No. 07-330

NOV 29 2007

IN THE

Supreme Court of the United States

Michael J. Greenlaw,

Petitioner,

v.

United States of America.

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

REPLY BRIEF OF PETITIONER

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Respondent acknowledges that the Eighth Circuit erred in enlarging petitioner's criminal sentence in the absence of a cross-appeal by the Government. Accordingly, the Court should accept the Solicitor General's suggestion that the judgment below cannot stand and should, at a bare minimum, grant, vacate, and remand (GVR) this case for further consideration in light of the Government's concession of error. However, there is no guarantee that the court of appeals would correct its error on remand, and substantial reason to believe that it would not. Moreover, the Solicitor General recognizes that the error below contributed to a growing circuit split over a court of appeals' authority to enlarge a criminal sentence in the absence of a government appeal or cross-appeal. A GVR would do little to resolve that division in the circuits. Accordingly, rather than remand the case for reconsideration, the Court should summarily reverse the decision below, ending the growing circuit split on a question that is not susceptible to reasonable dispute.

I. The Court Should Summarily Reverse The Judgment Below To Correct The Eighth Circuit's Decision And Resolve The Acknowledged Circuit Split.

The Government's prediction that a GVR will prompt the Eighth Circuit to correct itself, and that the acknowledged circuit split will eventually sort itself out without this Court's intervention, is ill-founded.

1. Although the question of the court's authority to increase petitioner's sentence without a cross-

appeal was not briefed before the panel, the decision was plainly considered and is unlikely to change without more substantial direction from this Court. The Eighth Circuit forthrightly acknowledged that it was contributing to a circuit split, following *United States v. Moyer*, 282 F.3d 1311 (10th Cir. 2002), and expressly departing from the Seventh Circuit's decision in *United States v. Rivera*, 411 F.3d 864 (7th Cir.), *cert. denied*, 546 U.S. 966 (2005). The court further quoted the essential contrary holding of the Seventh Circuit's decision, acknowledging that its sister circuit had held that "[b]y deciding not to take a cross-appeal, the United States has ensured that [the defendant's] sentence cannot be increased." Pet. App. 9a-10a n.5 (quoting *Rivera*, 411 F.3d at 867). For that proposition, the Seventh Circuit cited this Court's decision in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), the principal authority upon which the United States relies in concluding that the decision below is wrong, BIO 8-9. Accordingly, although it is technically true that the court of appeals' decision "did not address this Court's decision in *Neztsosie*," BIO 12, it would be misleading to suggest that the court was unaware of that decision, and unrealistic to assume that it will reverse course in light of further briefing on *Neztsosie*'s relevance to this case.

The Solicitor General also suggests that the Eighth Circuit might reverse course on remand in light of this Court's intervening decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007). BIO 12. But then the Government goes on to suggest that the decision in *Bowles* would actually *support* the decision below by indicating that the cross-appeal requirement is non-jurisdictional. BIO 17 (suggesting that *Bowles* held

that limitations not embodied in statutes are non-jurisdictional, and further asserting that "[n]o federal statute specifies the time for filing a notice of cross-appeal"). That reading of *Bowles* – together with settled Eighth Circuit precedent holding that the cross-appeal requirement is not jurisdictional[1] – casts doubt on any hope that a remand in light of *Bowles* would correct the decision below or resolve the circuit split.

2. A GVR is also unlikely to correct erroneous decisions in other circuits. As the Government acknowledges, BIO 14, the Tenth Circuit recently increased a criminal defendant's sentence *sua sponte* without a cross-appeal by the Government. *See United States v. Moyer*, 282 F.3d 1311, 1318 (10th Cir. 2002). Despite the Solicitor General's prediction that it is "likely that the Tenth Circuit . . . will be amenable to reconsidering" *Moyer*, BIO 14, his brief provides little reason to believe that the Tenth

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[1] As the United States recognizes, the Eighth Circuit's decision in this case is consistent with prior circuit precedent that holds that the cross-appeal requirement is a "rule of practice," not a restriction on the court's jurisdiction. *See* BIO 13-14; *see also Chi., Burlington & Quincy R.R. Co. v. Ready Mixed Concrete Co.*, 487 F.2d 1263, 1268 n.5 (8th Cir. 1973) (modifying the judgment below in favor of appellee though appellee did not file a cross-appeal); *see also Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 476 (8th Cir. 1977) ("[R]ules requiring separate appeals by other parties are rules of practice, which may be waived in the interest of justice where circumstances so require."). The Government attempts to suggest that the Eighth Circuit will reconsider *that* line of precedent, too. BIO 13-14. But at most, the Government's brief illustrates the uncertainty and confusion that reigns in and among circuits about courts' authority to enlarge a judgment in favor of a non-appealing party.

Circuit will do so without this Court's intervention. To the contrary, any reversal of course would require action by the entire membership of the Tenth Circuit sitting en banc. *See Shubargo v. Astrue*, 498 F.3d 1086, 1088 n.1 (10th Cir. 2007) ("We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.").[2] The prospect of future reversal by an en banc court – always a theoretical possibility, but rarely a real solution[3] – should not prevent this Court from intervening now to end a division that has only grown in recent years, not diminished. *See* Pet. 7-11.

3. Reversal of the Eighth Circuit's decision thus is necessary to return uniformity to the law. And because the court of appeals' error is clear, summary proceedings are appropriate in this case. As the Government's brief demonstrates, there is no serious argument to support the view that a court of appeals may enlarge a criminal sentence in the absence of an appeal or cross-appeal by the Government. *See* BIO 8-12. This Court has long adhered to the "inveterate and certain" rule against "modifying judgments in favor of a nonappealing party." *Neztsosie*, 526 U.S. at

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[2] As discussed above, while *Bowles* may be relevant, it is unlikely that a three-judge panel would hold that it is sufficiently "contrary" to justify reversing *Moyer* without en banc review.

[3] The Tenth Circuit has issued only four en banc opinions this calendar year. *See San Juan County, Utah v. United States*, 503 F.3d 1163 (10th Cir. 2007) (en banc); *In re Mersmann*, --- F.3d ---, 2007 WL 2833218 (10th Cir. Sept. 24, 2007) (en banc); *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160 (10th Cir. 2007) (en banc); *Cortez v. McCauley*, 478 F.3d 1108 (10th Cir. 2007) (en banc).

479-80. Whether that limitation is jurisdictional or not, the Court has noted that "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to that rule." *Id.* at 480. As petitioner has argued, Pet. 18-19, and as the Government agrees, BIO 11-12, there is especially good reason to preclude any exception with respect to criminal sentencing appeals – Congress entrusted the Attorney General, the Solicitor General, or a designated deputy solicitor general, with the authority to determine when and whether the Government should appeal lower court judgments. *See* 18 U.S.C. § 3742(b). The decision below inalterably conflicts with that congressionally ordained division of authority.

In the absence of sufficient reason to believe that further percolation will resolve the circuit split, and in light of the overwhelming authority supporting reversal, this Court should forgo any further delay and uncertainty by summarily reversing the Eighth Circuit's judgment.

CONCLUSION

For the foregoing reasons, this Court should summarily reverse the judgment below.

Respectfully submitted,

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