority with other circuits, as well.

B. Manrique's holding exacerbates a significant circuit split.

Consistent with Lemke, and Rule 4(b)(2), eight circuits have expressly acknowledged the vitality of a premature notice of appeal in a criminal case. United States v. Cheal, 389 F.3d 35 (1st Cir. 2004) (holding premature notice of appeal filed after sentencing, but before restitution was ordered, was sufficient, where both parties fully briefed the restitution issue and there was no question of government surprise or prejudice); Hyde v. United States, 556 F. App'x 62, 63 n.1 (2d Cir. 2014) (holding that original notice of appeal of criminal judgment ripened into an effective notice from the amended judgment designating restitution); United States v. Andrews, 681 F.3d 509,

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that provision in a civil case as making 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 amendment replaced the "nullity" rule in civil appeals with a rule that recognizes ripening of a premature notice of appeal. See Fed. R. App. P. 4(b)(2) advisory committee's note (1993). The committee's note explains the provision was written to eliminate the "trap" that previously resulted in a civil appeal if an unsuspecting litigant did not file a second notice of appeal if an amended judgment was entered while the appeal was pending under the original notice of appeal.

Although this eliminated the trap in civil cases, the trap never existed in criminal appeals. The 1993 amendment to Rule 4(b)(2) (criminal appeals) simply codified prior precedents of this Court and the circuits, which had recognized that a premature notice of appeal in a criminal case does not deprive a court of appeals of jurisdiction to hear an appeal of the judgment and sentence.

516 n.2 (3rd Cir. 2012) (holding premature notice of appeal deemed filed as of date final judgment was later entered); United States v. Thornton, 1 F.3d 149, 157-58 (3rd Cir. 1991) (holding Court of Appeals had jurisdiction over appeals of post-trial motions, despite premature notice of appeal, because parties had fully briefed the issues without any claim of prejudice); United States v. Bly, 510 F.3d 453, 457 n.6 (4th Cir. 2007) (holding Court of Appeals had jurisdiction, despite premature notice of appeal, based on Rule 4(b)(2) because it "is deemed to be 'filed on the date of and after entry'"); United States v. Winn, 948 F.2d 145, 155 (5th Cir. 1991) (holding that, absent prejudice, Court of Appeals would hear challenges to both judgment and sentence despite premature notice of appeal); United States v. Baker, 559 F.3d 443, 447 n.2 (6th Cir. 2009) (holding Court of Appeals had jurisdiction over premature notice of appeal filed after sentencing, but before judgment entered); United States v. Stoian, 2015 WL 5036366 (6th Cir. Aug. 12, 2015) (holding notice of appeal timely filed as to final judgment "spring[s] forward" to confer jurisdiction on deferred judgment regarding restitution) (relying on United States v. Malcolm, 114 F.3d 1190 at *6 (6th Cir. 1997) (unpublished) and the Eleventh Circuit's since-abrogated decision in Kapelushnik, 306 F.3d at 1093-94); United States v. Cantero, 995 F.2d 1407, 1408 n.1 (7th Cir. 1993) (holding that Rule 4(b)(2) permits notice of appeal to be filed after sentencing, but before entry of final judgment); United States v. Walker, 915 F.2d 1463, 1465 (10th

Cir. 1990) (holding premature notice of appeal filed before sentencing ripens when judgment is formally finalized, conferring jurisdiction on Court of Appeals).[3]

As noted above, Hyde relied in part on the Eleventh Circuit's decision in Kapelushnik, the decision the Eleventh Circuit abrogated in its Manrique decision below. Until the Manrique decision abrogated its prior precedent, the Eleventh Circuit also held that a premature notice of appeal matures upon the filing of the final judgment. See United States v. Kapelushnik, 306 F.3d at 1090 (holding that "once the judgments of conviction [including restitution] became final, the Government's premature notice of appeal ripened into an effective notice as of that date.") (citing United States v. Curry, 760 F.2d 1079, 1079-80 (11th Cir. 1985) (holding that, where defendant filed notice of appeal after verdict but before sentencing, "premature notice of appeal is effective to perfect appeal as of the date the sentence is entered as the judgment."); United States v. Quincoces, 503 F. App'x 800, 802 (11th Cir. 2013) (holding that, where district court's restitution order was not final when timely notice of appeal was filed, it "ripened into an effective notice of appeal on the date the district

[3] Another distinction between the civil and criminal subsections of Rule 4 supports this conclusion. "While the appellate rules specifically require an appellant in a civil case to file an amended notice if he wishes to bring certain post-judgment motions within the scope of his appeal, see Fed. R. App. P. 4(a)(4), there is no parallel provision for criminal cases." Malcolm, 114 F.3d at *7. As Malcolm explained, several circuits have reasoned that this distinction implies that an appellant in a criminal case is under no duty to amend his notice of appeal, so long as the government is not prejudiced thereby. Id., citing United States v. Thornton, 1 F.3d at 157-58 (3d Cir.); United States v. Winn, 948 F.2d at 155 (5th Cir.); United States v. Walker, 915 F.2d at 1465 (10th Cir.); see also,16 A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3950.11 at 253-54 (2d ed. 1996).

court made its final restitution determination") (citing Kapelushnik). Manrique incorrectly overruled that precedent.

The Eleventh Circuit professed that the change in its precedent was driven by this Court's decision in Dolan v. United States:

> We previously held an appeal from a sentencing judgment that deferred restitution was premature and did not ripen until the district court either (1) ordered restitution or (2) lost the power to do so after 90 days. See United States v. Kapelushnik, 306 F.3d 1090, 1093-94 (11th Cir. 2002). However, the Supreme Court later held "[t]he fact that a sentencing court misses the statute's 90-day deadline . . . does not deprive the court of the power to order restitution." Dolan v. United States, 560 U.S. 605, 611 (2010). We subsequently recognized, in light of Dolan, the Kapelushnik framework created an injustice because it was possible for an appeal to never ripen, and addressed whether judgments that deferred the issue of restitution were nevertheless final for appellate jurisdiction purposes. United States v. Muzio, 757 F.3d 1243, 1246 (11th Cir.), cert. denied 135 S. Ct. 395 (2014).

Manrique, 618 F. App'x at 582-83. Although this explains the need for the Court of Appeals to recognize its jurisdiction over the initial judgment, it does not explain or justify ignoring Rule 4(b)(2) ripening as to the deferred restitution judgment.

By expressly abrogating Kapelushnik, in its decision below, the Eleventh Circuit has created a serious split with the Court's decision in Lemke, Rule 4(b)(2), and the uniform holdings of eight other circuits. The only other circuit that has failed to give effect to Rule 4(b)(2) ripening is the Ninth Circuit, in United States v. Castro, 554 F. App'x 664 (9th Cir. 2014), which held that a timely notice of appeal from a final judgment, filed before the restitution award, should be dismissed where the government objects to untimeliness in its answer brief. Although Castro acknowledges that the timeliness requirement is not jurisdictional – so in that sense it differs from

the Eleventh Circuit's decision below – it refused to give effect to the ripening clause of Rule 4(b). Adding another dimension to the circuit split is the First Circuit's decision in United States v. Cheal. Although Cheal acknowledges no jurisdictional barrier to a single notice of appeal, the First Circuit is uncertain about timeliness, so it recommends a best practice to be applied prospectively: "[L]ooking to the future, we think that, as a general proposition, a deferred restitution order entered pursuant to § 3664(d)(5), subsequent to a final judgement of conviction which has been directly appealed, should be the subject of a second notice of appeal." 389 F.3d at 51, 52.

Focusing specifically on the interaction of Rule 4(b)(2) and deferred restitution judgments, as here, the circuit split is equally problematic. In this more focused context, the circuits split 4-1 on the jurisdiction of a Court of Appeals to decide a restitution challenge based solely on the filing of a premature notice of appeal. Four circuits recognize their jurisdiction – the First (Cheal), Second (Hyde), Sixth (Stoian), and Ninth (Castro) – while the Eleventh (Manrique) holds that it lacks jurisdiction. But even that circuit split can arguably be counted differently, as 3-2, because although the Ninth Circuit recognized its jurisdiction in Castro it still refused to give effect to Rule 4(b)(2) ripening. And, although Cheal stands with the majority of circuits on jurisdiction and ripening, the First Circuit is uncertain enough to advise a practice contrary to what Rule 4(b)(2) expressly authorizes.

Thus, the circuit division is manifest: Most circuits recognize and give effect to the ripening clause, while two do not, and one of the circuits recognizing ripening

recommends a practice at odds with Rule 4(b)(2) because it is uncertain about the interaction of appellate rules in the aftermath of Dolan.

To be sure, the Eleventh Circuit's Manrique decision is the outlier, at odds even with its own prior precedent. In United States v. Quincoces, 503 F. App'x 800, 802 (11th Cir. 2013), for example (now abrogated along with Kapelushnik), the Eleventh Circuit had relied on Kapelushnik and Rule 4(b)(2) to hold that a premature notice of appeal ripened to cover a deferred restitution judgment. 503 F. App'x at 508. Following its decision in Manrique, however, the Eleventh Circuit's position is expressly in conflict with the Court's decision in Lemke, Rule 4(b)(2), and the majority of other circuits.

C. Manrique's jurisdictional determination is wrong.

The holding below is ostensibly premised on the Eleventh Circuit's recent decision in United States v. Muzio, 757 F.2d 1243 (11th Cir.), cert. denied 135 S. Ct. 395 (2014), which altered circuit precedent following this Court's decision in Dolan v. United States, 560 U.S. 605, 611 (2010). Yet, the Court's decision in Dolan neither requires, nor counsels in favor of, abandoning the existing premature notice rule. Neither does the Eleventh Circuit's corrective opinion in Muzio. The decision below misapprehends Dolan and Muzio and has effectively muddled jurisdiction in criminal cases with briefly-deferred restitution hearings.

In Dolan, this Court held that the 90-day limit for ordering restitution under the Mandatory Victim Restitution Act, 18 U.S.C. § 3664(d)(5), is not ironclad or jurisdictional. 560 U.S. at 608. As a result, a district court is permitted to take longer

in making its restitution award. The decision says nothing about the timeliness of a notice of appeal, or that the decades of precedent under Rule 4(b)(2) was altered in any way. The Court "le[ft] all such matters for another day." 560 U.S. at 618.

Prior to the Court's decision in Dolan, the Eleventh Circuit would not permit a criminal appeal to go forward until restitution was ordered. Under the Kapelshunik formulation, the Court of Appeals lacked jurisdiction over the appeal until a final judgment of restitution was entered, which should occur within 90 days under the statute. The flaw in that formulation was illuminated in Muzio.

The district court in Muzio had entered a judgment sentencing the defendant to imprisonment and stating restitution would be ordered in 90 days, with entry of a new judgment. Restitution was eventually ordered, but no new judgment was filed. Muzio only sought to appeal the sentence of incarceration, not restitution. The question presented was whether Muzio could proceed with his appeal of the sentence, or had to wait for a restitution judgment that might never come. Under Kapelushnik, the judgment was not deemed final so the appeal had to wait. But this could go on indefinitely.

This Court's decision in Dolan makes clear that the balance of the judgment imposing sentence was separately final for purposes of appeal, even if the restitution award has not yet occurred. 560 U.S. at 617-18. The holding in Dolan abrogated the portion of Kapelshunik that said otherwise. To conform, the Eleventh Circuit in Muzio receded from that portion of Kapelshunik, holding instead that a defendant could appeal his judgment and sentence in either of two ways: (1) in a single proceeding, or,

(2) in a separate appeal, based on a second notice of appeal. See 775 F.3d at 1250, 1254 n.13. In reaching this decision, both of Muzio's majority opinions refused to decide whether a second notice of appeal was required or the first one ripened, because it did not matter in that case: Muzio did not seek to challenge the restitution portion of his sentence, so it made no difference if the premature notice ripened to cover restitution or not. 757 F.3d at 1247 n.3 (Wilson, J.); id. at 1260 n.4 (Coogler, J., concurring).[4] Thus, Muzio did not affect the ripening portion of Kapelushnik's holding; that portion of the Eleventh Circuit's precedent should have remained intact.

The decision below overlooked that Muzio did not overrule that portion of Kapelushnik that recognizes Rule 4(b)(2) ripening. Indeed, neither Dolan nor Muzio holds that a separate appeal is necessary in all cases, or that Rule 4(b)(2) is inapplicable to appeals of restitution awards where the district judge announces at sentencing that restitution is mandatory.

Nevertheless, the Eleventh Circuit decision below holds that Mr. Manrique was required to file two notices of appeal in the same appeal, in order to contest both the

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[4] The three opinions in Muzio each state that the decision does not address Rule 4(b)(2) ripening. The dissent in Muzio criticized the majority for failing to address the question of whether the defendant's premature notice of appeal ripened into an operative notice of appeal when the second judgment (including restitution) was entered. 757 F.3d at 1268 (Tjoflat, J., dissenting). The majority opinions responded that ripening was irrelevant in that case because Muzio did not challenge the restitution award. 757 F.3d at 1247 n.3 (Wilson, J.) and at 1260 n.4 (Coogler, J., concurring) ("As explained in footnote three of the Majority opinion, we are not reviewing the November restitution order because Muzio did not make his restitution proceeding the subject of this appeal. As such, we need not consider the question the dissent focuses on . . . .").

original judgment in a criminal case, as well as the amended judgment, which merely added the specifics of restitution expressly reserved by the written terms of the original judgment. Although a separate notice of appeal would be required for the separate-appeal option of Muzio, it is not required in the single-proceeding option due to the ripening effect of Rule 4(b)(2).

Notably, the Eleventh Circuit determined it lacked jurisdiction due to what is, at worst, a prematurely untimely notice of appeal. Yet, the timeliness of a filed notice of appeal is not an event of jurisdictional significance in a criminal case. The Eleventh Circuit supported its erroneous jurisdictional conclusion with its 2005 decision, United States v. Cartwright, 413 F.3d 1295, 1299 (11th Cir. 2005), which held that, "[a]bsent the filing of a timely notice of appeal, a Court of Appeals is 'without jurisdiction to review the decision on the merits.'" See Manrique 618 F. App'x at 583. The jurisdictional premise of Cartwright is contrary, however, to this Court's subsequent decision in Bowles v. Russell, 551 U.S. 205 (2007), which abrogated Cartwright's conclusion that a timely notice of appeal is jurisdictional in criminal cases. See United States v. Lopez, 562 F.3d 1309, 1312-13 (11th Cir. 2009) ("Because the deadline in Rule 4(b) for a defendant to file a notice of appeal in a criminal case is not grounded in a federal statute, we hold that it is not jurisdictional.") (recognizing that prior Circuit precedent to the contrary was abrogated by the Supreme Court's decision in Bowles v. Russell).

Consequently, the Eleventh Circuit's holding that "[w]e do not have jurisdiction to entertain Manrique's challenge to his restitution amount because he did not file a

notice of appeal designating the amended judgment setting forth the restitution amount" misapprehends and overlooks the express language of Rule 4(b)(2), the portion of Kapelushnik's holding that remains intact despite Muzio, and the governing jurisdictional jurisprudence of Bowles and Lopez.

As this Court's decision in Lemke holds, the Court of Appeals has jurisdiction over a premature notice of appeal. The question is not one of jurisdiction, but rather whether substantial rights have been affected under Fed. R. Crim. P. 52(a). Here the government has made no such claim, nor could it, for the question of restitution was fully briefed by both parties in due course of the pending appeal.

D. Manrique incorrectly refused to decide the appeal of a restitution award in a deferred judgment case.

The sentencing proceeding below is notable because it illustrates how the notice of appeal captured restitution both in the first instance, and as amended to flesh out the dollar amount. The events below also demonstrate that the absence of a second notice of appeal in the same appellate case did not affect the government's substantial rights one whit.

In his oral pronouncement of sentence, the district judge specifically announced that restitution was mandatory. Those words included restitution in the sentence from the very first. The first written judgment then incorporated the oral pronouncement including restitution, but noted that the amount of restitution would be decided at a future date, followed by an amended judgment to reflect this. Both the oral pronouncement and the original written judgment ordered restitution (albeit sans a

dollar amount) and the written judgment spoke to the fact that a more specific amended judgment would be filed. When the defendant filed a timely notice of appeal as to the first judgment, it followed both the oral pronouncement that restitution is mandatory and the written judgment that the precise amount would be designated in an amended judgment. Thus, the original notice of appeal captured that portion of the sentence involving restitution and the language in that original judgment relating to a future amended judgment. See United States v. Cheal, 389 F.3d at 46-46, 53 (holding that where sentencing judge announced, "[y]ou shall pay restitution," but written judgment deferred restitution award, single notice of appeal from original judgment gave Court of Appeals jurisdiction to hear appeal of amended restitution judgment); United States v. Hyde (same); United States v. Stoian (same).

The notice of appeal captured the original judgment and it ripened under Rule 4(b)(2) to include the amended judgment mentioned in the original judgment, once the second judgment was entered. All parties and the clerk of the Court of Appeals understood that. All transcripts, orders and briefs were filed in the single appellate case, and both parties fully briefed the restitution issue, without objection or misunderstanding. Under the proper Rule 52(a) standard, a Court of Appeals should have proceeded to determine the merits of the restitution challenge on appeal. Yet, one circuit holds it lacks jurisdiction to do so (the Eleventh in Manrique); one (the Ninth in Castro) would have dismissed it if the government had simply objected based on timeliness, without addressing substantial rights; three circuits would have addressed the restitution issue (the First in Cheal, Second in Hyde, and Sixth in Stoian); but,

then again, the First Circuit in Cheal recognizes the uncertainty, so it recommends a second notice of appeal even though it is jurisdictionally unnecessary and it has no impact on substantial rights.

E. Manrique is an ideal vehicle to address the problematic interactions between deferred restitution judgments and appellate time limits, questions reserved by the Court's decision in Dolan.

In Dolan, this Court acknowledged the possibility of problematic interactions between deferred restitution orders and appellate time limits, but did not decide those questions because Dolan did not seek to appeal both the initial and amended judgments. Id., 560 U.S. at 618 (noting "the fact that the interaction of restitution orders with appellate time limits could have consequences extending well beyond cases like the present one (where there was no appeal from the initial conviction and sentence)," but "leav[ing] all such matters for another day.")

The Manrique decision exposes the questions Dolan perceived, but left unanswered, about the interaction of deferred restitution orders and appellate time limits. Moreover, this interaction illuminates a serious circuit split about how to accommodate it. As a result, Mr. Manrique's petition is an ideal vehicle for the Court to determine one of the issues it reserved in Dolan, the procedural requirements to perfect appeal of a deferred restitution judgment entered during a pending appeal of the judgment and sentence.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari.

Respectfully submitted,

MICHAEL CARUSO
Federal Public Defender

s/Paul M. Rashkind

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December 2, 2015
Miami, Florida

APPENDIX

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit,
United States v. Marcelo Manrique, 618 F. App'x 579 (11th Cir. 2015). . . . . . A

Order of the Court of Appeals for the Eleventh Circuit Denying
Rehearing and Rehearing En Banc (Sept. 11, 2015), ... B

Judgment imposing sentence (June 24, 2014). C

Judgment imposing sentence (Sept. 18, 2014). . . . . D

Information and Waiver of Indictment. . . . . E

Docket of Court of Appeals, Case No. 14-13029. . . . . F

No:

IN THE
SUPREME COURT OF THE UNITED STATES

MARCELO MANRIQUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, MARCELO MANRIQUE, pursuant to Sup. Ct. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed in forma pauperis.

Petitioner was previously found financially unable to obtain counsel and the Federal Public Defender of the Southern District of Florida was appointed to represent Petitioner pursuant to 18 U.S.C. § 3006A. Therefore, in reliance upon Rule 39.1 and § 3006A(d)(6), Petitioner has not attached the affidavit which would otherwise be required by 28 U.S.C. § 1746.

MICHAEL CARUSO
Federal Public Defender

Miami, Florida
December 2, 2015

By: *s/Paul M. Rashkind*
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(305) 536-6900

No:

IN THE
SUPREME COURT OF THE UNITED STATES

MARCELO MANRIQUE,
Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I certify that on this 2nd day of December 2015, in accordance with Sup. Ct. R. 29, copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed In Forma Pauperis, (3) Certificate of Service, and (4) Declaration Verifying Timely Filing, were served by third party commercial carrier for delivery within three days upon the United States Attorney for the Southern District of Florida, 99 N.E. 4th Street, Miami, Florida 33132-2111, and upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

MICHAEL CARUSO
Federal Public Defender

Miami, Florida
December 2, 2015

By: *s/Paul M. Rashkind*

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No:

IN THE
SUPREME COURT OF THE UNITED STATES

MARCELO MANRIQUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

DECLARATION VERIFYING TIMELY FILING

Petitioner, MARCELO MANRIQUE, through undersigned counsel and pursuant to Sup. Ct. R. 29.2 and 28 U.S.C. § 1746, declares that the Petition for Writ of Certiorari filed in the above-styled matter was sent in an envelope via third party commercial carrier for delivery within three days, addressed to the Clerk of the Supreme Court of the United States, on the 2nd day of December, 2015, which is within the time the petition for writ of certiorari is due.

MICHAEL CARUSO
Federal Public Defender

Miami, Florida
December 2, 2015

By: *s/Paul M. Rashkind*

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EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F