No. 07-330

IN THE

Supreme Court of the United States

MICHAEL J. GREENLAW,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Regulations

Other Authorities

BRIEF FOR THE PETITIONER

Petitioner Michael J. Greenlaw respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS 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, *id*. at 27a, which was denied on May 10, 2007, *id*. at 28a. On July 27, 2007, Justice Alito extended the time to file the petition for certiorari until September 7, 2007. *See* App. No. 07A80. This Court granted certiorari on January 4, 2008. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

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

> (b) 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;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

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

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 a 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 (Count 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 drug and conspiracy counts. Pet. App. 7a-8a. With respect to the gun counts, the Government argued that under 18 U.S.C. § 924(c), petitioner should be sentenced to a mandatory minimum sentence of five years for the first gun offense (Count 4), and an additional consecutive term of twenty-five years for the second (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 rejected that request, 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 consecutively to each other and to the 262-month sentence for the drug and conspiracy counts. *Id.* Thus, in all, the court sentenced petitioner to 442 months' imprisonment. *Id*. at 2a.

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

[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."

2. Although the district court rejected the Government's view of the mandatory minimum sentence required under Section 924(c), the Government did not exercise its right to appeal petitioner's sentence. *See* 18 U.S.C. § 3742(b)(1). Nor did it file a cross-appeal when petitioner filed his own notice of appeal challenging his sentence and conviction. *See* Pet. App. 9a. 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 18 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 Count 4 and 10 years consecutive for Count 10, resulting in a total sentence of 442 months rather than 662 months." J.A. 85. The conclusion that 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.* at 86.

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. 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 twenty-five-year mandatory minimum sentence for "second and subsequent" gun

convictions under Section 924(c)(1)(C). Pet. App. 8a-10a, 15a. The court acknowledged that the Government "did not appeal the issue." *Id.* at 9a. Nonetheless, it concluded that:

> 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) and find the district court plainly erred in excluding the statutory mandatory sentence under Count 10.

Id. at 9a-10a (footnote omitted).

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. Petitioner argued in his petition that the Eighth Circuit should not have vacated his sentence and remanded the case for resentencing because the Government had failed to appeal or cross-appeal the sentence. J.A. 95-96. The petition was denied on May 10, 2007. Pet. App. 28a.

3. On August 28, 2007, the district court resentenced petitioner, imposing a 25-year consecutive sentence for Count 10. J.A. 109. Petitioner's total sentence thus became 662 months of imprisonment. *Id*.

4. On September 7, 2007, petitioner filed a petition for certiorari with this Court, challenging the court of appeals' authority to increase his sentence in the absence of a Government cross-appeal. In response, the Government confessed error, "agree[ing] with petitioner that the court of appeals

erred in *sua sponte* remanding the case with directions to enhance petitioner's sentence." U.S. Br. 12.

5. The Court subsequently granted the writ of certiorari and appointed an amicus to defend the court of appeals' judgment.

SUMMARY OF THE ARGUMENT

There are few rules of appellate practice more firmly established than the principle that a non-appealing party "may not attack the [lower court] decree with a view either to enlarging his own rights thereunder or of 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." *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924). This principle is a necessary consequence of the equally established requirement that a party seeking revision of a judgment in its favor must file its own timely notice of appeal or cross-appeal. As a result, in the absence of a cross-appeal, a federal court of appeals lacks any authority to alter a district court's judgment in a non-appealing party's favor, either at that party's request or on the court's own initiative.

This rule is particularly appropriate in sentencing appeals. For most of the nation's history, the Government was not permitted to appeal a criminal sentence. When that authority was finally granted in 1984, Congress acted to ensure that such appeals would be rare, requiring express authorization from the Attorney General or the Solicitor General. Strict adherence to the traditional cross-appeal requirement is necessary to give effect to

that requirement and to maintain the allocation of authority between courts and prosecutors, as well as lines of authority within the Executive Branch, as ordained by Congress.

There is no room for an exception for plain sentencing errors. First, no exception is possible because the statutory requirement of a Government appeal in sentencing cases is jurisdictional. While there has been some disagreement on the Court as to the jurisdictional status of *time limits* for filing a notice of appeal, none has questioned that a court of appeals lacks jurisdiction if no notice of appeal is filed at all. The failure to file a cross-appeal equally deprives a court of appeals of jurisdiction to provide relief to a non-appealing party.

Second, even if the cross-appeal requirement is not strictly jurisdictional, it is nonetheless exceedingly strict. This Court has never recognized an exception to the rule, and none is warranted here. While permitting correction of plain errors might marginally advance a general interest in correct application of sentencing laws, that interest is overwhelmed by the broader institutional interests in regularizing the appeals process, providing parties fair notice of the scope of the appeal, and fostering both repose and compliance with important rules embodied in the Federal Rules of Appellate Procedure and, in this case, the federal sentencing appeals statute.

Finally, even if Federal Rule of Criminal Procedure 52(b) permitted a court of appeals to correct an unlawfully low sentence in the absence of a Government cross-appeal in cases of plain error, that rule has no application to this case. The rule does not

apply to errors injuring only the prosecutorial interests of the Government, rather than that substantial rights of the defendant. And even if it did, declining to correct a sentencing error that the Government did not appeal, where the defendant has already been given a lengthy sentence, does not seriously affect the fairness, integrity or public reputation of the judicial proceedings.

ARGUMENT

I. A Court May Not Increase A Criminal Defendant's Sentence In The Absence Of A Government Appeal Or Cross-Appeal.

For more than two centuries, this Court's decisions have established that a party to a federal case who has not taken an appeal "may not attack the [lower court] decree with a view either to enlarging his own rights thereunder or of 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." *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924). *See*, *e.g.*, *McDonough v. Dannery*, 3 U.S. (3 Dall.) 188, 198, (1796). The rule enforces the basic requirement that those who seek modification of a judgment must file their own timely notice of appeal or cross-appeal as required by rule and statute. In this case, the Government's decision not to appeal petitioner's sentence deprived the court of appeals of any authority to enlarge that sentence, regardless of the court's view of the merits of the lower court's sentencing decision.

A. The General Rule Against Granting Relief To A Non-Appealing Party Is Inveterate And Certain.

1. As early as 1796, this Court recognized as unexceptional the rule that an appellate court cannot grant relief to an appellee absent a cross-appeal. In *McDonough v. Dannery*, 3 U.S. 188, the Court entertained competing claims to a British ship captured, but then abandoned, by the French navy. Over the French captors' objection, the district court awarded one-third of the ship's value to its American salvagers, with the remainder to its British owners. *The Mary Ford*, 16 F. Cas. 981, 984 (D. Mass. 1796). The French appealed to the circuit court, which reversed and awarded the remainder to the French. *Id.* at 985. When the British owners sought review in this Court, neither the Americans nor the French filed a cross-appeal seeking a greater share than was awarded below. As a result, although this Court questioned whether "the whole property ought not to have been decreed to the American libellants, or, at least, a greater portion of it, by way of salvage," *McDonough*, 3 U.S. at 198, it concluded that it lacked the power to revise the judgment in the non-appealing parties' favor. Because the Americans had "not appealed from the decision of the inferior court," the Court explained, "we cannot now take notice of their interest in the cause." *Id.*

Over the ensuing two hundred years, this Court has repeatedly applied the rule in a variety of contexts, describing the principle as "settled" law as early as 1864. *See, e.g.*, *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 480 (1999) (noting the Court's "more than two centuries of repeatedly

endorsing the cross-appeal requirement"); *The William Bagaley*, 72 U.S. (5 Wall.) 377, 412 (1867) ("Settled rule in this court is that no one but an appellant in such a case can be heard for the reversal of a decree in the subordinate court."); *Chittenden v. Brewster*, 69 U.S. (2 Wall.) 191, 196 (1865) (stating that "the rule is settled in the appellate court, that a party not appealing cannot take advantage of an error in the decree committed against himself").[3]

The continuing validity of the rule has never been questioned. To the contrary, by 1927, the Court referred to this principle as "so well settled that citation is not necessary." *Fed. Trade Comm'n v. Pac. States Paper Trade Ass'n*, 273 U.S. 52, 66 (1927). Seventy years ago, the Court described the cross-appeal requirement as "inveterate and certain." *Morley Constr. Co. v. Md. Cas. Co.*, 300 U.S. 185, 191 (1937). And this Court applied the rule to preclude a court from expanding a judgment in favor of non-

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[3] *See also Union Tool Co. v. Wilson*, 259 U.S. 107, 111 (1922) (applying rule in patent infringement case); *Landram v. Jordan*, 203 U.S. 56, 62 (1906) (challenge to will); *Bolles v. Outing Co.*, 175 U.S. 262, 268 (1899) (copyright infringement); *Loudon v. Taxing Dist.*, 104 U.S. 771, 774 (1882) (public contracts); *Clark v. Killian*, 103 U.S. 766, 769 (1881) (real estate conveyances). The Court also continued to apply the rule in cases of admiralty and salvage. *See, e.g.*, *The Stephen Morgan*, 94 U.S. 599, 604 (1877); *The Maria Martin*, 79 U.S. (12 Wall.) 31, 40-41 (1871); *The Quickstep*, 76 U.S. (9 Wall.) 665, 672 (1870); *Stratton v. Jarvis & Brown*, 33 U.S. (8 Pet.) 4, 9-10 (1834); *Canter v. Am. & Ocean Ins. Cos.*, 28 U.S. (3 Pet.) 307, 318 (1830). As discussed *infra* at 13-15, the applicability of the rule to criminal appeals did not arise in early cases because during this time period, neither defendants nor the Government had any right to appeal a criminal conviction or sentence. *See Carroll v. United States*, 354 U.S. 394, 400-02 (1957).

appealing parties *sua sponte* as recently as 1999. *See Neztsosie*, 526 U.S. at 479.[4]

2. The Court has never deviated from the cross-appeal requirement, even in the case of very clear error. "Indeed," the Court noted in *Neztsosie*, "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule." 526 U.S. at 480.

Thus, in *Mail Co. v. Flanders*, 79 U.S. (12 Wall.) 130 (1870), for example, this Court concluded that it lacked the authority to vacate a judgment entered against a non-appealing party, even though it was absolutely clear that the district court erred in entering its order. The case arose when the United States seized two steamboats pursuant to the Civil War-era Abandoned or Captured Property Act. The owner of the boats sued in federal district court to enjoin their sale. The district court enjoined the sale of one of the boats, restoring it to the owner, but concluded that it lacked jurisdiction with respect to the second boat. *Id*. at 131, 134. The owner then appealed to this Court, challenging the district court's refusal to restore the second boat as well. Upon review, this Court affirmed, concluding that because "[b]oth parties . . . are citizens of the same State . . . the bill of complaint was properly dismissed for want of jurisdiction." *Id*. at 135. The Court recognized

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[4] Although often stated in terms of a limitation on the arguments that a non-appealing party may raise on appeal, *see, e.g.*, *Am. Ry. Express Co.*, 265 U.S. at 435, the decision in *Neztsosie* makes clear that the rule equally prevents a court of appeals from expanding a judgment in a non-appealing party's favor on its own initiative.

that this holding applied equally to the district court's award of the first boat to the appellant. It explained that "[m]uch difficulty, to say the least, would have arisen in sustaining that part of the decree." *Id.* at 134. But because the defendants had failed to file a cross-appeal, this Court held that "the error, if it be one, cannot be corrected. Correction of the error is not sought by the appellants, and it is well-settled that no one but an appellant can be heard in an appellate court for the reversal of a decree rendered in the subordinate court." *Id.* at 135.

Likewise, in *Chittenden v. Brewster*, 69 U.S. (2 Wall.) 191 (1864), this Court rejected an attempt by defendants-appellees to raise an obvious error in the trial court's judgment when only the plaintiffs had appealed from a partially favorable judgment below. The appellees argued that the plaintiffs – who were suing to set aside an assignment allegedly undertaken to avoid collection on a judgment – had failed to prove that "executions had been issued, and returned unsatisfied" and asserted that "this defect is fatal to the right of the complainants to maintain their bill." *Id*. at 195. This Court agreed, but found the claim barred by the absence of a cross-appeal: "This would be so, if the appellees, against whom the decree was rendered, had appealed from the same . . . . But here the complainants only have appealed, and the rule is settled in the appellate court, that a party not appealing cannot take advantage of an error in the decree committed against himself . . . ." *Id*. at 195-96.

In subsequent decisions, the Court often has not even considered whether a non-appealed error was plain or obvious, relying instead on the established

rule that *all* errors are beyond correction unless the affected party has taken an appeal. *See, e.g.*, *Bolles v. Outing Co.*, 175 U.S. 262, 268 (1899) (finding it "sufficient to say" that, irrespective of defendant's potential claims, "the defendant did not take out a writ of error, and cannot now be heard to complain of any adverse rulings in the court below"); *Alexander v. Cosden Pipe Line Co.*, 290 U.S. 484, 487 (1934) (finding it "advisable to point out at the outset that we have no occasion to re-examine" the non-appealed portions of the lower court judgment); *Loudon v. Taxing Dist.*, 104 U.S. 771, 774 (1882) (finding it "unnecessary to determine what might have been done in this case" if the appellee had preserved a cross-appeal).

B. The Cross-Appeal Requirement Is Especially Appropriate In The Sentencing Context.

Strict application of the traditional cross-appeal requirement is especially appropriate in the context of sentencing appeals, where the authority of the Government to seek correction of an erroneous sentencing has long been narrowly construed and presently is governed by strict statutory limitations that the cross-appeal requirement serves to enforce.

1. Since the birth of the federal judicial system, courts have treated "appeals by the Government in criminal cases [as] something unusual, exceptional, not favored." *Carroll v. United States*, 354 U.S. 394, 400 (1957). "The history shows resistance of the Court to the opening of an appellate route for the Government until it was plainly provided by the Congress, and after that a close restriction of its uses

to those authorized by the statute." *Id*. *See also United States v. Wilson*, 420 U.S. 332, 336 (1975); *United States v. Sanges*, 144 U.S. 310, 318-19, 323 (1892).

As a result, through most of the nation's history, appellate courts have lacked the authority to correct an unduly lenient sentence, either *sua sponte* or even at the behest of the Government. For the first half of that history, appeals in federal criminal sentences by either party were rare. "Indeed, it was 100 years before the *defendant* in a criminal case, even a capital case, was afforded appellate review as of right." *Carroll*, 354 U.S. at 400 (emphasis in original). The Government was not permitted to seek appellate review in criminal cases at all until 1907, when Congress allowed the United States to file writs of error in limited circumstances involving indictments and special pleas in bar. *See id*. at 401-02; Act of Mar. 2, 1907, ch. 2564, Pub. L. No. 59-223, 34 Stat. 1246, 1246 (1907).

Even then, however, the Government was not permitted to appeal an unduly lenient sentence. It was not until 1970 that Congress first gave the Government a limited right to appeal criminal sentences in a small category of cases arising under "dangerous special offender" and "dangerous special drug offender" provisions.[5] And it was not until 1984 that Congress extended that authority to all

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[5] *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 3576, 84 Stat. 922, 950-51 (1970) (repealed 1984); Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 409(h), 84 Stat. 1236, 1268-69 (1970) (codified as amended in various sections of title 21 of the U.S. Code).

categories of criminal sentences in the Comprehensive Crime Control Act of 1984 (CCCA), Pub. L. No. 98-473, § 213(a), 98 Stat. 1837, 2011-12 (1985). *See generally* 15B Charles Alan Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 3919.8.

Although it authorized Government sentencing appeals, the CCCA placed important restrictions on the Government's right to seek – and therefore, necessarily, upon the appellate courts' authority to grant – correction of an erroneous criminal sentence. Most significantly, to "assure that . . . appeals are not routinely filed for every sentence below the guidelines,"[6] Congress prohibited the Government from prosecuting any sentencing appeal unless "the Attorney General or the Solicitor General personally approves the filing of the notice of appeal." Pub. L. No. 98-473, § 213(a), 98 Stat. 1837, 2012 (1985) (codified as amended at 18 U.S.C. § 3742(b)).[7]

2. In light of this history and the statutory restrictions of the CCCA, strict enforcement of the traditional cross-appeal requirement is especially appropriate.

First, in drafting the CCCA, Congress expressly considered, and rejected, the proposal that a court of appeals be "authorized to augment (as well as diminish) [a] sentence" based on an appeal by the

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[6] S. Rep. No. 98-225, at 154 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3337.

[7] The Attorney General has assigned responsibility for authorizing sentencing appeals to the Solicitor General. *See* 28 C.F.R. § 0.20(b) (2007). The statute was amended in 1990 to permit a deputy solicitor general designated by the Solicitor General to provide approval as well. *See* Crime Control Act of 1990, Pub. L. No. 101-647, § 3501, 104 Stat. 4789, 4921 (1990).

defendant alone. S. Rep. No. 98-225, at 151 n.370 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3334. That proposal, the Senate Report explained, would do little to solve the problem of unduly lenient sentences "since it is unlikely that a defendant would choose to appeal, on the basis of alleged excessiveness, a sentence deemed by the reviewing court as so inadequate as to warrant enhancement." *Id.* At the same time, the Report concluded, such a system would place "an undesirable strain on the defendant's right to seek sentence review." *Id.*

Instead, Congress responded to the perceived need to correct unduly lenient sentences by empowering high-level Department of Justice officials to authorize Government sentencing appeals in appropriate cases. S. Rep. No. 98-225, at 151, 154. In making that decision, Congress understood and ratified the long-standing rule that without such an appeal, the courts would be precluded from expanding the judgment in favor of the Government. The Senate Report explained that "[i]f only the defendant could appeal his sentence, there would be no effective opportunity for the reviewing courts to correct the injustice arising from a sentence that was patently too lenient." *Id*. at 151. Thus, authorizing Government appeals was desirable because without it, "the appellate court could reduce excessive sentences *but not raise inadequate ones*." *Id.* at 65 (emphasis added).[8]

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[8] The legislative history of the Organized Crime Control Act of 1970, which authorized Government sentencing appeals in "dangerous special offender" cases, expressed the same understanding. The House Report explained that "a sentence may be made more severe only on review taken by the

Even without such on-point legislative history, this Court has long presumed that Congress is aware of the legal background against which it legislates. *See, e.g.*, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-99 (1979). As discussed above, at the time Congress enacted the CCCA, that background included the traditional cross-appeal requirement and this Court's historical practice of strictly construing the scope of appellate review of criminal sentences at the behest of the Government. There is nothing in the statute's text or history that indicates any congressional intent to deviate from established appellate practice in the context of sentencing appeals.

Second, allowing a court of appeals to correct a criminal sentence in the absence of a Government appeal authorized by the Solicitor General would vitiate the authorization requirement.

In permitting Government sentencing appeals in the CCCA, Congress was understandably concerned that the new power be exercised sparingly, lest the federal courts be inundated by sentencing appeals.[9] S. Rep. No. 98-225, at 154. Congress responded by

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Government and after hearing. Failure of the Government to take a review of the original sentence precludes any later imposition of a sentence more severe than that originally imposed." H.R. Rep. No. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4039-40.

[9] The burden of deciding sentencing appeals, even without significant numbers of appeals by the Government, is substantial. In 2006, there were over 8,000 sentencing appeals by defendants. U.S. Sentencing Comm'n, 2006 ANNUAL REPORT, ch. 5, at 44, *available at* http://www.ussc.gov/ANNRPT/2006/ar06toc.htm.

allowing appeals only upon authorization by the Attorney General or Solicitor General, a restriction Congress surely knew would leave many unlawful sentences uncorrected, as there would be many instances in which those officials would decline to authorize an appeal. As this Court has recognized, while a "private litigant . . . generally does not forgo an appeal if he believes that 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." *United States v. Mendoza*, 464 U.S. 154, 161 (1984). The Solicitor General plays the same role at the certiorari stage, where this Court "relies on the Solicitor General to exercise such independent judgment and to decline to authorize petitions for review in this Court in the majority of the cases the Government has lost." *United States v. Providence Journal Co.*, 485 U.S. 693, 702 n.7 (1988).

Allowing courts of appeals nonetheless to revise a criminal sentence in the Government's favor without an appeal authorized by the Solicitor General would not only undermine the purposes of the requirement – redirecting more judicial resources to the review of sentencing issues than Congress intended – but would also pose grave separation of powers concerns. Under the regime established by Congress, the "Executive Branch . . . controls the progress of Government litigation through the federal courts." *Mendoza*, 464 U.S. at 161. Congress placed the authority to seek correction of a criminal sentence – and, concomitantly, the authority to forgo that correction – squarely in the hands of the Executive, not the Judiciary. It is no more appropriate for a court to overrule the Government's decision to

abstain from taking an appeal than it is for a court to second-guess a prosecutor's decision to forgo charging a defendant with an applicable offense or to withdraw an indictment. *See, e.g.*, *United States v. Goodwin*, 457 U.S. 368, 380 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1869).

At the same time, strict adherence to the cross-appeal requirement is necessary to ensure the appropriate division of authority *within* the executive branch. The Eighth Circuit's decision creates an opportunity for line-level subordinates denied permission to appeal to nonetheless effectively seek review upon a defendant's appeal, by subtly (or not so subtly) suggesting that the sentence is erroneous and should be corrected *sua sponte*.

Third, as Congress recognized, a system of review permitting an increased sentence any time a defendant files an appeal would place an "undesirable strain" on a defendant's right to appeal his conviction and sentence. *See* S. Rep. No. 98-225, at 151 n.370. When the cross-appeal requirement is enforced, a defendant may appeal his conviction or sentence without fear that doing so will substantially increase the likelihood that the appeal will result in a higher sentence. To be sure, the Government may appeal or cross-appeal the sentence, but the likelihood that it will do so is remote[10] and, more importantly, is not affected by the defendant's decision to appeal. Under

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[10] In 2006, the Government chose to appeal a sentence in only 0.3% of criminal cases. *See* U.S. Sentencing Comm'n, 2006 ANNUAL REPORT, ch. 5, at 31-32, 44, *available at* http://www.ussc.gov/ANNRPT/2006/ar06toc.htm (finding 212 known Government appeals out of 72,585 sentencings in 2006).

the rule of the Eighth Circuit, however, a defendant's decision to take an appeal is now fraught with peril, as doing so will expose the defendant's sentence to increase at the initiative of the appellate panel even if the Government does not cross-appeal. It was precisely to avoid this effect that Congress rejected the proposal that would have permitted courts to correct an unduly lenient sentence in the course of deciding a defendant's appeal, opting instead to provide a separate avenue for such correction through an authorized appeal by the Government. *Id.*

II. There Is No Basis For An Exception To The Cross-Appeal Requirement In Cases Of Plain Error.

Although the Eighth Circuit was aware that other courts have declined to correct an unlawfully low sentence unless the Government has appealed, it nonetheless concluded that it could, and should, enlarge petitioner's sentence in the absence of an authorized cross-appeal because it believed that petitioner's sentence was plainly erroneous within the meaning of Federal Rule of Criminal Procedure 52(b). Pet. App. 9a-10a. That conclusion itself was plainly wrong. The rule prohibiting a court from enlarging a judgment in favor of a non-appealing party is not subject to exception and, even if it were, no exception would be warranted here.

A. The Cross-Appeal Requirement Is Jurisdictional.

The traditional cross-appeal requirement admits of no exception first and foremost because it enforces a limitation on the appellate jurisdiction of the circuit courts. *See Bowles v. Russell*, 127 S. Ct. 2360, 2366

(2007) (noting that "this Court has no authority to create equitable exceptions to jurisdictional requirements"); *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992) (noting that federal rules of procedure – like "plain error" rule, Fed. R. Crim. P. 52(b) – cannot "extend or restrict the jurisdiction conferred by a statute").

1. This Court has described and enforced the cross-appeal requirement in a manner consistent with its jurisdictional status. In *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937), Justice Cardozo described the rule as affecting "[*t*]*he power* of an appellate court to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal." *Id.* at 187 (emphasis added). Other cases likewise expressed the cross-appeal requirement in absolute, jurisdictional terms. *See, e.g.*, *McDonough v. Dannery*, 3 U.S. 188, 198, 3 Dall. 149, 158 (1796) (noting that "as they have not appealed . . . we *cannot* now take notice of their interest in the cause") (emphasis added); *Mail Co. v. Flanders*, 79 U.S. (12 Wall.) 130, 135 (1870) (stating that "inasmuch as that part of the decree was in favor of the appellants, and the respondents did not appeal, the error, if it be one, *cannot* be corrected") (emphasis added); *Union Tool Co. v. Wilson*, 259 U.S. 107, 111 (1922) (filing of a cross-appeal "enabled" the court to review that part of the order alleged to be erroneous); *Swarb v. Lennox*, 405 U.S. 191, 202 (1972) (White, J., concurring) ("It is true that this Court has no jurisdiction of that portion of the District Court's judgment from which no appeal or cross-appeal was taken.").

In addition, this Court has *applied* the cross-appeal rule as if it were jurisdictional. The Court has enforced the rule without exception for more than twenty decades. *See Neztsosie*, 526 U.S. at 480. Indeed, none of the early cross-appeal cases so much as mentioned the possibility of an exception to the rule.[11] The absence of such exceptions is the hallmark of a jurisdictional rule. *See Bowles*, 127 S. Ct. at 2366.

2. This Court's long-standing treatment of the cross-appeal requirement as jurisdictional is also consistent with the Court's insistence that other closely-related appeal requirements restrict the circuit courts' appellate jurisdiction.

"[I]t is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." *Id*. at 2363 n.2. *See also, e.g.*, *The S.S. Osborne*, 105 U.S. 447, 450 (1882). While members of this Court have disagreed whether some *time limits* for taking appeals are appropriately considered jurisdictional,[12] none has questioned the much more basic proposition that jurisdiction fails when the complaining party has failed to file *any notice of appeal at all.* "The filing of a notice of appeal is an event of jurisdictional

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[11] *See*, *e.g.*, *Loudon v. Taxing Dist.*, 104 U.S. 771, 774 (1882) ("An appeal brings up for review only that which was decided adversely to the appellant."); *Alexander v. Cosden Pipe Line Co.*, 290 U.S. 484, 488 (1934) (noting that in the absence of a cross-appeal by appellees, "it should be understood that the merits of the [claims decided in favor of appellant below] are not here under consideration").

[12] *See, e.g.*, *Bowles*, 127 S. Ct. at 2367 (Souter, J., dissenting).

significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam). *See also, e.g.*, *Credit Co. v. Ark. Cent. Ry. Co.*, 128 U.S. 258, 260-61 (1888). Thus, "if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act." *Griggs*, 459 U.S. at 61.

For a time, some courts took the view that so long as *some party* filed a notice of appeal, the court of appeals had jurisdiction over the case as a whole and any limitation on the scope of relief – including the bar against expanding the judgment in favor of a non-appealing party – was a non-jurisdictional "rule of practice" subject to exception in appropriate cases. *See, e.g.*, *Bryant v. Technical Research Co.*, 654 F.2d 1337, 1341-43 (9th Cir. 1981); *Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 476-77 (8th Cir. 1977).

That view is incompatible with this Court's subsequent decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988).[13] In that case, sixteen plaintiffs filed an employment discrimination suit against their employer. The district court dismissed the action for failure to state a claim. The lawyer who prepared the notice of appeal on behalf of all the plaintiffs inadvertently omitted the name of one of his clients, Jose Torres. The error apparently went unnoticed in the court of appeals, where the plaintiffs prevailed. On remand, the error was discovered and

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[13] *See, e.g.*, *Browning v. Navarro*, 894 F.2d 99, 100 (5th Cir. 1990) (recognizing conflict); *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408, 1415-16 (7th Cir. 1989) (same).

the district court entered summary judgment against Torres, holding that the prior dismissal order was final as to him because he had failed to take an effective appeal. This Court upheld the dismissal. *Id*. at 314. "The failure to name a party in a notice of appeal," the Court held, "constitutes a failure of that party to appeal." *Id*. As a result, "the Court of Appeals was correct that it never had jurisdiction over petitioner's appeal." *Id*. at 317. *See also id*. at 314 (noting that petitioner's failure presented "a jurisdictional bar to the appeal").

Importantly, it made no difference in *Torres* that the *case* was properly before the court of appeals on the basis of another party's timely notice of appeal. The petitioner's failure to appeal nonetheless deprived the court of jurisdiction to alter the district court's judgment in his favor. Moreover, it made no difference that the error may have been plain, or that the court of appeals was able to correct it with respect to Torres without expending any additional resources. The rule was jurisdictional and, therefore, not subject to exception under any circumstance.

3. Finally, the conclusion that the cross-appeal requirement is jurisdictional in criminal sentencing cases is strengthened by the fact that it arises from, and enforces, a statutory requirement. *See* 18 U.S.C. § 3742(b). In recent decisions considering the timing of appeals, this Court has ascribed "jurisdictional significance [to] the fact that a time limit is set forth in a statute." *Bowles*, 127 S. Ct. at 2363 n.2. While this case does not involve the timeliness of an

appeal,[14] the cross-appeal requirement nonetheless arises from a statute, 18 U.S.C. § 3742(b). By requiring the Government to file a notice of appeal to challenge a sentence and mandating that such appeals be authorized, Section 3742(b) describes the "classes of cases" falling within a court's adjudicatory authority, no less so than the statutory provisions setting time limits for filing required notices of appeal in a civil case. *See Bowles*, 127 S. Ct. at 2365-66; *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

B. Even If The Cross-Appeal Requirement Is Not Jurisdictional, No Exception Is Permitted To Correct Plain Errors.

In *Neztsosie*, this Court recognized that some courts have taken the view "that the prohibition on modifying judgments in favor of a nonappealing party is a 'rule of practice,' subject to exceptions, not an unqualified limit on the power of appellate courts." 526 U.S. at 480. The Court concluded that it "need not decide the theoretical status of such a firmly entrenched rule, however, for even if it is not strictly jurisdictional," there was no basis for an exception in the case before it. *Id*. The same is true here. Even if

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[14] This Court has never suggested that statutory codification is critical to the jurisdictional status of the more general requirement that an appealing party must file a notice of appeal to trigger the court of appeals' jurisdiction. *See Bowles*, 127 S. Ct. at 2363 n.2. (noting jurisdictional significance of "the fact that a *time limit* is set forth in a statute") (emphasis added). For example, while the Court has held that the time for seeking certiorari in a criminal case is not jurisdictional because the time limit is not set forth in any statute, *id*. at 2365, it has never intimated that the Court would have jurisdiction over a case in which the defendant filed no petition for certiorari at all.

the cross-appeal requirement were not strictly jurisdictional, the court of appeals nonetheless erred in disregarding it.

1. As an initial matter, even if not jurisdictional, historical practice demonstrates that the cross-appeal requirement is a rule that admits of no exceptions. In the sentencing context, the rule derives from 18 U.S.C. § 3742(b), which allows the Government to appeal a sentence by filing a notice of appeal. The provision includes no exception from the notice of appeal requirement. Nor do the Rules of Appellate Procedure, which likewise require an appealing party to file a notice of appeal without exception. *See* Fed. R. App. P. 3(a)(1) (providing that "[a]n appeal permitted by law . . . may be taken *only by filing a notice of appeal* with the district clerk" within the allotted time) (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). *See also* Fed. R. App. P. 4(b)(1)(B)(ii) (providing that in a criminal case, when the Government is entitled to cross-appeal, "its notice of appeal *must be filed* in the district court within 30 days . . . of . . . the filing of a notice of appeal by the defendant") (emphasis added). Indeed, the rules expressly provide that no exception is permitted from the time requirements for taking appeals, *see* Fed. R. App. P. 26(b), a rule that would make no sense if a court could forgo the requirement that a notice of appeal be filed at all.

Just as the "mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over

parties not named in a notice of appeal," *Torres*, 487 U.S. at 315, the mandatory nature of the rules requiring timely cross-appeals would be vitiated if a court of appeals were permitted to expand a judgment in favor of a party that filed no notice of appeal at all.

If a different rule is to be adopted, it should be imposed by Congress, not the courts. *See United States v. Curry*, 47 U.S. (6 How.) 106, 113 (1848) ("[I]f the mode prescribed for removing cases by writ of error or appeal be too strict and technical, and likely to produce inconvenience or injustice, it is for Congress to provide a remedy by altering the existing laws; not for the court."). At the very least, if a revision is to be undertaken by the judiciary, it should be through the rulemaking process rather than through ad-hoc recognition of unwritten exceptions to the established rules. *See Bowles*, 127 S. Ct. at 2367 (noting that allowing even "narrow" exceptions "would give rise to litigation testing their reach and would no doubt detract from the clarity of the rule" while "congressionally authorized rulemaking would likely lead to less litigation than court-created exceptions without authorization").

2. At any rate, even if this Court were to consider establishing a judicially-created exception to the cross-appeal requirement, any justification that could be offered to support the Eighth Circuit's ruling would be "clearly inadequate to defeat the institutional interests in fair notice and repose that the rule advances." *Neztsosie*, 526 U.S. at 480.

To be sure, allowing courts to correct plainly erroneous sentences might advance an interest in ensuring that federal sentencing statutes are

properly and consistently applied in the lower courts, at least to some degree.[15] But an interest in more faithful and consistent enforcement of the law arises in every case in which a party fails to appeal a potentially erroneous judgment. It was present, for example, in *Torres*, when the petitioner alleged – and the court of appeals agreed – that his suit under an important civil rights statute had been improperly dismissed. *See Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1301-04 (9th Cir. 1982). It was present in *Neztsosie*, when the non-appealing parties alleged that the district court had erred in treading on the sovereignty of a Native American Tribe and its courts. *See El Paso Natural Gas Co. v. Neztsosie*, 136 F.3d 610, 613-15 (9th Cir. 1998), *rev'd,* 526 U.S. 473 (1999). Indeed, the interest in advancing the proper and uniform application of the law was at issue in each of the dozens of cases over the last two hundred years in which this Court has applied the cross-appeal requirement. Yet the Court has never concluded that this interest is sufficient to warrant an exception.

Moreover, any claim that there is a special need to correct unduly lenient criminal sentences is

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[15] Because the correction would arise only if an appellate court noticed and exercised its discretion to correct an unlawful sentence *sua sponte*, any advancement of this interest likely would be limited and sporadic. Of course, the cause of better enforcement of sentencing law would be advanced more significantly if the Court were to allow Government attorneys to advocate for correction of a sentence in the absence of an authorized appeal or cross-appeal, but that rule would flout the plain language of the CCCA and completely eviscerate the Solicitor General's authority to control Government appeals. *See supra* 17-18.

particularly weak. For most of the nation's history Congress did not see fit to provide *any* avenue for appellate correction of unlawfully low sentences. *See supra* 13-15. And when it finally provided an avenue for Government sentencing appeals, Congress put in place a limitation – the requirement of high-level authorization to appeal – that ensures that most unlawful sentences are not, in fact, appealed by the Government or reviewed by an appellate court. *See supra* 19 n.10 (noting that the Solicitor General has authorized Government appeals in only 0.3% of cases).

At the same time, permitting an exception for cases of plain error would substantially impair the "institutional interests in the orderly functioning of the judicial system." *Neztsosie*, 526 U.S. at 481-82. A notice of appeal functions to put "opposing parties and appellate courts on notice of the issues to be litigated and encourag[e] repose of those that are not."[16] *Id*. Simultaneously, the passing of the time to file a notice of appeal has long marked the point at which the interest in correct application of the law gives way to the equally important interest in repose. *See, e.g.*, *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398-402 (1981); *Ackermann v. United*

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[16] The lack of fair notice to the appellant is compounded when, as in this case, a court acts *sua sponte* and without briefing by the parties. *See Day v. McDonough*, 547 U.S. 198, 210 (2006) ("[B]efore acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions."). Such a practice also poses a very real risk that the court of appeals will itself err, deprived of the "crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984).

States, 340 U.S. 193, 198 (1950); *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943) (per curiam).

In any event, even if the courts have a degree of discretion to adopt exceptions to the statutory cross-appeal requirement, they may not, "in their discretion, reject the balance that Congress has struck in a statute." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001). As discussed above, permitting a court of appeals to decide for itself whether a criminal sentence should be increased in the absence of a Government cross-appeal would undermine the authority Congress bestowed on the Attorney General and Solicitor General to determine which potentially erroneous criminal sentences should be subject to appellate review. *See supra* 17-19.

3. Finally, while this Court has never suggested that compliance with the cross-appeal requirement could be waived or forfeited, the Court has held that compliance with *some* non-jurisdictional "claims processing" rules can be. *See, e.g.*, *Kontrick*, 540 U.S. at 456-60. But even if the cross-appeal requirement fell into that category, the judgment below would still have to be reversed. Even if not jurisdictional, emphatic claims processing rules "assure relief to a party properly raising them." *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam).[17] Here, the Government rightly acknowledges that petitioner

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[17] This Court has not decided whether such rules, "despite their strict limitations, could be softened on equitable grounds." *Kontrick*, 540 U.S. at 457. The question does not arise in this case either, as the court of appeals did not purport to apply any rule "of equitable tolling or any other equity-based exception." *Id*.

properly raised an objection to the court of appeals' *sua sponte* increase in his sentence. U.S. Br. 6, 13. Accordingly, the court's duty to enforce the rule "was mandatory," *Eberhart*, 546 U.S. at 18, and its failure to do so was reversible error. [18]

III. Even If An Exception To The Cross-Appeal Requirement Were Permitted For Plain Errors Under Rule 52(b), The Rule Did Not Authorize Modification of Petitioner's Sentence In This Case.

Finally, even if the courts of appeals were allowed to overlook the Government's failure to appeal in cases of "plain error" under Federal Rule of Criminal Procedure 52(b), the requirements of that rule were not met in this case.

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[18] In *Kontrick* and *Eberhart*, the Court held that a court's duty to enforce a particular claims processing rule was contingent on the opposing party raising a timely objection to the noncompliance. *Kontrick*, 540 U.S. at 456; *Eberhart*, 546 U.S. at 18-19. Unlike this case, neither *Kontrick* nor *Eberhart* involved *sua sponte* action by a court. When the court acts *sua sponte*, the requirement that the appellant make a timely objection makes little sense. Because the Government did not ask for the increase in petitioner's sentence, petitioner had no reason to raise any objection relating to the Government's failure to file a cross-appeal prior to the court of appeals' decision. And while petitioner did object after the decision was entered, it is hardly reasonable to say that a court of appeals may expand a judgment in favor of a non-appealing party *sua sponte*, unless the appellant objects through a petition for rehearing, at which point the panel would be obliged to reverse itself. In this context, the better rule would be to simply prohibit a court of appeals from increasing a sentence *sua sponte*, relying instead on the Government to request a revision of the sentence despite the lack of a cross-appeal, at which point the defendant would have an opportunity to object.

First, the rule does not authorize correction of errors that affect only the interests of the *Government*. By its plain terms, the rule permits correction only of an error "that affects substantial rights," Fed. R. Crim. P. 52(b), a phrase most naturally understood to refer to the rights of natural persons, not the Government. *See United States v. Barajas-Nunez*, 91 F.3d 826, 835-36 (6th Cir. 1996) (Siler, J., concurring in part and dissenting in part).[19]

Indeed, at the time the Rule was adopted in 1944, there was little possibility of any other construction. The Advisory Notes described the rule as "a restatement of existing law," Fed. R. Crim. P. 52 advisory committee's note, and cited as a source this Court's decision in *Wiborg v. United States*, 163 U.S. 632 (1896). In that case, the Court held that it was within a court's discretion to correct "a plain error [that] was committed in a matter so absolutely vital *to defendants*." 163 U.S. at 658 (emphasis added). *See also Clyatt v. United States*, 197 U.S. 207, 222 (1905) (noting that *Wiborg* "justifies us in examining

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[19] This inference draws support from other similarly worded rules. 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).

the question in case a plain error has been committed in a matter so vital *to the defendant*") (emphasis added). The restriction of the rule to errors affecting the rights of defendants was not accidental – at the time *Wiborg* was decided, the Government had no right of appeal in criminal cases, *see Carroll v. United States*, 354 U.S. 394, 400-01 (1957), much less any ability to seek correction of a plain error to which it had offered no objection below.

By the time the Federal Rules were enacted, the Government had obtained a limited right to appeal in some criminal cases.[20] Nonetheless, at the time the plain error rule was codified in the Rules, courts were still applying the doctrine only in cases of error prejudicial to the rights of a criminal defendant. *See, e.g.*, *Crawford v. United States*, 212 U.S. 183, 203-05 (1909); *Clyatt*, 197 U.S. at 221-22; *Hemphill v. United States*, 112 F.2d 505, 507 (9th Cir. 1940), *rev'd on other grounds*, 312 U.S. 657 (1941); *Ayers v. United States*, 58 F.2d 607, 609 (8th Cir. 1932) (collecting cases).[21] As a codification of this "established appellate practice," *United States v. Olano*, 507 U.S. 725, 735 (1993), Rule 52(b) thus does not apply to

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[20] Beginning in 1907, and continuing through the adoption of the Rules, the Government had the ability to appeal certain issues relating to criminal indictments, pleas, and decisions arresting a judgment. *See Carroll*, 354 U.S. at 400-03; Act of Mar. 2, 1907, Pub. L. No. 59-223, ch. 2564, 34 Stat. 1246, 1246 (1907); Government Appeals Act of May 9, 1942, Pub. L. No. 77-543, ch. 295, § 1, 56 Stat. 271, 271-72 (1942) (codified at 18 U.S.C. § 682 (1946)).

[21] While it is difficult to prove a negative, petitioner has been unable to find any case noticing a plain error to the benefit of the Government prior to the time the Rule was promulgated.

errors injuring only a governmental interest in the prosecution.

Furthermore, even if Rule 52(b) could be applied to the benefit of the Government, it would not apply in the circumstances of this case. A court's power to correct a plain error should be exercised "sparingly." *Jones v. United States*, 527 U.S. 373, 389 (1999). In *Olano*, this Court explained that a court of appeals should correct a qualifying error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). *See also Jones*, 527 U.S. at 389. The facts of this case scarcely rise to that level. As discussed above, Congress contemplated that many sentencing errors benefiting a criminal defendant would be left uncorrected as a result of the Government's decision not to appeal the sentence. *See supra* 17-18. Thus, the fact of error alone is insufficient to warrant application of the Rule. Moreover, in this case, petitioner has already been subjected to a very lengthy sentence of 442 months. The district court's failure to increase that sentence further did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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