No. 07-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1937, this Court described as "inveterate and certain," the principle that an appellee "may not, in the absence of a cross-appeal … 'attack the decree with a view either to enlarging his own rights thereunder or lessening the rights of his adversary.'" *Morely Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191 (1937) (citation omitted). In light of this principle, numerous courts have held that a court of appeals may not order an increase in a criminal defendant's sentence in the absence of an appeal or cross-appeal by the Government. The Eighth and Tenth Circuits, however, have held that courts of appeals may *sua sponte* order increases in a defendant's sentence when the district court has failed to impose a statutory mandatory minimum sentence, even if the Government has not appealed or cross-appealed the sentence. The question presented is:

Whether a federal court of appeals may increase a criminal defendant's sentence *sua sponte* and in the absence of a cross-appeal by the Government.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael J. Greenlaw respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a) is published at 481 F.3d 601.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2007. Pet. App. 1a. On April 24, 2007, the Eighth Circuit granted petitioner leave to file an out-of-time petition for rehearing and rehearing en banc, Pet. App. 27a, which was denied on May 10, 2007, *id*. 28a. On July 27, 2007, Justice Alito extended the time for filing this petition through September 7, 2007. *See* 07A80. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

Section 3742(b) of Title 18 provides in relevant part:

> **Appeal by the Government.** – The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –
>
> (1) was imposed in violation of law. . . .
>
> The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

STATEMENT

After being convicted on drug and firearm charges, petitioner appealed his 442 month sentence to the Eighth Circuit. The Government did not appeal or cross-appeal the sentence. Nor, in responding to petitioner's appeal, did the Government request that the court of appeals review any of the district court's sentencing rulings favorable to petitioner. Nonetheless, the court of appeals *sua sponte* concluded that the district court had failed to impose a mandatory minimum sentence required by 18 U.S.C. § 924(c)(1)(C) and remanded the case with orders that petitioner's sentence be increased by fifteen years. In so doing, the court acknowledged it was further exacerbating a circuit split over whether a court of appeals may increase the sentence of a criminal defendant in the absence of an appeal or cross-appeal by the Government.

1. Petitioner, along with seven others, was arrested and accused of being a member of a street gang that sold crack cocaine on the south side of Minneapolis. Pet. App. 2a-4a. Six of those arrested pled guilty, while petitioner and another co-defendant stood trial on various drug and gun-related charges. After a two-week jury trial, petitioner was convicted of conspiracy to distribute in excess of fifty grams of crack cocaine (Count 1), conspiracy to possess firearms in relation to a drug trafficking crime (Count 2), carrying a firearm in relation to a drug trafficking crime (Counts 4), conspiracy to assault with a dangerous weapon (Count 5), two counts of assault with a dangerous weapon (Counts 6 and 8), and carrying a firearm during a crime of violence (Count 10). Pet. App. 4a, 7a-8a.[1]

The court sentenced petitioner to a total of 262 months for the various drug and conspiracy counts. Pet. App. 7a-8a. The court then turned to the gun counts. The Government argued that under 18 U.S.C. § 924(c), petitioner should be

[1] Petitioner was acquitted an additional charge of carrying a firearm during a drug trafficking crime. Pet. App. 4a.

sentenced to a mandatory minimum sentence of five years for the first gun offense (Count 4), and an additional consecutive term of 25 years for the second gun count (Count 10) because the second count constituted a "second or subsequent conviction" within the meaning of 18 U.S.C. § 924(c)(1)(C).[2] The trial court overruled the objection, concluding that Count 10 was not a second or subsequent conviction "because Greenlaw was only 'convicted' at the entry of judgment of conviction." Pet. App. 8a. Accordingly, the court sentenced petitioner to five years for the first weapons charge and ten years for the second, to be served consecutive to each other and to the 262 month sentence for the drug and conspiracy accounts. Thus, in all, the court sentenced petitioner to 442 months' imprisonment.

2. Although the district court rejected the Government's view of the mandatory minimum sentence required under Section 924(c), the Government did not appeal petitioner's sentence. Nor did it file a cross appeal when petitioner filed his own notice of appeal objecting to his sentence and conviction. *See* Pet. App. 9a.[3] Moreover, in responding to petitioner's challenge to his sentence in the Eighth Circuit, the Government did not urge the court of appeals to review the application of Section 924(c). *See id.* Instead, the Government simply noted, in passing, that "[a]lthough 19

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[2] That provision mandates that "[i]n the case of a second or subsequent conviction under this subsection, the person shall … be sentenced to a term of imprisonment of not less than 25 years." Section 924(c)(1)(D)(ii) further provides that "no term of imprisonment on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person."

[3] Petitioner appealed (1) the denial of his motion to sever his trial from his co-defendant's; (2) the denial of his request to represent himself; (3) the denial of his request for a downward departure; (4) the calculation of his criminal history category; and (5) the reasonableness of his sentence. Pet. App. 2a, 6a-7a.

U.S.C. § 924(c) required a 5-year sentence on Count 4 (consecutive to the 262 month guideline sentence, and a 25-year sentence, consecutive to the previously imposed sentences), the court gave the defendant 5 years consecutive for Court 4 and 10 years consecutive for Court 10, resulting in a total sentence of 442 months rather than 662 months." Govt. CA Br. 35. The conclusion the Government drew from this observation was not that petitioner's sentence should be increased, but rather that the "district court's sentence was not unreasonable." *Id*. 36.

The court of appeals agreed with the Government that petitioner's sentence was not unreasonable and, accordingly rejected that, and every other, objection petitioner raised against his conviction and sentence through his properly-noticed appeal. But rather than affirming the district court's decision, the Eighth Circuit *sua sponte* vacated petitioner's sentence and remanded with instructions to increase petitioner's sentence by fifteen years because it concluded that the district court had erred in declining to apply the 25 year mandatory minimum sentence for "second and subsequent" gun convictions under Section 924(c)(1)(C). Pet. App. 8a-9a. The court acknowledged that the "government … did not appeal the issue." *Id*. 9a. Nonetheless, it concluded that

> [b]ecause this error seriously affects substantial rights and the fairness, integrity, and public reputation of judicial proceedings, and because we think it is judicially efficient for us to address the error, we exercise our discretion under Fed. R. Crim. P. 52(b) and find the district court plainly erred in excluding the statutory mandatory sentence under Count 10.

Id. 9a-10 (footnote omitted).

In reaching this conclusion, the court noted that its decision was consistent with the Tenth Circuit's decision in *United States v. Moyer*, 282 F.3d 1311, 1313, 1317-19 (10th

Cir. 2002), but in conflict with the Seventh Circuit's decision in *United States v. Rivera*, 411 F.3d 864, 867 (7th Cir. 2005). *See* Pet. App. 9a-10a n.5, which held that a criminal defendant's sentence may not be increased unless the Government files an appeal or cross appeal.

On April 24, 2007, the Eighth Circuit granted petitioner leave to file an out-of-time petition for rehearing and rehearing en banc, Pet. App. 27a, which was denied on May 10, 2007, *id*. 28a. This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents the Court an opportunity to resolve a growing division among the circuits over whether a court of appeals may enlarge a criminal defendant's sentence in the absence of an appeal or cross-appeal by the Government. The majority of courts to have confronted the question have faithfully applied this Court's long-established rule that "[a]bsent a cross-appeal, an appellee . . . may not attack the decree with a view either to enlarging his own rights thereunder or lessening the rights of his adversary." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999) (internal quotation marks omitted). The Eighth and Tenth Circuits, however, have held that a court of appeals may *sua sponte* order an increase in a defendant's sentence to correct a district court's erroneous application of a statute requiring a mandatory minimum sentence.

This division of authority reflects a broader conflict over whether the cross-appeal requirement imposes a restriction on appellate jurisdiction – allowing for no exceptions, even to correct a plain error – or a rule of practice subject to exception in appropriate cases. This Court recognized, but did not resolve, that conflict in *Neztsosie* and granted certiorari to decide the question three years later in *Zapata Industries v. W.R. Grace & Company*, 536 U.S. 990 (2002), but was prevented from doing so when the case was settled and the petition withdrawn, 537 U.S. 1025. This case

provides the Court a vehicle for completing that unfinished business.

I. The Circuits Are Intractably Divided Over Whether A Court Of Appeals May Increase A Criminal Defendant's Sentence Absent An Appeal Or Cross-Appeal By The Government.

Seventy years ago, this Court reaffirmed the "inveterate and certain" principle that an appellee "may not . . . in the absence of a cross-appeal … 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *Morely Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191 (1937) (citation omitted). Indeed, the Court had "recognized [this] limitation as early as 1796." *Neztsosie*, 526 U.S. at 479 (citing *McDonough v. Dannery*, 1 L.Ed. 563). In "more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of [this Court's] holdings has ever recognized an exception to the rule." *Id*. at 480. The Eighth Circuit's disregard for the "inveterate" cross-appeal requirement in this case further deepened a growing division among the courts of appeals over the specific question whether a cross-appeal is required to enlarge a criminal sentence, as well as the more general question whether the cross-appeal requirement is a jurisdictional limitation or a rule of practice.

A. The Eighth And Tenth Circuits Have Departed From The Majority Rule Prohibiting Enlargement Of A Criminal Sentence Absent An Appeal Or Cross-Appeal By The Government.

While most courts have adhered to the cross-appeal requirement in criminal sentencing appeals, the Eighth and Tenth Circuits have held that the absence of a cross-appeal does not prevent a court of appeals from correcting a plain sentencing error resulting in an unlawfully low sentence.

1. In this case, the Eighth Circuit was aware that the Government had not cross-appealed petitioner's sentence, Pet.

9a, and that the Seventh Circuit had held that the absence of a Government cross-appeal prevents enlargement of a criminal sentence under this Court's decision in *Neztsosie*, *id*. at 9a-10a n.5. Nonetheless the Eighth Circuit held that it had "discretion under Fed.R.Crim.P. 52(b)" to correct a plain sentencing error that diminished a defendant's sentence if the error "seriously affects substantial rights and the fairness, integrity, and public reputation of judicial proceedings." Pet. App. 9a. It concluded that the district court's failure to impose a minimum sentence mandated by statute constituted such an error and, accordingly, *sua sponte* ordered a massive enlargement of petitioner's sentence. *Id*. 9a-10a.

The Tenth Circuit reached the same conclusion in *United States v. Moyer*, 282 F.3d 1311 (10th Cir. 2002). In that case, the defendant pleaded guilty pursuant to a plea agreement under which the Government agreed not to seek an enhancement under 18 U.S.C. § 924(e)(1).[4] The district court did not impose the enhancement, but the defendant appealed the sentence on other grounds. Although the Government did not cross-appeal, the Tenth Circuit nonetheless *sua sponte* vacated the sentence as unlawful and remanded for application of the Section 924(e)(1) enhancement, which it viewed as mandating an enhancement whether requested by the Government or not. 282 F.3d at 1317-19.[5] Like the Eighth Circuit in this case, the court found authority to enlarge the sentence in the absence of a cross-appeal in Fed. R. Crim. P. 52(b). *Id*. at 1318.

2. As the Eighth Circuit acknowledged, Pet. App. 9a-10a n.5., in *United States v. Rivera*, 411 F.3d 864 (7th Cir. 2005), the Seventh Circuit held that a court may *not* increase a

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[4] Section 924(e)(1) requires a mandatory minimum sentence of fifteen years for those convicted of a gun office after being convicted of three violent felonies or serious drug offenses.

[5] The court also provided, however, that the defendant be allowed to withdraw his guilty plea in light of the Government's promise not to seek the enhancement. *Id*. at 1319.

criminal defendant's sentence unless the Government appeals or cross-appeals the judgment. *See id*. at 867 ("By deciding not to take a cross-appeal, the United States ensured that Rivera's sentence cannot be increased.") (citing *Neztsosie*, 526 U.S. at 479-82). This rule has been recognized and applied in the Seventh Circuit on many occasions.[6]

Other circuits apply the same rule. For example, in *United States v. Harvey*, 2 F.3d 1318 (3d Cir. 1993), the defendant appealed his sentence, arguing that the district court erred in applying a certain upward departure under the Sentencing Guidelines. *Id*. at 1324. The Government acknowledged that the upward departure was erroneous, but argued that the district court had erred in the first instance in selecting the wrong base level offense. *Id*. at 1325. If the proper base level offense had been used, the defendant would have been given an even higher sentence than he received, even setting aside the upward departure. The court of appeals

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[6] *See, e.g., United States v. Goldman*, 219 Fed. Appx. 508, 510-11 (7th Cir. 2007) (unpublished) ("We see no authority here for the court to reduce the sentence below the mandatory minimum, but the government did not object in the district court and did not cross-appeal this issue. We therefore cannot disturb the sentence in a way that favors the government.") (citing, *inter alia*, *Neztsosie*, 526 U.S. at 479-82; *Rivera*, 411 F.3d at 867); *United States v. Miller*, 450 F.3d 270, 276 (7th Cir. 2006) ("Miller should give thanks that the United States did not file a cross appeal . . . . As it is, the prosecution was content with Miller's 300-month sentence, and the lack of a cross-appeal protects him against any increase."); *United States v. Malik*, 385 F.3d 758, 761 (7th Cir. 2004) ("[B]y not filing a cross-appeal, Malik disabled himself from receiving a sentence lower than 30 months [his original sentence]."); *Romandine v. United States*, 206 F.3d 731, 737 (7th Cir. 2000) ("The United States could have taken an appeal from the order [reducing the defendant's sentence], and had this been done, we would have reversed for reasons that are by now obvious. But the United States did not appeal . . . . When the time for appeal expired, so did any possibility for correcting the error.").

found that the departure was unlawful and that the district court used the wrong base level offense. *Id*. But it did not vacate the sentence and order its enlargement on remand. Instead, the court held that "because the government filed no cross-appeal, it cannot obtain a sentence more favorable than that already imposed." *Id*. at 1326. Thus, even though the sentence was vacated and remanded on other grounds, the Third Circuit held that "because the government did not file a cross-appeal" the district court was constrained on remand to issue a sentence no greater than that originally imposed. *Id*. at 1330. *See also United States v. Lieberman*, 971 F.2d 989, 997 n.5 (3d Cir. 1992) (noting in a criminal case that "a party may not seek more extensive relief on appeal than it received in district court without filing a cross-appeal").

In *United States v. Whaley*, 148 F.3d 205, 207 (2d Cir. 1998), the Second Circuit considered an appeal by a criminal defendant in which the Government argued that the defendant's "sentence was illegal and [that] we should vacate and remand for resentencing *de novo*." While the court agreed that the sentence should have been longer under a correct application of the law, it nonetheless held that it was "precluded from remanding for resentencing because we lack jurisdiction over [the] sentence" given that the Government never filed an appeal or cross-appeal. *Id*.

The Fourth Circuit likewise refused to consider an increase in the defendant's sentence absent a Government cross-appeal in *United States v. Luskin*, 926 F.2d 372 (4th Cir. 1991). In that case, the defendant was convicted on multiple counts related to an attempted murder plot and on three counts of carrying a gun in relation to a crime of violence. Under 18 U.S.C. § 924(c), the sentences on the gun counts should have been made consecutive to the murder-related counts and to each other. However, the district court ordered concurrent sentences. *Id*. at 374 n.2. On the defendant's appeal, the Fourth Circuit noted the district court's likely error. *Id*. "However," the court concluded, "since the United States has not counter-appealed on this point, we will not

address it." *Id*. Numerous other decisions have likewise refused to consider increases in a criminal sentence absent a Government appeal.[7] While these cases have not necessarily expressed their conclusions in absolute or jurisdictional terms,

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[7] *See, e.g.*, *United States v. Guzman*, 225 Fed. Appx. 496, 497 n.3 (9th Cir. 2007) ("We will not consider the government's suggestion that the prison sentence itself should be revisited and increased. The government did not cross appeal.") (citing *Neztsosie*, 526 U.S. at 479); *United States v. Santana-Mendoza*, 29 Fed. Appx. 613, 613-614 (1st Cir. 2002) (observing that district court grossly undercounted the loss caused by the defendant's conduct for sentencing purposes, but holding that "[b]ecause the government did not cross-appeal in this case, however, we decline to remand for resentencing"); *United States v. Gonzalez-Vazquez*, 219 F.3d 37, 44 (1st Cir. 2000) (declining to correct error that unlawfully decreased a defendant's sentence because "the government did not cross-appeal"); *United States v. Brock*, 211 F.3d 88, 93 (4th Cir. 2000) (refusing to consider whether district court applied proper base level offense because "the Government did not cross-appeal" the issue); *United States v. Waks*, No. 98-50531, 1999 WL 450857, *1 n.3 (June 28, 1999 9th Cir.) (unpublished) (refusing to consider Government's assertion that district court undercounted the amount of funds derived from offense for sentencing calculation "because the government did not cross-appeal on this issue"); *United States v. Night*, 29 F.3d 479, 481 n.2 (9th Cir. 1994) ("The enhancement term under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Here, the district court imposed concurrent terms. Because the government did not cross appeal, however, we do not consider the issue.") (citation omitted); *United States v. Miller*, 910 F.2d 1321, 1324 n.2 (6th Cir. 1990) ("The government's failure to appeal precludes us from reviewing the district court's decision to depart downward from the 63 to 78-month guideline range."); *United States v. Turner*, 898 F.2d 705, 711 (9th Cir. 1990) ("[B]ecause the government failed to contest Turner's sentence on appeal pursuant to 18 U.S.C. § 3742(b) (Supp. V 1987), it has waived any challenge to the district court's miscomputation of Turner's sentence in his favor.") (citation omitted).

they nonetheless leave little room to doubt that petitioner's sentence would not have been increased in those circuits given the Government's failure to cross-appeal his sentence.

3. Finally, the Fifth Circuit has been inconsistent. In *United States v. Coscarelli*, 149 F.3d 342 (5th Cir. 1998) (en banc), the court refused to consider an argument by a criminal defendant seeking a reduction in his sentence because he had failed to file a cross appeal. The requirement of a timely notice of appeal, the court held, is "mandatory and jurisdictional." *Id*. at 343 (citation omitted). Accordingly, because the defendant had filed "no notice of appeal or cross-appeal" the Fifth Circuit held that "an appellate court simply has no authority to grant [the defendant] relief that would expand his rights under the judgment." *Id*. However, in an earlier case not cited in *Coscarelli*, the Fifth Circuit *sua sponte* vacated a criminal sentence in the absence of an appeal or cross-appeal from the Government, when the court concluded that the sentence did not comply with a statutory mandatory minimum. *See United States v. Schmeltzer*, 960 F.2d 405, 407 (5th Cir. 1992). Accordingly, it appears that the case law in the Fifth Circuit presently stands for the untenable proposition that a court of appeals may revise a sentence in favor of the Government without a cross-appeal, but may not remedy a sentencing error to benefit a non-appealing criminal defendant.[8]

B. The Conflict In This Case Also Implicates A Broader Unresolved Division Over The Jurisdictional Status Of The Cross-Appeal Requirement.

The circuit conflict over a court of appeal's ability to correct a sentencing decision that favored a defendant without a Government cross-appeal reflects a broader disagreement

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[8] *See also Marts v. Hines*, 117 F.3d 1504, 1508-11 (5th Cir. 1997) (en banc) (Garwood, dissenting) (cataloguing inconsistent decisions within the circuit).

over whether the cross-appeal requirement is a limitation on appellate jurisdiction or, instead, a rule of practice subject to exception in appropriate cases. In *Neztsosie*, this Court recognized that conflict, noting that this "issue has caused much disagreement among the Courts of Appeals and even inconsistency within particular Circuits for more than 50 years." 526 U.S. at 480 n.2 (collecting cases). However, there was no need to decide the question in *Neztsosie*, *id*. at 480, and so the conflict persisted. Three years later, this Court granted certiorari to resolve the question in *Zapata Industries v. W.R. Grace & Company*, 536 U.S. 990 (2002). Again, however, the Court was unable to resolve the dispute, this time because the parties reached a settlement and dismissed the petition. *See* 537 U.S. 1025 (2002).

This case presents the Court with an opportunity to finally resolve this long-standing and far-reaching conflict once and for all. If the cross-appeal requirement is a "mandatory, jurisdictional requirement," *Young Radiator Co. v. Celotex Corp*., 881 F.2d 1408, 1416 (7th Cir. 1989), as petitioner contends, the Eighth Circuit lacked jurisdiction to enlarge petitioner's conviction without a Government cross-appeal, regardless of how plain the error or serious the perceived miscarriage of justice. On the other hand, if the requirement is simply a rule of practice, there is room for argument that a court may properly correct a district court's application of a statutory mandatory minimum sentence. Litigants and the lower courts would benefit greatly from knowing whether such exception are ever permitted.

C. This Case Also May Provide The Court An Opportunity To Resolve A Long-Standing Confusion Over Whether Fed. R. Crim. P. 52(b) Applies To Objections Forfeited By The Government.

Were this Court to conclude that the cross-appeal requirement is subject to exception, the Court would then have an opportunity to resolve the additional conflict and

confusion over whether the "plain error" doctrine applies to excuse forfeiture of objections by the Government.

The Eighth and Tenth Circuits justified their disregard of the cross-appeal requirement by reference to Fed. R. Crim. P. 52(b), which provides that a "plain error that affects substantial rights may be considered even though it was not brought to the court's attention." *See* Pet. App. 9a-10a; *Moyer*, 282 F.3d at 1318-19. However, "[t]he courts are split on whether the government can ever take advantage of Rule 52(b) to raise an issue for the first time on appeal." Hutchinson, Hoffman, Young & Popko, FED. SENT. L. & PRACT. § 11.8 (2007 ed.) (collecting cases). Commentators and courts have described the division as pitting the Fifth and Eighth Circuits against the majority of courts, which have held that Rule 52(b) applies to excuse Government forfeitures. *See id*. (citing *United States v. Garcia-Pillado*, 898 F.2d 36, 39 (5th Cir. 1990), and *United States v. Filker*, 972 F.2d 240, 242 (8th Cir. 1992)); *United States v. Dickerson*, 381 F.3d 251, 257 (3d Cir. 2004) (citing *Garcia-Pillado* and *United States v. Posters 'N' Things, Ltd*., 969 F.2d 652, 663 (8th Cir. 1992)); *United States v. Rodriguez*, 938 F.2d 319, 322 n.4 (1st Cir. 1991) (citing *Garcia-Pillado*). However, there are now cases from both the Fifth and Eighth Circuits (including this one) applying the plain error rule to reach forfeited Government objections. *See* Pet. App. 9a n.5; *United States v. Avants*, 278 F.3d 510, 521 & n.12 (5th Cir. 2002); *United States v. Kelly*, 961 F.2d 524, 528 (5th Cir. 1992). The confused state of the case law within these circuits reinforces the need for review by this Court.

II. The Division Of Authority Is Long-Standing, Intractable, And Ready For Resolution By This Court.

The conflict presented by this case is considered and entrenched. The Eighth Circuit expressly acknowledged the conflict with the Seventh Circuit but decided, instead, join the Tenth Circuit in holding that plain sentencing errors may be

corrected *sua sponte*. *See* Pet. App. 9a-10a n.5. The court further denied a petition for rehearing that again noted the intercircuit conflict. *See* Pet. for Rehearing or Rehearing En Banc by Appellant 10-11. At the same time, in *Rivera*, the Seventh Circuit expressly rejected the Fifth Circuit's prior decision in *Schmeltzer*, concluding that it was inconsistent with this Court's more recent pronouncement in *Neztsosie*. *See Rivera*, 411 F.3d at 867. Since then, the Seventh Circuit has repeatedly enforced its cross-appeal requirement. See n. 6, *supra*. There is no genuine prospect that any of these circuits will reverse position on its own. Indeed, as time has passed, the division has grown wider, not narrower. Only intervention by this Court will resolve the conflict.

Such intervention is badly needed, as the present disparate treatment of similarly situated criminal defendants is untenable. There is no question that if petitioner had brought his appeal in the Seventh Circuit, for example, his sentence would now be *fifteen years* less than it is now, solely because he had the misfortune of finding himself in a circuit that has disregarded the long-standing majority rule. While the court of appeals justified its action in part by reference to the need to protect the "public reputation of judicial proceedings," Pet. App. 9a, the vastly disparate treatment of similarly situated citizens based on accidents of geography undermines the public reputation of the federal criminal justice system as well.

Finally, this case presents an ideal vehicle for resolving the conflict – the question presented was squarely addressed by the court of appeals, whose resolution of the issue determined the outcome of the case. *See* Pet. App. 9a-10a.

III. The Court Of Appeals' Decision Conflicts With The Decisions Of This Court And The Statutory Scheme Congress Established To Govern Criminal Appeals On Behalf Of The Government.

Certiorari is further warranted because the decision below is wrong, disregarding both the limits Congress has

placed upon courts of appeals' jurisdiction and the legislature's decision to bestow discretion upon the Attorney General and the Solicitor General – not the courts of appeals – to decide which sentencing errors benefiting a defendant should be presented for potential correction on appeal.

1. "Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Bowles v. Russell*, 127 S.Ct. 2360, 2365 (2007). Since the earliest days of the Republic, Congress has limited the courts of appeals' jurisdiction to cases in which the party seeking revision of a judgment has filed a timely notice of appeal. *See* Act of Mar. 3, 1891, ch. 517, §§ 6, 11, 26 Stat. 826, 826, 829 (statute creating federal appellate courts and establishing scope of jurisdiction); 28 U.S.C. § 2107(c) (2007) (modern requirement of notice of appeal).

Accordingly, just last Term, this Court reaffirmed that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" *Bowles*, 127 S.Ct. at 2463.[9] Obviously, the failure to take any appeal at all is no less a jurisdictional defect than taking an appeal out of time. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314-15 (1988) (holding that failure to name co-plaintiffs in notice of

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[9] The jurisdictional nature of the notice of appeal requirement is further reinforced by the Federal Rules of Appellate Procedure. *See* Fed. R. App. P. 3(a)(1) ("An appeal permitted by law as of right from a district court to a court of appeals may be taken *only by filing a notice of appeal* . . . .") (emphasis added); Fed. R. App. P. 3(a)(2) ("An appellant's failure to take any step *other than the timely filing of a notice of appeal* does not affect the validity of the appeal . . . .") (emphasis added); Fed. R. App. P. 2 (permitting courts to suspend rules, except as provided in Rule 26(b)); Fed. R. App. P. 26(b)(2) (prohibiting extension of time to file notice of appeal).

appeal "constitutes a failure of the party to appeal" and refusing to allow courts of appeals "to exercise jurisdiction over parties not named in the notice of appeal").

The rule applies with equal force to sentencing appeals by the Government. In *United States v. Robinson*, 361 U.S. 220, 224 (1960), this Court held that holding that "the filing of a notice of appeal" within the time permitted by the federal rules "is mandatory and jurisdictional" in a criminal case. Indeed, the specific statute authorizing sentencing appeals by the Government, like the general appeals statute this Court has repeatedly construed as imposing a jurisdictional requirement, provides that a Government appeal shall be initiated by the filing of a notice of appeal. *Compare* 18 U.S.C. § 3742(b)(1) ("Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence ... was imposed in violation of law.") *with* 28 U.S.C. § 2107(a) (providing that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed . . . .").

The jurisdictional requirement of a timely notice of appeal does not abate simply because the opposing party also has appealed from the same judgment. *See generally Marts*, 117 F.3d at 1511-1518 (Garwood, J., dissenting). The federal statutes governing appellate jurisdiction make no distinction between appeals and cross-appeals, requiring instead a timely notice of appeal in all cases in which a party seeks review of a district court's judgment. *See* 28 U.S.C. § 2107(a); 18 U.S.C. § 3742(b)(1). While the Federal Rules of Appellate Procedure allow additional time for the filing of a cross-appeal, they require a timely notice of appeal for cross-appellants in no less stringent terms than for the original appealing party. *Compare* Fed. R. App. P. 4(a)(1) *with* Fed. R. App. P. 4(a)(3). Moreover, while some courts once held that the filing of a timely notice of appeal by any party gave the court of appeals jurisdiction over the entirety of the judgment, *see, e.g., Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d

468, 476 (8th Cir. 1977), that misconception was corrected by this Court in *Torres*, which held that an appeal by some plaintiffs was insufficient to confer jurisdiction upon the court of appeals to disturb the judgment entered against a non-appealing co-plaintiff. *See* 487 U.S. at 314-18.

Thus, an appellee's failure to file a timely notice of cross-appeal has jurisdictional consequences, limiting the power of the reviewing court to revise the judgment below, even upon a showing of very clear error. "Without a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record,'" but "[w]hat he may not do in the absence of a cross-appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.'" *Morely Const. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191 (1937) (quoting *United States v. Am. Ry. Express*, 265 U.S. 425 (1924)).

Nor may the court of appeals enlarge the judgment in favor of a nonappealing party on its own accord, however inequitable it may seem to leave the error uncorrected. *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 480, 480 (1999) (reversing court's *sua sponte* enlargment of judgment); *see also Bowles*, 127 S.Ct. at 2366 (holding that "this Court has no authority to create equitable exceptions to jurisdictional requirements"). Certainly, nothing in Rule 52(b) authorizes such action. By its plain terms, the Rule does not purport to affect the scope of appellate jurisdiction. *See* Fed. R. Crim. P. 52(b). And, in fact, the Rule would be invalid if it did.[10]

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[10] As originally enacted, the Rules Enabling Act permitted only the promulgation of "general rules of practice and procedure," 28 U.S.C. § 2072(a), not substantive rules enlarging or restricting jurisdiction. Congress subsequently amended the Act to permit this Court to "define when a ruling of a district court is final for the purposes of appeal under section 1291." 28 U.S.C. § 1072(c). That limited delegation of authority to define the scope of appellate

Accordingly, the Eighth Circuit lacked jurisdiction to increase petitioner's sentence, either upon request of the Government or its own initiative.[11]

2. Proper respect for Congress's authority to establish the prerequisites for appellate review requires strict observance of the cross-appeal requirement in all cases, civil and criminal. However, in the criminal context there is added reason to deny courts of appeals the authority to order increases in criminal sentences when the Government has declined to bring its own appeal. The statute authorizing Government appeals of criminal sentences expressly provides that after filing a notice of appeal, the "Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." 18 U.S.C. § 3742(b).[12] The purpose of this restriction is to assure that such appeals are not routinely filed, lest the courts be inundated by appeals from local federal prosecutors dissatisfied by sentences in particular cases. *See* S. Rep. No. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3337; *cf. United States v. Providence Journal Co.*, 485 U.S. 693, 702 & n.7 (1988) (commenting on Solicitor General's parallel role in approving Government petitions for certiorari).

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jurisdiction marks the outer limits of the Rules' effect on the jurisdiction of the federal courts of appeals.

[11] Even if the cross-appeal requirement were not considered strictly jurisdictional, the Eighth Circuit nonetheless erred in disregarding it. "[I]n more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of [this Court's] holdings has ever recognized an exception to the rule." *Neztsosie*, 526 U.S. at 480. As discussed next, the context of Government sentencing appeals is a particularly inappropriate area in which to invent, for the first time, an exception to this long-standing rule.

[12] The Attorney General has delegated his authority to authorize appeals to the Solicitor General. *See* 28 C.F.R. §0.20(b).

Congress plainly understood that a consequence of this limitation would be that some unlawful sentences would be allowed to stand uncorrected, even when, in the opinion of a court, it might be "judicially efficient for [the court] to address the error." Pet. App. 9a. *Cf. United States v. Mendoza*, 464 U.S. 154, 161 (1984) ("Unlike a private litigant who generally does not forego an appeal if he believes he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the government and the crowded dockets of the courts, before authorizing an appeal."). Congress determined that top officials at the Department of Justice, not members of the judiciary, should be charged with the responsibility for deciding which sentencing rulings adverse to the Government should be candidates for possible correction on appeal. Allowing a court of appeals to nonetheless consider errors that the Solicitor General has chosen not to pursue on appeal – either entirely *sua sponte* or based on subtle (or not so subtle) suggestions by government attorneys denied authority to appeal the district court's order directly – would undermine the allocation of authority established by Congress.

In this case, the Solicitor General plainly did not conclude that any error unlawfully reducing petitioner's sentence was worthy of correction through a Government appeal or cross-appeal.[13] The court of appeals' disregard for that decision should be corrected by this Court.

3. Finally, even if the courts of appeals had authority to revise a criminal sentence in favor of a non-appealing party in cases of plain error under Fed. R. Crim. P. 52(b), that authority would have no application to this case for the simple reason that the Rule does not apply to revive objections forfeited by the Government. By its express terms, the Rule allows a court to correct a plain error only if the error "affects

[13] It is, of course, too late for the Solicitor General to authorize an appeal now. *See* Fed. R. App. P. 4(b)(1)(B); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98-99 (1994).

substantial rights." Fed. R. Crim. P. 52(b). While the United States surely has important *interests* at stake in a criminal prosecution, the Government does not have "substantial rights" as that term is most naturally understood in the context of these rules. *See United States v. Barajas-Nunez*, 91 F.3d 826, 835-36 (6th Cir. 1996) (Siler, J., concurring in part and dissenting in part). For example, Rule 11 provides that "variance from the requirements of this rule is harmless error if it does not affect *substantial rights*," Fed. R. Crim. P. 11(h) (emphasis added), plainly referring solely to the substantial rights of a criminal defendant. *See* Fed. R. Crim. P. 11(b)(1) (requiring court to inform defendant of a panoply of rights prior to accepting guilty plea). Rule 7 similarly uses essentially the same term – "substantial right" – in a manner that likewise leaves no room for doubt that it refers solely to the rights of the defendant. *See* Fed. R. Crim. P. 7(e) ("Unless an additional or different offense is charged or a *substantial right of the defendant* is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.") (emphasis added).

Even if a sentencing error benefiting a defendant could be said to "affect[] substantial rights," Fed. R. Crim. P. 52(b), it nonetheless would be inappropriate for a court of appeals to exercise its discretion to correct it, especially in the absence of an express request to do so by the Government. It is one thing for a court to consider an argument made by the Government in a properly-authorized appeal when the prosecution failed to make an objection in the trial court. However, it is quite another for a court to *sua sponte* correct an error in a judgment the Government as chosen not to appeal. Given that Congress has expressly authorized the Government to decline to appeal an unlawful sentence, and given the historic understanding that the failure to take such an appeal would bar consideration of the error on appeal, it simply cannot be said that correction of the unchallenged error is necessary to ensure the "fairness, integrity or public

reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993) (internal quotation marks omitted).

CONCLUSION

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

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September 7, 2007

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 05-3391

United States of America, *
Appellee, *
v. *
LaQuan Dwayne Carter, also known *
as "Quan," also known as "Q-Ball," *
Appellant. *

Nos. 06-1365

United States of America, *
Appellee, *
v. *
Michael Greenlaw, also known *
as "Mikey," *
Appellant. *

Appeal from the United States District Court for the District of Minnesota.

Submitted: September 26, 2006
Filed: March 23, 2007

Before MURPHY, HANSEN, and RILEY, Circuit Judges.

RILEY, Circuit Judge.

The district court sentenced Michael Greenlaw (Greenlaw) to 442 months' imprisonment and LaQuan Carter (Carter) to 405 months' imprisonment following their convictions on drug and firearms charges, in violation of 21 U.S.C. § § 841(a)(1), (b)(1)(A) and (B) and 846, and 18 U.S.C. § § 924(c) and (o), 1959 and 1961. In this consolidated appeal, Greenlaw appeals the district court's (1) denial of his motion to sever the trial, (2) denial of his request to represent himself, and (3) sentence of 442 months' imprisonment. Carter appeals the district court's (1) denial of his Batson challenge,[1] and (2) finding that sufficient evidence supported his conviction of conspiracy to distribute crack cocaine. For the reasons stated below, we vacate Greenlaw's sentence and remand to the district court for resentencing. In all other respects, we affirm the judgment of the district court.

I. BACKGROUND

Greenlaw and Carter belonged to a gang named the "Family Mob," which sold crack cocaine on the south side of Minneapolis. From 1996 until his arrest in 1999, Norman Toney (Toney) supplied the Family Mob with cocaine, which Family Mob members cooked into crack cocaine and sold on the streets.

Family Mob members used their collective efforts to sell an estimated two to three kilograms of crack cocaine per week. For example, one member would hold the crack, another would hold the money, another would carry a gun for security purposes, and another would serve as lookout.

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Family Mob members hid the crack cocaine near them while on the street rather than carry it on their person or carried the crack in their mouths to be swallowed if police approached. They also hid guns in others' houses and basements to avoid being caught in possession of the firearms. Family Mob members discussed the location of these guns so the guns were available to them when needed.

The Family Mob established and defended a territory in south Minneapolis to sell crack cocaine. When the presence of Family Mob members alone was not enough to keep competitors out of their territory, the members employed intimidation and violence to defeat competition. For example, James Hicks (Hicks), a Family Mob member, testified that, on May 10, 1997, Carter and other Family Mob members were on the south side of Minneapolis dealing drugs when a confrontation with nonmembers occurred. According to Hicks, when the non-members returned to the area, Carter responded by firing a gun at their car.

Another incident occurred in October 1998, when Robert Lewis (Lewis), a member of a rival gang, the "Bogus Boys," shot and killed Family Mob member Daryl Bellamy (Bellamy). Family Mob member Everett Jones (Jones) testified he and Greenlaw responded by dynamiting Lewis's home. Hicks explained the Family Mob had to respond to Bellamy's death because otherwise "[m]ore people would have been coming over where we at trying to cause us bodily harm. Trying to shoot us, take guys' money, our drug clientele."

After the arrests of several Family Mob members, police recovered numerous weapons, including a .9 millimeter handgun with laser sight, an AR-15 rifle, a .40 caliber handgun, a Davis .38 caliber handgun, a "ball and cap revolver," a .20 gauge sawed-off shotgun, a .44 magnum, a .45 semi-automatic handgun, a .9 millimeter semi-automatic handgun, a .38 caliber pistol, a .9 millimeter Luger, and a

Tech .9 millimeter handgun. In addition, police recovered approximately 240 grams of crack cocaine and nearly two kilograms of cocaine.

Eight defendants were indicted on various drug and firearm charges. Six of the defendants pled guilty, but Carter and Greenlaw elected a jury trial. The counts against both Carter and Greenlaw included conspiracy to distribute in excess of fifty grams of crack cocaine and conspiracy to possess firearms during and in relation to a drug trafficking crime. Greenlaw's charges also included two counts of carrying a firearm during and in relation to a drug trafficking crime and one count of carrying a firearm during a crime of violence.[2]

Following a two-week joint trial, the jury returned verdicts of guilty against both Carter and Greenlaw on all counts except one. Greenlaw was acquitted on one of two counts of carrying a firearm during a drug trafficking crime.

II. DISCUSSION

A. Greenlaw's Motion to Sever

Greenlaw first argues the district court erred in denying his motion to sever the trials. Greenlaw moved for severance of the trials during a pretrial hearing. The district court denied his request. Greenlaw did not renew his motion at the close of the government's case or at the close of all the evidence. Because of this omission, we review the denial of the motion for plain error. *United States v. Haskell*, 468 F.3d

[2] Greenlaw was charged also with one count of conspiracy to commit a violent crime in aid of racketeering and two counts of a violent crime in aid of racketeering. Carter was charged also with one count of aiding and abetting distribution in excess of five grams of crack cocaine and one count of a violent crime in aid of racketeering.

1064, 1070 (8th Cir. 2006).[3] We will "reverse only if there was misjoinder which had a substantial and injurious effect or influence on the verdict." *Id.*

Greenlaw contends severance was necessary because the jury was unable to compartmentalize the evidence. Greenlaw claims he was unfairly prejudiced in a complex case of multiple separate criminal acts by evidence relevant only to Carter. Greenlaw specifically points to the testimony of Tasha Humphries (Humphries), who testified Carter shot her boyfriend. Because Humphries failed to state Greenlaw was not present during that incident, and because Greenlaw and Carter were sitting next to each other in the courtroom, Greenlaw contends the jury may have improperly considered Humphries's testimony against him.

However, Greenlaw was never charged with the shooting. Humphries's testimony applied only to Carter, did not implicate Greenlaw in any way, and did not prevent Greenlaw from presenting a defense. *Id.* Greenlaw fails to demonstrate the jury was unable to compartmentalize this evidence as it related to Greenlaw and Carter. To the contrary, the fact Greenlaw was acquitted on one of the charges against him, i.e., carrying a firearm during a drug trafficking crime, indicates the jury considered the evidence against each defendant separately. Here, the district court did

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[3] As the *Haskell* decision recognized, the standard of review applicable to the denial of a severance motion has been a subject of debate. *Haskell*, 468 F.3d at 1070 n. 3. *United States v. Mathison*, 157 F.3d 541, 546 (8th Cir. 1998), as did *Haskell*, adopted a plain error standard of review. But, *United States v. Flores*, 362 F.3d 1030, 1039 n. 4 (8th Cir. 2004), adopted an abuse of discretion standard "in light of the purposes for requiring the motion's renewal." (quotation omitted). Regardless, whether we review the district court's decision for plain error or for abuse of discretion, the outcome in this case remains the same.

not abuse its discretion or plainly err in denying Greenlaw's severance request.

B. Greenlaw's Request for Self-Representation

Greenlaw also argues the district court erred in denying his request to represent himself at trial. We do not agree. Before the court can consider if a defendant may represent himself, the defendant is required to make a clear and unequivocal request for self-representation. *United States v. Light*, 406 F.3d 995, 998-99 (8th Cir. 2005).

Here, the government claims Greenlaw never made a clear and unequivocal request for self-representation. Greenlaw, however, contends the following exchange shows otherwise:

> **The Court:** Are [your motions] having to do with getting a new lawyer? Are you asking to represent yourself or what are you going to do?
>
> **Greenlaw:** No, I'm asking to be a co-counsel, to be appointed with a different attorney and also be a co-counsel.
>
> **The Court:** What do you mean by "a co-counsel?"
>
> **Greenlaw:** To be entitled to all evidence that's being used against me, for my records, so I can prepare myself for trial.

Based on this colloquy, as well as prior demands for new counsel, Greenlaw argues he made a clear and unequivocal request to represent himself. However, the record and these arguments fail to show a *clear and unequivocal* request for self-representation. Greenlaw never adequately invoked his right to self-representation. *Id*. at 999.

C. Greenlaw's Sentence

Greenlaw further claims the district court erred in sentencing him to 442 months' imprisonment. First, Greenlaw argues the district court erred by denying his motion for downward departure. Greenlaw specifically

contends his criminal history was overstated and should have been category II instead of category III. However, Greenlaw does not assert the district court failed to recognize it had the authority to depart, and nothing in the record suggests the district court was unaware of its authority to depart. *See United States v. Andreano*, 417 F.3d 967, 970 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 1118 (2006) (holding "[t]he discretionary denial of a motion for downward departure is unreviewable unless the court failed to recognize its authority to depart."). Consequently, on this record, the district court's discretionary denial of a motion for downward departure is unreviewable.

Greenlaw next argues the district court erred in sentencing him to 442 months. Greenlaw contends the district court abused its discretion and he should have received only a 15-year sentence. We disagree. An abuse of discretion occurs if the district court failed to consider a relevant factor that should have received significant weight, gave significant weight to an improper or irrelevant factor, or considered only appropriate factors but committed a clear error of judgment in weighing those factors. *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir.), *cert. denied*, 126 S.Ct. 276 (2005). Greenlaw does not indicate what factors the court failed to consider or should have considered to arrive at a 15-year sentence. Greenlaw makes only vague assertions regarding his "age and historical characteristics" which do not establish the district court abused its discretion.

Here, based on a total offense level of 38 and a criminal history category III, the district court calculated an advisory Guidelines range of 292 to 365 months' imprisonment. The district court gave Greenlaw credit for 62 months already served on state drug-related charges. Thereafter, the district court sentenced Greenlaw to a concurrent 262 months' imprisonment for Count 1 (conspiracy to distribute crack cocaine), Count 2 (conspiracy to possess firearms in relation to a drug trafficking crime), Count 5 (conspiracy to assault

with a dangerous weapon), and Counts 6 and 8 (assault with a dangerous weapon).[4]

We note, however, when considering Counts 4 and 10, which involved possession of firearms under 18 U.S.C. § 924(c), the district court committed an error. The district court sentenced Greenlaw consecutively to 5 years' imprisonment for Count 4 and to 10 years' imprisonment for Count 10. However, 18 U.S.C. § 924(c)(1)(A)(i) and (C)(i) require a 5-year sentence on Count 4 to be served consecutively to the 262-month sentence, and a 25-year sentence on Count 10 to be served consecutively to the total sentence after factoring in Count 4.

Under 18 U.S.C. § 924(c)(1)(C), "[i]n the case of a second or subsequent conviction under this subsection, the person shall ... be sentenced to a term of imprisonment of not less than 25 years." Greenlaw's conviction under Count 10 was his second conviction under the statute. Thus, under § 924(c)(1)(C), Greenlaw should have been sentenced consecutively to the mandatory minimum sentence of 25 years for Count 10.

The district court determined Count 10 was not a second or subsequent conviction under § 924(c)(1)(C) because Greenlaw was only "convicted" at the entry of judgment of conviction. However, the Supreme Court has declared "[i]n the context of § 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of final judgment of conviction." *Deal v. United States*, 508 U.S. 129, 132 (1993). Contrary to the district court's reasoning, Greenlaw was convicted when the jury found him guilty of Count 10, not at

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[4] The district court arrived at this number by sentencing Greenlaw to 262 months for Count 1, 240 months each for Counts 2, 6, and 8, and 36 months for Count 5, all to be served concurrently.

the entry of final judgment of conviction. Greenlaw's total sentence should include the mandatory consecutive 25 years under § 924(c)(1)(C), in addition to the mandatory consecutive 5-year sentence for Count 4.

The government did object to this error at sentencing, but did not appeal the issue. Because this error seriously affects substantial rights and the fairness, integrity, and public reputation of judicial proceedings and because we think it is judicially efficient for us to address the error, we exercise our discretion under Fed.R.Crim.P. 52(b)[5] and find the district

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[5] *See Silber v. United States*, 370 U.S. 717 (1962) ("'In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936))); *United States v. Granados*, 168 F.3d 343, 346 (8th Cir. 1999) (per curiam) ("The Supreme Court and this court have recognized in criminal cases that appellate courts can examine a critical issue affecting substantial rights sua sponte under Fed.R.Crim.P. 52(b)."); *see also United States v. Baugham*, 449 F.3d 167, 170 (D.C.Cir. 2006) ("[T]his court in any event has the power to notice a plain error sua sponte" (citing *Silber*, 370 U.S. at 718)); *United States v. Moyer*, 282 F.3d 1311, 1313, 1317-19 (10th Cir. 2002) (recognizing the court had the power to correct the imposition of an illegal sentence sua sponte). As we have noted above, fairness concerns run both ways. *See United States v. Cotton*, 535 U.S. 625, 634 (2002) ("The real threat then to the 'fairness, integrity, and public reputation of judicial proceedings' would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial."). *But see United States v. Rivera*, 411 F.3d 864, 867 (7th Cir.) (refusing to correct sentence that was below the statutory mandatory minimum because "[b]y deciding not to take a cross-appeal, the United States

court plainly erred in excluding the statutory mandatory sentence under Count 10. *See United States v. Barnett*, 410 F.3d 1048, 1050-51 (8th Cir. 2005) (finding the district court's failure to impose a consecutive sentence under 18 U.S.C. § 924(c) was "an error [that] affected the substantial rights of the government and people of the United States to have defendants sentenced in accordance with governing law.... The public reputation of criminal trials and of sentencing would certainly be undermined if we were to decline to correct a clear error of law that would result in [a defendant] serving a sentence of five years less than that required by law."); *United States v. Campos*, 362 F.3d 1013, 1014 n. 1 (8th Cir. 2004) ("[W]e have previously held that an error which lengthened a defendant's sentence by 21 months was a miscarriage of justice and we think that the result should be the same when an error shortens a defendant's sentence by an equal or greater amount.... It goes without saying that both the defendant and the people of the United States are entitled to equal justice." (internal citation omitted)). This error shortened Greenlaw's sentence by a statutorily mandated additional 180 months, which sentence is contrary to law and a miscarriage of justice.[6]

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has ensured that [the defendant's] sentence cannot be increased"), *cert. denied*, 126 S.Ct. 493 (2005).

[6] We also note the district court erred in concluding that, without a jury finding (citing *United States v. Booker*, 543 U.S. 220 (2005)), it could not make a finding with respect to whether Greenlaw possessed a firearm in connection with Count 1. The district court said: "I just don't think under *Booker* I can make that determination." Contrary to the district court's assertion, the district court can make that determination under *Booker* when calculating an advisory Guideline range. *See United States v. Sandoval-Rodriguez*, 452 F.3d 984, 990-91 (8th Cir. 2006). The government objected to this *Booker* error, but did not appeal the error. Under plain error review, an error must be plain, affect substantial rights, and seriously affect the fairness, integrity, or

D. Carter's *Batson* Motion

Carter contends the district court erred in overruling his Batson challenge of the government's peremptory strike of the sole minority member[7] of the jury pool. Batson challenges are evaluated under a three-part analysis. United States v. Blaylock, 421 F.3d 758, 769 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 1108 (2006). First, a defendant must make a prima facie showing that the prosecutor has stricken a potential juror because of race. Second, if such a showing is made, the burden shifts to the prosecutor to articulate a race neutral explanation for striking the prospective juror. Third, the district court must decide the ultimate question of whether or not the defendant has proven purposeful discrimination.[8] *Id*.

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public reputation of judicial proceedings. *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Pirani*, 406 F.3d 543, 550 (8th Cir.) (en banc), *cert. denied*, 126 S.Ct. 266 (2005). The § 924(c)(1)(C) error we recognize today as plain is triggered primarily because the error violates a Congressional mandate. This *Booker* error does not. Based on the unique circumstances of this sentencing, we conclude this *Booker* error does not affect substantial rights or seriously affect the fairness, integrity or public reputation of the judicial proceedings. The district court treated the Sentencing Guidelines as advisory and, in a separate exercise of our plain error review discretion, we determine "the effect of the error on the result in the district court is uncertain or indeterminate-where we would have to speculate" as to how the error affected the substantial rights of the parties. *See Pirani*, 406 F.3d at 553 (quoting *United States v. Rodriguez*, 398 F.3d 1291, 1301 (11th Cir.), *cert. denied*, 545 U.S. 1127 (2005)). Therefore, exercising our Rule 52(b) power "sparingly," we do not find the district court's *Booker* error was plain error. *See Jones v. United States*, 527 U.S. 373, 389 (1999).

[7] This veniremember had a Hispanic surname. Carter is black and not Hispanic.

[8] At the third stage, the question may be framed in terms of pretext. However, "[u]nless a discriminatory intent is inherent in

The district court's ultimate finding on the issue is set aside only if clearly erroneous. Id. "If there is no inherently discriminatory intent in the prosecutor's explanation, the reason offered will be deemed race neutral." *United States v. Roebke*, 333 F.3d 911, 913 (8th Cir. 2003) (quotation marks and citation omitted).

Here, we focus on the second step of the analysis because the government, by offering a race neutral explanation, in effect, excused Carter from establishing a prima facie case of racial discrimination. *See id*. Thus, the court must determine whether the government articulated a race neutral explanation for striking the minority veniremember.

The government first claims this veniremember was stricken from the panel because of his employment with the postal service and argues many postal employees are unhappy with the government. On appeal, Carter attempts to show this reason was merely a pretext by pointing to a similarly situated juror who was employed by the government as an air traffic controller but was not stricken from the panel. However, because Carter never made this "similarly situated" argument before the district court, he cannot raise it for the first time on appeal. *United States v. Gibson*, 105 F.3d 1229, 1232 (8th Cir. 1997) (holding a "similarly situated" juror argument must be made at the trial level and is untimely if it is raised for the first time on appeal).

Nevertheless, the veniremember's employment is not the sole reason the government struck this person from the panel. The government also chose to strike this veniremember because his nearly empty questionnaire showed a lack of interest in the process. Lack of interest in the process is a

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the prosecutor's explanation, the reason offered will be deemed race neutral." *See United States v. Meza-Gonzalez*, 394 F.3d 587, 593 (8th Cir. 2005) (quoting *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995)).

valid, race neutral reason to strike a juror. *See United States v. Jenkins*, 52 F.3d 743, 747 (8th Cir. 1995). Based on the veniremember's short and vague answers to his questionnaire, the district court determined no discriminatory intent was inherent in the government's explanation to strike this veniremember. We give deference to the district court on its finding that the government's reasons for striking the veniremember were race neutral and not pretextual. *See United States v. Pherigo*, 327 F.3d 690, 696 (8th Cir. 2003).

Carter contends the district court rushed its ruling without affording him the third step of the relevant inquiry, i.e., to show the government's explanation was pretextual. However, nothing in the record indicates the district court failed to assess whether the reason offered by the government to strike this veniremember was a valid race neutral reason. As a result, the district court's finding that the government had a valid race neutral reason to strike the veniremember is not clearly erroneous.

E. Carter's Sufficiency of the Evidence Challenge

Carter argues insufficient evidence exists to support his conviction for conspiracy to distribute crack cocaine. To convict Carter of a conspiracy to distribute crack cocaine, the government had to prove there was an agreement to distribute crack cocaine-an agreement known to Carter in which he intentionally joined. *United States v. Cook*, 356 F.3d 913, 917 (8th Cir. 2004). The government can prove a conspiracy by direct or circumstantial evidence. Id. We review de novo the sufficiency of the evidence to sustain a conviction and will uphold a jury verdict if substantial evidence supports it. *Light*, 406 F.3d at 997. We view the evidence in the light most favorable to the verdict and accept as established all reasonable inferences supporting the verdict. *Id*.

First, Carter points to the testimony of Toney, the Family Mob's primary supplier of cocaine. Toney testified he sold drugs to Carter individually on three or four occasions.

Carter claims Toney's testimony eliminates him as part of a conspiracy because it demonstrates a very limited participation by Carter. This argument, however, is without merit. "Participation by a defendant in a single act may in fact demonstrate membership in a conspiracy if the act itself will justify an inference of knowledge of the broader conspiracy." *United States v. Tran*, 16 F.3d 897, 904 (8th Cir. 1994). Testimony indicated Carter actively participated in the drug activities of the Family Mob, agreed to stake out the gang's territories where it sold crack cocaine, and embraced the use of firearms to protect the group's trafficking turf. This evidence supports the reasonable inferences that the drug purchases from Toney were a part of the Family Mob's drug trafficking activities, Carter knew there was an agreement among the Family Mob's members to sell drugs, and Carter participated knowingly in that agreed activity.

Carter argues his conviction for aiding and abetting the sale of drugs to Ernest Moss, an individual not connected with the Family Mob, indicates he was working alone and not as part of a conspiracy. However, that Carter made deals on his own or associated with individuals other than Family Mob members does not exculpate him from being a co-conspirator with Family Mob members.

Carter also argues certain testimony indicated Toney, Jones, and other Family Mob members believed Carter to be a snitch. According to Carter, this testimony indicates he was not part of the conspiracy. However, the jury chose not to credit this testimony, and we leave credibility questions to the jury. *United States v. Hill*, 249 F.3d 707, 714 (8th Cir. 2001).

Finally, Carter contends the acts of violence described by the government as acts in furtherance of drug trafficking were only acts of violence as a result of personal disputes. He contends most of the acts of violence resulted from the death of Bellamy, the Family Mob member who was killed by a

member of the rival gang the Bogus Boys. However, that the Family Mob retaliated does not indicate the Family Mob members were solely avenging Bellamy's death. As Family Mob member Hicks testified, Bellamy's death required a response because "[m]ore people would have been coming over ... [t]rying to shoot us, take guys' money, our drug clientele." Such testimony indicates retaliation, protection, money, and preservation of the drug customer base were all factors intertwined and linked to the Family Mob's criminal behavior.

We conclude the record as a whole is sufficient to support the jury's finding Carter conspired with the Family Mob to distribute crack cocaine. Accordingly, we affirm Carter's conviction.

III. CONCLUSION

For the foregoing reasons, we vacate Greenlaw's sentence of 442 months' imprisonment and remand Greenlaw's sentence to the district court to impose the statutory mandatory consecutive minimum sentence of 25 years under Count 10, and we affirm the district court's judgment in all other respects.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	Case Number: **03CR107(4) (JNE/SRN)**
MICHAEL GREENLAW	USM Number: **11255-041**
	Social Security Number: **9017**
	Date of Birth: **1977**
	James B. Sheehy
	(Defendant's Attorney)

THE DEFENDANT:

[ ] pleaded guilty to count(s): .

[ ] pleaded nolo contendere to count(s) **which was accepted by the court.**

[x] was found guilty on count(s) **1, 2, 4, 5, 6, 8, 10** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
21:841(a)(1);(b)(1)(A);846	Conspiracy to Distribute & Possess with Intent to Distribute in Excess of 50 Grams of Cocaine Base and 5,000 Grams of Cocaine	11-16-04	1
18:924(o)	Conspiracy to Possess and Brandish Firearms During and in Relation to a Drug Trafficking Crime	11-16-04	2
18:924(c)(1)&2	Carrying a Firearm in Relation to a Crime of Violence	9-11-98	4
18:1959(a)(6)	Conspiracy to Assault with a Dangerous Weapon	9-11-98	5
18:1959(a)(3)&2	Assault with a Dangerous Weapon	10-07-98	6
18:1959(a)(3)&2	Assault with a Dangerous Weapon	06-15-99	8
18:924(c)(1)&(2)	Carrying, Brandishing, and Discharging a Firearm in Relation to a Crime of Violence	06-15-99	10

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[x] The defendant has been found not guilty on counts **9**.

[ ] Count(s) (is) (are) dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change

of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

January 19, 2006
Date of Imposition of Judgment

Joan N. Erickson, United States District Judge

January 20, 2006
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **four-hundred-forty-two (442) months. This term consists of 262 months on Count 1; 240 months on each of Counts 2, 6, and 8; and 36 months on Count 5, all to be served concurrently; and sixty (60) months on Count 4, to be served consecutively to the terms imposed on Counts 1, 2, 5, 6, and 8; and one-hundred-twenty (120) months on Count 10, to be served consecutively to the terms imposed on Counts 1, 2, 4, 5, 6, and 8.**

[x] The court makes the following recommendations to the Bureau of Prisons: **Court recommends incarceration in a facility as close to the State of Minnesota as possible.**

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district

[ ]at on.

[ ] as notified by the United States Marshal

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before on.

[ ] as notified by the United States Marshal

[ ] as notified by the Probation or Pretrial Services Office

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
By Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) years. This term consists of 5 years on each of Counts 1, 4, and 10; 3 years on each of Counts 2, 6, and 8; and 1 year on Count 5, all such terms to be run concurrently.**

The defendant must report to the probation office in the district to which the defendant is released with 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[ ] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[x] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation office;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Special Conditions of Supervision

a) The defendant shall not commit any crimes, federal, state, or local.

b) The defendant shall abide by the standard conditions of supervised release recommended by the Sentencing Commission.

c) The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.

d) The defendant shall participate in a program for drug and alcohol abuse at the direction of the probation officer. That program may include testing and inpatient or outpatient treatment, counseling or a support group. Further, the defendant shall contribute to the costs of such treatment as determined by the Probation Office Co-Payment Program not to exceed the total cost of treatment.

e) The defendant shall undergo mandatory drug testing as set forth by 18 U.S.C. §§ 3563(a) and 3583(d).

f) The defendant shall not associate with any member, prospect, or associate member of the "Family Mob Gang," or any other gang. If the defendant is found to

be in the company of such individuals wearing the clothing, colors, or insignia of the "Family Mob Gang" or any other gang, the Court will presume that this association was for the purpose of participating in gang activities.

g) The defendant shall cooperate in the collection of DNA as approved by the probation officer and mandated pursuant to 18 U.S.C. §§ 3563(a) and 3583(d).

h) The defendant shall participate in educational programming, as approved by the probation officer, to obtain a high school diploma or General Equivalency Diploma.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$700.00	0	

[x] The determination of restitution is left open for ninety (90) days. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. §3664(i), all nonfederal victims must be paid before the United States is paid.

Name and Address of Payee	*Total Loss	Restitution Ordered	Priority or Percentage
Totals:	$0.00	$0.00	0.00%

Payments are to be made to the Clerk, U.S. District Court, for disbursement to the victim

[ ] Restitution amount ordered pursuant to plea agreement $.

[ ] The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] the interest requirement is waived for the [ ] fine [ ] restitution.

[ ] the interest requirement for the: [ ] fine [ ] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [ ] Lump sum payment of $ due immediately, balance due
[ ] not later than, or
[ ] in accordance [ ] C, [ ] D, [ ] E, or [ ] F below; or

B [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, or [ ] F below); or

C [ ] Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g. months or years), to commence (e.g. 30 or 60 days) after the date of this judgment; or

D [ ] Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g. months or years), to commence (e.g. 30 or 60 days) after the release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

[ ] The defendant shall pay the cost of prosecution

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interesting the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including costs of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-1365

United States of America,

Appellee

v.

Michael Greenlaw, also known as Mikey,

Appellant

Appeal from U.S. District Court for the District of Minnesota - St. Paul
(CR 03-107-04 JNE/SRN)

ORDER

Appellant's motion to file his petition for rehearing en banc out of time has been considered by the court and is granted.

April 24, 2007

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-1365

United States of America,

Appellee

v.

Michael Greenlaw, also known as Mikey,

Appellant

Appeal from U.S. District Court for the District of Minnesota - St. Paul
(CR 03-107-04 JNE/SRN)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 10, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans