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

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[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

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[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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