No. 07-330

In the Supreme Court of the United States

MICHAEL J. GREENLAW, AKA MIKEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
DEANNE E. MAYNARD
Assistant to the Solicitor General
JEFFREY P. SINGDAHLSEN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, where petitioner appealed his convictions and sentence as unreasonably long, but the government did not cross-appeal, the court of appeals erred when, after rejecting petitioner's arguments, it *sua sponte* vacated the judgment and remanded to the district court with directions to increase the length of petitioner's sentence.

TABLE OF CONTENTS

Page

Opinion Below 1
Jurisdiction 1
Statutory provisions and federal rules involved 2
Statement 2
Summary of Argument 8
Argument:
The court of appeals erred in *sua sponte* ordering the district court to increase petitioner's sentence 11
I. The court of appeals lacked jurisdiction to order an increase in the sentence in the absence of a notice of appeal by the government under Section 3742 11
A. The jurisdiction of the courts of appeals is limited to that conferred by statute 11
B. Congress enacted Section 3742 to provide appellate jurisdiction over sentencing appeals in criminal cases in certain limited situations 13
C. Congress conditioned appellate jurisdiction to correct errors in criminal sentences on the filing of a notice of appeal by the party aggrieved by the error 17
D. The rule-based time limitations for the filing of a notice of appeal and cross-appeal are not jurisdictional in criminal sentencing appeals 24

Table of contents—Continued: Page

E. The Court need not decide the distinct question whether a cross-appeal is necessary to confer jurisdiction under 28 U.S.C. 1291 to award relief in favor of an appellee because appellate jurisdiction here is governed and limited by 18 U.S.C. 3742 26

II. Even if the filing of a notice of appeal by the government is not a jurisdictional prerequisite in a sentencing appeal, the filing of a timely notice of cross-appeal is a mandatory claim-processing rule that must be enforced when it is properly invoked 29

A. Both the need for a cross-appeal and the deadlines for filing one are mandatory requirements 29

B. Under this Court's cases, both the filing of a cross-appeal and the filing of a timely cross-appeal are inflexible rules that must be enforced if properly asserted 34

C. Petitioner is entitled to application of the cross-appeal requirement 37

D. There is no sound basis for recognizing an exception to the cross-appeal requirement in this case 39

1. Federal Rule of Criminal Procedure 52(b) does not create an exception to the cross-appeal requirement 39

2. Sound policy reasons counsel against permitting district courts to increase sentences absent a government cross-appeal 42

Table of contents—Continued: Page

3. Although the government has "substantial rights" under Rule 52(b), the decision whether to vindicate those rights belongs to the government 44
Conclusion 48
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Alexander v. *Cosden Pipe Line Co.*, 290 U.S. 484 (1934) 31
Andres v. *United States*, 333 U.S. 740 (1948) 43
Bowles v. *Russell*, 127 S. Ct. 2360 (2007) 11, 12, 13, 26, 41
Carlisle v. *United States*, 517 U.S. 416 (1996) 34, 35, 36
Carroll v. *United States*, 354 U.S. 394 (1957) 13, 14, 15, 18, 21
Castro v. *United States,* 540 U.S. 375 (2003) 40
Chittenden v. *Brewster,* 69 U.S. (2 Wall.) 191 (1865) 31
Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) 14
Day v. *McDonough,* 547 U.S. 198 (2006) 40, 41
Deal v. *United States*, 508 U.S. 129 (1993) 4, 6
Dorszynski v. *United States*, 418 U.S. 424 (1974) 15
Eberhart v. *United States*, 546 U.S. 12 (2005) 12, 25, 35, 36, 37
El Paso Natural Gas Co. v. *Neztsosie*, 526 U.S. 473 (1999) ..... *passim*

Cases—Continued: Page

FEC v. *NRA Political Victory Fund*, 513 U.S. 88 (1994) 20, 43
Heckler v. *Chaney*, 470 U.S. 821 (1985) 42
John R. Sand & Gravel Co. v. *United States*, 128 S. Ct. 750 (2008) 12
Johnson v. *United States*, 520 U.S. 461 (1997) 47
Kline v. *Burke Constr. Co.*, 260 U.S. 226 (1922) 12
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 12, 24, 25, 36
Koon v. *United States*, 518 U.S. 81 (1996) 15, 16
Langnes v. *Green*, 282 U.S. 531 (1931) 32
Long Island Care at Home, Ltd. v. *Coke*, 127 S. Ct. 2339 (2007) 14
McDonough v. *Dannery*, 3 U.S. (3 Dall.) 188 (1796) 30, 32
Morley Constr. Co. v. *Maryland Cas. Co.*, 300 U.S. 185 (1937) 30, 31, 33, 36
Northwest Airlines, Inc. v. *County of Kent*, 510 U.S. 355 (1994) 31
Owen Equip. & Erection Co. v. *Kroger*, 437 U.S. 365 (1978) 24
Powerex Corp. v. *Reliant Energy Servs., Inc.*, 127 S. Ct. 2411 (2007) 44
Schacht v. *United States*, 398 U.S. 58 (1970) 41
Sheldon v. *Sill*, 49 U.S. (8 How.) 441 (1850) 12
Silber v. *United States*, 370 U.S. 717 (1962) 6, 41
Strunk v. *United States,* 412 U.S. 434 (1973) 39, 41
The Maria Martin, 79 U.S. (12 Wall.) 31 (1871) 32
United States v. *American Ry. Express Co.*, 265 U.S. 425 (1924) 31, 32

Cases—Continued: Page

United States v. *Barajas-Nunez*, 91 F.3d 826 (6th Cir. 1996) 45
United States v. *Barnett*, 410 F.3d 1048 (8th Cir. 2005) 45, 46
United States v. *Becker*, 929 F.2d 442 (9th Cir.), cert. denied, 502 U.S. 862 (1991) 22
United States v. *Bennett*, 363 F.3d 947 (9th Cir.), cert. denied, 543 U.S. 950 (2004) 23
United States v. *Booker*, 543 U.S. 220 (2005) 6, 17, 44
United States v. *Campbell*, 106 F.3d 64 (5th Cir. 1997) 23
United States v. *Castillo*, 386 F.3d 632 (5th Cir.), cert. denied, 543 U.S. 1029 (2004) 45, 46
United States v. *Clark*, 274 F.3d 1325 (11th Cir. 2001) 45
United States v. *Dickerson*, 381 F.3d 251 (3d Cir. 2004) 45
United States v. *Dickinson*, 213 U.S. 92 (1909) 15
United States v. *DiFrancesco*, 449 U.S. 117 (1980) 16
United States v. *Edelin*, 996 F.2d 1238 (D.C. Cir. 1993), cert. denied, 510 U.S. 1078 (1994) 45
United States v. *Filker*, 972 F.2d 240 (8th Cir. 1992) 46
United States v. *Garcia-Pillado*, 898 F.2d 36 (5th Cir. 1990) 46
United States v. *Garduño*, 506 F.3d 1287 (10th Cir. 2007) 26
United States v. *Gordon*, 291 F.3d 181 (2d Cir. 2002), cert. denied, 537 U.S. 1114 (2003) 45

Cases—Continued: Page

United States v. *Hamilton*, 46 F.3d 271 (3d Cir. 1995) 22
United States v. *Hicks*, 146 F.3d 1198 (10th Cir.), cert. denied, 525 U.S. 941 (1998) 23
United States v. *Horn*, 29 F.3d 754 (1st Cir. 1994) 14
United States v. *Jackson*, 207 F.3d 910 (7th Cir. 2000), vacated on other grounds, 531 U.S. 953 (2000) 46
United States v. *Mancari*, 914 F.2d 1014 (7th Cir. 1990), cert. denied, 499 U.S. 924 (1991) 23
United States v. *Marasco*, 487 F.3d 543 (8th Cir. 2007)) 22
United States v. *Margiotta*, 646 F.2d 729 (2d Cir. 1981) 22
United States v. *Martinez*, 496 F.3d 387 (5th Cir. 2007) 26
United States v. *Mendoza*, 464 U.S. 154 (1984) 43
United States v. *Mickelson*, 433 F.3d 1050 (8th Cir. 2006) 19
United States v. *Moyer*, 282 F.3d 1311 (10th Cir. 2002) 45
United States v. *Nixon*, 418 U.S. 683 (1974) 43
United States v. *Olano*, 507 U.S. 725 (1993) 44, 46
United States v. *Perkins*, 108 F.3d 512 (4th Cir. 1997) 45
United States v. *Pimienta-Redondo*, 874 F.2d 9 (1st Cir.), cert. denied, 493 U.S. 890 (1989) 23
United States v. *Pirani*, 406 F.3d 543 (8th Cir.), cert. denied, 546 U.S. 909 (2005) 7

Cases—Continued: Page

United States v. *Posters 'N' Things Ltd.*, 969 F.2d 652 (8th Cir. 1992), aff'd in different part, 511 U.S. 513 (1994) 46
United States v. *Providence Journal Co.*, 485 U.S. 693 (1988) 43
United States v. *Reed*, 167 F.3d 984 (6th Cir. 1999) 38
United States v. *Rivera*, 411 F.3d 864 (7th Cir.), cert. denied, 546 U.S. 966 (2005) 7, 38
United States v. *Robinson*, 361 U.S. 220 (1960) 35
United States v. *Rodriguez*, 938 F.2d 319 (1st Cir. 1991) 45
United States v. *Ruiz*, 536 U.S. 622 (2002) 9, 16, 17, 18, 29
United States v. *Sanges*, 144 U.S. 310 (1892) 13, 14, 21
United States v. *Scott*, 437 U.S. 82 (1978) 14, 21
United States v. *Sisson*, 399 U.S. 267 (1970) 14
United States v. *Smith*, 331 U.S. 469 (1947) 35, 36
United States v. *Townsend*, 178 F.3d 558 (D.C. Cir. 1999) 23
United States v. *Vasquez*, 85 F.3d 59 (2d Cir. 1996) 23
United States v. *Vieke*, 348 F.3d 811 (9th Cir. 2003) 45
United States v. *Wasman*, 468 U.S. 559 (1984) 23
United States v. *Zannino,* 895 F.2d 1 (1st Cir.), cert. denied, 494 U.S. 1082 (1990) 38

Constitution, statutes and rules:

U.S. Const.:
Art. II, § 3 43

Constitution, statutes and rules—Continued: Page

Art. III 12
Amend. V (Double Jeopardy Clause) 16
Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 828 13
Controlled Substances Act, Pub. L. No. 91-513, Tit. II, § 409(h), 84 Stat. 1268 (21 U.S.C. 849(h) (1970)) 16, 20
Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1001(a), 84 Stat. 948 15
84 Stat. 950 (18 U.S.C. 3576 (1970)) 15, 16, 20
Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Chap. II, 98 Stat. 1987:
§ 212(2), 98 Stat. 1987 ..... 15, 16
§ 213(a), 98 Stat. 2011 (18 U.S.C. 3742(b) (Supp. II 1984)) 16, 18
§ 219, 98 Stat. 2027 16
18 U.S.C. 924(c) (2000 & Supp. V 2005) 4, 5, 47
18 U.S.C. 924(c)(1) 2, 3, 4, 5
18 U.S.C. 924(c)(1)(A)(iii) 4
18 U.S.C. 924(c)(1)(C) 4, 7, 47
18 U.S.C. 924(c)(2) 4, 47
18 U.S.C. 924(*o*) 3
18 U.S.C. 1959(a)(3) 3
18 U.S.C. 1959(a)(6) 3
18 U.S.C. 3553(a) (2000 & Supp. V 2005) 23
18 U.S.C. 3575 (1970) 15
18 U.S.C. 3731 (1964 & Supp. V 1969) 14, 1a
18 U.S.C. 3731 (2000 & Supp. V 2005) 21, 22, 26
18 U.S.C. 3742 (2000 & Supp. V 2005) ..... *passim*

Statutes and rules—Continued: Page

18 U.S.C. 3742(a) 16, 17, 19, 20, 21
18 U.S.C. 3742(a)(1) 17, 18
18 U.S.C. 3742(a)(1)-(4) 16
18 U.S.C. 3742(b) ..... *passim*
18 U.S.C. 3742(b)(1) 17, 18
18 U.S.C. 3742(b)(1)-(4) 16
21 U.S.C. 846 3
28 U.S.C. 1291 ..... 13, 14, 19, 22, 26, 28, 8a
28 U.S.C. 1292(a)(1) 28
28 U.S.C. 2106 28
28 U.S.C. 2107 ..... 24, 25, 12a
28 U.S.C. 2107(a) 28
28 U.S.C. 2107(c) 12
28 U.S.C. 2255 23
Fed. R. App. P. :
Rule 4(a)(3) 33
Rule 4(b) 24
Rule 4(b)(1) 25, 36
Rule 4(b)(1)(B) 33
Rule 4(b)(4) 33, 36
Rule 26(b)(1) 33
Rule 28.1(b) 33
Fed. R. Bankr. P.:
Rule 4004 25
Rule 4004(a) 24
Fed. R. Crim. P.:
Rule 33 25

Rules—Continued: Page

Rule 33(b)(2) 25
Rule 52 ..... 44, 22a
Rule 52(a) 44, 45
Rule 52(b) ..... *passim*

Miscellaneous:

S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 16, 21, 42

In the Supreme Court of the United States

No. 07-330

MICHAEL J. GREENLAW, AKA MIKEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 481 F.3d 601.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2007. A petition for rehearing was denied on May 10, 2007 (Pet. App. 28a). On July 27, 2007, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including September 7, 2007, and the petition was filed on that date. The petition for a writ of certiorari was granted on January 4, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

The relevant statutory provisions and federal rules are reprinted in an appendix to this brief. App., *infra*, 1a-22a.

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of numerous drug and firearms offenses, including two separate violations of 18 U.S.C. 924(c)(1). The district court sentenced petitioner to a total of 442 months of imprisonment, to be followed by five years of supervised release. Petitioner appealed; the United States did not. The court of appeals rejected petitioner's claims, but vacated and remanded for imposition of a higher sentence, holding that the district court's imposition of a ten-year, rather than a 25-year, consecutive sentence for the second of petitioner's two Section 924(c)(1) convictions was erroneous. The court concluded that, despite the government's failure to cross-appeal, it should correct the error because the error seriously affected substantial rights of the government and the public. Pet. App. 1a-15a, 19a. On remand, the district court sentenced petitioner to 622 months of imprisonment, to be followed by five years of supervised release. J.A. 109-110.

1. Petitioner and others were members of a gang known as the "Family Mob," which operated as a cohesive drug trafficking organization that controlled the sale of crack cocaine in a neighborhood on the south side of Minneapolis. Pet. App. 2a-3a. From 1996 to 2003, the gang sold an estimated two to three kilograms of crack cocaine per week. *Id.* at 2a; J.A. 13, 27.

In connection with drug transactions, a member of the Family Mob "would carry a gun for security purposes." Pet. App. 2a. Members also hid firearms at various locations throughout their territory and relayed those locations to each other, so that all members would have ready access to a gun when needed. *Id*. at 3a. In addition to providing protection from robbery and other threats, the Family Mob used firearms (as well as violence and intimidation generally) to prevent rival dealers from moving into their territory. *Ibid.* As a result of the arrests and the execution of search warrants, the police recovered numerous weapons used by the Family Mob. See *id.* at 3a-4a.

2. On November 16, 2004, a federal grand jury in the District of Minnesota returned a sixth superseding indictment against petitioner and others. J.A. 13, 27-37. Petitioner was charged on eight of the ten counts in the indictment: conspiracy to distribute in excess of fifty grams of crack cocaine, in violation of 21 U.S.C. 846 (Count 1); conspiracy to possess firearms in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(*o*) (Count 2); carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (Count 4); conspiracy to commit a violent crime (assault with a dangerous weapon) in aid of racketeering, in violation of 18 U.S.C. 1959(a)(6) (Count 5); committing a violent crime (assault with a dangerous weapon) in aid of racketeering, in violation of 18 U.S.C. 1959(a)(3) (Counts 6 and 8); and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Counts 9 and 10). J.A. 27-36; see Pet. App. 4a.

Following a two-week trial (Pet. App. 4a), a jury found petitioner guilty on seven of the eight counts, in-

cluding two of the Section 924(c)(1) counts, Counts 4 and 10. The jury acquitted petitioner on the third Section 924(c)(1) count, Count 9. J.A. 38-45.

3. At sentencing, the government argued that the convictions on Counts 4 and 10 required mandatory consecutive sentences of five and 25 years, respectively, because Count 10 was "a second or subsequent conviction" under 18 U.S.C. 924(c)(1)(C) and (2). See J.A. 51-52, 61-62. The district court rejected the government's argument. The court held that Count 10 was not "a second or subsequent conviction" based on its view that a conviction could not be second or subsequent when the two violations of Section 924(c)(1) are "charged in the same indictment." J.A. 59, 61-62; Pet. App. 8a.[1] Because the jury had found that the firearm in Count 10 had been discharged, however, the court held that a ten-year consecutive sentence applied to that count under 18 U.S.C. 924(c)(1)(A)(iii). J.A. 59-60; see J.A. 44-45.

Based on those rulings, the court sentenced petitioner to a total of 442 months of imprisonment, to be followed by five years of supervised release. Pet. App. 18a-19a. Specifically, the court sentenced petitioner to 262 months on Count 1, 240 months on each of Counts 2, 6, and 8, and 36 months on Count 5, to be served concurrently with each other; 60 months on Count 4 (the first Section 924(c) conviction), to be served consecutively to

---

[1] At the time of sentencing, the government objected to the court's ruling. See J.A. 62-63. Government counsel was unable to call to mind, however, this Court's decision in *Deal* v. *United States*, 508 U.S. 129 (1993), see J.A. 61-63, which held that, when a defendant is charged with more than one Section 924(c) offense in the same indictment and found guilty of multiple such offenses in the same trial, all but the first Section 924(c) conviction are treated as a "second or subsequent conviction." See *Deal*, 508 U.S. at 132-137.

the total imposed on Counts 1, 2, 5, 6, and 8; and 120 months on Count 10 (the second Section 924(c) conviction), to be served consecutively to all other sentences. *Id*. at 18a.

4. Petitioner appealed, challenging both his convictions and his sentence. See Pet. App. 2a; J.A. 79. Petitioner contended that, instead of being sentenced to 442 months, he should have been sentenced to 15 years of imprisonment. After considering petitioner's claims, the court of appeals rejected them as without merit. See Pet. App. 4a-7a.

The government did not appeal or cross-appeal. Nor did the government request in briefing or at argument that the court vacate or increase petitioner's sentence based on any error by the district court. To the contrary, the government contended that the sentence should be affirmed. See J.A. 84-86. In response to petitioner's challenge to the reasonableness of his sentence, however, the government did note, *inter alia*, that Section 924(c)(1) provided for a 25-year, mandatory minimum, consecutive sentence on Count 10, rather than the ten-year sentence the district court imposed. J.A. 83, 85.[2]

---

[2] During oral argument, the court of appeals asked petitioner's counsel how petitioner avoided the 25-year mandatory minimum on Count 10. In so doing, however, the court noted that the government had not appealed the sentencing issue, and it elicited a concession from petitioner's counsel that the 442-month sentence was reasonable if the district court should have sentenced petitioner to a consecutive 25-year sentence on Count 10. In addressing the issue, government counsel noted that petitioner should have received a 25-year sentence on the count and that the government preserved that issue in the district court, but he noted that the government had not appealed the issue. Consistent with the government's brief, counsel argued that that fact supported the reasonableness of the district court's sentence and urged

Despite the government's failure to file a cross-appeal, the court of appeals *sua sponte* vacated petitioner's sentence and remanded with instructions that the district court impose a new sentence that would include the statutory minimum 25-year sentence for Count 10. Pet. App. 8a-10a, 15a. The court of appeals noted that, although the government had objected below to the district court's failure to apply Section 924(c)(1)(C) and (2), the United States had not appealed the district court's sentence. *Id.* at 9a. The court stated, however, that it had discretion to raise and correct the error *sua sponte* under Federal Rule of Criminal Procedure 52(b) and this Court's decision in *Silber* v. *United States*, 370 U.S. 717, 718 (1962) (per curiam). Pet. App. 9a-10a & n.5.

Applying plain-error analysis, the court concluded that the sentence was directly contrary to the Court's decision in *Deal* v. *United States*, 508 U.S. 129 (1993). Pet. App. 8a-9a (quoting *Deal*, 508 U.S. at 132) ("[I]n the context of § 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of final judgment of conviction."). Further, the court concluded that the district court's failure to apply the statutory penalty for a second or subsequent conviction affected the substantial rights of the government and the public, and seriously affected the fairness, integrity, and public reputation of judicial proceedings. *Id.* at 9a-10a.[3] The court therefore

---

the court to reject the petitioner's appellate arguments. See C.A. Oral Argument (Sept. 26, 2006) <http://www.ca8.uscourts.gov/oralargs/oaFrame.html> (Case No. 05-3391).

[3] The court of appeals held that the district court also had committed plain error in holding that under *United States* v. *Booker*, 543 U.S. 220 (2005), it could not make a fact-based adjustment under the Guidelines where there was no jury finding on the fact. Pet. App. 10a n.6. The

vacated the sentence and remanded for the district court "to impose the statutorily mandated consecutive minimum sentence of 25 years under Count 10." *Id.* at 15a.

5. Petitioner filed a petition for rehearing and rehearing en banc in which he argued that the court of appeals should not have corrected the district court's error. Petitioner's principal argument was that the error had not seriously affected the fairness, integrity, or public reputation of judicial proceedings, and so relief was not appropriate under the fourth prong of plain-error review. J.A. 90-91, 93-96. Petitioner also contended that the panel "could have, and should have, elected to take the same route" as the Seventh Circuit in *United States* v. *Rivera*, 411 F.3d 864, cert. denied, 546 U.S. 966 (2005), which reasoned that "'[b]y deciding not to take a cross-appeal, the United States ensured that [the defendant's] sentence cannot be increased.'" J.A. 95 (quoting *Rivera*, 411 F.3d at 867) (alteration in original). Accordingly, petitioner contended that, "[b]ecause the government did not raise an appeal or cross-appeal, [petitioner's] sentence should have been left alone." J.A. 95-96. The court of appeals denied the petition without calling for a response and without recorded dissent. Pet. App. 28a.

---

court of appeals, however, declined to correct that error. *Id.* at 10a-11a n.6. The court explained that it had corrected the Section 924(c)(1)(C) error "primarily because the error violates a Congressional mandate." *Id.* at 11a n.6. In contrast, because the Guidelines are advisory, "'the effect of the [Guidelines] error on the result in the district court is uncertain or indeterminate—[so] we would have to speculate' as to how the error affected the substantial rights of the parties." *Ibid.* (quoting *United States* v. *Pirani*, 406 F.3d 543, 553 (8th Cir.) (en banc), cert. denied, 546 U.S. 909 (2005)).

6. On August 28, 2007, the district court resentenced petitioner. The court imposed a 25-year consecutive sentence on Count 10 and left the sentences on the remaining counts unchanged. As a result, petitioner's total sentence was increased to 622 months of imprisonment, to be followed by five years of supervised release. See J.A. 103-104, 109-110. Neither party appealed that judgment.

SUMMARY OF ARGUMENT

I. Congress is constitutionally charged with defining the jurisdictional limits of the federal appellate courts. Congress can place limits not only on the general class of cases over which those courts have jurisdiction, but also when and under what conditions they can hear those cases. In Section 3742 of Title 18, Congress specifically defined and limited the jurisdiction of courts of appeals over sentencing errors in criminal cases. The text, structure, and history of Section 3742 compel the conclusion that the government's filing of a notice of appeal is a jurisdictional prerequisite for an appellate court to correct a sentencing error that aggrieves the government.

This Court has long recognized that courts of appeals lack jurisdiction over government appeals of final judgments in criminal cases absent statutory provisions that expressly grant that authority. The Court has also construed any such authority narrowly. Acting against this background understanding, Congress conferred appellate jurisdiction over sentencing errors in Section 3742, but only in certain limited circumstances. In particular, Congress separately delineated which types of sentencing errors defendants could appeal and which types of errors the government could appeal. This Court has

held that this delineation of claims places a jurisdictional limitation on appellate jurisdiction. See *United States* v. *Ruiz*, 536 U.S. 622 (2002).

Section 3472 not only limits the types of errors that appellate courts have jurisdiction to correct, it also requires that the particular party aggrieved by a sentencing error file a notice of appeal in order to vest jurisdiction in the court of appeals to correct that error. As such, a notice of appeal by a defendant does not vest the court of appeals with jurisdiction to correct a sentencing error that aggrieves the government. Rather, the statute requires the government to file a notice of appeal to trigger court of appeals' jurisdiction to correct such an error. Section 3472's requirement that one of three high-ranking Department of Justice officials must personally approve any government sentencing appeal further confirms that a defendant's decision to appeal does not vest the court of appeals with jurisdiction to correct an error that aggrieves the government. That conclusion is bolstered by the structure of the statute, which provides for notices of appeal by defendants in a separate subsection from its provision authorizing notices of appeals by the government. And, given the historical limitations on government appeals in criminal cases, the statute should not be read to vest courts of appeals with jurisdiction to correct errors that aggrieve the government on the basis of only a defendant's appeal, in the absence of plain language doing so. The court of appeals thus lacked jurisdiction to order an increase in petitioner's sentence.

II. Even if the Court concludes that a government notice of appeal is not a prerequisite to an appellate court's jurisdiction to correct a sentencing error that aggrieves the government, the filing of a timely notice of

a cross-appeal is a mandatory claim-processing rule that the court has a duty to enforce when the rule is timely asserted. For over two hundred years, this Court has recognized that an appellate court cannot enlarge the judgment in favor of a party that fails to file a cross-appeal. And the Federal Rules establish rigid time limitations for the filing of a cross-appeal.

These long-established rules of practice are the type of inflexible rules that do not admit of judicial exception. Where, as here, the court would lack authority under the rules to extend the time for filing a notice of appeal, it would be counter-intuitive to allow it to excuse the filing of the notice of appeal altogether. The requirement of a timely cross-appeal serves the same interests as other claim-processing rules that this Court has recognized are mandatory: it promotes the interests of the orderly function of the judicial system, provides notice to opposing parties, and advances repose of issues. The rule must be enforced when it is timely asserted. Here, petitioner timely asserted the government's failure to cross-appeal, and the court of appeals therefore should not have enlarged the judgment against him.

There is no warrant for creating an exception to this long-standing requirement in this case. Contrary to the apparent view of the court of appeals, nothing in the language or history of Rule 52(b) suggests that it creates an exception to the long-standing cross-appeal requirement. Nor is there any reason to create an exception to the cross-appeal requirement in this case, under the rubric of Rule 52(b) or otherwise. Section 3742(b) charges three high-ranking Department of Justice officials with the prosecutorial discretion to determine whether the government should appeal an erroneous sentence. Those officials are institutionally better suit-

ed to protect, and fully capable of protecting, the interests of the government and the public with respect to such sentences. Appellate courts should not take on that role *sua sponte*.

ARGUMENT

THE COURT OF APPEALS ERRED IN *SUA SPONTE* ORDERING THE DISTRICT COURT TO INCREASE PETITIONER'S SENTENCE

Although the government did not appeal or cross-appeal from petitioner's sentence, the court of appeals, on petitioner's appeal, *sua sponte* ordered that the sentence be increased. That action was error. First, the court of appeals lacked jurisdiction under 18 U.S.C. 3742 (2000 & Supp. V 2005) to rule that a sentence was too low when the government did not appeal or cross-appeal. Second, and in any event, the modification of the judgment in favor of a non-appealing party violated a settled rule of appellate practice, which the court had a duty to enforce upon petitioner's timely invocation.

I. THE COURT OF APPEALS LACKED JURISDICTION TO ORDER AN INCREASE IN THE SENTENCE IN THE ABSENCE OF A NOTICE OF APPEAL BY THE GOVERNMENT UNDER SECTION 3742

A. The Jurisdiction Of The Courts Of Appeals Is Limited To That Conferred By Statute

This Court's recent decisions "have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules," explaining that "jurisdiction" refers to the limits on a court's personal jurisdiction over parties or its subject-matter jurisdiction over "classes of cases." *Bowles* v. *Russell,* 127 S. Ct. 2360,

2364-2365 (2007) (quoting *Eberhart* v. *United States*, 546 U.S. 12, 16 (2005) (per curiam)); *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004); see *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 753-754 (2008). Because "Congress decides what cases the federal courts have jurisdiction to consider," *Bowles*, 127 S. Ct. at 2365, the Court has observed that requirements that are created only by court-promulgated rules are not properly termed "jurisdictional." *Ibid.*; *Kontrick*, 540 U.S. at 452. At the same time, however, this Court has recognized that statutory requirements can have "jurisdictional significance." *Bowles*, 127 S. Ct. at 2364. Finding jurisdictional significance in statutory limits on the authority of the lower federal courts has underpinnings in Congress's power under Article III of the Constitution to define and limit the power of those courts. See *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922) ("Only the jurisdiction of the Supreme Court is derived from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress."); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448-449 (1850) ("Congress, having the power to establish the courts, must define their respective jurisdictions. * * * Courts created by statute can have no jurisdiction but such as the statute confers.").

In *Bowles*, the Court enforced statutory limits on the jurisdiction of federal appellate courts. The district court had purported to reopen the time period for filing a notice of appeal for 17 days, in conflict with 28 U.S.C. 2107(c), which permitted a district court to reopen that period for only 14 days. 127 S. Ct. at 2363. Because the would-be appellant filed his notice of appeal outside the 14-day period allowed by the statute, this Court held that the court of appeals lacked jurisdiction over the

appeal. In so holding, the Court recognized that the notion of subject-matter jurisdiction includes congressional decisions not only about "whether federal courts can hear cases at all," but also "when, and under what conditions, federal courts can hear them." *Id.* at 2365.

In this case, Congress has provided for a specific scheme to govern sentencing appeals in the federal system. See 18 U.S.C. 3742 (2000 & Supp. V 2005). The text, structure, and history of that statute confirm that it places jurisdictional limitations on the court of appeals to hear sentencing appeals, and that the filing of a notice of appeal by the government in a criminal case is necessary to vest the court of appeals with jurisdiction to correct sentencing errors that result in a sentence being too low.

B. Congress Enacted Section 3742 To Provide Appellate Jurisdiction Over Sentencing Appeals In Criminal Cases In Certain Limited Situations

Although 28 U.S.C. 1291 and its predecessors granted appellate jurisdiction over final orders and decisions of the district courts, this Court long ago construed those jurisdictional provisions not to confer generally applicable jurisdiction over appeals by the government of final orders in criminal cases. See *United States* v. *Sanges*, 144 U.S. 310, 323 (1892) (interpreting the general grant of appellate jurisdiction to circuit courts of appeals to review a "final decision * * * in all cases" in the Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 828, not to apply to government appeals in a criminal case). In so ruling, the Court emphasized the historic limitations on appellate authority over government appeals in criminal cases. *Id.* at 312-323; *Carroll* v. *United States*, 354 U.S. 394, 400 (1957) (noting that "the history

of federal appellate jurisdiction" supports the principle that "appeals by the Government in criminal cases are something unusual, exceptional, not favored"). In light of that unique history, the Court in *Sanges* reasoned, the statutory provision "giving the Circuit Courts of Appeals in general terms appellate jurisdiction of criminal cases, says nothing as to the party by whom the writ of error may be brought, and * * * [i]t is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States." 144 U.S. at 323.[4]

For these same reasons, this "Court has long taken the view that the United States has no right of appeal in a criminal case, absent explicit statutory authority." *United States* v. *Scott*, 437 U.S. 82, 84-85 (1978) (citing *Sanges*, *supra*); *United States* v. *Sisson*, 399 U.S. 267 (1970) (dismissing government appeal for lack of jurisdiction because not authorized by 18 U.S.C. 3731 (1964 & Supp. V 1969), which authorized government appeals

[4] That does not mean that Section 1291 is entirely inapplicable to government appeals in criminal cases. The Court recognized in *Carroll* that the government might be able to invoke Section 1291 and the collateral order doctrine recognized in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), in qualifying instances. *Carroll*, 354 U.S. at 403 (noting that such instances are "very few"); see, *e.g., United States* v. *Horn*, 29 F.3d 754, 767-769 (1st Cir. 1994) (finding authority under heightened collateral order doctrine to hear government appeal of district court's order awarding, pursuant to court's supervisory authority, costs and fees against the government in a criminal case). That recognition does not detract from the general presumption against appeals by the government in criminal cases absent express statutory authorization. *Carroll*, 354 U.S. at 400-401. And, in the context of criminal sentencing appeals, the specific provisions in Section 3742 would govern over any more general provision for appeals from final decisions of the district courts. See, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2348 (2007).

from certain types of decisions in criminal cases); *United States* v. *Dickinson*, 213 U.S. 92 (1909) (extending *Sanges* to certiorari review); see *Carroll*, 354 U.S. at 399 (noting that "since the jurisdictional statutes prevailing at any given time are so much a product of the whole history of both growth and limitation of federal-court jurisdiction since the First Judiciary Act, 1 Stat. 73, they have always been interpreted in the light of that history and of the axiom that clear statutory mandate must exist to found jurisdiction").

Sentencing appeals were, historically, an area subject to particular restraint. Although the broad jurisdictional grants over final judgments were deemed sufficient to establish appellate jurisdiction over a defendant's appeal of his sentence, the legal claims available to defendants on such appeals were extremely limited. See, *e.g.*, *Koon* v. *United States*, 518 U.S. 81, 96 (1996) (noting that, "[b]efore the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal"); *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974) (noting "the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end"). And, historically, there is no case in this Court that has authorized the government to appeal a sentence under general federal appellate jurisdiction.[5]

---

[5] In 1970, Congress provided jurisdiction for sentencing appeals by the government and defendants in two limited instances, both of which were replaced by the general provisions in Section 3742. See Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, § 1001(a), 84 Stat. 948 (enacting 18 U.S.C. 3576 (1970) (review of sentences of "dangerous special offenders"), repealed by SRA § 212(2), 98 Stat. 1987; and 18 U.S.C. 3575 (1970) (sentencing of "dangerous

In 1984, in conjunction with its overhaul of federal sentencing, Congress considerably revised its approach to appellate review of sentences by providing appellate jurisdiction "for review of an otherwise final sentence" in specified circumstances. 18 U.S.C. 3742(a) and (b); see Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98-473, Tit. II, Chap. II, § 213(a), 98 Stat. 2011. Congress sought to "establish[] a limited practice of appellate review of sentences," while at the same time not unduly burdening courts of appeals by opening sentences to reconsideration based on every possible claim. See, *e.g.*, S. Rep. No. 225, 98th Cong., 1st Sess. 149-150, 154 (1983). Congress did so by defining the specific claims that could be maintained on appeal by defendants, 18 U.S.C. 3742(a)(1)-(4), and those that could be maintained by the government, 18 U.S.C. 3742(b)(1)-(4).

In *United States* v. *Ruiz*, 536 U.S. 622 (2002), this Court held that Section 3742 delimits appellate jurisdiction, in the strict meaning of that term. *Id.* at 626-628; see *Koon*, 518 U.S. at 96 (describing Section 3742 as providing "limited appellate jurisdiction to review federal sentences"). In *Ruiz*, this Court considered, in the context of a defendant's sentencing appeal, "a question of statutory jurisdiction that potentially blocks our consideration." 536 U.S. at 626. The Court observed that Sec-

---

special offenders"), repealed by SRA § 212(2), 98 Stat. 1987; Controlled Substances Act (CSA), Pub. L. No. 91-513, Tit. II, § 409(h), 84 Stat. 1268 (21 U.S.C. 849(h) (1970)) (review of sentences of "dangerous special drug offender[s]"), repealed by SRA § 219, 98 Stat. 2027. And even that limited appellate right prompted a constitutional challenge. In *United States* v. *DiFrancesco*, 449 U.S. 117 (1980), the Court held that authorization under former 18 U.S.C. 3576 of appeal by the United States of a criminal sentence did not violate the Double Jeopardy Clause.

tion 3742(a) delineates certain classes of sentencing errors as to which a "defendant may file a notice of appeal." *Id.* at 626-627 (quoting 18 U.S.C. 3742(a)). Based on that language, the Court concluded that appellate jurisdiction existed only if the defendant's appeal fit within one of the specified grounds. *Id.* at 627-628. The Court ultimately held that it had jurisdiction to reach the merits, because if the defendant's underlying claim were correct, the sentence would have been "imposed in violation of law," which is an express basis for appeal under 18 U.S.C. 3742(a)(1). *Ruiz*, 536 U.S. at 628. *Ruiz* thus establishes that the limitations on sentencing appeals in Section 3742 are jurisdictional limits.[6]

C. Congress Conditioned Appellate Jurisdiction To Correct Errors In Criminal Sentences On The Filing Of A Notice Of Appeal By The Party Aggrieved By The Error

Just as Section 3742(a) defines permissible sentencing appeals by defendants, Section 3742(b) delineates certain types of sentencing errors for which "[t]he Government may file a notice of appeal." 18 U.S.C. 3742(b). Section 3742(b)(1) provides that the government may appeal a sentence that "was imposed in viola-

---

[6] This Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), broadened the grounds for an appeal of a within-range sentence by allowing a party to challenge any sentence as "unreasonable." See, *e.g.*, *id.* at 260 (noting that "the Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under § 3553(a))"); *id.* at 261 (establishing review for "unreasonable[ness]"). Such appeals are best understood as arising under Section 3742(a)(1)'s provision for appeals on the ground that the sentence "was imposed in violation of law." Nothing in *Booker* casts doubt on this Court's holding in *Ruiz* that the delineation of the claims that may be pursued under Section 3742 is of a jurisdictional character.

tion of law." 18 U.S.C. 3742(b)(1). The statute further provides 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).[7]

Under this Court's reasoning in *Ruiz*, courts of appeals lack jurisdiction over government appeals in sentencing cases that assert *types* of errors other than those delineated in Section 3742(b)(1). See *Ruiz*, 536 U.S. at 626-628. Here, the type of error at issue—a sentence imposed in violation of law—is one type of error set forth in Section 3742(b)(1). Section 3742(b), however, does not confer free-floating jurisdiction on the courts to correct sentencing errors. Rather, the statute requires the government to file a notice of appeal to trigger appellate jurisdiction to correct an error that harms the government. That textual conclusion is supported by the procedural prerequisites to the government's pursuit of appeal and the long tradition that government appeals in criminal cases must be "plainly provided by the Congress." *Carroll*, 354 U.S. at 400.[8]

---

[7] As originally enacted, the provision required that "the Attorney General or the Solicitor General personally approve[] the filing of the notice of appeal." SRA § 213(a), 98 Stat. 2012 (18 U.S.C. 3742(b) (Supp. II 1984)). The language has since been modified to allow for the filing of a protective notice of appeal until "further prosecut[ion]" of the appeal is approved. 18 U.S.C. 3742(b).

[8] Petitioner generally noticed an appeal "from the final judgment, conviction and sentence." J.A. 79. On appeal, he contended that the district court erred in not granting his motion for a downward departure and that the length of his sentence was unreasonable. See Pet. App. 6a-7a. In light of this Court's decision in *Booker*, see note 6, *supra*, his challenge to his sentence as "unreasonable" constitutes a claim under 18 U.S.C. 3742(a)(1), which authorizes a defendant to assert

Both the text and structure of Section 3742 point to the conclusion that the court of appeals' jurisdiction to correct a sentencing error that aggrieves the government is vested only by the "fil[ing] of a notice of appeal" by the government. 18 U.S.C. 3742(b). Unlike more general statutory grants of appellate jurisdiction, such as 28 U.S.C. 1291, Section 3742 defines not only the classes of sentencing errors over which appellate courts have jurisdiction, but also establishes which particular party—the defendant or the government—can appeal which class of claim. The statute also expressly conditions an appeal by either party on the requirement that the particular party "file a notice of appeal." 18 U.S.C. 3742(a) and (b). This requirement is reinforced by the structure of the provision, which includes one subsection for appeals by defendants and a separate subsection for appeals by the government. See *ibid.*

Reading the statute to require the government to file a notice of appeal in order for the court of appeals to have jurisdiction to review sentencing errors that aggrieve the government is further supported by Congress's decision to entrust to the Attorney General and the Solicitor General (or his designated Deputy Solicitor General) the determination whether the government should pursue such appeals. See 18 U.S.C. 3742(b). The purpose of that provision is to ensure that the government has made a considered decision to draw upon appellate resources before an appellate court considers sentencing rulings that harm the government's interests. The defendant's decision to pursue an appeal does not fulfill that purpose, and permitting appellate courts

---

that his sentence was "imposed in violation of law." See, *e.g.*, *United States* v. *Mickelson*, 433 F.3d 1050, 1052-1055 (8th Cir. 2006).

to notice sentencing errors that harm the government *sua sponte* would undermine it. The text and structure of the provision thus compel the conclusion that the party harmed by a sentencing error must invoke the court's jurisdiction by filing its own notice of appeal before the court of appeals has jurisdiction to award it any relief. Absent an appeal by the government, duly authorized by the official designated by Congress, the court of appeals lacks jurisdiction. See *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88 (1994) (dismissing petition for want of jurisdiction absent timely authorization of the certiorari petition by the Solicitor General).[9]

The background understanding that government appeals must be clearly and explicitly authorized by

---

[9] The earlier, more limited sentencing appeal statutes, see note 5, *supra*, similarly reflected a congressional view that, in the absence of express language to the contrary, an appeal by one party did not constitute an appeal by the other. In those earlier statutes, Congress provided that any appeal by the government of a sentence should be "*deemed* the taking of a review of the sentence and an appeal of the conviction by the defendant." OCCA § 1001(a), 84 Stat. 950 (18 U.S.C. 3576 (1970)) (emphasis added); see CSA § 409(h), 84 Stat. 1269 (21 U.S.C. 849(h) (1970)) (same). But Congress made clear that the "deeming" did not run in the other direction: "a sentence may be made more severe only on review of the sentence taken by the United States and after hearing." OCCA § 1001(a), 84 Stat. 950-951 (18 U.S.C. 3576 (1970)); see CSA § 409(h), 84 Stat. 1269 (21 U.S.C. 849(h) (1970)) (same). In contrast to the earlier statutes, 18 U.S.C. 3742(a) and (b) do not provide that an appeal by any party will be deemed an appeal by another, and its very different text suggests otherwise. Similarly, because Section 3742 expressly distinguishes appeals by defendants and ones by the government, its structure indicates that a government appeal is required to remedy an error harmful to the government's interests. Congress therefore had no need to carry forward the language expressly prohibiting the increase of a sentence absent a government appeal.

statute further confirms the jurisdictional character of the limitations in Section 3742(b). See, *e.g.*, *Scott*, 437 U.S. at 84-85; *Carroll*, 354 U.S. at 399-405; *Sanges*, 144 U.S. at 323. "The history shows resistance of the Court to the opening of an appellate route for the Government until it was plainly provided by Congress, and after that a close restriction of its uses to those authorized by the statute." *Carroll*, 354 U.S. at 400. Although Congress could have provided more broadly for appellate jurisdiction to review sentences, it instead narrowed the class of claims for which review was authorized and broke into separate subsections appeals by defendants and appeals by the government, tying each to the filing of "a notice of appeal." 18 U.S.C. 3742(a) and (b). Consistent with that distinction, 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." See S. Rep. No. 225, *supra*, at 151; *ibid.* (noting that "it is clear that a system * * * in which sentence increase is possible as a consequence of sentence review initiated by the government[] is not objectionable on constitutional grounds"). Indeed, the Report reflects the concern that a system that would allow appellate courts to increase a sentence upon a defendant's appeal would "place[] an undesirable strain on the defendant's right to seek sentence review." *Id.* at 151 n.370. In the absence of statutory language plainly providing for appellate jurisdiction to correct errors that aggrieve the government based solely on the *defendant's* appeal, the Court should not find such jurisdiction.

That conclusion is buttressed by Section 3731, which similarly provides for party-specific appellate jurisdiction in criminal cases. Section 3731 defines a set of cir-

cumstances in which the government may appeal. The statute authorizes appeals only "by the United States." 18 U.S.C. 3731 (2000 & Supp. V 2005). As numerous courts of appeals have recognized, "this statute does not provide for a cross-appeal by the defendant." *United States* v. *Marasco*, 487 F.3d 543, 546 (8th Cir. 2007); see, *e.g.*, *United States* v. *Hamilton*, 46 F.3d 271, 279 n.8 (3d Cir. 1995) (Section 3731 "preclud[es] a defendant from filing a cross-appeal") *United States* v. *Becker*, 929 F.2d 442, 447 (9th Cir.) ("We lack jurisdiction to consider these expanded issues in this section 3731 appeal. A defendant may not file a cross appeal to a section 3731 interlocutory appeal."), cert. denied, 502 U.S. 862 (1991); *United States* v. *Margiotta*, 646 F.2d 729, 734 (2d Cir. 1981) ("We lack appellate jurisdiction" because cross-appeal "is unavailable with interlocutory appeals pursuant to § 3731."). That approach reinforces the conclusion that, in criminal appellate statutes, one party's appeal does not give a court of appeals jurisdiction to resolve the other party's claims.[10]

Accordingly, this Court should conclude that the absence of a notice of appeal by the government under Section 3742(b) is an event of jurisdictional significance, depriving the court of appeals of authority to review a claim that falls within the authorized bases for review under that provision. (The same conclusion applies in the reverse direction: a court of appeals has no jurisdic-

---

[10] In contrast, under the general language of Section 1291, which makes no reference to the filing of a notice of appeal by any particular party, it could be argued that, once one party files a timely notice of appeal, that notice of appeal vests the court of appeals with jurisdiction over the order appealed from in its entirety, at least as between the appellant and his opposing party—including portions of the order unfavorable to the non-appealing opposing party. See pp. 26-29, *infra*.

tion to grant sentencing relief in favor of a defendant if only the government has filed a notice of appeal.) Because the government did not file a notice of appeal under Section 3742(b) in this case, the court of appeals therefore lacked jurisdiction to increase petitioner's sentence.[11]

---

[11] In certain circumstances, a defendant's notice of appeal alone can result in a broader remedy than the one the defendant expressly sought. For example, if a defendant successfully attacks some, but not all, of the counts of conviction on a multi-count indictment, the court of appeals may vacate the entire sentence on all counts so that the district court can consider the overall consequences for its sentencing plan, and it may need to do so in order for the sentence as a whole to be sufficient to satisfy the sentencing factors in 18 U.S.C. 3553(a) (2000 & Supp. V 2005). As many courts of appeals have recognized, in that situation, a district court on remand may impose a sentence on the remaining counts that is longer than that imposed at the initial sentencing on those particular counts, as long as the aggregate sentence on remand is not longer than the original aggregate sentence. See, *e.g.*, *United States* v. *Pimienta-Redondo*, 874 F.2d 9, 12-16 (1st Cir.) (en banc), cert. denied, 493 U.S. 890 (1989); *United States* v. *Vasquez*, 85 F.3d 59, 61 (2d Cir. 1996); *United States* v. *Campbell*, 106 F.3d 64, 68 (5th Cir. 1997); *United States* v. *Mancari*, 914 F.2d 1014, 1018-1022 (7th Cir. 1990), cert. denied, 499 U.S. 924 (1991); *United States* v. *Bennett*, 363 F.3d 947, 955-956 (9th Cir.), cert. denied, 543 U.S. 950 (2004); *United States* v. *Hicks*, 146 F.3d 1198, 1201-1203 (10th Cir.), cert. denied, 525 U.S. 941 (1998); see also *United States* v. *Townsend*, 178 F.3d 558, 566-569 (D.C. Cir. 1999) (applying same principle after some, but not all, counts of conviction were vacated under 28 U.S.C. 2255). Those courts correctly reason that, when a defendant is found guilty on a multi-count indictment, the sentence imposed typically constitutes a package that takes into account "a 'breadth of information' to ensure that "the punishment 'will suit not merely the offense but the individual defendant.'" *Pimienta-Redondo*, 874 F.2d at 14 (quoting *United States* v. *Wasman*, 468 U.S. 559, 564 (1984)). That result, however, is not inconsistent with the conclusion that a court of appeals lacks jurisdiction to award relief to the government on a claim comprehended by Section 3742(b) when the government does not appeal. An appellate court's vacation of the entire

D. The Rule-Based Time Limitations For The Filing Of A Notice Of Appeal And Cross-Appeal Are Not Jurisdictional In Criminal Sentencing Appeals

Petitioner relies (Pet. 15-17) on this Court's decision in *Bowles* to suggest that the *time limitations* for taking a cross-appeal are jurisdictional. Although the *filing* of a notice of appeal by the government is necessary to vest jurisdiction in the court of appeals to correct sentencing errors that aggrieve the government, the *timing deadline* for the filing of such a notice of appeal or cross-appeal is not a jurisdictional requirement. Unlike Section 2107, which *Bowles* held establishes jurisdictional deadlines for the filing of initial appeals in civil cases, no statutory provision sets a time limitation on the filing of appeals, or cross-appeals, of sentences in criminal cases. Rather, for criminal sentencing appeals, the time limits for both initial notices of appeal and notices of cross-appeal are prescribed only by the Federal Rules of Appellate Procedure. See Fed. R. App. 4(b)(1).

As this Court observed in *Kontrick*, "'[i]t is axiomatic' that such rules [of procedure] 'do not create or withdraw federal jurisdiction.'" 540 U.S. at 453 (quoting *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 370 (1978)). *Kontrick* involved Federal Rule of Bankruptcy Procedure 4004(a), which provides that an objection to a debtor's discharge "shall be filed no later than 60 days after the first date set for the meeting of creditors." A creditor filed a timely objection, but he subsequently

---

judgment when a defendant has obtained relief on one count does not award relief on a claim that falls within Section 3742(b); it simply permits the district court to conduct resentencing on a clean slate (a consequence that is implicitly authorized by the defendant's attack on one aspect of an interrelated sentencing package).

amended his filing (outside the time limit) to add a new objection. See *Kontrick*, 540 U.S. at 448-449. The debtor responded on the merits without noting the untimeliness of the new objection; only later did he raise the issue, arguing that the timing rule was "jurisdictional" and therefore a claim of untimeliness could not be forfeited. See *id.* at 450-451. This Court rejected that argument, holding that because Rule 4004 concededly did not affect the bankruptcy court's subject-matter jurisdiction, see *id.* at 454, it was merely an "inflexible claim-processing rule" that could "be forfeited if the party asserting the rule waits too long to raise the point," *id.* at 456.

This Court followed *Kontrick* in *Eberhart*, a case that involved Federal Rule of Criminal Procedure 33, which allows district courts to grant new trials but requires that "[a]ny motion for a new trial * * * must be filed within 7 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2). Eberhart filed an untimely new-trial motion, and the government responded on the merits without addressing the issue of timing. See *Eberhart*, 546 U.S. at 13-14. This Court held that the government had forfeited its objection to the untimeliness of the motion. See *id.* at 19. In so holding, it concluded that Rule 33 is not jurisdictional: "It is implausible that the Rules considered in *Kontrick* can be nonjurisdictional claim-processing rules, while virtually identical provisions of the Rules of Criminal Procedure can deprive federal courts of subject-matter jurisdiction." *Id.* at 16.

The principle of *Kontrick* and *Eberhart* governs the time limitations in Federal Rule of Appellate Procedure 4(b)(1) at issue here. Indeed, in *Bowles*, this Court distinguished the timing requirements in Section 2107 from

the timing rules in *Kontrick* and *Eberhart* on the very basis that the former was statutory and the latter were not. See *Bowles*, 127 S. Ct. at 2364-2365; see also U.S. Amicus Br. at 16 n.4, *Bowles*, *supra* (No. 06-5306) (noting that "[c]riminal appeals are different" from civil appeals because "no statute governs the timing of a defendant's notice of appeal in criminal cases"). And since this Court's decision in *Bowles*, several courts of appeals have held that the time limitations for criminal appeals are not jurisdictional. See *United States* v. *Garduño*, 506 F.3d 1287, 1290-1291 (10th Cir. 2007); *United States* v. *Martinez*, 496 F.3d 387, 388-389 (5th Cir.) (per curiam), cert. denied, 128 S. Ct. 728 (2007).[12]

E. The Court Need Not Decide The Distinct Question Whether A Cross-Appeal Is Necessary To Confer Jurisdiction Under 28 U.S.C. 1291 To Award Relief In Favor Of An Appellee Because Appellate Jurisdiction Here Is Governed And Limited By 18 U.S.C. 3742

As a matter of general appellate practice, this Court has long recognized "two linked principles governing the consequences of an appellee's failure to cross-appeal." *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479 (1999). In the absence of a cross-appeal, "an appellee may 'urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court,' but may

[12] In contrast to the absence of statutory time limitations with respect to sentencing appeals, Congress has prescribed a statutory deadline with respect to certain government appeals in criminal cases not at issue here. See 18 U.S.C. 3731 (2000 & Supp. V 2005) (providing that "all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted"). Under this Court's decision in *Bowles*, that limitation is jurisdictional.

not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *Ibid.* (citation omitted).

This Court applied that rule in *Neztsosie* in the context of an interlocutory appeal in a civil case. In that case, the district court had entered an order granting in part and denying in part an injunction sought by various companies that had been sued in multiple tribal courts. In particular, the district court, relying on the doctrine of tribal-court exhaustion, denied the companies' requests for preliminary injunctions, "'except to the extent' that [the Tribal-Court plaintiffs] sought relief in the Tribal Courts under the Price-Anderson Act." *Neztsosie*, 526 U.S. at 478. The companies appealed, and the court of appeals affirmed the portion of the district court's order denying their request for preliminary injunctions. The court of appeals, however, also reversed the portion of the order enjoining the Tribal-Court plaintiffs from pursuing Price-Anderson Act claims in the Tribal Courts, even though those parties had not cross-appealed. *Id.* at 478-479. The court of appeals concluded that the significant interests in comity to the Tribal Courts warranted creating an exception to the requirement for a cross-appeal. *Id.* at 478.

This Court disagreed. *Neztsosie*, 526 U.S. at 479-480. The Court noted that the court of appeals apparently viewed the cross-appeal requirement as "a 'rule of practice,' subject to exceptions, not an unqualified limit on the power of appellate courts." *Id.* at 480. Although presented with arguments that the rule was "an unqualified bound on the jurisdiction of the courts of appeals," this Court declined to decide that question: "[w]e need not decide the theoretical status of such a firmly entrenched rule, however, for even if it is not strictly juris-

dictional * * * the 'comity considerations' invoked by the Court of Appeals to justify relaxing it are clearly inadequate to defeat the institutional interests in fair notice and repose that the rule advances." *Ibid.*[13]

The Court has even less need to decide the question left open in *Neztsosie* here than in *Neztsosie* itself. Appellate jurisdiction in *Neztsosie* was governed by 28 U.S.C. 1292(a)(1), which grants jurisdiction to courts of appeals over certain classes of interlocutory orders. See *ibid.* That provision, like the principal statute governing appellate jurisdiction, 28 U.S.C. 1291, grants jurisdiction over a broadly defined class of cases. See *ibid.* (providing that the "court of appeals * * * shall have jurisdiction from all final decisions of the district courts * * * except where a direct review may be had in the Supreme Court"). See also 28 U.S.C. 2107(a) ("no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days").[14] In contrast, jurisdiction over sentencing appeals is defined and delimited not by 28 U.S.C. 1291, but by the special jurisdictional provision

---

[13] In *Neztsosie*, the United States as amicus curiae contended that the cross-appeal requirement was jurisdictional in nature. See 526 U.S. at 480; U.S. Amicus Br. at 20-22, *Neztsosie*, *supra* (No. 98-6). But the government in *Neztsosie* did not have the benefit of the Court's recent decisions holding that non-statutorily based timing requirements are not jurisdictional in the strict sense. See U.S. Amicus Br. at 9 n.2, 16 n.4, *Bowles*, *supra* (No. 06-5306).

[14] See also 28 U.S.C. 2106 ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.").

for sentencing appeals, 18 U.S.C. 3742 (2000 & Supp. V 2005). See *Ruiz*, 536 U.S. at 626-628. The question here turns on whether Section 3742 requires the government to file its own notice of appeal (or cross-appeal) to vest courts of appeals with jurisdiction to correct sentencing errors that aggrieve the government. For the reasons explained above, Section 3742 does have jurisdictional force, and the absence of a notice of appeal filed by the government meant that the court of appeals had no jurisdiction to correct sentencing errors that aggrieved the government.

II. EVEN IF THE FILING OF A NOTICE OF APPEAL BY THE GOVERNMENT IS NOT A JURISDICTIONAL PREREQUISITE IN A SENTENCING APPEAL, THE FILING OF A TIMELY NOTICE OF CROSS-APPEAL IS A MANDATORY CLAIM-PROCESSING RULE THAT MUST BE ENFORCED WHEN IT IS PROPERLY INVOKED

Even if the Court concludes that a defendant's notice of appeal of his sentence vests the court of appeals with jurisdiction to review errors in a sentence that aggrieved the government, the court of appeals erred in modifying the judgment in favor of the government in the absence of a cross-appeal. At a minimum, the requirement of a cross-appeal is a mandatory claim-processing rule that must be enforced where, as here, the appellant invokes the rule in a timely fashion. This Court has never recognized an exception to that inveterate rule, and none is justified here.

A. Both The Need For A Cross-Appeal And The Deadlines For Filing One Are Mandatory Requirements

1. Although the Court in *Neztsosie* left open whether the cross-appeal requirement is "strictly jurisdictional," see pp. 26-28, *supra*, the Court's language

and reasoning emphasized the mandatory nature of the rule. In holding that the court of appeals had erred in recognizing an exception to that rule, the Court described the rule as "firmly entrenched" and "inveterate and certain," observing that the Court had "repeatedly expressed" the requirement in "emphatic terms." *Neztsosie*, 526 U.S. at 479-481 & n.3 (quoting *Morley Constr. Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 191 (1937)). In addition, the Court stressed the long-standing, unqualified nature of the requirement. The Court explained that by 1796 it had recognized that a cross-appeal is required to obtain expanded relief. *Id.* at 479 (citing *McDonough* v. *Dannery*, 3 U.S. (3 Dall.) 188, 198 (1796)). And "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of [the Court's] holdings has ever recognized an exception to the rule." *Id.* at 480.

Sixty years before *Neztsosie*, the Court likewise reversed a court of appeals' modification of a judgment in favor of a nonappealing party. See *Morley*, 300 U.S. at 185. In *Morley*, the district court rejected a surety's request for specific performance of its agreement with a contractor, but granted the surety relief on its equitable exoneration claim. *Id.* at 189. On the contractor's appeal, and in the absence of a cross-appeal by the surety, the court of appeals expressed doubts about the merits of the surety's exoneration claim but remanded to the district court to modify its decree to award the surety specific performance. *Id.* at 190.

For the Court, the case turned on "[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." *Morley*, 300 U.S. at 187. In resolving that question, the Court left little doubt that appellate courts have no such

power: although an appellee may defend a judgment on any ground in the record, even if it "involve[s] an attack upon the reasoning of the lower court," "[w]hat [an appellee] may not do in the absence of a cross-appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.' * * * The rule is inveterate and certain." *Id.* at 191 (quoting *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924)). Although the Court noted that the line between defending a judgment and seeking to modify it is not always sharply defined, *ibid.*, it held that the court of appeals had provided the surety with "a new measure of relief," which it was not "at liberty" to do in the absence of a cross-appeal by the surety. *Id.* at 193.

The holdings in *Neztsosie* and *Morley* are consistent with cases in which the Court has "repeatedly expressed the [cross-appeal] rule in emphatic terms," both with respect to review in this Court and in the courts of appeals. *Neztsosie*, 526 U.S. at 481 n.3 (citing cases). Indeed, as early as 1864, this Court described the rule as "settled" that "a party not appealing cannot take advantage of an error in the decree committed against himself," and the Court refused to correct an acknowledged error. *Chittenden* v. *Brewster*, 69 U.S. (2 Wall.) 191, 196 (1865) ("If the appellees desired to avail themselves of this error in the decree, they should have brought a cross appeal."); see, *e.g.*, *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364-365 (1994) ("A cross-petition is required * * * when the respondent seeks to alter the judgment below."); *Alexander* v. *Cosden Pipe Line Co.*, 290 U.S. 484, 487 (1934) ("The defendant alone petitioned for a review here. In this situation the plaintiff is not entitled to be heard in opposition to

the parts of the decision of the Court of Appeals which were adverse to it."); *American Ry. Express Co.*, 265 U.S. at 435; *The Maria Martin*, 79 U.S. (12 Wall.) 31, 40-41 (1871) ("[W]here only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken."); *McDonough*, 3 U.S. (3 Dall.) at 198.

Although the Court in *Neztsosie* acknowledged that this Court had, in a few cases, "made statements in dictum that might be taken to suggest the possibility of exceptions to the rule," see *Neztsosie*, 526 U.S. at 480-481 n.3 (citing cases), it emphasized that none of those decisions had actually recognized an exception.[15] For example, in *Langnes* v. *Green*, 282 U.S. 531 (1931), the Court stated that the requirement to file a cross-petition, if a respondent seeks to enlarge the relief obtained below, is a rule of practice that this Court need not follow "if the court deems there is good reason to do so." *Id.* at 538. But, as the Court in *Langnes* explained, it was "not necessary to consider this rule of practice because the respondent offers no objection to the decree," but merely seeks to present alternative arguments "to sustain it." *Ibid*. Furthermore, the Court's statement in *Langnes* was premised on the Court not having previously denied in express terms "the *power* of the court to review objections urged by [a] respondent" who did not cross-petition. *Ibid.* As discussed above, however, that is the specific question (in the context of a cross-appeal)

[15] As the Court explained, all but one of those cited statements concerned the related issue of the filing of a cross-petition for review in the Supreme Court, rather than "statements concerning the power of the courts of appeals." *Neztsosie*, 526 U.S. at 480 n.3.

that the Court took up six years later in *Morley*, where it did expressly hold that appellate courts lack "[t]he power * * * to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal." 300 U.S. at 187.

2. In addition to this Court's longstanding articulation of the mandatory and inflexible nature of the filing of a cross-appeal in order for an appellee to increase its rights, the Federal Rules prescribe rigid time limitations on the filing of such a notice. In criminal cases, if a defendant has filed a notice of appeal, the government must file its notice of cross-appeal within 30 days after "the filing of a notice of appeal by any defendant" (or within 30 days of the judgment or order being appealed, whichever is later). Fed. R. App. P. 4(b)(1)(B); see Fed. R. App. P. 28.1(b) (providing that, in cross-appeals, the "party who files a notice of appeal first is the appellant").[16] That time period may only be extended by the district court "[u]pon a finding of excusable neglect or good cause," and only for "a period not to exceed 30 days from the expiration of the time otherwise prescribed." See Fed. R. App. P. 4(b)(4); Fed. R. App. P. 26(b)(1) (providing that the court may not extend the time to file "a notice of appeal (except as authorized in Rule 4)").

[16] The rule for cross-appeals in civil cases is similar. See Fed. R. App. P. 4(a)(3) ("If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period is later.").

B. Under This Court's Cases, Both The Filing Of A Cross-Appeal And The Filing Of A Timely Cross-Appeal Are Inflexible Rules That Must Be Enforced If Properly Asserted

This Court's cases considering the nature of claim-processing rules demonstrate that the cross-appeal requirement itself, as well as the relevant rule-based time limitations, are mandatory claim-processing rules. In both criminal and civil cases, this Court has repeatedly emphasized the inflexible, mandatory nature of claim-processing rules, recognizing that courts have a duty to enforce them when they are properly invoked.

1. In *Carlisle* v. *United States*, 517 U.S. 416 (1996), this Court addressed "whether a district court has authority to grant a postverdict motion for judgment of acquittal filed one day outside the time limit prescribed by Federal Rule of Criminal Procedure 29(c)." *Id.* at 417-418. This Court answered that question in the negative. The Court observed that the governing rules were "plain and unambiguous." *Id.* at 421. The Court thus concluded that there was "simply no room" in the text of the rules for the granting of an untimely motion for judgment of acquittal, "regardless of whether the motion is accompanied by a claim of legal innocence, is filed before sentencing, or was filed late because of attorney error." *Ibid.*

The Court in *Carlisle* also rejected the argument that, despite the fact that the motion was untimely under the federal rules, the district court could *sua sponte* enter a judgment of acquittal. The Court refused to decouple the time limits from a court's authority to rule on an issue: "'[i]t would be a strange rule' * * * 'which deprived a judge of power to do what was asked when request was made by the person most concerned, and

yet allowed him to act without petition.'" *Carlisle*, 517 U.S. at 422 (quoting *United States* v. *Smith*, 331 U.S. 469, 474 (1947)); *Smith*, 331 U.S. at 475 ("We think that expiration of the time within which relief can openly be asked of the judge, terminates the time within which it can properly be granted on the court's own initiative."). The Court also rejected an effort to rely on the inherent supervisory power of courts, observing that, "[w]hatever the scope of [a court's] 'inherent power,' * * * it does not include the power to develop rules that circumvent or conflict with the Federal Rules." *Carlisle*, 517 U.S. at 426.

Similarly, in *United States* v. *Robinson*, 361 U.S. 220 (1960), this Court strictly enforced the rule-based time limitation for filing a notice of appeal in a criminal case. In so doing, the Court described the limitation as "mandatory and jurisdictional." *Id.* at 224. The Court concluded that the period could not be extended, "regardless of excuse," because the rules provided that the courts could not enlarge the time for taking an appeal. *Id.* at 229-230. The Court therefore held that the court of appeals lacked authority to hear the untimely appeal. *Ibid.*

Although this Court's subsequent decisions in *Bowles*, *Kontrick*, and *Eberhart*, cast doubt on *Robinson*'s use of the term "jurisdictional" in the context of purely rule-based limitations, those cases confirm the *mandatory* nature of claim-processing rules. "[T]he central point of the *Robinson* case" remains valid: "when the Government objected to a filing untimely under the [applicable rule], the court's duty to dismiss the appeal was mandatory." *Eberhart*, 546 U.S. at 18. As *Eberhart* explained, courts "must observe the clear limits" of the Federal Rules "when they are properly in-

voked." *Id.* at 17. "These claim-processing rules thus assure relief to a party properly raising them, but do not compel the same result if the party forfeits them." *Id.* at 19; see *Kontrick*, 540 U.S. at 456-457.

2. The same analysis applies here as in *Carlisle* and *Robinson*. The rule that a court of appeals lacks authority to enlarge a judgment in the absence of a cross-appeal is an "inveterate and certain" one that this Court has repeatedly expressed in "emphatic terms" and has applied without exception for over two hundred years. *Neztsosie*, 526 U.S. at 479-481 & n.3 (quoting *Morley*, 300 U.S. at 191). Moreover, the Federal Rule provision governing the timing of a notice of cross-appeal in criminal cases is "plain and unambiguous." See *Carlisle*, 517 U.S. at 421. The time period provided cannot be extended for more than "30 days from the expiration of the time otherwise prescribed by this Rule 4(b)"—a time that has long since passed. Fed. R. App. 4(b)(1) and (4). These rules leave no room for creating a judicial exception. Nor do they permit a court of appeals to *sua sponte* notice an error and grant the same relief that it could if a party had made a timely cross-appeal. As this Court recognized in *Carlisle* and *Smith*, it would be odd for a court to have *sua sponte* authority, when the rules would mandate the denial of a motion for an extension of time to file a cross-appeal. *Carlisle*, 517 U.S. at 422; *Smith*, 331 U.S. at 474-475. Indeed, the rules expressly contemplate *sua sponte* extensions of time, but those too are limited to the 30-day window. See Fed. R. App. 4(b)(1) and (4).

Moreover, like other claim-processing rules, the cross-appeal requirement and the time limitations for complying with it are "meant to protect institutional interests in the orderly functioning of the judicial sys-

tem, by putting opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not." *Neztsosie*, 526 U.S. at 481-482; see *Eberhart*, 546 U.S. at 13, 19. These requirements have significant practical consequences. If a timely cross-appeal is filed, it puts the initial appellant on notice that if he continues to pursue his appeal, he is at risk of having the judgment against him expanded. In both civil and criminal cases, that knowledge can lead to settlement of the competing appeals. In addition, the deadlines ensure that the initial appellant is aware, before he files his opening brief and chooses the full nature of his arguments, whether the other party also intends to challenge a portion of the judgment. In this case, petitioner may well have pursued his appeal differently, or abandoned it altogether, if he had known within 30 days of filing his notice of appeal that he risked a fifteen-year increase in his already lengthy sentence.

C. Petitioner Is Entitled To Application Of The Cross-Appeal Requirement

As discussed above, the cross-appeal requirement is mandatory unless waived or forfeited by the party it would benefit. Here, petitioner timely raised the issue. The government had not appealed or cross-appealed, nor had it argued for an increase in petitioner's sentence in its brief or at oral argument. See p. 5 & note 2, *supra*. It was only after the court of appeals issued its opinion that petitioner had reason to raise the issue, which he did in a petition for rehearing.[17] There, petitioner argued that "[b]ecause the government did not raise an

[17] Although petitioner missed the initial deadline for filing his rehearing petition, the court of appeals granted him leave to file out of time. Pet. App. 27a.

appeal or cross-appeal, [his] sentence should have been left alone." J.A. 95-96. Although petitioner did not extensively develop the argument, he supported it with citation to the Seventh Circuit's decision in *Rivera*, 411 F.3d at 867, where the court, relying on *Neztsosie*, held that the cross-appeal requirement is mandatory, and he asked the court of appeals "to take the same route as *Rivera*." J.A. 95.

If petitioner were alleging error in the district court proceedings, a mere assertion of a claim and citation of a case would not be sufficient to require a court of appeals to address it, see, *e.g.*, *United States* v. *Reed*, 167 F.3d 984, 993 (6th Cir. 1999) (The settled appellate rule is that "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (quoting *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir.), cert. denied, 494 U.S. 1082 (1990)). But here, the court of appeals itself had determined to increase his sentence *sua sponte* and had examined its authority to do so and cited the contrary authority in *Rivera*. Pet. App. 9a-10a n.5. In that context, petitioner's objection provided a sufficient basis to alert the court of appeals to his reliance on the general rule of practice against modification of a judgment in favor of a party that had not cross-appealed. Because petitioner did not waive or forfeit the argument against increasing his sentence absent a cross-appeal by the government, the court of appeals was obligated to enforce the rule and simply affirm his conviction and sentence, rather than remand with directions to increase it.

D. There Is No Sound Basis For Recognizing An Exception To The Cross-Appeal Requirement In This Case

Even assuming that the cross-appeal requirement is not strictly jurisdictional and that sufficiently extraordinary circumstances might justify an exception to the cross-appeal requirement and its time limitations, there is no warrant for recognizing such an exception in this case.

1. Federal Rule of Criminal Procedure 52(b) does not create an exception to the cross-appeal requirement

The court of appeals erred in concluding that Federal Rule of Criminal Procedure 52(b) granted it authority to increase petitioner's sentence in the absence of a cross-appeal by the government. Pet. App. 9a & n.5. Nothing in the language or history of Rule 52(b) purports to address, let alone create an exception to, the cross-appeal requirement. Such a novel interpretation would effectively create a blanket plain-error exception to the cross-appeal requirement in criminal cases, a result that is nowhere suggested in, and would be contrary to, this Court's decisions. See, *e.g*, *Neztsosie*, 526 U.S. at 480 ("Indeed, in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule."); *Strunk* v. *United States*, 412 U.S. 434, 436-437 (1973) ("On this record, it seems clear that petitioner was responsible for a large part of the 10-month delay which occurred and that he neither showed nor claimed that the preparation of his defense was prejudiced by reason of the delay. * * * However, in the absence of a cross-petition for certiorari, questioning the holding that petitioner was denied a speedy trial, the only ques-

tion properly before us for review is the propriety of the remedy.").

As a general matter, the adversary system contemplates that the parties will frame the issues for decision and the courts will function as neutral adjudicators of the matters presented. Departures from that model in which the appellate courts review the record and formulate their own issues for parties who do not appeal should be the rare exception to that rule. To the extent that courts may depart from the pure adversary model in the criminal justice system, the justification has usually been to protect a *pro se* litigant's rights. See *Castro* v. *United States*, 540 U.S. 375, 381-383 (2003). But as a general rule, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Id.* at 386 (Scalia, J., joined by Thomas, J., concurring) ("I am frankly not enamored of any departure from our traditional adversarial principles."). Nothing in Rule 52(b) can be read to displace that principle, especially against the well-established rule against awarding relief in favor of an appellee who has not cross-appealed.[18]

---

[18] The Court has held that "district courts are permitted, but not obliged, to consider *sua sponte*, the timeliness of a state prisoner's habeas petition." *Day* v. *McDonough*, 547 U.S. 198, 209 (2006). That action, however, does not inject a new legal basis for relief into the case that the aggrieved party did not raise. Moreover, *Day* permits a district court to raise an issue *sua sponte* that the State itself could raise by motion if the court invited such action. *Ibid.* Here, the time for filing a cross-appeal had long passed, and appellate courts are not in the habit of inviting the parties to take appeals that they have knowingly waived. In addition, *Day* conditioned such *sua sponte* action on "acccord[ing] the parties fair notice and an opportunity to present their positions," *id.* at 210; here, the court of appeals did not do so. Finally, *Day* noted that

The court of appeals cited this Court's decision in *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam), in support of its application of plain-error review. Although *Silber* supports an appellate court's discretion to recognize a plain error that has not been pressed by a party, it does not support a court's authority to do so in the absence of an appeal or cross-appeal by the party harmed by that error. Rather, the decision was rendered on Silber's petition for a writ of certiorari, and Silber sought by that petition to have his conviction reversed. See Pet. Br., *Silber*, *supra* (No. 454). More generally, we are aware of no case in which the Court has granted relief to a party based on a finding of plain error when that party did not file a petition or cross-petition with the Court. At most, this Court has "suggested in passing that there might be occasions when, in a criminal case, the Court might address a *constitutional* issue resolved in favor of a petitioner and not raised in a cross-petition for certiorari." See *Neztsosie*, 526 U.S. at 480 n.3 (emphasis added) (describing dicta in *Strunk*, 412 U.S. at 437). Here, of course, the error is not one of constitutional dimension.[19]

---

other factors bore on the district court's exercise of discretion, including prejudice to the habeas petitioner from the court's raising the limitations issue *sua sponte*. *Ibid.* Here, if petitioner had been made aware of the prospect that his own appeal could have resulted in *increasing* his sentence, he may have withdrawn it altogether.

[19] It is true that, in criminal cases, this Court has waived its rules governing the timing of petitions on the ground that "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht* v. *United States*, 398 U.S. 58, 64 (1970); see *Bowles*, 127 S. Ct. at 2365 (recognizing same). But waiving the timing deadline is a far cry from waiving the requirement that a party file a petition *at all*.

2. Sound policy reasons counsel against permitting district courts to increase sentences absent a government cross-appeal

Nor should this Court recognize an exception to the cross-appeal requirement in this case, whether under the rubric of Rule 52(b) or otherwise. Congress expressly assigned to specific high-ranking officials within the Department of Justice the responsibility for determining whether the government, on behalf of the public, should pursue a sentencing appeal. See 18 U.S.C. 3742(b) (requiring "the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General" for the prosecution of any government sentencing appeal). Congress thus entrusted the Executive Branch, not the courts, with the discretion to determine whether to seek the correction of sentencing errors that harmed the government. See S. Rep. No. 225, *supra*, at 151, 153 (recognizing that the government serves as the representative of the public in deciding whether to appeal a sentence). In so doing, Congress necessarily understood that, as a result of the government's exercise of its prosecutorial discretion whether to pursue an appeal, not all sentencing errors would be corrected.

As with other exercises of prosecutorial discretion, the government's decision not to pursue a greater sentence through appeal often will "involve[] a complicated balancing of a number of factors" that the Executive "is far better equipped than the courts" to evaluate. *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). The Executive's advantages accrue not only from institutional competence to weigh those factors, but also from constitutional function. See *id.* at 832 (noting prosecutorial decisions have "long been regarded as the special province of the

Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed'") (quoting U.S. Const. Art. II, § 3); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.").

That is no less true at the appellate stage than at the trial or charging stage. Indeed, Section 3742(b) expressly contemplates the exercise of discretion by the Executive Branch at some point after conviction and sentencing, but before prosecution of an appeal. This Court has recognized the legitimacy of, and significant interests promoted by, the Solicitor General's role in deciding which appeals and petitions for writs of certiorari the government will pursue. See, *e.g.*, *NRA Political Victory Fund*, 513 U.S. at 96; *United States* v. *Providence Journal Co.*, 485 U.S. 693, 702-703 n.7 (1988); *United States* v. *Mendoza*, 464 U.S. 154, 160-161 (1984). That determination, which often involves "divers reasons unrelated to the merits of a decision," *Andres* v. *United States*, 333 U.S. 740, 765 n.9 (1948) (Frankfurter, J., concurring), is not well suited to second-guessing by the courts.

Sentencing appeals may implicate precisely the sorts of interests that are best balanced by the Executive. Even if a particular sentence is judged erroneous, it may require an undue commitment of scarce criminal justice resources or appellate risk to seek to correct it on appeal. And a remand for resentencing is not cost free. Ordinarily, a defendant must be transported back to the court, temporarily disrupting his imprisonment and requiring the marshals to devote resources to the task. Once back in court, a defendant may take advantage of

a resentencing to seek to reopen previously settled issues or to raise new ones. Particularly in the changing and uncertain sentencing environment created by *United States* v. *Booker*, 543 U.S. 220 (2005), the ultimate outcome of a resentencing proceeding may be unpredictable and not necessarily favorable to the government. The government may therefore elect to opt for finality rather than to extract the highest possible sentence that might be obtained from an appeal.

3. Although the government has "substantial rights" under Rule 52(b), the decision whether to vindicate those rights belongs to the government

a. Petitioner contends (Pet. Br. 32-34; Pet. 12-13, 19-20) that the government can never obtain relief under Rule 52(b) because the government has no "substantial rights" within the meaning of the Rule. But Rule 52(b) is not by its terms limited to claims by defendants. See Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). Moreover, the argument that the government has no "substantial rights" is irreconcilable with the fact that subparagraphs (a) and (b) of Rule 52 both condition the granting of relief on whether the error affected "substantial rights." See Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). As this Court explained in *United States* v. *Olano*, 507 U.S. 725 (1993), that language involves the same inquiry under both subsections, the only difference is which party bears the burden of establishing the requisite effect on "substantial rights." *Id.* at 734-735; see *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2417 (2007) ("A standard principle

of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."). Accordingly, petitioner's reading of "substantial rights" would mean that the government not only could never obtain relief for forfeited errors, but that it also could never obtain relief for preserved errors. If the government has no "substantial rights," any and all errors harmful to the government's interests "must be disregarded" under Rule 52(a) because they by definition do not "affect substantial rights." Fed. R. Crim. P. 52(a). Nothing in the law or reason supports that view.

Further, every court of appeals to have addressed the issue has recognized that the government may obtain relief for sentencing errors under Rule 52(b). See, *e.g.*, *United States* v. *Rodriguez*, 938 F.2d 319, 321-322 (1st Cir. 1991); *United States* v. *Gordon*, 291 F.3d 181, 193-194 (2d Cir. 2002), cert. denied, 537 U.S. 1114 (2003); *United States* v. *Dickerson*, 381 F.3d 251, 257 (3d Cir. 2004); *United States* v. *Perkins*, 108 F.3d 512, 517 (4th Cir. 1997); *United States* v. *Barajas-Nunez*, 91 F.3d 826, 830, 833 (6th Cir. 1996); *United States* v. *Barnett*, 410 F.3d 1048, 1050-1051 (8th Cir. 2005); *United States* v. *Moyer*, 282 F.3d 1311, 1319 (10th Cir. 2002); *United States* v. *Clark*, 274 F.3d 1325, 1326, 1328-1330 (11th Cir. 2001); *United States* v. *Edelin*, 996 F.2d 1238, 1244-1245 (D.C. Cir. 1993) (per curiam), cert. denied, 510 U.S. 1078 (1994); see also *United States* v. *Castillo*, 386 F.3d 632, 637-638 (5th Cir.) (recognizing availability of plain-error review for claims forfeited by the government, but holding that the claim failed under the fourth prong), cert. denied, 543 U.S. 1029 (2004); *United States* v. *Vieke*, 348 F.3d 811, 813-814 (9th Cir. 2003) (recognizing that "an erroneous sentence may be reviewed for plain error,"

but rejecting claim); *United States* v. *Jackson*, 207 F.3d 910, 917 (7th Cir.) ("while it is unusual for the government to be arguing plain error in a criminal case, there is nothing to prevent its doing so"), vacated on other grounds, 531 U.S. 953 (2000).

The cases cited by petitioner (Pet. 13) are not to the contrary. See *United States* v. *Filker*, 972 F.2d 240, 242 (8th Cir. 1992); *United States* v. *Posters 'N' Things Ltd.*, 969 F.2d 652, 662-663 (8th Cir. 1992), aff'd in different part, 511 U.S. 513 (1994); *United States* v. *Garcia-Pillado*, 898 F.2d 36, 39-40 (5th Cir. 1990). None of those cases, all of which pre-date *Olano*, *supra*, decides whether the government has "substantial rights" under Rule 52(b). Instead, they each reviewed the government's forfeited claim under a then-existing general standard of "manifest injustice," *Garcia-Pillado*, 898 F.2d at 39, "miscarriage of justice," *Posters 'N' Things*, 969 F.2d at 663, or "gross miscarriage of justice," *Filker*, 972 F.2d at 242. And as the Circuits that issued those decisions have recognized, the *Olano* standard has supplanted the analysis in those cases. See, *e.g.*, *Barnett*, 410 F.3d at 1051; *Castillo*, 386 F.3d at 637. Moreover, even under the standards applied, those courts did not purport to establish categorical rules that the government could not obtain relief on a forfeited sentencing claim, but instead simply applied the then-applicable standard to the facts before them. See, *e.g.*, *Filker*, 972 F.2d at 242 (noting sentence difference was only fifteen months and that district court might impose same sentence on remand); *Garcia-Pillado*, 898 F.2d at 37, 39 (noting that sentencing difference was limited to six months in deciding "under the circumstances of this case" that sentence was affirmed); see also *Barnett*, 410 F.3d at 1051 ("Furthermore, the sentencing errors up-

held in *Filker* and *Posters 'N' Things* * * * pale in comparison to the five year disparity at issue here.").

b. Although the government has substantial rights within the meaning of Rule 52(b), and the failure to accord the government those rights under sentencing statutes may seriously affect the fairness, integrity, and public reputation of judicial proceedings, *Johnson* v. *United States*, 520 U.S. 461, 469-470 (1997), the government is fully capable of determining whether to seek to vindicate its rights. The mandatory nature of Section 924(c)'s penalties does not divest the government of its discretion over the decision whether to appeal. Although Congress prescribed a mandatory minimum sentence for a second Section 924(c) conviction such as petitioner's, see 18 U.S.C. 924(c)(1)(C) and (2), Congress statutorily assigned to the Executive Branch the discretion to decide whether to appeal a sentence that "was imposed in violation of [that] law." 18 U.S.C. 3742(b). The Executive Branch is institutionally best suited to determine, and fully capable of determining, whether the incremental benefit in seeking to enforce the full extent of Section 924(c)'s penalties in a particular case warrants the investment of resources in an appeal and resentencing. A conclusion that the public interest is best served by devoting judicial and prosecutorial resources to new cases, rather than seeking to increase sentences (often only marginally) in old ones, is entitled to respect from the appellate courts. There is no warrant in this situation for creating an unprecedented exception to the mandatory and inflexible rules requiring the notice of a timely cross-appeal.

CONCLUSION

The judgment of the court of appeals should be reversed in part, and the case remanded for re-imposition of the original sentence.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DEANNE E. MAYNARD
Assistant to the Solicitor General

JEFFREY P. SINGDAHLSEN
Attorney

FEBRUARY 2008

APPENDIX

1. 18 U.S.C. 3731 (2000 & Supp. V 2005) provides:

Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

2. 18 U.S.C. 3742 (2000 & Supp. V 2005) provides:

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)[1] 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.

---

[1] See references in text note below.

(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, hav-

ing 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 de-

gree, 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).

3. 28 U.S.C. 1291 provides:

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

4. 28 U.S.C. 1292 provides:

Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Is-

lands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit

may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this

subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

5. 28 U.S.C. 2107 provides:

Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

6. Rule 4 of the Federal Rules of Appellate Procedure provides:

Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or

- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judg-

ment or order—is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A)

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court

may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a

notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

7. Rule 26 of the Federal Rules of Appellate Procedure provides:

Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

(3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or—if the act to be done is filing a paper in court—a day on which the

weather or other conditions make the clerk's office inaccessible.

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

8. Rule 52 of the Federal Rules of Criminal Procedure provides:

Harmless and Plain Error

(a) HARMLESS ERROR. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.