No. 07-330

IN THE
Supreme Court of the United States

MICHAEL J. GREENLAW,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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The National Association of Criminal Defense Lawyers ("NACDL") files this brief as amicus curiae in support of petitioner with the written consent of the parties.[1]

INTEREST OF *AMICUS CURIAE*

NACDL is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs on a broad range of subjects in this Court and other courts, including briefs in previous cases involving sentencing issues. *See, e.g.*, *Burgess v. United States*, No. 06-11429 (to be argued March 24, 2008); *Begay v. United States,* No. 06-11543 (argued Jan. 15, 2008).

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[1] Letters of consent have been filed with the Clerk. No party or counsel for a party to this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Petitioner was convicted of drug and firearm-related crimes, and the district court imposed a sentence of 442 months' imprisonment. Petr. Br. 2-3. The Government had urged a sentence 15 years longer under 18 U.S.C. § 924(c)(1), but the district court expressly rejected the Government's argument and imposed the lesser sentence. *Id.* at 3. The Government not only declined to appeal the sentence, but answered petitioner's own challenge to the sentence on appeal by arguing that the district court's § 924(c) calculation was "not unreasonable." JA86. Despite the lack of any appeal by the Government, the Eighth Circuit *sua sponte* increased petitioner's sentence by 15 years, adopting the very argument rejected by the district court and left unappealed by the Government. Pet. App. 9a-10a.

The Eighth Circuit's decision to increase petitioner's sentence *sua sponte* was wrong and should be reversed. Petitioner describes as "inveterate and certain," and possibly jurisdictional, the rule that an appellate court cannot alter a judgment to benefit a non-appealing party. NACDL does not address the status or nature of the rule generally, but instead submits that the question in this case is best answered by principles – including separation of powers considerations and due process concerns – that apply uniquely to an appellate court's *increase* of a sentence unchallenged by the Government. As elaborated below, this Court can and should correct the Eighth Circuit's error here without casting doubt on the authority of an appellate court to decrease a sentence that exceeds the period authorized by Con-

gress when a defendant fails to challenge that sentence on appeal.

ARGUMENT

I. SEPARATION OF POWERS PRINCIPLES PROHIBIT APPELLATE COURTS FROM INCREASING CRIMINAL SENTENCES *SUA SPONTE*

The authority of an appellate court to increase a criminal sentence *sua sponte* is controlled – and precluded – by policy judgments exercised by both Congress and the Executive Branch. Congress has always controlled the extent to which the prosecution can appeal criminal cases, if at all, and only recently authorized general sentencing appeals, subject to the Solicitor General's specific determination that an appeal is warranted. When a federal appellate court decides on its own that a criminal sentence should be increased, it is overriding the Executive Branch's judgment that the sentence should not be challenged despite an arguable error, as well as the Legislative Branch's judgment that decisions about sentencing appeals should be left to the discretion of senior Executive Branch judicial officers.

A. Congress Has Historically Limited Criminal Appeals By Government

Congress has long controlled – and strictly limited – the Government's right to appeal any issue in any criminal case. *Carroll v. United States*, 354 U.S. 394, 400-01 (1957). Congress did not authorize the Government to appeal criminal cases at all until 1907. *Id.* at 401 (citing Act of Mar. 2, 1907, ch. 2564, 34 Stat. 1246). The history of congressional restriction shows that "appeals by the Government in

criminal cases are something unusual, exceptional, not favored." *Id.* at 400.

The history also shows that the judgment about what matters generally may be challenged on appeal in criminal cases is one reserved for Congress in the first instance. It is "the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." *Id.* at 408. Accordingly, regulation of "discretionary limitation of the right to take the appeal" can come "only through legislative resolution." *Id.* at 408. In addition to respecting Congress's policy and constitutional prerogatives, the principle of narrowly construing government criminal appeal rights reflects "a concern that individuals should be free from the harassment and vexation of unbounded litigation by the sovereign," and helps safeguard "the constitutional ban against double jeopardy." *Arizona v. Manypenny*, 451 U.S. 232, 246 (1981). Accordingly, this Court has long adhered to a "presumption that the prosecution lacks appellate authority absent express legislative authorization to the contrary." *Id.*

In the Comprehensive Crime Control Act of 1984 ("CCCA"), Pub. L. No. 98-473, § 213(a), 98 Stat. 1837 (1985), Congress for the first time gave the Government general authority to pursue sentencing appeals, but it imposed an important condition: "the Attorney General or the Solicitor General" must "personally approve[] the filing of the notice of appeal." *Id.*, 98 Stat. at 2012 (codified as amended at

18 U.S.C. § 3742(b)).[2] Congress thus determined that, absent such personal authorization, sentencing errors – no matter how obvious or egregious – simply would not be brought to the attention of the appellate courts. The law *presupposed*, in other words, that certain errors would remain uncorrected. As the next section shows, that determination reflects an important policy judgment about prosecutorial discretion over sentencing appeals.

B. The Requirement Of Solicitor General Approval Of Sentencing Appeals Reflects An Important Policy Judgment About Discretion In Enforcement Of Sentencing Statutes

The CCCA's requirement that the Solicitor General personally approve every sentencing appeal reflects Congress's recognition that a sentencing appeal, just like a charging decision, may constitute a significant policy determination implicating more than just the facts and circumstances of the individual case. As a general matter, Congress expected that the Solicitor General would enforce the basic policy of minimizing burdensome appellate litigation, and therefore approve sentencing appeals selectively. *See* S. Rep. No. 98-225, at 154 (1983), *re-*

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[2] The Attorney General has delegated to the Solicitor General the authority to authorize appeals. *See* 28 C.F.R. § 0.20(b) (2007). The statute was amended in 1990 to allow a deputy solicitor general designated by the Solicitor General to approve an appeal, and to require such approval after the filing of a notice of appeal for the Government to "further prosecute such appeal." Crime Control Act of 1990, Pub. L. No. 101-647, § 3501, 104 Stat. 4789, 4921.

printed in 1984 U.S.C.C.A.N. 3182, 3337 (Solicitor General approval would "assure that such appeals are not routinely filed for every sentence below the guidelines"). More significantly, the Solicitor General approval requirement ensures that each sentencing appeal decision is made with an eye to broader law enforcement objectives. As then-Judge Kennedy explained with respect to criminal appeals generally, "[i]n reaching its decision whether or not to appeal, the government must be concerned . . . with the consistency of its positions and the future impact of the case." *United States v. Avendano-Camacho*, 786 F.2d 1392, 1394 (9th Cir. 1986). The same principle applies equally to sentencing appeals: the Solicitor General selects which sentences to appeal based not only on the merits of a case, but also in accordance with statutory and executive law enforcement policies implicated in sentencing. *See United States v. Gonzalez*, 970 F.2d 1095, 1102 (2d Cir. 1992) ("[C]entralized decisionmakers screen proposed Government appeals so that the appellate courts' attention will be focused on those sentences for which review is deemed crucial to the proper functioning of the sentencing guidelines."); *United States v. Long*, 911 F.2d 1482, 1484 (11th Cir. 1990) ("[T]he Justice Department's present procedures ensure that proposed [sentencing] appeals will be reviewed for consistency with Congress's policy directives.").

This Court has long recognized the important role played by the Solicitor General in selecting cases to appeal based in part on Executive Branch policy objectives. *See, e.g.*, *United States v. Mendoza*, 464 U.S. 154, 161 (1984) ("It would be idle to pretend

that the conduct of government litigation in all its myriad features . . . is a wholly mechanical procedure which involves no policy choices whatever."); *Andres v. United States*, 333 U.S. 740, 764 (1948) (Frankfurter, J., concurring) (approving the Solicitor General's "comprehensive view in determining when certiorari should be sought" and when, for "reasons unrelated to the merits of a decision, review ought not be sought"). Just as the centralization of the decision whether to seek certiorari endows the Solicitor General with the ability to coordinate the Government's litigating position and to speak for the Government "with one voice," *United States v. Providence Journal Co.*, 485 U.S. 693, 706 (1988), the personal involvement of the Solicitor General in pursuing sentencing appeals "focus[es] the government's attention on the most important sentencing issues, prevent[s] the government from taking inconsistent positions, and limit[s] the possible proliferation of appeals," *United States v. Ruiz-Alonso*, 397 F.3d 815, 819 (9th Cir. 2005).

Because many factors unrelated to the merits of a case may inform which sentences the Government chooses to appeal, Congress necessarily understood that requiring the personal authorization of the Solicitor General would leave some improperly lenient sentences in place. *Cf. Providence Journal*, 485 U.S. at 702 n.7 (explaining that, with respect to the decision whether to seek certiorari, it is necessary to "rel[y] on the Solicitor General to exercise . . . independent judgment and to decline to authorize petitions for review in this Court in the majority of the cases the Government has lost"). Congress's requirement that the Solicitor General screen sentenc-

ing appeals reflects a judgment that some degree of error must be tolerated in order to advance a coordinated appeals process.

In the foregoing respects, the decision whether to appeal a criminal sentence is not materially different from the decision whether to bring a criminal case *ab initio* – a decision that has been deemed the subject of exclusive Executive Branch discretion. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996). "In the ordinary case '. . . the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion.'" *Id.* at 464 (quoting *Bordenkircher v. Hayes,* 434 U.S. 357, 364 (1978)); *see also United States v. Nixon*, 418 U.S. 683, 694-95 (1974) ("Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government."). As Judge Kozinski has explained: "Second-guessing the exercise of prosecutorial discretion reflects a fundamental disregard for the principle of separation of powers. An opinion of this court is not a platform from which individual judges should express their personal views about the wisdom of . . . enforcement efforts." *United States v. Mussari*, 168 F.3d 1141, 1142 (9th Cir. 1999) (Kozinski, J., dissenting from denial of rehearing en banc); *see also United States v. Redondo-Lemos,* 955 F.2d 1296, 1299-1300 (9th Cir. 1992) ("Prosecutorial charging and plea bargaining decisions are particularly ill-suited for broad judicial oversight. . . . Such judicial entanglement in the core decisions of another branch of government – especially as to those bearing directly and substantially on matters liti-

gated in federal court – is inconsistent with the division of responsibilities assigned to each branch by the Constitution.").

This principle applies equally to prosecutorial decisions affecting sentencing. *See*, *e.g.*, *In re Vasquez-Ramirez*, 443 F.3d 692 (9th Cir. 2006). In *Vasquez-Ramirez*, the district court refused to accept a defendant's guilty plea on the ground that the plea limited the court's ability to impose a sentence that was adequate in light of the defendant's criminal history. *Id.* at 697. The Ninth Circuit issued a writ of *mandamus* to force the district court to accept the plea. *Id.* at 701. The court of appeals applied the rule that, while a district court generally has sentencing discretion with respect to a charge brought before it, the court's discretion is "cabined . . . by the prosecutor's decision regarding which charges to pursue," a "strictly executive" decision in which a court "has no constitutional role." *Id.* at 698.

The same rule must apply here. By express statutory design, a sentencing appeal decision is an executive policy judgment akin to a charging decision. Accordingly, an appellate court has no more discretion to increase a sentence the Government has chosen not to appeal than a district court has to impose a sentence for a crime the Government has chosen not to charge. Either court's discretion is limited solely to the matters the Government has elected to put before it, in the exercise of its congressionally mandated law enforcement authority. *Cf. Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but es-

sentially as arbiters of legal questions presented and argued by the parties before them."). To increase a sentence the Government has chosen not to challenge on appeal is to interfere with an exercise of prosecutorial discretion, which is beyond the power of any Article III court.

C. The Government's Decision To Forgo A Challenge To A Sentence On Appeal Is An Affirmative Act Of Discretion Distinct From Forfeiture

Federal Rule of Criminal Procedure 52(b) – which allows appellate courts to afford relief for "plain error[s]" affecting "substantial rights" – does not strictly govern this case because that rule, by its terms, applies when a party brings to the appellate court's attention an error that was *not* challenged in the district court. Here the situation is the opposite: the Government did raise its sentencing argument below, but affirmatively elected not to challenge the district court's sentencing error on appeal. The question here is not whether the trial court committed "plain error" under Rule 52(b) – it is whether the appellate court has authority to correct a properly-noticed error below that the Government chose not to challenge on appeal. Rule 52(b) does not answer that question, but certain principles embodied in the Rule – specifically, the distinction between "waiver" and "forfeiture" – do provide helpful guidance.

Waiver and forfeiture under Rule 52(b) are different acts with different consequences. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v.*

Olano, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Errors in criminal cases that are merely forfeited are reviewable for plain error pursuant to Rule 52(b), but errors that are affirmatively waived are *not* reviewable under Rule 52(b). *See id.* at 733-34; *accord United States v. Walker*, 237 F.3d 845, 851 (7th Cir. 2001) ("Waiver precludes appellate review."). In other words, a court of appeals has discretion to correct errors involving "an accidental or negligent omission (or an apparently inadvertent failure to assert a right in a timely fashion)," but not those errors that are "manifestation[s] of an intentional choice not to assert the right." *United States v. Cooper*, 243 F.3d 411, 416 (7th Cir. 2001).

Waiver can be inferred from the circumstances, so long as they show that the party knowingly relinquished a legal right. *See, e.g.*, *United States v. Magouirk*, 468 F.3d 943, 947 (6th Cir. 2006); *see also United States v. Avants*, 278 F.3d 510, 519 (5th Cir. 2002) (looking to "evidence of the government's intent" to determine whether the government waived an issue). Courts of appeals have often refused to review sentencing determinations for plain error when a party declines to press an argument for what appear to be tactical reasons, *see, e.g., United States v. Quinones*, 511 F.3d 289, 321 (2d Cir. 2007) ("such inaction constitutes a true waiver which will negate even plain error review" (quotation omitted)), or when a party withdraws an objection knowing that the district court is poised to make an error, *see, e.g., United States v. Masters*, 118 F.3d 1524, 1526 (11th Cir. 1997) ("The plain error doctrine is inapplicable in [this] situation.").

A decision by the Government not to appeal a criminal sentence, despite its preservation of an objection below, is clearly a waiver of its right to appeal, not a forfeiture. Given the elaborate process Congress imposed on Government sentencing appeals, there can be nothing "accidental or negligent" (*Cooper*, 243 F.3d at 416) when the Government fails to appeal a sentence that is improperly lenient. Indeed, as noted, Congress necessarily *assumed* some such sentences would go unchallenged. To deem those instances forfeitures and thereby allow discretionary plain-error review would negate Congress's decision to entrust the executive – not the judiciary – with the discretion to determine which improperly low sentences should stand uncorrected.

Because the Government's failure to appeal an erroneous sentence is necessarily a waiver of its right to appeal, rather than a forfeiture, the principles applied under Rule 52(b) demonstrate that the asserted error is unreviewable on appeal.

II. DUE PROCESS CONCERNS ALSO WEIGH STRONGLY AGAINST INCREASING SENTENCES *SUA SPONTE*

An appellate court's power to increase a sentence *sua sponte* also must be constrained by concerns for the due process rights of the defendant whose sentence is suddenly, and surprisingly, increased. Defendants of course have substantial due process interests in the fairness of the procedures used to determine the length of time for which their liberty is deprived. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 469, 490 (2000) (holding that the Due Process Clause of the Fourteenth Amendment requires jury

determinations of certain facts that would increase a defendant's sentence); *Alabama v. Smith*, 490 U.S. 794, 798-99 (1989) (stating that the Due Process Clause prohibits heightened sentences that result from judicial vindictiveness upon resentencing). Allowing appellate courts to increase sentences *sua sponte* adversely affects those interests in several ways.

First, a *sua sponte* sentence increase denies the defendant his or her right to fair notice. Notice of the possibility of a sentence increase is of special import to criminal defendants, as evidenced by the various notice-related rights provided expressly in the Federal Rules of Criminal Procedure. *See, e.g.*, Fed. R. Crim. P. 32(f) (opportunity for defendant to object to presentence report); *id.* R. 32(h) (court must give notice of possible departure from the Federal Sentencing Guidelines on grounds not previously identified); *id.* R. 43(a)(3) (requiring the defendant's presence at sentencing). And a central purpose of the cross-appeal requirement (and the basic notice-of-appeal requirement) is to provide the adverse party notice that his or her rights are not secure, but instead will be challenged on appeal. *See Smith v. Barry*, 502 U.S. 244, 248 (1992) ("The purpose of [the notice of appeal] requirement is to ensure that the filing provides sufficient notice to other parties and the courts."); *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943) ("The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's de-

mands."). Allowing appellate courts to increase sentences even absent any sentencing appeal by the Government by definition denies defendants the notice to which they are entitled.

Second, the possibility that a defendant's sentence may increase if the defendant exercises his right to appeal – even if the Government does not – imposes an unjustifiable burden on that right. This Court has emphasized "the importance of appellate review to a correct adjudication of guilt or innocence." *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion); *see id.* at 19 (those "den[ied] adequate review . . . may lose their life, liberty or property because of unjust convictions which appellate courts would set aside."). Once a defendant is entitled to this right to appeal, he cannot be penalized for exercising it. "A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) (quotation omitted); *see United States v. Medley*, 476 F.3d 835, 841 (10th Cir. 2007) (McConnell, J., concurring) ("Appeals serve an important function, and we should not create disincentives for criminal defendants to appeal when they have meritorious grounds for doing so."). As Judge McConnell has elaborated, a regime that puts a "'tax' on appeals," wherein defendants must subject themselves to a distinct probability of having their sentences enhanced if they exercise their appellate rights, presents "troubling questions of fairness and possibly even of due process." *Medley*, 476 F.3d at 840.

Congress, in fact, recognized precisely this concern in enacting the CCCA, when it *rejected* a proposal to expressly allow appellate courts to increase as well as decrease sentences upon appeal by the defendant alone. Such a rule, the Act's drafters explained, would "place[] an undesirable strain on the defendant's right to seek sentence review." S. Rep. 98-225, at 151 n.370, *reprinted in* 1984 U.S.C.C.A.N. at 3334; *see United States v. Jones*, 460 F.3d 191, 199 (2d Cir. 2006) (Walker, C.J., dissenting) ("Congress sought to protect the complaining party from receiving a more adverse sentence following an appeal. In the absence of this protective scheme, a court of appeals would be able to set aside a sentence as unreasonably low even though it was the defendant, not the government, that chose to pursue an appeal from that sentence.").

Third, increasing a sentence *sua sponte* on appeal compromises the defendant's interest in finality reflected in the Double Jeopardy Clause. *See United States v. DiFrancesco*, 449 U.S. 117, 136 (1980) (defendant may have an expectation of finality implicating the double jeopardy bar when "the time to appeal has expired"); *Williams v. Travis*, 143 F.3d 98, 99 (2d Cir. 1998) (describing the "government's ability to appeal the defendant's sentence" as "an important factor bearing upon a defendant's expectation of finality"). When the government repeatedly and unmistakably indicates its intention not to challenge an aspect of the district court's sentence on appeal, the defendant's expectation of finality with respect to that aspect is particularly well founded. The possibility of *sua sponte* correction of a sentence in such circumstances intolerably compels the defendant "to

live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187-88 (1957). For these reasons, the interests underlying the Double Jeopardy Clause "generally prohibit[] courts from enhancing a defendant's sentence once the defendant has developed a legitimate 'expectation of finality in the original sentence.'" *United States v. Triestman*, 178 F.3d 624, 640 (2d Cir. 1999) (quoting *DiFrancesco*, 449 U.S. at 139).

III. NEITHER SEPARATION OF POWERS PRINCIPLES NOR DUE PROCESS CONCERNS CONSTRAIN THE AUTHORITY OF APPELLATE COURTS TO DECREASE SENTENCES *SUA SPONTE*

The considerations discussed in Parts I & II should preclude appellate courts from increasing a criminal sentence when the Government has elected not to challenge the sentence on appeal. They do not, however, operate the same way in the converse situation, i.e., where the defendant has failed to appeal a sentence that is unlawfully long. This Court has long recognized the general authority of appellate courts to correct errors not challenged on appeal that seriously injure a defendant's rights, including errors that result in unlawfully long sentences. *See Silber v. United States*, 370 U.S. 717, 717-18 (1962) ("in exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings"); *Bartone v. United States*, 375 U.S. 52, 53 (1963) ("This error, in enlarging the sentence in the absence of petitioner,

was so plain . . . that it should have been dealt with by the Court of Appeals, even though it had not been alleged as error."); *accord United States v. Graham*, 275 F.3d 490, 521-22 (6th Cir. 2001). Nothing about the result in this case should cast doubt on that rule.

To start, no separation of powers principles are implicated when a defendant fails to appeal an unlawful sentence. The "government's litigation conduct in a case is apt to differ from that of a private litigant," *Mendoza*, 464 U.S. at 161, not least because, as discussed above, the Government makes appeal decisions in part on the basis of various policy objectives that are of no relevance to a defendant's appeal judgments, *see Avendano-Camacho*, 786 F.2d at 1394 (Government is concerned with consistency and coordination, "considerations that do not weigh as heavily, if at all, in the decision of the defendant"). By contrast, a criminal defendant "generally does not forego an appeal if he believes that he can prevail." *Mendoza*, 464 U.S. at 161. Although criminal defendants generally seek to raise whatever arguments they believe will give them relief on appeal, they are constrained by numerous factors that bear no resemblance to the discretionary judgments that inform Government appeals: word limits and time constraints force defense counsel to make selective judgments about which issues to pursue (and sentencing issues may be secondary when compared with issues that could provide complete relief from judgment); scarce resources may limit the ability to invest in researching and identifying potential errors; and counsel may have less experience than sophisticated Government adversaries in identifying the issues worthy of presentation in a space-limited

appellate brief. For these reasons, a defendant's failure to challenge a sentence ordinarily will be a forfeiture rather than a waiver, and thus should be treated differently from the Government's failure, which is a waiver essentially by definition, as explained above. In short, even when a defendant has not raised a sentencing error on appeal for whatever reason, decreasing an unlawful sentence *sua sponte* will almost certainly be justified to protect the defendant's constitutional liberty interest, and will not contravene any exercise of congressionally-mandated law enforcement discretion.

The Government likewise can assert no due process harms to itself when an appellate court decreases a sentence *sua sponte*. Whatever "rights" the Government generally possesses as a party-litigant, they are not rights of a constitutional dimension comparable to the rights affected by a *sua sponte* sentence increase, i.e., the right to fair notice, to an unencumbered appeal, and to finality. *See supra* Part II. And while the Government has no cognizable due process right in the length of the defendant's sentence, a defendant assuredly does have a due process right – of the most fundamental order – not to be imprisoned for longer than the law allows.

Finally, it bears emphasis that criminal law and procedure generally reflects numerous asymmetries designed to work to the benefit of defendants but not the Government. The Rule of Lenity, for example, requires that ambiguities in criminal laws be construed in favor of criminal defendants, *see, e.g.*, *Hughey v. United States*, 495 U.S. 411, 422 (1990), and applies to "answer questions about the severity of sentencing," *United States v. R.L.C.*, 503 U.S. 291,

305 (1992) (plurality opinion). As described earlier, the right to appeal itself is asymmetrical – all jurisdictions permit criminal defendants to appeal convictions, *see* Joshua Dressler, Understanding Criminal Procedure § 1.03[C][9] (2d ed. 1997), but the Double Jeopardy Clause prohibits Government appeals when a defendant is acquitted, *see Kepner v. United States*, 195 U.S. 100, 133 (1904). The "reasonable doubt" standard of proof influences the "relative frequency" of "two types of erroneous outcomes" – either that guilty persons will be found innocent, or that innocent persons will be convicted – and reflects "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring). The Due Process Clause requires the Government – but not defendants – to disclose all potentially exculpatory evidence material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

As these asymmetries and others demonstrate, there would be nothing unusual about applying different standards to the Government and to defendants in this context. To protect a defendant's fundamental liberty interest, appellate courts generally *must* decrease an illegally long sentence, even when the defendant has, for whatever reason, failed to appeal the sentence. But to protect important separation of powers principles, appellate courts should *never* increase a criminal sentence – no matter how contrary to the statute that sentence may be – when the Government exercises its discretion not to appeal the sentence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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