No. 07-330

IN THE

Supreme Court of the United States

MICHAEL J. GREENLAW, AKA MIKEY,
Petitioner,

v.

UNITED STATES,
Respondent.

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

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether, after Petitioner appealed the legality of his sentence, the absence of a cross-appeal by the United States barred the court of appeals from ordering a remand to correct the district court's plainly erroneous failure to impose the statutory mandatory-minimum sentence.

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INTEREST OF *AMICUS CURIAE*

On January 10, 2008, this Court invited Jay T. Jorgensen to brief and argue this case, as *amicus curiae,* in support of the judgment below. 128 S. Ct. 976 (2008). This brief is submitted in accordance with the Court's order.

STATUTORY PROVISION INVOLVED

The full text of 18 U.S.C. § 3742 is set out in Addendum A to this brief. Add. A, *infra*, 1a-6a. The most relevant portions of section 3742 follow:

> (a) Appeal by a defendant.—A defendant 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; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
>
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.
>
> (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.

. . . .

(d) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether 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 outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

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

. . . .

(f) Decision and disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

. . . .

STATEMENT

The facts and proceedings below have been adequately summarized by the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

Following a jury trial, petitioner Michael Greenlaw ("Petitioner") was convicted of numerous drug and weapons offenses, including violations of 18 U.S.C. § 924(c)(1)'s prohibition on carrying a firearm during and in relation to a drug trafficking crime. It is undisputed that a jury found Petitioner guilty on two counts arising under subsection 924(c)(1) and that, in light of the jury's verdict, the district court was required by statute to sentence Petitioner to consecutive terms of five and twenty-five years' imprisonment. It is also undisputed that the trial court's failure to do so violated federal sentencing law. See *Deal* v. *United States*, 508 U.S. 129, 132-37 (1993).

By its plain language, 18 U.S.C. § 3742 gives an appellate court jurisdiction to determine the legality of a criminal sentence once any party raises the issue on appeal. Section 3742 states that when either party challenges a sentence's legality, "the court of appeals *shall* determine whether the sentence . . . was imposed in violation of law," *id.* § 3742(e)(1) (emphasis added), and that "[i]f the court of appeals determines that . . . the sentence was imposed in violation of law . . . the court *shall* remand the case for further sentencing proceedings with such

instructions as the court considers appropriate," *id.* § 3742(f)(1) (emphasis added). This reading of section 3742 is the one most faithful not only to the plain text of the statute but also to the purposes of the Sentencing Reform Act ("SRA"), of which section 3742 is a part. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, sec. 213(a), § 3742, 98 Stat. 1837, 2011.

At the time it was considering the SRA, Congress specifically recognized that then-"current law permitt[ed] appeals of sentences not authorized by law." H.R. Rep. No. 98-1017, at 90 (1984). Although both government and defendant sentencing appeals were relatively rare before section 3742 was enacted in 1984, see Br. for the United States ("Gov't Br.") 15 & n.5; Br. for the Pet'r ("Pet'r Br.") 14-15 & n.5, this was because "sentencing judges ha[d] traditionally had almost absolute discretion to impose any sentence legally available in a particular case." S. Rep. No. 98-223, at 147 (1983).

With the SRA's enactment, trial judges' sentencing discretion was reduced and Congress imposed upon the federal judiciary a duty to ensure that sentences are both sufficient and consistent. To ensure these duties are carried out, Congress empowered and obligated appellate courts that are presented with the issue of whether a sentence is legal to make that determination. As Congress noted, "[a]ppellate review is a vital part of the new sentencing system; *it serves to assure all parties that judges have complied with the sentencing laws*." H.R. Rep. No. 98-1017, at 88 (emphasis added).

To the extent that historical sentencing practices and generalized appellate doctrines are inconsistent with the specific obligations imposed on courts by the SRA, Petitioner's and the government's reliance on them is misplaced. It likewise makes no sense to

assert, as Petitioner, the government, and *amicus curiae* National Association of Criminal Defense Lawyers ("NACDL") do, that a Justice Department official, rather than an appellate court, is the one to decide when a trial judge's unlawful sentence should be corrected. See Pet'r Br. 17-19; Gov't Br. 19-20, 42; Br. of NACDL as *Amicus Curiae* in Supp. of Pet'r ("NACDL Br.") 5-10. Indeed, any construction of section 3742 that forbids appellate courts to correct plainly unlawful sentences whose legality has been challenged by either party on appeal should be rejected as producing a result that runs directly contrary to Congress's statements and purpose.

The text and background of section 3742 make clear that, regardless of whether the government filed a notice of cross-appeal, Petitioner's appeal of his sentence obligated the court of appeals to determine the legality of Petitioner's sentence and remand for resentencing if the sentence was illegal. Thus, this Court need look only to section 3742 in affirming the judgment below.

But the result would be the same even in the absence of section 3742's specific statutory commands. Under this Court's precedents both recent and remote, the general prohibition on expanding a judgment in favor of a non-appealing party is best understood as a non-jurisdictional rule of practice that may be relaxed under exceptional circumstances—namely, where countervailing considerations outweigh the interests in notice and repose that the rule advances. The district court's egregious failure to impose the minimum sentence mandated by statute constitutes such a circumstance, and Petitioner's opaque and inadequate protest in a petition for rehearing did not diminish the court of

appeals' ability to ensure that a lawful sentence was imposed.

Not only was correction of the district court's sentencing error within the jurisdiction of the court of appeals, it was also an entirely appropriate exercise of that jurisdiction. As reflected in 28 U.S.C. § 2106, federal appellate courts have long had "supervisory power" over lower courts, a power that includes the authority to correct unlawful sentences. Appellate courts, including this Court, have exercised this supervisory authority to correct errors in lower court judgments even where the parties have failed properly to appeal or raise an issue, so long as a notice of appeal has given the court jurisdiction over the case. See *Reynolds* v. *United States*, 98 U.S. 145, 169 (1878) (finding error in sentencing that was not raised by party where "the irregularity is one which appears on the face of the record"); see also cases cited Part III.A *infra*. The need for the appellate courts' exercise of their supervisory power is particularly crucial here, where Congress has imposed a duty on the courts, and not simply on the government, to ensure that sentences comply with federal law. Cf. *Young* v. *United States*, 315 U.S. 257, 258-59 (1942).

In addition, the court of appeals properly relied on Federal Rule of Criminal Procedure 52(b) to correct (what all parties agree was) the plainly unlawful sentence imposed by the trial court. There can be no doubt, in light of Congress's purpose in enacting the SRA and subsection 924(c)(1)'s mandatory-minimum sentences, that the public's interest in lawful sentencing is a substantial right directly implicated by the district court's error. Ruling that the court of appeals was prohibited from correcting such a plain sentencing error would do violence to the language of

Rule 52(b) and would be inconsistent with reviewing courts' obligation to supervise the lower courts and to ensure that the laws enacted by Congress are followed, particularly as they pertain to the scope of a lower court's powers.

ARGUMENT

I. ONCE PETITIONER CHALLENGED THE LEGALITY OF HIS SENTENCE, SECTION 3742 REQUIRED THE COURT OF APPEALS TO OVERTURN THE PLAINLY ILLEGAL SENTENCE.

The judgment below should be affirmed because Petitioner's challenge to the legality of his sentence under 18 U.S.C. § 3742(a)(1) vested the court of appeals with both the jurisdiction and the duty to overturn the illegal sentence.[1] Once either party challenges a sentence's legality, that issue is squarely before the court of appeals, and section 3742's plain text mandates that the court remand any illegal sentence regardless of whether the remand hurts or helps the appealing party.

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[1] Because Petitioner appealed his sentence as "unreasonable," Add. B 8a-11a, his appeal fell under 18 U.S.C. § 3742(a)(1). *See* Gov't Br. 18 n.8 (defendant's "challenge to his sentence as 'unreasonable' constitutes a claim under 18 U.S.C. [§] 3742(a)(1), which authorizes a defendant to assert that his sentence was 'imposed in violation of law'" (quoting *United States* v. *Mickelson*, 433 F.3d 1050 (8th Cir. 2006))); *accord United States* v. *Trejo-Martinez*, 481 F.3d 409, 411-12 & n.1 (6th Cir. 2007) (collecting cases from the First, Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits).

A. The Plain Text Of Section 3742 Required The Court Of Appeals To Remand Petitioner's Sentence For Resentencing Once He Challenged Its Legality.

"The starting point for [the] interpretation of a statute is always its language," *Cmty. for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989), and "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). Walking through the linear progression of section 3742's text makes clear that an illegally low sentence must be remanded regardless of whether the appeal is taken by the defendant or the government.

Subsection 3742(a) provides that "[a] defendant 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." 18 U.S.C. § 3742(a)(1). Similarly, subsection 3742(b) provides that "[t]he 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." *Id.* § 3742(b)(1). Section 3742 further provides that "[i]f a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals" the relevant record in the case. *Id.* § 3742(d). "Upon review of the record, the court of appeals shall determine whether the sentence . . . was imposed in violation of law." *Id.* § 3742(e)(1).[2] Finally, "[i]f the court of appeals

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[2] Although this Court suggested that it was excising the entirety of subsection (e) in *United States* v. *Booker*, 543 U.S. 220, 245 (2005) ("We conclude that [18 U.S.C. § 3553(b)(1)] must be severed and excised, as must one other statutory section,

determines that . . . the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate." *Id.* § 3742(f)(1).[3]

Section 3742 thus contains *no* language suggesting that the reviewing court can remand a plainly illegally low sentence only if the government appeals. Congress instructed the courts of appeals to provide the correct answer when a party places the issue of a sentence's legality in question and did not limit the courts of appeals to providing an answer that would benefit the side that filed a notice of appeal.[4] Thus,

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§ 3742(e), which depends upon the Guidelines' mandatory nature."); *id.* at 260, 265, language in this Court's subsequent decisions indicates that *Booker* excised only the portion of subsection (e) that directed courts to apply a *de novo* standard of review, *see Rita* v. *United States*, 127 S. Ct. 2456, 2471 (2007) (Stevens, J., joined in part by Ginsburg, J., concurring) ("*Booker* excised the portion of § 3742(e) that directed courts of appeals to apply the *de novo* standard. Critically, we did not touch [other] portions of § 3742(e) . . . ." (internal citation omitted)).

[3] The use of "shall" indicates that section 3742 sets forth an unequivocal mandate for reviewing courts. *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2531-32 (2007). This does not mean that a court of appeals is under an obligation to independently research sentencing issues that are not raised by the parties, however. Rather, the broad mandate of section 3742 should be interpreted to require the reviewing court to remand an illegally low sentence in the absence of a government cross-appeal at least where that sentence is plainly illegally low (a condition indisputably met in this case). This interpretation is in harmony with Federal Rule of Criminal Procedure 52(b). *See* Part III.B *infra*.

[4] Indeed, section 3742's clear mandate is consistent with 18 U.S.C. § 3553(a), which embodies Congress's determination that the fairness, integrity, and reputation of judicial proceedings are

once Petitioner challenged his sentence's legality, the court of appeals was under an obligation to remand the sentence because it was plainly illegally low. Cf. *United States* v. *Boone*, 933 F.2d 1539 (4th Cir. 1993) (unpublished table decision), *available at* 1993 WL 192513, at *3 (once government withdrew cross-appeal of defendant's sentence, defendant "withdrew his appeal on the sentencing issue so as not to expose himself to yet a longer sentence than that which he was given").

Contrary to the government's assertions otherwise, see Gov't Br. 20 n.9, Congress's prior use of two very different sentencing provisions, see Gov't Br. 15 n.5, affirms section 3742's plain-text meaning. Unlike section 3742, both of these historic provisions explicitly stated that a court of appeals could not increase a defendant's sentence in the absence of a government sentencing appeal.[5] Congress chose not

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called into question when similarly situated defendants receive disparate sentences for the same illegal conduct. *See* 18 U.S.C. § 3553(a)(6) (requiring the sentencing court to "consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

[5] Organized Crime Control Act of 1970, Pub. L. No. 91-452, sec. 1001(a), § 3576, 84 Stat. 922, 950-51 ("[A] sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction."), *repealed by* SRA § 212(2), 98 Stat. at 1987; Controlled Substances Act, Pub. L. No. 91-513, § 409(h),

to adopt this limiting language when it enacted the SRA, but rather mandated that courts review appealed sentences for their legality and remand if they are found to be illegal. See 18 U.S.C. § 3742(e)-(f). Indeed, Congress repealed these prior sentencing provisions at the same time it enacted section 3742. See Gov't Br. 15 n.5. Accordingly, section 3742's text cannot possibly bear the construction the government places on it. See 2B Norman J. Singer, *Sutherland Statutes and Statutory Construction* §§ 51:2, 51:4 (6th ed. 2007).

Nothing in *United States* v. *Ruiz*, 536 U.S. 622 (2002), is to the contrary. Although *Ruiz* establishes that section 3742 is "jurisdiction[al]" in the limited sense that it delineates the types of sentencing claims that appellate courts have the authority to hear, *id.* at 626-28, *Ruiz* does not mention, let alone dispute, section 3742's clear text mandating that once either party challenges the legality of the sentence, the reviewing court must determine whether the sentence is illegal and, if so, remand.

The government argues that a reviewing court cannot remand an illegally low sentence if the government does not cross-appeal. The government attempts to find a textual basis for this argument by pointing to the fact that subsection 3742(a) sets out one class of sentencing claims for which the defendant may file a notice of appeal, while a different subsection, subsection (b), sets out another class of sentencing claims for which the government may file a notice of appeal. Gov't Br. 19.[6] That

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84 Stat. 1236, 1268 (1970) (same), *repealed by* SRA § 219, 98 Stat. at 2027.

[6] To the extent the government means to suggest that the specific types of sentencing claims the government may appeal

Congress set forth these appellate rights in different statutory subsections is beside the point. As discussed *supra* at 10-12, once one party appeals a sentence's legality, that triggers a particular set of actions and creates an obligation in the reviewing court. The clerk submits the relevant portions of the sentencing record, and "[u]pon review of the record, the court of appeals shall determine whether the sentence . . . was imposed in violation of law." 18 U.S.C. § 3742(e)(1). Section 3742 also makes clear that "[i]f the court of appeals determines that the sentence . . . was imposed in violation of law . . . , the court shall remand the sentence for further sentencing proceedings with such instructions as the court considers appropriate." *Id.* § 3742(f)(1). These statutory instructions contain no language stating that the reviewing court can increase a sentence only if the government appeals.

The text of subsection (f)(2) also demonstrates that the government's interpretation is incorrect. That subsection states:

> If the court of appeals determines that . . . the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is

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are different from the types of sentencing claims defendants may appeal under section 3742, *see* Gov't Br. 19 ("Section 3742 . . . establishes which particular party—the defendant or the government—can appeal which class of claim."); *id.* at 16, that is incorrect. Although section 3742 sets out four specific types of claims that defendants may appeal, and four types the government may appeal, three of the four types are identical for each party, *compare* 18 U.S.C. § 3742(a)(1), (a)(2), (a)(4), *with id.* § 3742(b)(1), (b)(2), (b)(4), while the fourth type of defendant claim is a mirror image of the government's fourth type of claim, *compare id.* § 3742(a)(3), *with id.* § 3742(b)(3). *See supra* at 1-2.

> based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—
>
> > (A) if it determines that the sentence is too high and *the appeal has been filed under subsection (a)*, it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate . . . ;
> >
> > (B) if it determines that the sentence is too low and *the appeal has been filed under subsection (b)*, it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate . . . .

18 U.S.C. § 3742(f)(2) (emphases added). Thus, Congress has made clear that for certain types of sentencing appeals not at issue here, the identity of the party that filed the appeal makes a difference in whether a remand may be ordered. But because Congress did not include similar language in subsection (f)(1) (where reviewing courts determine the legality of the sentence), the necessary negative implication is that Congress did not expect the identity of the party who appealed the sentence to matter when the reviewing court determines the sentence's legality.[7]

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[7] Furthermore, because section 3742 allows both defendants and the government to appeal, while 18 U.S.C. § 3731 "authorizes appeals only 'by the United States,'" Gov't Br. 22 (quoting 18 U.S.C. § 3731), the government improperly relies upon case law concerning *section 3731* in arguing that a

B. The Legislative History Of Section 3742 Supports The Section's Plain Text.

Where, as here, the words of the statute are unambiguous, the "'judicial inquiry is complete.'" *Germain*, 503 U.S. at 254 (quoting *Rubin* v. *United States*, 449 U.S. 424 (1981)). Nonetheless, Petitioner and the government attempt to introduce ambiguity by emphasizing that historically there was a relative rarity of sentencing appeals. Pet'r Br. 14-15 & n.5; Gov't Br. 15 & n.5.

As an initial matter, this argument ignores that Congress *specifically* recognized that at the time it was considering the SRA, then-"current law permitt[ed] appeals of sentences not authorized by law." H.R. Rep. No. 98-1017, at 90.[8] See *United States* v. *Booker*, 543 U.S. 220, 306 n.5 (2005) (Scalia, J., dissenting in part) (recognizing that even before

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government cross-appeal is required for the court to be able to remand an illegally low sentence appealed by the defendant under *section 3742*. *Id.* at 21-22.

[8] Although Congress went on to list only situations where defendants had appealed illegal sentences under then-current law, *see* H.R. Rep. No. 98-1017, at 90, Congress appears to have believed that both the government and defendants could appeal illegal sentences under then-current law:

> *Subsection (a) permits the defendant or the Government to appeal a sentence on any of three grounds.* Subsection (a)(1) permits appeal on the ground that the sentence resulted from an incorrect application of the sentencing guideline.
>
> Subsection (a)(2) permits appeals of sentences that are imposed other than in accordance with the Federal Rules of Criminal Procedure. *Subsection (a)(3) authorizes appeals of sentences that violate the Constitution or laws of the United States. These two provisions carry forward that part of the current law permitting appeals of sentences not authorized by law.*

Id. (emphases added).

section 3742 was enacted, "[c]ourts of appeals had of course always" "determine[d] whether a sentence 'was imposed in violation of law'" (quoting 18 U.S.C. § 3742)); *id.* at 307 ("Before the Guidelines, federal appellate courts had little experience reviewing sentences for anything but legal error.").

Moreover, while Petitioner and the government correctly observe that there was a relative rarity of both government *and* defendant sentencing appeals before section 3742 was enacted in 1984, see Pet'r Br. 14-15 & n.5; Gov't Br. 15 & n.5, they fail to note that the reason for this phenomenon supports *amicus's* interpretation of the statute. "The reason given for unavailability of appellate review of sentences under [then-]current law [wa]s the fact that sentencing judges ha[d] traditionally had almost absolute discretion to impose any sentence legally available in a particular case." S. Rep. No. 98-223, at 147; *accord* S. Rep. No. 97-307, at 1225 (1981); S. Rep. No. 98-225, at 150 (1983). It was Congress's conclusion that this broad trial court discretion was a substantial cause of the "uncertainty and inequity of the [then-]current sentencing-parole process." S. Rep. No. 97-307, at 8.

However, these circumstances and the minimal appellate review they engendered were eliminated when Congress passed the SRA, creating a new Sentencing Guidelines system that "entirely revamped" "[t]he sentencing system." *Id.*; see also Gov't Br. 16 (recognizing that Congress "overhaul[ed] federal sentencing").

As Congress explained, "[t]he sentencing provisions of the Code represent a complete revision and reformation of sentencing law *to assure that sentences are fair both to defendants and to the public. The provisions are designed to achieve a rationality,*

uniformity, and fairness that simply have not existed before." S. Rep. No. 97-307, at 10 (1981) (emphasis added); see also *id.* at 11 ("The system is designed to promote general uniformity and fairness . . . ."); *id.* at 1225 ("The sentencing provisions of the reported bill . . . . are intended to afford enough guidance and control of the exercise of that discretion to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing."); *accord* S. Rep. No. 98-223, at 147; S. Rep. No. 98-225, at 150.

Furthermore, Congress recognized that "[a]ppellate review is a vital part of the new sentencing system; it serves to assure all parties that judges have complied with the sentencing laws." H.R. Rep. No. 98-1017, at 88; see also S. Rep. No. 98-225, at 151 ("[M]ost Western nations . . . consider review at the behest of either the defendant or the public to be a fundamental precept of a rational sentencing system, and the Committee considers it to be a critical part of the foundation for the bill's sentencing structure."); H.R. Rep. No. 98-1017, at 89 ("appellate review of sentences will further the goals of individualizing justice, eliminating the perception that the current system is unfair, and substantially reducing sentencing disparity"); *id.* ("Appellate court scrutiny . . . inject[s] the critical element of systematic review of the application of judicial discretion and reduces the chances that the sentencing guidelines will result in arbitrary sentences."); *id.* ("Appellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the

guidelines."); *accord* S. Rep. No. 97-307, at 1226; S. Rep. No. 98-223, at 148; S. Rep. No. 98-225, at 155.[9]

In particular, Congress explained that "section 3742 create[d] for the first time a comprehensive system of review of sentences that . . . provid[es] adequate means for correction of erroneous and clearly unreasonable sentences." S. Rep. No. 98-223, at 152; *accord* S. Rep. No. 98-225, at 155; S. Rep. No. 97-307, at 1229. And, as Congress further recognized, "[i]t is an anomaly to provide for appellate correction of prejudicial trial errors and not to provide for appellate correction of incorrect or unreasonable sentences." S. Rep. No. 98-223, at 147; *accord* S. Rep. No. 97-307, at 1225; S. Rep. No. 98-225, at 150. Even the government concedes that Congress in 1984 "considerably revised its approach to appellate review of sentences." Gov't Br. 16.

Given Congress's broad-sweeping sentencing reforms, it should come as no surprise that Congress imposed no restrictions in its explanation of what an appellate court is to do when reviewing the legality of a sentence appealed by either party:

> Under subsection (d) [now (e)], upon review of the record, the court of appeals is to determine whether the sentence was imposed in violation of law . . . .

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[9] Indeed, before section 3742 was enacted, this Court recognized that "it may be said with certainty that history demonstrates that the common law never ascribed such finality to a sentence as would prevent a legislative body from authorizing its appeal by the prosecution. Indeed, countries that trace their legal systems to the English common law permit such appeals." *United States* v. *DiFrancesco*, 449 U.S. 117, 134 (1980) (citing sources).

> Under subsection (e) [now (f)], if the court of appeals finds that the sentence was not imposed in violation of law, . . . it is to affirm the sentence.
>
> If the court determines that the sentence was imposed in violation of law . . . it is required to remand the case for further sentencing proceedings or correct the sentence.

S. Rep. No. 98-225, at 154; *accord* S. Rep. No. 98-223, at 151.

Petitioner and the government ignore the context of section 3742's enactment and instead focus upon isolated snippets in the legislative history stating 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.'" Pet'r Br. 16 (alteration in original) (quoting S. Rep. No. 98-225, at 151); see also Gov't Br. 21 ("the Senate Report evidences an understanding that, unless Congress authorized the government to appeal, the appellate court 'could only reduce excessive sentences but not enhance inadequate ones'" (quoting S. Rep. No. 98-225, at 151)). However, these quotations merely reflect Congress's self-evident observation that if *only* defendants could initiate sentencing appeals, the courts of appeals would be unlikely to review the most egregious failures to impose an adequate sentence because "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." S. Rep. No. 98-225, at 151 n.370. This statement of a criminal defendant's obvious motivations does nothing to undermine the clear context and

legislative history supporting section 3742's plain-text meaning.

In sum, the SRA was designed and intended to work a radical change in federal sentencing imposition and review. It removed most sentencing discretion from the trial judge's hands and obligated the federal judiciary to impose sentences that are both sufficient and consistent, building upon preexisting precedent that courts cannot impose a sentence in violation of law. Given this context, Petitioner's and the government's reliance on standard appellate doctrines that shy away from reviewing judgments not challenged by those they harm and on more specific rules disfavoring challenges to sentences are wholly misplaced. Both the general and specific doctrines arise from the traditional appellate deference to the discretion afforded the judge as trier and sentencer and to the party's control of its case. Neither of these traditional justifications has any application here.

Congress created the SRA regime to limit trial judges' discretion and to protect the public's interest in sufficient and non-disparate sentences. The only way to effectuate those objectives is by empowering and obligating appellate courts presented with the issue of whether the sentence is legal to decide the issue regardless of whether the determination helps or hurts the appealing party. Indeed, any interpretation of section 3742 that *forbids* appellate courts to correct plainly unlawful sentences once either party has brought the sentence's legality into dispute should be rejected, not only because such an interpretation is contrary to section 3742's plain text, but also because it would produce a result that runs contrary to Congress's purpose.

C. Because Petitioner Challenged His Sentence's Legality, The Solicitor General's Failure To Approve A Cross-Appeal Is Irrelevant.

Subsection 3742(b) states that "[t]he 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). Petitioner, the government, and NACDL rely on this subsection to argue that the lack of the Solicitor General's approval for a government cross-appeal prevented the court of appeals from giving the obvious answer to Petitioner's query whether his sentence was imposed according to law. Pet'r Br. 17-19; Gov't Br. 19-20, 42; NACDL Br. 5-10. This interpretation would unduly limit this Court's and appellate courts' oversight of lower court decisions, in contravention of Congress's plain intent.

Initially, the absence of Solicitor General approval for a cross-appeal is irrelevant to this case. As discussed *supra* at 10-12, once a defendant challenges his sentence's legality on appeal, subsections 3742(e) and (f) require the court of appeals to determine whether the sentence is illegal and remand for correction any illegally low or high sentence. As further discussed in Part I.B *supra*, the SRA was designed to end what Congress saw as inadequate and inconsistent sentences. One of Congress's principal means of doing this was to provide appellate oversight of lower court sentencing decisions. Once a defendant appeals the legality of his sentence, the government cannot prevent the appellate courts from fulfilling the duty imposed by Congress to correct errant trial court sentences and to ensure that they comply with explicit federal law, particularly when

the sentences are outside of the statutory range Congress prescribed.

The court of appeals' remand of Petitioner's illegal sentence was also fully consistent with the constitutional role of the federal courts. The lower courts play a limited role in reviewing laws set out by Congress, *e.g.*, *Stewart Org., Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 26 (1988), and this limitation is nowhere more appropriate than in the instance of sentencing for federal crimes. "It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.); see also *Dowling* v. *United States*, 473 U.S. 207, 214 (1985); *Ex Parte United States*, 242 U.S. 27, 42 (1916). Thus, when courts impose a sentence that is beyond the limits laid down by Congress, their actions should be corrected once properly brought before a reviewing court.

It is of no moment that the government did not seek correction of the error in this case. Indeed, even when the government confesses error, courts retain a duty to perform their "judicial function" and determine "the proper administration of the criminal law." *Young*, 315 U.S. at 258-59. This is the case because "[t]he public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding." *Id.* "That interest is entrusted to [the court's] consideration and protection as well as that of the enforcing officers," such that "the proper administration of the criminal law cannot be left merely to the stipulation of parties." *Id.*; *accord U.S. Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993); *Swift & Co.* v. *Hocking Valley Ry.*, 243 U.S. 281, 290 (1917); *Town of S. Ottawa* v. *Perkins*, 94 U.S. 260, 267 (1876).

Petitioner, the government, and NACDL argue that the prosecutorial discretion of the Executive Branch should control whether an unlawful sentence is corrected. Pet'r Br. 18-19; Gov't Br. 42-43; NACDL Br. 8-9. However, this Court has questioned whether unfettered prosecutorial discretion in the sentencing area would be constitutional. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 391 n.17 (1989) ("Indeed, had Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally had assigned judicial responsibilities to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch.").

Additionally, NACDL's argument that prosecutorial discretion extends to later decisions regarding the punishment for a conviction is clearly incorrect. NACDL Br. 9-10. Although the government has the discretion "to nullify some provisions of law by the mere failure to prosecute," that discretion ends as soon as a criminal prosecution is concluded. *Davis* v. *United States*, 512 U.S. 452, 464-65 (1994) (Scalia, J., concurring) ("[O]nce a prosecution has been commenced and a confession introduced, the Executive assuredly has neither the power nor the right to determine what objections to admissibility of the confession are valid in law."). The government's decision not to seek enforcement of a statutory sentencing requirement is not an excuse for the court to do the same, particularly when the statute limits judicial discretion. *Id.* ("We shirk our duty if we systematically disregard that statutory command simply because the Justice Department systematically declines to remind us of it.").

Moreover, the pragmatic considerations underlying the government's plea for prosecutorial discretion are irrelevant in a case, such as this, where the defendant has placed the legality of his sentence before the court of appeals. Although the government sometimes does not appeal adverse rulings in order to conserve prosecution resources and to avoid clogging of judicial dockets,[10] these concerns have no relevance once the defendant has independently chosen to challenge his sentence's legality. The defendant's appeal brings the issue squarely before the reviewing court to be answered, and the government must have one of its lawyers write a brief on the sentencing issue, argue the issue before the court of appeals, and handle any resentencing at the district court. Accordingly, the absence of Solicitor General approval when the defendant appeals his sentence is not a relevant basis for requiring the court of appeals to ignore the obvious answer to the question before it.[11]

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[10] *See United States* v. *Mendoza*, 464 U.S. 154, 161 (1984) ("[T]he 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.").

[11] Petitioner and the government quote a Senate report stating that allowing courts of appeals to increase a sentence upon a defendant's appeal would place an "'undesirable strain'" on the defendant. Pet'r Br. 19 (quoting S. Rep. No. 98-225, at 151 n.370); Gov't Br. 21 (same). However, this concern does not override section 3742's plain text. Moreover, Congress's decision to allow the courts of appeals to determine the legality of sentences appealed by either party places no additional strain on the defendant's right to appeal. The defendant does not know whether the government will file a notice of cross-appeal until after the time for the defendant to file his notice of appeal has passed. *Compare* Fed. R. App. P. 4(b)(1)(A) ("a defendant's notice of appeal must be filed in the district court within 10

The government does not explain why the Solicitor General did not authorize a cross-appeal in this case or how the government's interest was served by that omission. The government cannot claim that there would have been "appellate risk to seek to correct it on appeal" or that "the ultimate outcome of a resentencing proceeding may be unpredictable and not necessarily favorable to the government," Gov't Br. 43-44, since Supreme Court precedent clearly held that Petitioner's sentence was below the statutory minimum. See *Deal*, 508 U.S. at 137.

In sum, the plain text and historical context of section 3742 firmly establish the court of appeals' authority to notice and correct the egregious sentencing error in this case.

II. THE ABSENCE OF A CROSS-APPEAL DID NOT DEPRIVE THE COURT OF APPEALS OF THE AUTHORITY TO ORDER THAT PETITIONER'S UNLAWFUL SENTENCE BE CORRECTED.

Petitioner urges the Court to resolve the open question of whether the general bar against modifying judgments in favor of a nonappealing party

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days"), *with id.* 4(b)(1)(B) (the government's "notice of appeal must be filed in the district court within 30 days"). *See* S. Rep. No. 98-223, at 152 ("[T]he Committee intends that the Federal Rules of Appellate Procedure be applicable to a proceeding under this section."); *accord* S. Rep. No. 97-307, at 1229; S. Rep. No. 98-225, at 155. Accordingly, a defendant makes his choice to appeal his sentence before he knows whether the government will also appeal. Moreover, because the Solicitor General faces substantial time pressure in deciding whether to authorize appeals, the government attorney in any given case ordinarily files a protective notice of cross-appeal. Thus, the defendant often will not know until after he has perfected his appeal whether the government will actually proceed with its cross-appeal.

is a "strictly jurisdictional" rule that places "an unqualified limit on the power of appellate courts." *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 480 (1999). The Court need not answer that question, for section 3742 makes clear that the absence of a cross-appeal was not a jurisdictional impediment in this case. But if the Court were to resolve the question, it should answer in the negative. None of this Court's cases cited by Petitioner or the government have described a cross-appeal as a jurisdictional prerequisite to expanding the relief afforded an appellee. This Court's recent precedents rejecting the imprecise use of the term "jurisdictional" strongly suggest that this label—with the unavoidable and at times inefficient consequences that it carries—does not apply to the filing of a cross-appeal. The cross-appeal requirement is instead best construed as a non-jurisdictional rule of practice that is properly relaxed where, as here, countervailing considerations outweigh "the institutional interests in fair notice and repose that the rule advances." *Id.*

A. The General Prohibition Against Modifying Judgments In Favor Of A Nonappealing Party Is A Rule Of Practice Subject To Exceptions.

The only event necessary to vest the court of appeals with plenary jurisdiction over a case is the timely filing of an initial notice of appeal that complies with the requirements of Federal Rule of Appellate Procedure 3(c). See 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3904, at 218 (2d ed. 1992 & Supp. 2007) ("The jurisdiction of the court of appeals is established by the timely filing of the *first* notice of appeal.") (emphasis added); *Smith* v. *Barry*, 502 U.S. 244, 248 (1992) ("Rule 3's dictates are jurisdictional in nature, and their

satisfaction is a prerequisite to appellate review."). It is this "first" or initial notice of appeal that the Court has described as "an event of jurisdictional significance" because that filing "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 *Scarborough* v. *Principi*, 541 U.S. 401, 413 n.3 (2004) (calling the notice of appeal "the filing that triggers appellate-court jurisdiction over the case"). But once the initial notice of appeal has invoked the appellate court's jurisdiction over the parties and the case, that "court has the authority to fully adjudicate the appeal before it." *Mendocino Envtl. Ctr.* v. *Mendocino County*, 192 F.3d 1283, 1298 (9th Cir. 1999).

Petitioner and the government gloss over this fundamental distinction between an initial notice of appeal and subsequent cross- or separate appeals. Perhaps as a result, they raise unwarranted concerns that affirming the Eighth Circuit's decision would sanction "free-floating jurisdiction [for] the courts to correct sentencing errors," Gov't Br. 18, or authorize appellate courts to assert jurisdiction even where no notice of appeal (or petition for certiorari) is filed. Pet'r Br. 25 n.14. But the Eighth Circuit did not issue the extreme holding Petitioner and the government fear. Instead, the court of appeals relied on the controlling principle that an appellate court with jurisdiction over the issues and the parties before it is not deprived of the authority to afford a specific measure of relief to a nonappealing party

simply because that party did not file a cross-appeal.[12]

This principle both flows from and accords with this Court's longstanding recognition that the bar on modifying judgments in favor of a nonappealing party is a "rule of practice" that may be relaxed for good cause. See *Langnes* v. *Green*, 282 U.S. 531, 538 (1931). The Court in *Langnes* conducted a careful analysis of its prior decisions (including *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U.S. 52 (1927), upon which Petitioner relies here, Pet'r Br. 10), in concluding that its cases on point "simply announce[d] a rule of practice which generally has been followed; but none of them deny the *power* of the court to review objections urged by respondent, although he has not applied for certiorari, if the court deems there is good reason to do so." *Langnes*, 282 U.S. at 538.

This assessment was not, as the government would have it, an offhand statement that the Court went on to reject just six years later in *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185 (1937). See Gov't Br. 32-33. Although *Morley* described the issue before it as "[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," 300 U.S. at

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[12] *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88 (1994), is not to the contrary. The government cites that case to support its contention that courts of appeals lack jurisdiction to award the government relief "[a]bsent an appeal by the government, duly authorized by the official designated by Congress." Gov't Br. 20. Critically, however, *NRA Political Victory Fund* did not involve cross- or multiple petitions for certiorari; only the FEC had sought certiorari there. Accordingly, once it concluded that it lacked jurisdiction over the only request for review before it, the Court had no choice but to dismiss the case in its entirety.

187, the context reveals that this Court was not referring to its jurisdiction. The *Morley* Court never again referred to the "power of an appellate court," and the remainder of the opinion is couched in terms of what an *appellee* may or "may not do in the absence of a cross-appeal"—a discussion during which it cited *Langnes* with approval. *Id.* at 191. *Morley*, accordingly, does not suggest that the general rule against modifying judgments in favor of a nonappealing party amounts to "an unqualified bound on the jurisdiction of the courts of appeals." *Neztsosie*, 526 U.S. at 480.

Decisions of the courts of appeals provide additional evidence that the cross-appeal requirement has been—and is best—understood as a flexible "rule of practice." Various circuits have adhered to the rule-of-practice position for decades. See *Mendocino Envtl. Ctr.*, 192 F.3d at 1298 & n.27 (collecting cases from, among others, the Second, Fourth, Ninth and D.C. Circuits).[13] Moreover, many of these courts reaffirmed that the cross-appeal requirement represents a rule of practice after this Court's decisions in *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), and *Neztsosie*, 526 U.S. 473. See, *e.g.*, *Am. Roll-On Roll-Off Carrier, LLC* v. *P & O Ports Balt., Inc.*, 479 F.3d 288, 295 (4th Cir. 2007); *Carlson* v. *Principal Fin. Group*, 320 F.3d 301, 309 (2d Cir. 2003); *Lee* v. *Burlington N. Santa Fe Ry.*, 245 F.3d 1102, 1107 (9th Cir. 2001).

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[13] The circuits remain sharply divided on the jurisdictional status of the rule. *See Marts* v. *Hines*, 117 F.3d 1504, 1507-08 (5th Cir. 1997) (Garwood, J., dissenting) (en banc) (collecting cases). This Court in *Neztsosie* noted both the conflict and the fact that some courts of appeals had issued inconsistent opinions on the question. 526 U.S. at 480 n.2.

Interpreting the rule as a non-jurisdictional matter of practice is fully consistent with *Torres*. The *Torres* Court held that, in combination with the time limits in Federal Rule of Appellate Procedure 4, Rule 3(c)'s requirement that the notice of appeal specify the names of the appealing parties was a jurisdictional limitation that could not be relaxed. But even given an expansive reading, *Torres* stands at most for the proposition that "a court of appeals always lacks jurisdiction to afford relief to a *party* who is not named in a notice of appeal." 15A Wright et al., *supra* § 3904, at 228 (emphasis added). *Torres* is therefore distinguishable from situations "involving jurisdiction over particular claims or issues in a case in which the court has jurisdiction over all of the relevant parties." *Mendocino Envtl. Ctr.*, 192 F.3d at 1298 n.27; see also *United States* v. *Tabor Court Realty Corp.*, 943 F.2d 335, 344 (3d Cir. 1991). That is the situation here, where both Petitioner and the government were parties named in the initial notice of appeal and thus were within the Eighth Circuit's jurisdiction.

Treating the cross-appeal requirement as a non-jurisdictional rule of practice is not only a better reading of this Court's precedent, it is also the better approach. As one leading treatise observes, "there is an astonishing lack of reasoned explanation for the cross-appeal requirement." 15A Wright et al., *supra* § 3904, at 206. While a rule requiring a cross-appeal before expanding the judgment might have "some value in fostering repose, identifying the issues to be met, [and] shaping the progress of the appeal," *id.*, the "requirement should be administered with substantial flexibility" in light of the "uncertainties" surrounding its value. *Id.*

As Judge Posner has noted, treating a cross-appeal as a jurisdictional requirement carries a number of consequences, "all of which are bad." *Coe* v. *County of Cook*, 162 F.3d 491, 497 (7th Cir. 1998). Requiring a cross-appeal before a court may consider both sides of the issues before it "makes federal law more complicated than it has to be." *Id.* It also "increases paperwork, by requiring the appellee as well as the appellant to file a notice of appeal"; "increases the number of remands"; "trips up the unwary"; and "multiplies the number of cross-appeals, because appellees frequently confuse defending a judgment on new grounds, which doesn't require a cross-appeal, with seeking to alter the judgment in their favor." *Id.* Recognizing that the courts—not Congress—created the idea that a cross-appeal is jurisdictional, Judge Posner has called on the Seventh Circuit to "abandon[ ] the rule as a rule of jurisdiction." *Id.* at 498.

This Court's recent decision in *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), emphasizes that, in determining whether a particular requirement is jurisdictional, this Court will consider the consequences of that rigid classification. The consequences of the rule Petitioner proposes would be severe. For example, if a rule like the cross-appeal requirement is jurisdictional, it can be raised by any party at any time, including for the first time in this Court. In addition, the jurisdictional label would oblige courts to enforce compliance on their own motion and foreclose arguments based on equity, waiver, consent, or estoppel. See *Ins. Corp. of Ire., Ltd.* v. *Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702 (1982); see also Scott Dodson, *Mandatory Rules* (forthcoming Stanford Law Review 2008)

(manuscript at 5), *available at* http://papers.ssrn.com/sol3/papers.cfm?/abstract_id=1095352.

Arbaugh itself is instructive in this regard. In that case, the Court pointed to three "consequences" that would flow from classifying Title VII's employee-numerosity requirement as "a determinant of subject-matter jurisdiction, rather than an element of [the plaintiff's] claim for relief." 546 U.S. at 513-14. Federal courts, including this Court, would be compelled to raise the issue on their own motion; trial judges would have to resolve contested facts that would otherwise be determined by a jury; and courts would be forced to dismiss complaints in their entirety, rather than retaining the discretion to exercise supplemental jurisdiction over remaining claims. *Id.* at 514. Anticipating the potential for "unfairness" and "waste of judicial resources" entailed by the jurisdictional classification, this Court held that "the sounder course" was to reject the jurisdictional label and "leave the ball in Congress' court." *Id.* at 515.

The similarly undesirable consequences of the jurisdictional label in this setting are starkly evidenced by the very scenario that NACDL highlights—a situation where the government has appealed but "the defendant has failed to [cross-] appeal a sentence that is unlawfully long." NACDL Br. 16. If the cross-appeal requirement were jurisdictional, the defendant's failure to file a cross-appeal in this scenario should also categorically bar the appellate court from "decreasing an unlawful sentence," *id.* at 18, either on its own motion or at the defendant's request—a fundamentally unfair outcome. NACDL thinks it could avoid this consequence because the separation of powers and due process concerns that bar courts from increasing

sentences *sua sponte* do not apply in the other direction. *Id.* at 16-18. The government disagrees. See Gov't Br. 22-23 (explaining its view that courts of appeals likewise lack "jurisdiction to grant sentencing relief in favor of a defendant if only the government has filed a notice of appeal"). But treating the cross-appeal requirement as a rule of practice would avoid both the one-way ratchet advocated by NACDL and the enforcement of patently unlawful sentences that the government is prepared to tolerate.

B. Neither The Time Limits For Filing Cross-Appeals Nor The Filing Of A Cross-Appeal Itself Are Jurisdictional Requirements Under This Court's Recent Precedents.

This Court has in recent years sought to rein in the "profligate" and sometimes imprecise use of the term "jurisdictional," "'a word of many, too many, meanings.'" *Arbaugh*, 546 U.S. at 510 (citation omitted). The line of decisions culminating in *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), has clarified two important points. First, the label "jurisdictional" should be used "only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004); see also *Eberhart* v. *United States*, 546 U.S. 12, 16 (2005) (per curiam). Second, time prescriptions may be jurisdictional when contained in a statute, see *Bowles*, 127 S. Ct. at 2363-64, but are otherwise non-jurisdictional claim-processing rules that will be enforced when properly invoked. *Eberhart*, 546 U.S. at 19; *Kontrick*, 540 U.S. at 456.

Under these two related principles, the time limits in Federal Rule of Appellate Procedure 4(b)(1) for

filing cross-appeals in criminal cases are not jurisdictional. Unlike the prescription at issue in *Bowles*, these limits are not statutorily based. See 127 S. Ct. at 2363-64. The government correctly recognizes that, because the time limits for filing both initial notices of appeal and notices of cross-appeal are prescribed only by the Federal Rules of Appellate Procedure, those limits are not jurisdictional. Gov't Br. 24-26. This conclusion finds further support in the decisions of the courts of appeals, one of which appreciated the effect of *Kontrick* on Rule 4(b) even prior to the subsequent ruling in *Bowles*. See *United States* v. *Sadler*, 480 F.3d 932, 935-37 (9th Cir. 2007); *accord United States* v. *Garduño*, 506 F.3d 1287, 1290-91 (10th Cir. 2007); *United States* v. *Martinez*, 496 F.3d 387, 388-89 (5th Cir.) (per curiam), *cert. denied*, 128 S. Ct. 728 (2007).

The question then becomes whether the filing of *some* cross-appeal is a "jurisdictional" requirement even though filing a *timely* cross-appeal is not. There is no sound basis for drawing such a distinction. The general cross-appeal requirement at issue in *Neztsosie* is a product of this Court's decisions and is not set forth in any federal statute. Under *Kontrick*, *Eberhart*, and *Bowles*, therefore, the limitation is no different than a time prescription contained in a rule of court procedure and is not jurisdictional.

Petitioner and the government also point to subsection 3742(b) in arguing for a jurisdictional cross-appeal requirement, but that statute by its terms covers appeals, not cross-appeals. Contrary to the suggestion that section 3742 prevents a court of appeals from determining whether a sentence is lawful once that issue has been appealed, the plain text of section 3742 *requires* a court of appeals to correct an unlawful sentence when an appealing

party has placed the legality of the sentence at issue. See Part I.A *supra*. Accordingly, section 3742 neither serves as a jurisdictional barrier to the court of appeals' action under the facts of this case, nor does it convert the filing of a cross-appeal into a jurisdictional prerequisite to relief in criminal appeals as a general matter.

C. The Court Of Appeals Had Good Reason To Relax The Cross-Appeal Requirement In This Case.

For the reasons set forth in Part II.A *supra*, the Court should conclude that the bar on modifying a judgment in favor of a non-appealing party is a non-jurisdictional rule of practice subject to exceptions. The relevant question is thus whether the court of appeals had "good reason" to deviate from the rule in this case. *Langnes*, 282 U.S. at 538. Under the factors that appellate courts weigh in deciding whether to relax this requirement, it did.[14]

Petitioner put the lawfulness of his sentence in play when he challenged it as "unreasonable." See *supra* at 9 n.1. Petitioner was also on notice that the mandatory consecutive sentence lingered as an issue because the government specifically preserved an objection to that ruling in the district court, J.A. 62-

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[14] The factors that the Ninth Circuit considers are instructive: (1) the interrelatedness of the issues on appeal and cross-appeal, (2) whether the nature of the district court opinion should have put the appellee on notice of the need to file a cross-appeal, (3) whether notice of cross-appeal was late or was not filed at all, and (4) the extent of any prejudice to the appellant caused by the absence of a cross-appeal. *See Lee*, 245 F.3d at 1107 & n.3. Careful application of these factors ensures that appellate courts will dispense with the cross-appeal requirement only under "exceptional circumstances." *Spann* v. *Colonial Vill., Inc.*, 899 F.2d 24, 33 (D.C. Cir. 1990) (R.B. Ginsburg, J.).

63, and flagged the issue in its appellate brief. See J.A. 85. Petitioner nevertheless opted not to file a reply brief, an omission that seriously undermines any claim of prejudice he might otherwise have. Faced with a challenge to the sentence's legality, the Eighth Circuit could not simply ignore the district court's egregious failure to impose the sentence required by statute and this Court's controlling decision in *Deal*, 508 U.S. at 137. And once the court of appeals was alerted to the error, it was obliged—once again by statute—to "remand the case for further sentencing proceedings with such instructions as [it] consider[ed] appropriate." 18 U.S.C. § 3742(f)(1). Enforcing a mandatory consecutive sentence that Congress required for the most dangerous offenders surely qualifies as "good reason" to dispense with the cross-appeal requirement.

The government attempts to shift the focus away from the nature of the error at issue, insisting that the cross-appeal requirement is at minimum a claim-processing rule analogous to those recognized in *Kontrick* and *Eberhart* and, as such, must be enforced when properly invoked. Gov't Br. 35-38. But even if the government's premise is correct, its desired conclusion does not follow.

The government acknowledges that "petitioner did not extensively develop" in his petition for rehearing the argument that the court of appeals acted improperly in the absence of a government cross-appeal. *Id.* at 38. That is an understatement. Petitioner styled his argument as follows: "The panel's decision to exercise discretion under Fed. R. Crim. P. 52(b) and remand for resentencing should be reheard en banc because any error by the district court in sentencing defendant to 442 months did not seriously affect fairness, integrity, or the public

reputation of judicial proceedings." J.A. 93. In other words, Petitioner did not assert that a cross-appeal was required, but rather contended that the panel had misapplied the fourth prong of the plain-error test articulated by this Court in *United States* v. *Olano*, 507 U.S. 725 (1993), and its progeny. To be sure, Petitioner mentioned the government's failure to appeal in the introductory statement and factual recitation of his rehearing petition. J.A. 90, 92. Those casual references did not, however, bring to the Eighth Circuit's attention either the supposedly controlling decisions of this Court or the general bar on expanding the judgment in favor of an appellee.[15]

The government recognizes that the perfunctory "assertion of a claim and citation of a case" is normally insufficient to preserve a claim of error. Gov't Br. 38. Indeed, the case law is replete with examples of appellate courts refusing to reach arguments raised in a single sentence, paragraph, or footnote.[16] In the face of this rule, the government proposes what amounts to a one-time-only exception ostensibly limited to cases where a court of appeals *sua sponte* expands the judgment in favor of a non-appealing appellee. See *id.* But the government's attempt to narrow its position lacks logical justification and would place enormous burdens on line-level federal prosecutors and appellate courts

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[15] To locate those decisions, the court of appeals would have had to trace back the sources relied on in *United States* v. *Rivera*, 411 F.3d 864 (7th Cir. 2005), which Petitioner did cite in his petition for rehearing. J.A. 95.

[16] *See, e.g.*, *Thomas* v. *Speedway SuperAmerica, LLC*, 506 F.3d 496, 500 & n.1 (6th Cir. 2007) (one paragraph); *United States* v. *Hall*, 370 F.3d 1204, 1208 n.4 (D.C. Cir. 2004) (one sentence); *United States* v. *Pirro*, 212 F.3d 86, 89 n.6 (2d Cir. 2000) (one footnote).

alike. The former would be forced to respond to every argument advanced by defense counsel on appeal, no matter how haphazardly raised. Unsure of their obligations, cautious courts of appeals would do the same, possibly prompting resolution of important issues without the full benefit of the very "'adversarial testing'" Petitioner extols. Pet'r Br. 29 n.16 (quoting *United States* v. *Cronic*, 466 U.S. 648, 656 (1984)). The better course is to avoid these potential pitfalls by holding that the Eighth Circuit properly dispensed with the cross-appeal requirement in order to correct the district court's contravention of a clear statutory command.

III. BECAUSE A CROSS-APPEAL IS NOT JURISDICTIONALLY REQUIRED, THE COURT OF APPEALS APPROPRIATELY VACATED THE UNLAWFUL SENTENCE UNDER BOTH ITS SUPERVISORY POWER AND THE PLAIN ERROR RULE.

As explained in Part I, section 3742 required the court of appeals to determine the legality of Petitioner's sentence once he filed an appeal under section 3742(a)(1), and to remand for resentencing that complied with subsection 924(c)(1)'s statutory minimum. But even if section 3742 did not so require, 28 U.S.C. § 2106 and Federal Rule of Criminal Procedure 52(b) both independently authorized the court of appeals to order that Petitioner be resentenced in accordance with law. Because the court of appeals' decision to do so was not jurisdictionally foreclosed by the absence of a cross-appeal, see Part II, the court of appeals properly exercised this authority.

A. The Court Of Appeals Properly Exercised Its Supervisory Powers Over The District Court In Ordering That A Lawful Sentence Be Entered.

This Court and the courts of appeals have long held a "supervisory power" over lower courts to fix unlawful sentences.[17] See *Yates* v. *United States*, 356 U.S. 363, 366 (1958); see also *Millich* v. *United States*, 282 F. 604, 606 (9th Cir. 1922) ("The appellate court, in affirming a conviction, may modify the punishment imposed by the trial court, by mitigating, reducing, or otherwise changing it, so far as it exceeds the limits prescribed by the statute." (internal quotation marks omitted)); *accord United States* v. *Wiley*, 278 F.2d 500, 503-04 (7th Cir. 1960); *Priori* v. *United States*, 6 F.2d 575, 576 (6th Cir. 1925) (per curiam).

The appellate courts' supervisory power to remedy unlawful sentences was ultimately codified in 28 U.S.C. § 2106. See *United States* v. *Clements*, 86 F.3d 599, 600-01 (6th Cir. 1996) ("Section 2106 . . . vests courts of appeals with supervisory power to vacate and remand an entire sentencing package despite the fact that it includes an unchallenged sentence."); *accord United States* v. *Ahuja*, 936 F.2d 85, 89-90 (2d

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[17] The federal appellate courts' power to correct an unlawful sentence on appeal is "well established" in this Court. *See*, *e.g.*, *Bozza* v. *United States*, 330 U.S. 160, 166-67 (1947) ("It is well established that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside on appeal . . . . The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner. In this case the court only set aside what it had no authority to do . . . ." (internal quotation marks omitted)); *Tinder* v. *United States*, 345 U.S. 565, 570 (1953).

Cir. 1991) (section 2106 gives court authority to remand improper sentence).

Section 2106 specifically gives authority to "[t]he Supreme Court or any other court of appellate jurisdiction" to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review." Courts have long recognized that the plain language of this statute gives courts the authority to modify unlawful sentences. See, *e.g.*, *Tinder* v. *United States*, 345 U.S. 565, 570 (1953) (Pursuant to 28 U.S.C. § 2106, "[t]he judgment of the Court of Appeals is reversed and the cause is remanded to the District Court to correct the [unlawful] sentence."); *accord Clements*, 86 F.3d at 600-01; *McClain* v. *United States*, 643 F.2d 911, 914 (2d Cir.) ("we may vacate appellant's entire sentence under the general supervisory powers granted us by 28 U.S.C. [§] 2106"), *cert. denied*, 452 U.S. 919 (1981).

The courts of appeals' supervisory power, as codified in section 2106, enables them to remand or modify a sentence once a notice of appeal is filed, even if the issue is not the subject of a cross-appeal. See, *e.g.*, *United States* v. *Milledge*, 109 F.3d 312, 315 (6th Cir. 1997) ("Without filing a cross-appeal, the government requested remand so the district judge could consider whether to enhance the defendant's sentence. We held that such a remand was permissible" under section 2106.); *United States* v. *Andersson*, 813 F.2d 1450, 1460-61 (9th Cir. 1987) ("[O]ur supervisory powers under 28 U.S.C. § 2106 allow us to remand for resentencing . . . [when] the entire judgment [is] in issue [because of] the inconclusiveness of the notice of appeal." (internal citations omitted)).

This Court, too, has recognized that its own supervisory power to correct unlawful sentences

extends to instances where parties have failed to properly appeal or raise an issue, as long as a notice of appeal has given the Court jurisdiction over the case. See, *e.g.*, *Reynolds*, 98 U.S. at 168-69. In *Reynolds*, "the sentence of the court below require[d] the imprisonment to be at hard labor, when the act of Congress under which the indictment was found provide[d] for punishment by imprisonment only." *Id*. Accordingly, this Court found that the sentencing court had exceeded its statutory power and for that reason "reverse[d] the judgment of the court below for the purpose of correcting the only error which appear[ed] in the record, to wit, in the form of the sentence." *Id*. at 169. The Court took this action even though the sentencing error had not been raised. *Id*. ("*This was not assigned for error on the former hearing*, and we might on that account decline to consider it now; but as the irregularity is one which appears on the face of the record, we vacate our former judgment . . . ." (emphasis added)); see also *Priori*, 6 F.2d at 576 (court of appeals "observe[d] that the sentence . . . was unauthorized by law [and] amended [it] accordingly," even though appellant did not assign error as to the sentence).

Once the court of appeals obtained jurisdiction over Petitioner's sentencing appeal, the court was vested with the discretionary power to correct Petitioner's unlawful sentence. That this was an appropriate exercise of appellate discretion is further recommended by the obviousness of the error in this case. See *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976) ("Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, or where 'injustice might otherwise result.'"). Consequently, the court of

appeals' considered judgment should not be overturned.

B. Rule 52(b) Authorizes Correction Of The District Court's Plainly Erroneous Failure To Impose A Lawful Sentence.

In addition to its general supervisory power over the district court, the court of appeals was also authorized to order Petitioner resentenced under Federal Rule of Criminal Procedure 52(b). Rule 52(b) permits appellate courts, in their discretion, to correct errors that are plain, that affect substantial rights, and that "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Cotton*, 535 U.S. 625, 626 (2002). Petitioner and the government do not dispute the fact that the district court committed legal error in imposing a sentence 220 months shorter than the sentence mandated by Congress in 18 U.S.C. § 924(c)(1). Nor do they dispute the fact that the district court's legal error was plain under *Deal*, 508 U.S. at 137. Instead, Petitioner proposes that this Court redefine "substantial rights" so as to exclude the rights of the public in the criminal justice process. Moreover, Petitioner, the government and NACDL, each in their varying ways, would have this Court so narrowly cabin appellate discretion as to transform it into a one-way ratchet that allows unlawfully lenient sentences to stand.

1. The District Court's Unlawful Sentence Affected Substantial Rights.

As the government has explained, see Gov't Br. 45-46 (collecting cases), it is well settled that Rule 52(b) authorizes courts to correct plain errors that result in unduly lenient sentences. In so ruling, the courts of appeals have consistently rejected the view (espoused

by Petitioner here) that only criminal defendants have substantial rights that may be protected through plain error review. See Pet'r Br. 32-33.

First, Rule 52(b) on its face draws no distinction between plain errors that affect the substantial rights of criminal defendants and those errors that affect the substantial rights of the government: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b); see, *e.g.*, *United States* v. *Dickerson*, 381 F.3d 251, 257 (3d Cir. 2004); *United States* v. *Gordon*, 291 F.3d 181, 194 (2d Cir. 2002); *United States* v. *Barajas-Nunez*, 91 F.3d 826, 833 (6th Cir. 1996).[18]

Moreover, there is no indication in the Federal Rules of Criminal Procedure that the term "substantial rights" is limited to only the rights of criminal defendants. Indeed, contrary to Petitioner's suggestion, see Pet'r Br. 32 n.19, the use of the term "substantial rights" in Rule 7(e) supports the view

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[18] Because the language of Rule 52(b) is clear, it is unnecessary for the Court to consider the history of the plain error doctrine prior to the adoption of Rule 52(b). But even if the Court were to look to pre-Rule practices in defining the scope of Rule 52(b), *see* Pet'r Br. 33-34, the fact that the plain error doctrine developed at a time when only criminal convictions (and not criminal sentences) could be appealed arguably suggests that such restrictions on appellate review should not apply to modern-day sentencing appeals. Given the high costs associated with retrying a defendant, the ability of courts to correct forfeited errors related to a defendant's conviction was understandably restricted. However, the costs of resentencing a defendant are substantially less than holding an entirely new trial, and thus there is a lesser need to restrict the ability of courts to correct sentencing errors. *See Gordon*, 291 F.3d at 199 & n.2 (Newman, J., concurring).

that "substantial rights" encompasses both the rights of criminal defendants and the government. If "substantial rights" by definition were limited only to the rights of criminal defendants, then the phrase "of the defendant" would be mere surplusage. 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).

Defining the term "substantial rights" so as to exclude the rights of the government would also betray the fact that the public, too, has important rights in the criminal justice process. See *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.) ("[J]ustice, though due to the accused, is due to the accuser also."), *overruled in part on other grounds by Malloy* v. *Hogan*, 378 U.S. 1 (1964). Along with concerns for adequate and consistent criminal sentences, mandatory minimum sentences for offenses such as carrying a firearm during a crime of violence reflect Congress's considered judgment that such criminal acts pose an especially grave threat to public safety. See *United States* v. *T.M.*, 413 F.3d 420, 426 (4th Cir. 2005) ("[T]he legislative history of § 924(c) demonstrates a keen and continuing attentiveness by Congress to combating the serious national problem caused by the use of firearms in furtherance of crimes of violence."). Thus, the public's rights are directly implicated when an illegally low sentence is imposed, and Rule 52(b) allows federal appeals courts to reach and correct unlawful sentences.

2. Failure To Impose A Statutorily-Mandated Sentence Seriously Affects The Fairness, Integrity And Public Reputation Of Judicial Proceedings.

The Eighth Circuit appropriately determined that the error at issue "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (alteration in original).

As 18 U.S.C. § 3553(a) makes clear, Congress has determined that the fairness, integrity and reputation of judicial proceedings is called into question when similarly situated defendants receive disparate sentences for the same illegal conduct.[19] See 18 U.S.C. § 3553(a) ("The court, in determining the particular sentence to be imposed shall consider— . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . . ."); *Barajas-Nunez*, 91 F.3d at 833. When a sentencing court fails to impose a sentence in accordance with express statutory mandates regarding the required sentence, the disparity and unfairness are fully apparent. Moreover, because the costs associated with resentencing a defendant are comparatively less than holding a new trial, allowing a plain sentencing error to go uncorrected is even more unfair. See *Gordon*, 291 F.3d at 194-95.

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[19] Petitioner's suggestion that courts have no discretion to correct illegally low sentences is incorrect. As the government correctly notes in its brief, *see* Gov't Br. 46-47, the Fifth and Eighth Circuit decisions relied upon by Petitioner were based on a narrow formulation of the plain error doctrine rejected in *Olano*, and the validity of these pre-*Olano* decisions is now in doubt. *See, e.g.*, *United States* v. *Barnett*, 410 F.3d 1048, 1051 (8th Cir. 2005); *Dickerson*, 381 F.3d at 257 n.6; *United States* v. *Campos*, 362 F.3d 1013, 1014 (8th Cir. 2004).

A lack of sentencing uniformity is particularly problematic in the mandatory minimum context. See *United States* v. *Clark*, 274 F.3d 1325, 1329 (11th Cir. 2001) (per curiam) ("We can discern no principled basis for restricting access to 'plain error' review of an illegal sentence which contravenes either a statutory minimum or a statutory maximum." (citation omitted)). Mandatory minimum sentences are designed to deter dangerous criminal conduct and prevent repeat offenses by guaranteeing that defendants will receive at least a minimum sentence for certain crimes. See U.S. Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 13 (Aug. 1991); *United States* v. *Angelos*, 433 F.3d 738, 751 (10th Cir.) ("[T]he lengthy sentences mandated by § 924(c) were intended by Congress . . . to deter criminals from possessing firearms during the course of certain felonies." (citation omitted)), *cert. denied*, 127 S. Ct. 723 (2006); see also *Harmelin* v. *Michigan*, 501 U.S. 957, 1008 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (Michigan mandatory-minimum sentencing "scheme provides clear notice of the severe consequences that attach to possession of drugs in wholesale amounts, thereby giving force to one of the first purposes of criminal law-deterrence"). These deterrent effects will be undermined, however, if courts do not ensure consistent application of mandatory minimum statutes through plain error review. Indeed, if the Court were to adopt Petitioner's and NACDL's view that only unduly harsh sentences could be corrected, the result would be a one-way ratchet that would result in sentences below the minimum mandated by statute. See Pet'r Br. 32; NACDL Br. 19.

Petitioner also argues that the court of appeals should have overlooked the district court's plain legal error because Petitioner had already received a "very lengthy sentence of 442 months." Pet'r Br. 34. The fact that Petitioner received such a sentence, however, merely reflects the severity of Petitioner's crimes as a member of a major drug conspiracy. In determining whether a sentencing error should be corrected, the relevant metric is not the length of the initial sentence but rather the disparity between the length of the sentence mandated by statute and the length of the sentence actually imposed. Here, Petitioner received a sentence that was 220 months (or 33%) shorter than the minimum sentence required by law. Such an egregious error can hardly be deemed de minimis under any formulation.

Furthermore, remand of Petitioner's illegal sentence cannot be deemed a violation of due process. As explained *supra* at 36, Petitioner had ample notice that the lawfulness of his sentence was in question. The issue of subsection 924(c)(1)'s mandatory minimum sentence was squarely addressed during Petitioner's sentencing hearing. See J.A. 59 ("I realize that the Probation Office calculated a 25-year mandatory minimum on Count 10, and I'm asking the Court not to impose that."). In choosing to appeal the reasonableness of his sentence, Petitioner himself placed the lawfulness of his sentence at issue. Thus, the Eighth Circuit's remand of Petitioner's sentence should have come as no shock to him.[20]

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[20] Petitioner contends that the Eighth Circuit's correction of the district court's plain error was unfair because the court did not have the benefit of briefing by the parties. Pet'r Br. 29 n.16. However, the sentencing error was explicitly discussed in the government's brief to the Eighth Circuit. J.A. 85 ("Although 18 U.S.C. § 924(c) required a 5-year sentence on Count 4

Nor does the district court's resentencing of Petitioner run afoul of double jeopardy concerns. See *United States* v. *Hawthorne*, 806 F.2d 493, 501 (3d Cir. 1986) ("[I]t is well settled that correction of an illegal sentence by resentencing does not implicate double jeopardy rights." (internal quotation marks omitted)). In *United States* v. *DiFrancesco*, 449 U.S. 117, 132 (1980), this Court ruled that appellate review of a defendant's sentence does not constitute a double jeopardy violation simply because it "might deprive respondent of the benefit of a more lenient sentence." See *id.* ("[O]ur task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support such an equation."); *Bozza* v. *United States*, 330 U.S. 160, 166-67 (1947).

Here, the district court at resentencing imposed the minimum sentence permitted by statute, so there can be no suggestion that Petitioner's increased sentence constitutes double jeopardy or reflects vindictiveness by the courts for taking an appeal. See *United States* v. *Guevremont*, 829 F.2d 423, 427-28 & n.7 (3d Cir. 1987) ("[W]here the increase of sentence results from the correction of an illegal sentence to make it conform to the statutory minimum or to the original

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(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."). Petitioner could have addressed this issue if he had filed a reply brief, but he elected not to do so.

intent of the sentencing judge, the argument that the double jeopardy clause precludes an increase of sentence has been uniformly rejected."); *United States ex rel. Ferrari* v. *Henderson*, 474 F.2d 510, 512-13 (2d Cir. 1973); *United States* v. *Bishop*, 487 F.2d 631, 633 (1st Cir. 1973).

3. Rule 52(b) Permits Courts To Correct Plain Errors *Sua Sponte*.

Finally, the Eighth Circuit's remand of Petitioner's illegal sentence was permitted under Rule 52(b) because courts have the authority to notice plain errors *sua sponte*.[21]

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[21] Contrary to NACDL's suggestion, *see* NACDL Br. 10-12, the district court's sentencing error has not been waived by the government and is still remediable under Rule 52(b). As the Court explained in *Olano*, "waiver" in the context of plain error review means that there is no legal error to be corrected, *i.e.*, when a party consents to a particular course of proceedings, the party's rights are not violated, and there is no legal error. *See* 507 U.S. at 732-33 ("Deviation from a legal rule is 'error' unless the rule has been waived."). In this case, legal error did occur because the district court imposed a plainly illegal sentence over the explicit objection of the government. *See* J.A. 49-50 ("The law is clear on this issue, and the appropriate sentence is . . . twenty-five years, consecutive, for Count 10."); *id*. 62-63 ("In order to preserve any potential appeal, I would simply object to that finding."). Thus, the only question under Rule 52(b) is whether the district court's error affected substantial rights and seriously affected the fairness, integrity or public reputation of judicial proceedings.

Moreover, because Rule 52(b) on its face authorizes courts to correct plain errors *sua sponte*, it is of no moment that the government did not request on appeal that Petitioner's unlawful sentence be vacated. And even if a party's knowing decision not to appeal a legal error could trump a court's power to correct plain legal errors (including errors preserved in the district court), it is unclear whether the government here intentionally relinquished the right to cross-appeal or whether it

This Court has previously made clear that, although parties ordinarily bring plain errors to the attention of an appellate court, there is no requirement that courts turn a blind eye to plain errors not raised by the parties. See *Silber* v. *United States*, 370 U.S. 717, 717-18 (1962) (per curiam) ("While ordinarily we do not take note of errors not called to the attention of the Court of Appeals nor properly raised here, that rule is not without exception. The Court has the power to notice a plain error though it is not assigned or specified." (internal quotation marks omitted)); *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936).

Likewise, Rule 52(b) expressly provides that a court may consider a plain error "even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b); see 3B Wright et al., *supra* § 856, at 513 (3d ed. 2004) ("Ordinarily Rule 52(b) is invoked by counsel who, in preparing an appeal, discover what they consider to be an error to which no objection was taken below. The rule is not so limited, however, and the appellate court may take notice of an error on its own motion though it is never put forward by counsel."). Rule 52(b) is thus in accord with this Court's own plain error rule. See Sup. Ct. R. 24.1(a) ("At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.").

In arguing that plain errors affecting the public's substantial rights should be corrected only if a cross-appeal is filed, the government contends that "the

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inadvertently failed to file a timely protective notice of cross-appeal. *See Olano*, 507 U.S. at 733 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)).

government is fully capable of determining whether to seek to vindicate its rights." Gov't Br. 47. Such an argument, however, overlooks the fact that Rule 52(b) exists precisely because even plain errors may sometimes escape the attention of the parties or go unnoticed until after the time to file a notice of cross-appeal has elapsed. If the Court were to adopt the government's modification of Rule 52(b), courts would be wholly unable to correct plain errors (no matter how egregious) that are first discovered by the government during briefing or in preparation for oral argument, or that are overlooked by the government altogether, unless the government coincidentally had filed a cross-appeal on other grounds. Adopting the government's construction of Rule 52(b) would also suggest that this Court's discretion to correct plain errors under Supreme Court Rule 24.1 similarly should be restrained.

Preserving the power of courts to correct plain errors *sua sponte* is especially important in cases (such as this one) in which the government has confessed error. Because the ordinary assurances provided by the adversarial process do not apply, the authority of courts to notice and correct plain errors takes on heightened importance. See *Young*, 315 U.S. at 258-59 ("[O]ur judicial obligations compel us to examine independently the errors confessed. . . . [T]he proper administration of the criminal law cannot be left merely to the stipulation of parties." (citation omitted)). Thus, the Eighth Circuit appropriately exercised its authority to correct a plainly illegal sentence that contravened the considered judgment of Congress and this Court's binding precedent.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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ADDENDUM A

18 U.S.C. § 3742. Review of a sentence

(a) Appeal by a defendant.—A defendant 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; or

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

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

(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.

(c) Plea agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether 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 outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

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

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such

instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Sentencing upon remand.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) Application to a sentence by a magistrate judge.—An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) Guideline not expressed as a range.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) Definitions.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

ADDENDUM B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPELLATE CASE NO. 06-1365

UNITED STATES OF AMERICA,

Appellee,

vs.

MICHAEL JASON GREENLAW,

Appellant.

BRIEF OF APPELLANT, Michael Jason Greenlaw

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* * * *

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN DETERMINING APPELLANT'S SENTENCE, AND THE IMPOSED SENTENCE OF 442 MONTHS WAS EXCESSIVE IN LIGHT OF THE FACTORS ENUMERATED IN 18 U.S.C. SECTION 3553(A) AND THUS UNREASONABLE.

A. *Standard of Review*

This Court examines *de novo* whether the district court correctly interpreted and applied the guidelines. *United States v. Guy,* 340 F.3d 655, 658 (8th Cir.2003). The Court reviews findings of fact for clear error. *See United States v. Killgo*, 397 F.3d 628, 631 (8th Cir. 2005). Finally, the Court reviews a district court's decision to depart from the appropriate guidelines range for abuse of discretion. *See United States v. Pizano*, 403 F.3d 991 (8th Cir. 2005). If the sentence was imposed as the result of an incorrect application of the guidelines, this Court will remand for resentencing as required by 18 U.S.C. § 3742(f)(1) without reaching the reasonableness of the resulting sentence in light of § 3553(a). In *United States v. Booker*, 125 S.Ct. 738, 769, the Court indicated that the standard of review for a sentence is for reasonableness.

B. *The District Court Abused Its Discretion and Also Erred By Failing to Employ a Criminal History Category of II Instead of a Criminal History Category of III.*

The federal sentencing guidelines provide for a downward departure of the criminal history score in certain situations. *See United States Sentencing Guidelines Section 4A1.3 (b) (1).* Specifically, "[I]f

reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted." *USSG section 4A1.3 (b) (1).*

In determining whether a downward departure is justified under 4A1.3, the court must consider the historical facts of a defendant's career, including his age when he committed the offenses, the proximity in time of earlier offenses to the current one, and the state courts' handling of sentencing as well as the length of time the defendant actually served. *See United States v. Senior*, 935 F.2d 149, 151 (8th Cir. 1991).

In the instant case, the presentence investigation report (hereinafter "PSR") determined that Mr. Greenlaw had a total of five criminal history points placing him in a Category III for criminal history. However, one of those convictions was for an offense committed when Mr. Greenlaw was 18 years old; over 10 years prior to his age at the time of the instant sentencing. Further, although the instant allegations involved conduct ranging from 1996 to 2003, Mr. Greenlaw has been incarcerated, as the result of a state conviction and pretrial federal detention, since July 12, 2000. Mr. Greenlaw was sentenced to 60 months in a Minnesota Correctional Facility, and served the majority of that time in state prison before being brought to face federal charges.

Given the above factors, the district court should have granted a downward departure of Mr. Greenlaw's criminal history to category II pursuant to USSG section 4A1.3. By failing to do so, the district court abused its discretion.

C. *The District Court Abused Its Discretion By Imposing a Sentence that is Unreasonable in light of the Considerations in 18 U.S.C. Section 3553(a).*

The Supreme Court ruled that its Sixth Amendment holding *in Blakely v. Washington,* 124 S.Ct. 2531 (2004) and *Apprendi v. New Jersey,* 530 U.S. 466 (2000) applies to the Federal Sentencing Guidelines. *United States v. Booker,* 125 S.Ct. at 756. Under *Booker,* sentencing courts must treat the guidelines as just one of a number of sentencing factors set forth in 18 U.S.C. 3553(a). The primary directive in Section 3553(a) is for sentencing courts to impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2. Section 3553(a) (2) provides, in pertinent part, that factors to be considered include:

(1) the nature and circumstances of the offense
(2) the need for the sentence imposed -
    (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
    (B) to afford adequate deterrence to criminal conduct;
    (C) to protect the public from further crimes of the defendant; and
    (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. Section 3553(a).

In the instant case, Appellant requested the District Court to impose a mandatory minimum sentence of 15 years, or rather the shortest sentence

possible upon consideration of Section 3553 (a). *See Position of Defendant With Respect to Sentencing Factors* at 8-10. The Court declined to honor this request by the defense and sentenced Appellant Greenlaw to a total of 442 months.

Part of this sentence included a consecutive sentence or 120 months for Count 10 of the indictment; the allegations from June 15, 1999 for which Appellant was convicted and incarcerated in state court prior to the federal indictment. *See Transcript of Sentencing Hearing dated January 19, 2006* at 9, 21. This decision was unreasonable not only because Mr. Greenlaw had already served a sentence for the same conduct alleged in Count 10, but also because the factors in Section 3553(a) support a lesser sentence.

Specifically, a 15 year sentence is sufficient to satisfy the purposes of sentencing. A 15 year sentence would reflect the seriousness of the offense of conviction and provide sufficient deterrence for future misconduct. The minimum 15 year sentence also is sufficient and not greater than is needed to provide Mr. Greenlaw with needed educational and vocational opportunities while incarcerated. 15 years is more than reasonable given Mr. Greenlaw's age and historical characteristics. Further, the PSR recommended that Mr. Greenlaw should be considered an average participant.

Given all of these factors, the Court abused its discretion by sentencing Mr. Greenlaw to 442 months. A lesser sentence as discussed above would comply with the statutory mandate of 18 USC Section 3553(a) because it is sufficient to comply with the purposes of that statutory provision.

CONCLUSION

For the reasons advanced in the arguments above, Appellant Michael Jason Greenlaw requests that this Court reverse his conviction and grant him a new trial, or alternatively, should the conviction be affirmed, remand the case for resentencing. Further, as this matter is a consolidated appeal following a joint trial, Appellant Greenlaw requests leave to adopt any arguments of his codefendant Laquan Carter that are raised on appeal and were preserved on the record below.

Respectfully submitted,

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